VAN NATTA'S WORKERS' COMPENSATION REPORTER

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

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CONTENTS

CITE AS

38 Van Natta ___ (1986)

RICHARD V. ANDERS, Claimant
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SAIF Corp Legal, Defense Attorney

WCB 85-01368
July 1, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee Michael Johnson's orders which: (1) set aside its denial of claimant's aggravation claim for a neck condition; (2) awarded 10 percent (32 degrees) unscheduled permanent disability for a neck condition, whereas a January 16, 1985 Determination Order had awarded no unscheduled permanent disability, and (3) increased claimant's scheduled permanent disability award for a right leg (knee) injury from 25 percent (37.5 degrees), as awarded by the aforementioned Determination Order, to 35 percent (52.5 degrees). On review, SAIF contends that claimant's neck condition has not worsened and that he is not entitled to additional awards of permanent disability.

The Board affirms that portion of the Referee's orders which awarded claimant a total of 35 percent scheduled permanent disability for loss of use or function of his right leg (knee). However, we reverse those portions which found that claimant's neck condition had worsened and which awarded unscheduled permanent disability.

Claimant was 29 years of age at the time of hearing. In June 1983, while working as a "rigging slinger" for a logging company, he was struck by a falling log. Claimant sustained a right knee injury, a cerebral concussion, and a cervical sprain. Dr. Campagna, claimant's attending neurosurgeon, released him to regular work in July 1983, but claimant's right knee symptoms soon forced him to stop working and to seek further medical treatment.

In September 1983 Dr. Potter, orthopedist, performed a right knee arthroscopy and meniscectomy. At this time, Dr. Potter also reported that claimant had full range of motion of the cervical spine. Thereafter, claimant continued to receive treatment for his right knee, as well as vocational assistance. In April 1984 Dr. Renaud, claimant's then attending orthopedist, reported that claimant's was approaching medical stability and, because of his right knee limitations, would have to modify his future work activities.

In June 1984 claimant returned to Dr. Campagna. His complaints included pain from the base of his neck which extended constantly throughout the spine and intermittently into his shoulders and arms. Claimant was also experiencing arm numbness and headaches. Neck motions or strenuous activities aggravated his symptoms. Dr. Campagna scheduled a battery of tests, noting that if the findings were normal the claim should be closed. Thereafter, a myelogram, X-rays, an EEG, and an EMG all reported normal findings.

In August 1984 claimant returned to Dr. Campagna, stating that he was experiencing less neck pain, but was not working due to his right knee condition. In Dr. Campagna's opinion claimant had sustained a cervical sprain. Concluding that

claimant's neck and back motion were normal, Dr. Campagna recommended a reexamination in three months in preparation for claim closure.

In December 1984 Dr. Campagna performed a closing examination. Claimant reported that he felt improved since June 1984, but continued to experience neck, shoulder, and spine pain. Range of motion tests were normal and no weakness, atrophy, or sensory loss was detected. Consequently, Dr. Campagna opined that there was no neurologic impairment.

A January 16, 1985 Determination Order issued, awarding claimant approximately 18 months of temporary disability and 25 percent scheduled right leg (knee) permanent disability. No unscheduled permanent disability was awarded.

On the morning of January 27, 1985 claimant awoke with "the worst kink [in the neck] that I've had in my life." He was transported to an emergency room, where he received an injection and was released. Dr. Sutherland, neurosurgeon, reported that claimant's neck pain had been present since the June 1983 injury, but in a less severe degree. An examination of the upper extremities indicated that claimant's triceps reflexes were depressed. Dr. Sutherland concluded that claimant was unable to work due to his persistent pain. Suspecting a cervical nerve root irritation, Dr. Sutherland scheduled a CT scan. The scan demonstrated no significant bony abnormalities.

In March 1985 Dr. Sutherland advised that claimant's severe pain had subsided, although he continued to notice a tingling numbness in the scapular area. Although Dr. Sutherland opined that there had not been an objective deterioration of claimant's physical condition, he felt that there had been a symptomatic worsening of claimant's neck condition. Dr. Sutherland agreed with the medical consensus that claimant should refrain from heavy lifting activities.

Dr. Campagna reviewed Dr. Sutherland's report concerning claimant's January 1985 examination. Dr. Campagna found no apparent change in claimant's condition.

In April 1985 claimant applied for unemployment compensation. In answer to a question concerning his medical condition, claimant listed his right knee condition, but did not refer to any neck problems. Claimant explained that he had not listed a neck problem because he had not received a disability award for that condition.

In June 1985 claimant returned to Dr. Sutherland, stating that his neck problems were continuing. Dr. Sutherland had last examined claimant in April 1985. Claimant's range of motion was good, but he experienced pain when rotating his neck to the right. Dr. Sutherland continued to conclude that there were no objective physical findings to support claimant's recent increase of symptoms. In Dr. Sutherland's opinion, claimant's condition was medically stationary at the time of the April 1985 examination.

Claimant experiences a constant aching in his neck. His pain worsens if he "sleep[s] on it wrong" or if he engages in

strenuous physical activity. Prolonged sitting and holding his arms out in front of his body also exacerbate his neck pain. He has experienced these same problems since the June 1983 injury. Because of his pain, claimant feels that he can no longer perform his former work activities, such as logging or heavy equipment operation.

Claimant testified that he had a restricted driver's license due to a recent "DUII" conviction. He stated that he received the license "about a month ago." He further testified that the hours he was permitted to drive were printed on a piece of paper which was in his truck. Although he had driven to the hearing in a truck, claimant explained that the truck was his father's and that the paper was in his truck which he had left at home. For the purposes of impeachment, Motor Vehicle Division records were admitted. The records showed that, as of approximately two weeks before the hearing, claimant's driving privileges had been suspended. On redirect examination, claimant conceded that he did not possess a driver's license. He acknowledged that he had been untruthful, but he insisted that "anything else that I said I was being as truthful as I can possibly be."

Based on the aforementioned deliberate misrepresentation, the Referee found that claimant had limited credibility. However, the Referee was persuaded that claimant had experienced a temporary worsening of symptoms in January 1985. Accordingly, the Referee concluded that claimant had established an aggravation claim between January 1985 and April 1985. In addition, the Referee found that claimant's neck problems precluded him from returning to his former heavy work activities. Consequently, claimant was awarded 10 percent unscheduled permanent disability.

Subsequent to the Referee's order, the Court of Appeals issued its decision in Consolidated Freightways v. Foushee, 78 Or App 509 (1986). In Foushee, the court held that it is not necessary to establish a worsening of an underlying compensable condition to prove an aggravation. However, the Foushee court also concluded that to establish an aggravation, claimant must prove that the symptomatology of his condition has worsened to an extent that he is more disabled than he was at the time of the last arrangement of compensation. See also, Johnson v. Argonaut Insurance Co., 79 Or App 230 (1986).

Following our de novo review of the medical and lay evidence, we are not persuaded that the symptomatology of claimant's condition has worsened to the extent that he is more disabled than he was in January 1985, the time of his last award of compensation. Both medical experts concluded that there was no objective evidence to establish that claimant's condition had worsened. Dr. Sutherland, a physician who had not examined claimant prior to January 1985, was unable to detect any objective deterioration of claimant's condition. This opinion was shared by Dr. Campagna, who had examined claimant before the last award of compensation.

Inasmuch as there was no objective evidence that claimant's condition had worsened, he must establish the compensability of his aggravation claim through his subjective complaints of increased pain. We find these complaints unpersuasive. Claimant's misrepresentation at the hearing does

not necessarily force us to totally discard the remainder of his testimony. However, it does cause us to review his testimony and previous statements with a degree of skepticism. Claimant's "kink" in the neck certainly resulted in the need for additional medical treatment. Yes, claimant conceded that his neck problems were the same as those he had been experiencing since his June 1983 injury.

Considering the lack of objective evidence and claimant's limited credibility, we find his increased pain complaints insufficient to establish that he is presently more disabled than he was at the time of his last award of compensation. Therefore, he has failed to prove the compensability of his aggravation claim.

Finally, we are not persuaded that claimant has sustained any permanent impairment as a result of his compensable neck injury. The medical evidence suggests that claimant should avoid heavy physical activities, such as those as he had formerly performed. However, these limitations were apparently necessary because of claimant's right knee injury, rather than his neck condition. Claimant has already received a permanent disability award resulting from his right knee injury. He should not receive an additional award stemming from the same physical limitations.

Dr. Sutherland did attribute claimant's physical limitations to his neck problems. Yet, as discussed above, this opinion was not based on objective evidence. Rather, Dr. Sutherland based his opinion entirely on claimant's subjective complaints, which we have found to be of dubious evidentiary value. Dr. Campagna, claimant's former attending physician, had also failed to detect any objective evidence to suggest that claimant had suffered any permanent impairment. Moreover, after reviewing Dr. Sutherland's subsequent report, Dr. Campagna did not alter his previous conclusion that claimant was not neurologically impaired.

We are aware that medical evidence is not statutorily required to establish the extent of permanent disability. Garbutt v. SAIF, 297 Or 148 (1984). However, in view of the dearth of objective evidence, as well as claimant's discredited testimony, we find his complaints of disabling pain unpersuasive in proving that he has suffered permanent impairment as a result of his compensable neck injury. Consequently, we find that he is not entitled to to an award of unscheduled permanent disability.

ORDER

The Referee's orders dated August 15, 1985 and September 6, 1985 are affirmed in part and reversed in part. Those portions which set aside the SAIF Corporation's denial of claimant's aggravation claim for a neck condition, awarded an attorney's fee for prevailing on a denied claim, and granted 10 percent (32 degrees) unscheduled permanent disability are reversed. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $400 for services on Board review concerning the scheduled disability issue, to be paid by the SAIF Corporation.

SHARON L. BRACKE, Claimant
Parker & McCann, Claimant's Attorneys
Scott M. Kelly & Assoc., Defense Attorneys

WCB 84-06207
July 1, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Thye's order that denied claimant's request to adjust the rate at which claimant was compensated for temporary disability. The issue on review is the rate of compensation for temporary disability.

This claim for compensation for disability resulting from an occupational disease known as "meatwrapper's asthma" has been the cause of protracted litigation. The progress of the original litigation to finally determine compensability resulted in Supreme Court review: Sharon L. Bracke, 29 Van Natta 947 (1980) (Referee's order affirmed without opinion), reversed, Bracke v. Baza'r, 51 Or App 627 (1981), modified 293 Or 239 (1982). Attorney fees for services before the Supreme Court were considered and denied, and reconsidered without change of opinion. 294 Or 483 (1983). The next issue litigated was closure of the claim after the final determination of compensability: Sharon L. Bracke, 36 Van Natta 1245 (1984), reversed and remanded, Bracke v. Baza'r, 78 Or App 128 (1986). The Court reversed the Board's determination of a medically stationary date and remanded for determination of the periods of time during which claimant earned income to offset compensation awarded.

Consequently, the claim has been found compensable, the issue of which party is responsible for compensation has been determined, and the claim is presently open and has been since 1977. The issue presented to the Board now is whether claimant was entitled to compensation for temporary total disability at the rate of three days per week or at the rate of five days per week according to ORS 656.210 and the relevant administrative rules, if any, for those weeks when claimant was not able to work any days.

At the time of the commencement of claimant's disability in January 1977, ORS 656.210(2) provided in relevant part:

> "For the purpose of this section, the weekly wage of workmen shall be ascertained by multiplying the daily wage the workman was receiving at the time of his injury:
>
> (a) By 3, if the workman was regularly employed not more than three days a week.
>
> (c) By 5, if the workman was regularly employed five days a week.
>
> "As used in this subsection, 'regularly employed' means actual employment or availability for such employment."

There was no administrative rule relating to the statute until 1980. Until that time, according to testimony introduced at the hearing, the Workers' Compensation Department had advised insurers that if a worker was employed through a union hall call board and the worker was available for work five days per week through that call board then temporary total disability compensation was due at the five day a week rate even if the employment had been for only one day. The Department adopted OAR 436-54-212 on January 11, 1980 which provided in relevant part:

"(2) The rate of compensation for workers employed with unscheduled, irregular or no earnings shall be computed on the wages determined in the following manner:

(d) Employed through union hall call board: Compute as 5 day worker regardless of number of days actually worked per week.

(f) Employed two jobs, two employers: Use only wage of job on which injury occurred if worker unable to work either job. If able to return to job where injury occurred, no benefit is due. If able to return to the job other than the one where injury occurred, temporary partial disability is due based on the combined earning power of both jobs.

(h) Employed 1 or 2 days per week: Use daily wage times 3 to arrive at weekly wage (ORS 656.210).

(n) Situation not covered by ORS 656.210 or this section: The employer and worker shall be contacted and a reasonable wage determined to coincide with the objectives of the Workers' Compensation Law."

The evidence in this case is that claimant returned to work for Baza'r in August 1976 after a layoff. Claimant worked three to five days per week at Baza'r from the week of August 14, 1976 through the week of September 18, 1976. She worked for three other grocery chains between September 18, 1976 and January 15, 1977 in addition to working for Baza'r. From January 15, 1977 through April 2, 1977 claimant regularly worked four or five days per week with one day at Baza'r and the other days roughly evenly split between Albertson and Thriftway. After the week of April 2, 1977 claimant continued to work three to five days per week for Albertson and Thriftway but no longer worked for Baza'r until May 14, 1977, when claimant ceased working altogether due to her occupational disease. While claimant could work she utilized the union hall call board to fill up her week as much as she could with work at other employers in the same line of business doing the same work.

Claimant regularly worked approximately one day per week for one employer performing a unionized job and sought other job assignments performing the same type of work for similar employers in the same industry through her union's call board. Claimant was working or seeking work in her unionized industry according to the union agreement and was working or available for work five days per week to do the work she was trained to perform as a member of the union. Claimant did not perform and did not seek work outside her union membership and did not perform nor seek work other than her regular union occupation as a meatcutter.

The Referee found that claimant was regularly employed one day per week by the responsible employer and that the union hall call board "exception" was inapplicable to claimant. He concluded that claimant was entitled only to benefits under ORS 656.210(2)(a) because claimant was regularly employed one day per week by Baza'r. He also found that the term "available" did not

apply to claimant because she was working reduced hours due to economic conditions and cited Martin A. Janssens, 4 Van Natta 30 (1969). In Janssens the claimant was hired to work part-time and he continued to seek full-time employment. We find that Janssens is distinguishable from the case before us because in that case there was no union agreement and the claimant was hired for part-time work by only the one employer.

This case is analogous to those cases in which an injured worker was employed by more than one employer and after an injury is unable to return to work at the other employments. OAR 436-54-212(2)(f), set forth above for multiple employer situations, covered the issue but it did not address application to unionized employment. In addition it did not apply to claimant because it was not in effect at the time of the commencement of claimant's disability. ORS 656.202. In the circumstances of this case, to find that claimant was a regular one-day-per-week worker for Baza'r, and that claimant had a concurrent alternative occupation consisting of jobs she obtained through the union hall call board, ignores the plain language of the statute where it says "'regularly employed' means actual employment or availability for such employment." (Emphasis added.) Claimant was actually employed or available for five day per week employment as a meatcutter through her union hall call board to Baza'r or any other person or company that hired meatcutters pursuant to the collective bargaining agreement at the relevant times.

By comparison, in Reed v. SAIf, 63 Or App 1 (1983), the claimant was working about 48 hours per week as a draftsman and he worked about 15 hours per week as a service station attendant. He was injured on the service station job and was ultimately awarded permanent total disability. The Board awarded compensation based on the wages at the service station job only and the Court affirmed. The court relied on the definition of wages in the statute as it has survived through major changes in the Workers' Compensation Law. The Court concluded that the definition:

> "is not necessarily a legislative determination that wages from concurrent employment are not the appropriate wage base for benefits, but the referee noted and claimant concedes that the past practice of the agency has been to award disability benefits based only on wages from the injury-producing employment if more than one employment contract is involved." 63 Or App at 4.

In this case, the union contract is the only "contract of employment," and there is no evidence that claimant was not working under the provisions of that contract. Claimant's occupation was meatcutter and she worked one day per week for Baza'r of the five days per week she made herself available for such work. We find that the phrase "such work," as it has been used repeatedly in the cases, applies to the occupation in which the claimant was engaged at the time of the injury or disability. Therefore, claimant's "availability for such work" was every day she was on the call board.

This case is also distinguishable from Vivian

MacDougall, 15 Van Natta 117 (1975). In MacDougall the claimant was employed as a cocktail waitress with two different employers. One job was full-time and the other was part-time. She was injured while working at the part-time job. Claimant argued that she was entitled to aggregate her total wages for determination of her temporary total disability benefits. The Board affirmed the determination of the Referee which allowed temporary total disability benefits based on the part-time employment only. The MacDougall case involved two separate and distinct employments under two separate employment contracts.

We think that claimant's union contract and her union membership are the distinguishing factors in this case. Claimant, by membership in the union, relinquished her right to seek and form individual contracts of employment outside of the union agreement with employers who were parties to the collective bargaining agreement. ORS 663.015 and 663.120. We find that although the Department's rule was not applicable to claimant because it was not in effect, it was and is the correct application of the statute to determine the rate of temporary disability compensation for an injured worker who is a union member who only works within the scope of a collective bargaining agreement. Therefore, the Referee's order is reversed and the responsible insurer is ordered to compute and pay claimant's temporary total disability compensation at the five days regular employment per week rate for weeks during which claimant performed no work.

Claimant has also requested penalties and attorney fees for the insurer's unreasonable resistance to payment of compensation at the five days regular employment per week rate. The issue presented in this case is of first impression. There was no applicable administrative rule at the time of the first date of disability. The facts of the case are reasonably susceptible to interpretation in different ways. Considering these factors, we find that the insurer's refusal to change the rate at which temporary disability compensation was computed was not unreasonable and, therefore, we do not assess penalties or attorney fees against the insurer.

ORDER

The Referee's order dated April 4, 1985 is reversed. Claimant is awarded temporary total disability compensation computed at the rate of five days per week for any week in which she was unable to work due to her occupational disease with offset for wages earned until the claim is closed pursuant to ORS 656.268. Claimant's attorney is allowed 25 percent of the additional compensation granted by this order, not to exceed $3,000 as a reasonable fee for attorney services through hearing and on Board review, to be paid out of claimant's compensation.

EULA L. CROWE, Claimant
Olson Law Firm, Claimant's Attorney
Brian L. Pocock, Defense Attorney

WCB 82-06883
July 1, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Crowe v. Jeld-Wen, Inc., 77 Or App 81 (1985), rev den, 301 Or 76 (1986). We have been mandated to reinstate the Referee's order.

Therefore, the Referee's order dated September 19, 1983 is reinstated and affirmed.

IT IS SO ORDERED.

ROBERT L. DIEHR, Claimant
Galton, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 85-02242
July 1, 1986
Order Denying Motion to Dismiss

Claimant has moved the Board for an order dismissing the insurer's request for Board review of Referee Knapp's order on the ground that the request for Board review was untimely.

The Referee's order was mailed February 26, 1986. A request for Board review would have to have been mailed within 30 days, or on or before March 28, 1986, which was a Friday. ORS 656.289(3); 656.295(2). The Board received an original request for Board review by the insurer on Monday, March 31, 1986. The envelope bears a postage meter imprint showing mailing on March 28, 1986. The request was mailed by Certified Mail, but no stamped receipt from the Postal Service was obtained.

Claimant's motion to dismiss is based upon OAR 438-05-040(4) and the three recent cases of Brett A. Stevens, 38 Van Natta 110, Roy L. Morris, 38 Van Natta 99 and William H. Kahl, 38 Van Natta 93, all issued February 7, 1986. In each of those cases, the party requesting Board review alleged that it had mailed a request within the allowed time, and in each case the parties had some circumstantial evidence tending to support their allegations of mailing. However, in each of the cases no original request for review was ever received by the Board. We decided the Morris and Stevens cases in reliance upon OAR 438-05-040(4) of our rules of practice and procedure, which 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 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." (Emphasis added.)

Because OAR 438-05-040(4) was not in effect at the time relevant in the Kahl case, we decided that case on the basis of whether a preponderance of the evidence established that the request had been mailed to the Board in a timely manner and concluded that it had not. In Morris and Stevens we concluded that the party requesting Board review was relying upon the date of mailing as the date of filing and neither party had produced "acceptable proof" of mailing, as required by the rule.

Kahl, Morris and Stevens shared one common, material fact that is absent from this case. In all three of those cases,

the original request for Board review was not received by the Board. There was, therefore, no means by which the Board could independently verify the mailing date, such as by examining the postmark. The requesting parties in Kahl, Morris and Stevens had to rely upon the mailing date in an affirmative manner, i.e. to prove after the fact that the requests had been mailed.

We hold that where, as in this case, the original request is received by the Board in the ordinary course of the mails in an envelope bearing a postmark or postage meter imprint establishing mailing in a timely manner, further proof of mailing is not required. Strict application of the "acceptable proof" of mailing requirement under Kahl, Morris and Stevens applies only in cases in which the original request for review is not received in the ordinary course of the mails. The motion to dismiss the request for review is denied.

IT IS SO ORDERED.

DALE R. HEINECKE, Claimant
Malagon & Moore, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 85-04756
July 1, 1986
Order Denying Motion to Dismiss

The employer has moved the Board for an order dismissing claimant's request for Board review, or in the alternative has cross-requested review. The basis urged for dismissal is that the employer requested that the Referee reconsider his order and the request for reconsideration was pending at the time claimant filed the request for review.

The Referee did not withdraw or abate his order pending a ruling on the request for reconsideration. The request for review filed by claimant vests jurisdiction in the Board. ORS 656.289(3); 656.295(2). See also James D. Whitney, 37 Van Natta 1463 (1985) (simultaneous abatement of Referee's order and request for Board review; jurisdiction retained by Referee.)

The motion to dismiss is denied. The cross-request for review is acknowledged.

IT IS SO ORDERED.

JOHN W. HOLLOWAY, Claimant
Velure & Bruce, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 84-04063 & 84-10221
July 1, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

WCB cases numbered 84-04063 and 84-10221 have been consolidated for Board review. In WCB Case No. 84-04063 the self-insured employer requests review of Referee Brown's order dated September 18, 1984 that granted claimant's motion to dismiss his request for hearing without prejudice. The employer argues that claimant's claim should have been dismissed with prejudice. In WCB Case No. 84-10221 the employer requests review of that portion of Referee Brown's order dated February 19, 1985 that awarded claimant 80 degrees for 25 percent unscheduled permanent partial disability for the low back in lieu of the September 29, 1983 Determination Order that awarded temporary disability compensation only. The issues are whether the Referee properly dismissed claimant's initial request for hearing without prejudice

and, if not, whether claimant was entitled to the 25 percent unscheduled disability award granted by the Referee.

In WCB Case No. 84-04063 we find that the Referee properly dismissed claimant's request for hearing without prejudice. We, therefore, affirm the Referee's order dated September 18, 1984. The remaining issue is whether the Referee correctly granted claimant a 25 percent unscheduled disability award. After de novo review we find that he did not.

Claimant is a retired timber cutter who worked in that capacity for various employers for nearly forty years. Sixteen of those years were spent with the present employer. Claimant sustained his first low back injury for this employer in 1975. He incurred another in early 1979. The 1979 accident resulted in lower lumbar pain and bilateral leg weakness. Degenerative arthritis was also diagnosed following the 1979 injury. Despite these findings claimant was released for regular work in September 1979 with few low back complaints. Neither of claimant's initial injuries resulted in an award of permanent disability.

Claimant's third injury for this employer is the subject of the present claim. The injury occurred on July 12, 1982 when claimant slipped off a log and fell into a ravine. Claimant reported wrenching his back and he experienced a return of lumbosacral tenderness. He was released for light work a week later, however, and within another week claimant was released to return to his regular heavy employment by Dr. Hartman, the then-treating physician.

On May 5, 1983 claimant incurred a fourth low back injury when he fell on top of a log. The result was a lumbosacral strain for which claimant began treating with Dr. Cullers, a chiropractor, two months after the injury occurred. The employer accepted the claim as nondisabling and claimant returned to light duty work on July 8, 1983. Dr. Cullers' treatment continued thereafter for three weeks and then terminated. Subsequently, claimant worked another eight or nine months and retired. There is no persuasive evidence that the retirement was necessitated by the effects of claimant's injuries.

The employer submitted the claim for closure in September 1983 after claimant failed to respond to an inquiry regarding the effects and treatment of the 1982 injury. A Determination Order thereafter issued, awarding claimant periods of temporary disability, but no permanent disability compensation. It was from that Determination Order, which pertained only to the 1982 injury, that claimant filed his request for hearing.

Dr. Hartman, the initial treating physician, reported in June 1984 that the 1982 injury appeared to have involved a lumbosacral strain, and that the effects of such strains are generally not permanent. In a later report, Dr. Hartman indicated that claimant returned to work following the 1982 injury and did well until the injury of 1983. Dr. Hartman suggested that any ongoing problem claimant might suffer would be the result of the 1983 injury. He found claimant's condition to be unchanged from 1982.

Dr. Cullers reported that he treated claimant for the

first time following the 1983 injury and that claimant ultimately developed a chronic lumbosacral strain. He concluded that claimant's "present condition is due to the injury of May 5, 1983 . . . ."

The Referee found claimant to be credible, but a poor historian. The Referee discounted Dr. Cullers' opinion regarding the effects of claimant's 1983 injury because the doctor did not have a history of claimant's injuries prior to that incident. He accepted Dr. Cullers' observation that claimant's condition had become chronic, however. He found the opinion of Dr. Hartman to support that of Dr. Cullers with regard to the chronic nature of claimant's condition. The Referee did not comment on Dr. Hartman's opinion that claimant's current condition was the result of the 1983, rather than the 1982, injury.

It is claimant's burden to prove that he has incurred a permanent loss of earning capacity as a result of the July 1982 injury. Although claimant's testimony with regard to causation is probative, it may not be persuasive when the claim involves a complex medical question. See Kassahn v. Publishers Paper Co., 76 Or App 105 (1985); Hoke v. Libby, McNeil and Libby, 73 Or App 44 (1985). In this case we find that we must determine the cause and extent of claimant's current disability, if any, from the opinions of Drs. Hartman and Cullers. We note, however, that claimant has on occasion attributed his condition to the 1983 injury in discussions with his doctors.

Neither Dr. Hartman nor Dr. Cullers have ever definitively attributed claimant's current condition to the 1982 injury. In fact, both attributed the condition to a later injury not involved in this claim. Claimant argues on review that Dr. Cullers offered his causation statement without benefit of claimant's complete medical history. While Dr. Cullers' inadequate history does lessen the persuasiveness of his opinion, discounting that opinion does nothing to affirmatively establish claimant's entitlement to an award. Claimant also argues that Dr. Hartman's discussion of claimant's pre-and-post 1983 conditions somehow aids in his entitlement to an award. We find, however; that Dr. Hartman's opinion is best summarized by his statement that he "would have to assume that [claimant's current back pain] is related to the industrial injury of May 5, 1983."

Claimant has failed to prove that any permanent disability from which he may now suffer is related to his 1982 injury. The Referee's permanent disability award for the effects of that injury, therefore, was incorrect and shall be reversed.

ORDER

The Referee's order dated September 18, 1984 is affirmed. For successfully defending against the employer's request for Board review, claimant's attorney is awarded a reasonable attorney fee of $200. The Referee's order dated February 19, 1985 is reversed.

CARL F. JUDD, Claimant
Michael Dye, Claimant's Attorney
Keith D. Skelton, Defense Attorney

WCB 83-10016
July 1, 1986
Order on Review

Reviewed by the Board en banc.

The insurer requests review of Referee McCullough's order that set aside its partial denial of continuing medical services for an accepted low back condition. On review, the insurer contends claimant's current medical treatment for a condition diagnosed as arthritis is not related to his accepted 1979 claim for low back strain.

We draw from the Referee's discussion and findings of fact. Claimant was 55 years of age at the time of hearing. He has worked for the same employer for 32 years, primarily as a press operator for a business supply company. Claimant has a history of back complaints dating back to 1960. Although some of the complaints were work related, claimant has not received a permanent disability award.

His February 1979 "twisted back" claim was accepted as a disabling injury. Claimant underwent a variety of diagnostic procedures to determine the cause of his low back pain, with radiating right leg symptoms. A myelogram was interpreted by Dr. Bolliger as compatible with a herniated disc. However, Dr. Melgard disagreed with that assessment. Dr. Tiley noted that claimant had experienced chronic low back problems for a number of years and carried a diagnosis of chronic lumbar degenerative disc disease. Dr. Raaf, neurologist, reported no objective findings, but suspected possibly some of claimant's symptoms were due to mild arthritis. Dr. Bolin, chiropractor, opined that claimant had suffered mid-thoracic and lumbosacral spine strain which was possibly not responsive to treatment due to preexisting arthritis.

In September 1979 claimant was evaluated and treated at the Northwest Pain Center. The final diagnosis was chronic mechanical low back pain, suspected Reiter's syndrome and poor posture mechanics. Since testing was negative, Dr. Seres of the Pain Center felt that rheumatoid disease, if present, was not a major source of his pain. Thereafter, claimant received conservative treatment from Dr. Regan, rheumatologist. The initial diagnosis was Reiter's syndrome. However, test results proved negative and there were no objective findings suggestive of inflammatory arthritis.

In January 1980 claimant came under the care of Dr. May, rheumatologist. For approximately the next 15 months Dr. May prescribed various medications for claimant's back and multiple joint symptoms. Throughout this time, Dr. May's opinion on whether claimant suffered from arthritis fluctuated. In January 1980 he reported that claimant's 1979 X-rays were compatible with Reiter's spondylitis. In August 1980 he noted that claimant had a presumptive diagnosis of Reiter's earlier. However, Dr. May did not feel that claimant had Reiter's. The rheumarologist concluded that although claimant had significant arthralgias throughout his body, there were no objective findings of arthritis. In February 1981 Dr. May advised that claimant continued to have flare-ups in his arthritic condition, which was Reiter's syndrome.

In June 1981 Dr. May reported that he had last seen

claimant in March and that it was his opinion that claimant's condition was stable. Dr. May again concluded that claimant had Reiter's syndrome. A Determination Order issued in August 1981. No permanent disability was awarded due to inadequate information. The order stated that a permanent disability determination would be made when adequate information was received. Apparently, no further information was forwarded nor was this order appealed.

Claimant returned to work in approximately January 1980. Although he has suffered periodic flare-ups for which he has received conservative treatment, he has continued to work.

In August 1983, Dr. Rifkin, naturopath, reported that claimant had aggravated his lumbar strain and recommended time loss. Dr. Rifkin, who had been treating claimant since February 1983, opined that claimant was suffering from "trauma induced arthritis" due to the 1979 injury.

Claimant was reexamined by Dr. May, who had not seen claimant for approximately 2 1/2 years. Dr. May reported that claimant was complaining of a fairly universal symmetrical polyarticular arthritis, malaise, and easy fatigability. Dr. May advised that he was never comfortable with his earlier diagnosis of Reiter's syndrome. Following further testing, Dr. May concluded that claimant was experiencing subjective symptoms, not supported by objective findings. Soon after receiving Dr. May's report, the insurer issued its partial denial, contending claimant's current problem was not related to the 1979 injury.

In September 1983 Dr. Rosenbaum, rheumatologist, performed an independent medical examination. It was Dr. Rosenbaum's opinion that claimant suffered from "an inflammatory type of arthritis, which involves the spine." This type of arthritis was usually accompanied by normal lab tests and physical examinations. Dr. Rosenbaum further advised that this type of arthritis was never caused by an injury, nor did the doctor feel from claimant's history that an injury had aggravated the condition. Dr. Rosenbaum concluded that claimant's condition, an ongoing systemic disease, was not work related. The doctor further opined that claimant's previous injury was medically stationary, with no residuals.

On the basis of Dr. Rosenbaum's opinion, the Referee was persuaded that claimant's arthritis was not related to the 1979 injury. However, the Referee found that the insurer was still liable for claimant's arthritis insofar as it affected his low back. The Referee reasoned that the insurer had been aware of claimant's arthritic problems since late 1979 and had never issued a denial. Therefore, the Referee concluded that the insurer was prohibited under Bauman v. SAIF, 295 Or 788 (1983), from denying responsibility for claimant's arthritis problem insofar as it affected his low back.

The facts of this case are very similar to those of Leokadia W. Piwowar, 37 Van Natta 1591 (1985). In Piwowar, claimant suffered two low back strains of rather minor intensity and continued to be disabled by pain after the second injury. She was treated and examined by numerous doctors, none of whom agreed as to the exact etiology of claimant's disabling pain. All did, however, agree that claimant was medically stationary and was

disabled by low back pain. The claim was finally closed with a 40 percent permanent partial disability award. After claim closure, claimant was examined by Dr. Rosenbaum, who diagnosed ankylosing spondylitis, which he opined had nothing to do with the claimant's industrial injuries. Eventually nearly all the claimant's other treating and examining physicians agreed with Dr. Rosenbaum. Within approximately 30 days of the diagnosis of ankylosing spondylitis, the employer issued a denial of responsibility for that condition. A majority of the Board held that the employer's denial was prohibited by Bauman v. SAIF, supra.

In this case, the record abounds with references to claimant possibly suffering from Reiter's syndrome from early in the history of the claim. Reiter's syndrome (also called Reiter's disease) is a "nongonococcal urethritis followed by conjunctivitis and arthritis, of unknown etiology, and occurring predominantly in males . . . ." Dorland's Illustrated Medical Dictionary (25th Ed., 1974) 461. This diagnosis is sufficiently discrete from a "twisted back" that it could have been denied from the outset without interfering with the processing of claimant's industrial injury claim. See Joji Kobayashi, 36 Van Natta 1558 (1984), rev'd on other grounds, Kobayashi v. Siuslaw Care Center, 76 Or App 320 (1985); see also Gracia A. Carter, 36 Van Natta 1604 (1985) (back-up denial of psychological component of claim barred by Bauman where evidence of psychological condition existed at time of initial claim acceptance).

The insurer knew that claimant may have been suffering from Reiter's syndrome or some other form of arthritic condition unrelated to his "twisted back" from early in its processing of the claim. Its denial four years later of that condition cannot stand. Wheeler v. Boise Cascade Corp., 298 Or 452, 456 (1985); Bauman v. SAIF, supra.

The Referee also ordered that a medical evaluation be arranged, so that claimant could receive the permanent disability rating by the Evaluation Division that he did not receive when his claim was closed in 1981. We believe that the Referee exceeded his authority.

Pursuant to ORS 656.268(4), the Evaluation Division shall reconsider determinations whenever one of the parties makes such a request and presents medical information not available at the time of the original determination. However, the statute requires that the request for reconsideration must be made prior to the time a request for hearing is made pursuant to ORS 656.283. Requests for hearing are subject to ORS 656.319. ORS 656.283(1). A hearing on objections to a determination order shall not be granted unless a request for hearing is filed within one year. ORS 656.319(4).

The 1981 Determination Order awarded no permanent disability due to a lack of medical information. Apparently, no further information was forthcoming to assist the Evaluation Division in determining the extent of claimant's permanent disability. Neither a request for reconsideration, accompanied by additional medical information, nor a request for hearing was filed within one year. Consequently, the order, and its disability determination, became final by operation of law.

Following claim closure, a claimant is entitled to a reopening and a redetermination of his claim only if he

establishes a worsening of his condition or if he ceases to be enrolled and actively engaged in an authorized vocational rehabilitation program. ORS 656.268(5); 656.273; Johnson v. Industrial Indem., 66 Or App 640 (1984). Neither event is present in this record. Accordingly, claimant was not entitled to a redetermination of his permanent disability.

ORDER

The Referee's order dated May 9, 1984 is affirmed in part and reversed in part. That portion of the Referee's order that set aside the insurer's denial issued September 6, 1983 is affirmed. That portion of the Referee's order that directed a medical evaluation and reclosure of claimant's claim is reversed. Claimant's attorney is awarded a reasonable attorney fee of $700 for services on Board review, to be paid by the insurer in addition to compensation.

BOARD CHAIRMAN FERRIS CONCURRING IN PART AND DISSENTING IN PART:

I agree with the majority that, under the facts of this case, given the result reached by the majority on the partial denial issue, claimant is not entitled to a redetermination of his disability.

For the reasons set forth in my dissent in Leokadia W. Piwowar, 37 Van Natta 1591, 1593-95 (1985), I respectfully dissent from the majority's holding that the employer's denial of claimant's "arthritic-like" condition is barred.

I am firmly convinced that, like the employer in Piwowar, the insurer in this case accepted a "twisted back" believing it to be work related -- not ankylosing spondylitis which the doctors agree is not work related. Surely an employer should not be estopped from denying a condition which is not work related simply because it in good faith accepted one which it believed to be work related. Such an interpretation would most certainly have a chilling effect on the acceptance of any claim, the etiology of which is unknown, penalize the "good" employer by requiring the employer to forever pay benefits for a non-work related condition, and, to some extent at least, cause employer/employe relations to suffer through reluctance to accept claims.

ERICA E. MORENO, Claimant
Evohl F. Malagon, Claimant's Attorney
Roger Luedtke, Defense Attorney

Own Motion 85-0572M
July 2, 1986
Own Motion Order

By letter dated October 11, 1985 claimant has requested that the Board exercise its own motion authority and reopen her claim for an alleged worsening of her February 21, 1974 industrial injury. Claimant's aggravation rights have expired. The Board denied claimant's request for compensation as the compensability of the recommended surgery had not been finally resolved. The self-insured subsequently paid temporary total disability benefits and, on February 13, 1986, submitted the claim to the Board for closure.

On June 17, 1985 Referee Foster issued an Opinion and Order which ordered Weyerhaeuser to reopen claimant's claim for

the payment of medical services and temporary total disability benefits. The self-insured timely requested Board review of the Referee's order. On February 18, 1986 the Board issued two orders: (1) an Order on Review in which the Referee's order was reversed and the case remanded to the Hearings Division for further proceedings consistent with the order; and (2) an Own Motion Order which denied claimant's request for own motion relief as the compensability of the recommended surgery had not been finally resolved. By Order on Remand, Referee Foster ruled that the self-insured was responsible for the elective surgery performed on August 7, 1985. This order was not appealed and is now final.

Although not timely, the self-insured paid temporary total disability benefits in accordance with the June 17, 1985 Opinion and Order. Benefits continued at least until Weyerhaeuser requested that the Board close the claim on February 13, 1986.

Based on a thorough review of the evidence, the Board reaches the following conclusions: Temporary total disability benefits were paid as directed by the Referee's order pursuant to ORS 656.313. However, the Board ruled in its February 18, 1986 order that the Referee lacked jurisdiction to rule on claimant's entitlement to temporary total disability benefits. It would appear that by this time all benefits had been paid in accordance with the Referee's order, not as a voluntary reopening of the claim, but rather pursuant to ORS 656.313. We find claimant is not entitled to temporary total disability benefits as she has not been regularly and gainfully employed during the twelve years following her injury. There is no medical evidence which would support her contention that she could not work during that time. We note that claimant testified at the most recent hearing before Referee Foster that she was taking steps to again become gainfully employed. Our denial of benefits is based on claimant's status at the time of surgery and is not intended to be a position on any future entitlement to compensation.

Because we deny claimant's entitlement to temporary total disability compensation, the request for claim closure submitted by Weyerhaeuser is moot.

ORDER

The request for own motion relief is hereby denied.

KIRK D. CALDWELL, Claimant
Larry Dawson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-06119
July 3, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Knapp's order which: (1) increased his unscheduled permanent disability award for a low back injury from 30 percent (96 degrees), as awarded by an August 25, 1983 Determination Order, to 45 percent (144 degrees); (2) upheld the SAIF Corporation's denials of aggravation claims for his low back condition; and (3) declined to assess a penalty and accompanying attorney fees for an allegedly unreasonable delay in referring claimant for vocational rehabilitation. On review, claimant contends that: (1) his

unscheduled permanent disability award should be increased; (2) the denials of his aggravation claims were unreasonable and should be set aside; and (3) penalties and accompanying attorney fees are justified for the aforementioned denials, as well as for SAIF's unreasonable delay in referring him for vocational rehabilitation.

We affirm that portion of the Referee's order which awarded claimant 45 percent unscheduled permanent disability for his compensable low back injury.

We also affirm that portion of the Referee's order which found that claimant's condition had not worsened since the last award of compensation, but with the following comment. Following our de novo review of the medical and lay evidence, we are not persuaded that claimant is more disabled as a result of his pain since the last award of compensation. Consequently, he has failed to establish the compensability of his claims for aggravation. See Johnson v. Argonaut Insurance Co., 79 Or App 230 (1986).

Finally, we lack jurisdiction to consider SAIF's alleged unreasonable delay in referring claimant for vocational assistance. This question must be addressed initially to the Director of the Workers' Compensation Department, not to this Board. ORS 656.283(2). See also Joel I. Harris, 36 Van Natta 829, 840 (1984), aff'd mem., 72 Or App 591 (1985); Ray Moore, 37 Van Natta 466, 469 (1985).

ORDER

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

JIM F. MORRIS, Claimant
Charles S. Tauman, Claimant's Attorney
Keith D. Skelton, Defense Attorney
Bruce Hamlin, Attorney

WCB 81-07056
July 3, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of that portion of Referee Knapp's order that set aside its denial of claimant's occupational disease claim for an organic brain syndrome diagnosed as "chronic toxic encephalopathy." Claimant cross-requests review of those portions of the Referee's order that (1) upheld the denial of claimant's seizure disorder on the ground that the disorder was not proved to be related to employment exposure, (2) denied claimant's assertion that the insurer had the burden of proof as to compensability of the siezure disorder, (3) denied claimant's assertion that the insurer was estopped to deny the claim and (4) denied claimant's request for penalties. The issues are compensability and penalties.

After thorough review of the voluminous record and extensive briefs filed by the parties, the Board affirms and adopts as its own the well-reasoned order of the Referee. We further conclude that although this was a case of extraordinary novelty and difficulty at the hearing level, claimant is not entitled to an extraordinary attorney fee for services on Board review, because his activity on Board review consisted largely of reiterating argument made to the Referee.

ORDER

The Referee's order dated July 3, 1984 is affirmed. Claimant's attorney is awarded a reasonable fee for services on Board review of $350, to be paid by the insurer.

ALEX SHIERMAN, Claimant
Charles S. Tauman, Claimant's Attorney
Keith D. Skelton, Defense Attorney

WCB 83-3609 & 83-3610
July 3, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of that portion of Referee Knapp's order that set aside its denial of claimant's occupational disease claim for an organic brain syndrome diagnosed as "chronic toxic encephalopathy." Claimant cross-requests review of those portions of the Referee's order that held that the insurer was not estopped to issue the denial and denied claimant's request for a penalty. The issues are compensability and penalties.

After thorough review of the voluminous record and extensive briefs filed by the parties, the Board affirms and adopts as its own the well-reasoned order of the Referee. We further conclude that although this was a case of extraordinary novelty and difficulty at the hearing level, claimant's attorney is not entitled to an extraordinary fee for services on Board review, because his activity on Board review consisted largely of reiterating argument made to the Referee.

ORDER

The Referee's order dated July 3, 1984 is affirmed. Claimant's attorney is awarded a reasonable attorney fee for services on Board review of $350, to be paid by the insurer.

KENNETH A. YEATS, Claimant
Goldberg & Mechanic, Claimant's Attorneys
Keith D. Skelton, Defense Attorney

WCB 82-03802
July 3, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The insurer requests review of that portion of Referee Menashe's order that set aside its denial of claimant's occupational disease claim for an organic brain syndrome diagnosed as "chronic toxic encephalopathy." Claimant cross-requests review of that portion of the Referee's order that upheld the insurer's denial insofar as it denied the compensability of a siezure disorder. The issue is compensability.

After thorough review of the voluminous record and extensive briefs filed by the parties, the Board affirms and adopts as its own the well-reasoned order of the Referee. We further conclude that although this was a case of extraordinary novelty and difficulty at the hearing level, claimant's attorney is not entitled to an extraordinary attorney fee for services on Board review, because his activity on Board review consisted largely of reiterating argument made to the Referee.

ORDER

The Referee's order dated November 23, 1983 as supplemented and republished February 21, 1984 is affirmed. Claimant's attorney is awarded a reasonable attorney fee for services on Board review of $400, to be paid by the insurer in addition to compensation.

PRESTON AUTERY, Claimant
Michael B. Dye, Claimant's Attorney
Garrett, et al., Defense Attorneys

WCB 84-05247
July 9, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The self-insured employer requests review of Referee Seymour's order that set aside its partial denial of claimant's low back condition. The issue is compensability.

We affirm the order of the Referee with the following comments. Claimant is a former cannery maintenance worker. On September 23, 1983 he sustained a compensable low back strain. He was initially treated by a chiropractor and then referred to Dr. Poulson, an orthopedist. In the treatment that followed Dr. Poulson noted the preexistence of a degenerative low back osteoarthritis condition. Dr. Poulson felt that a "good part" of claimant's current condition was due to the preexisiting degenerative process, but that the preexisting condition was aggravated by the compensable incident. The initial treating chiropractor agreed with that assessment. Drs. Langston and Rosenbaum each examined claimant once on behalf of the employer. Both felt that claimant's current condition was not materially related to his compensable injury. Based on Dr. Langston's report, the employer issued a partial denial, reaffirming its responsibility for claimant's compensable low back strain but denying responsibility for "any treatment or disability" associated with the underlying condition.

The Referee held that while the employer is not responsible for the underlying degenerative condition as such, it is responsible for any increased disability associated with the worsened symptoms experienced by claimant as a result of the compensable strain. He therefore set aside the employer's partial denial insofar as it denied responsibility for "any treatment or disability" associated with the underlying condition. On review the employer asserts that it should not now be responsible for any of claimant's treatment because the effects of the compensable strain have resolved and the current disability is due solely to the noncompensable degenerative condition. Claimant responds that the employer should be responsible not only for claimant's worsened symptoms, but also for the underlying condition itself.

Like the Referee we find the opinions of claimant's treating doctors most persuasive regarding the effect of the compensable strain on the underlying condition. We find that the strain aggravated the underlying condition to the extent that claimant appears to have required treatment for not only the compensable strain, but also for the symptomatic changes in his underlying condition. All effects of the strain are compensable, including those materially affecting the underlying condition. The employer is and shall remain responsible for those effects,

but it will not be responsible for disability not materially precipitated by the compensable strain. See David F. Brainerd, 37 Van Natta 276 (1985); Roy L. Bier, 36 Van Natta 1825 (1984).

We find this case to have been one of ordinary difficulty and the usual chance for success for claimant. A reasonable attorney fee is awarded accordingly.

ORDER

The Referee's order dated July 2, 1985 is affirmed. Claimant's attorney is awarded a fee of $650, to be paid by the self-insured employer.

RICHARD M. DESKINS, Claimant
Evohl F. Malagon, Claimant's Attorney
Rankin, et al., Defense Attorneys

WCB 85-00088
July 9, 1986
Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Review dated May 6, 1986. In the aforementioned order, we affirmed the Referee's order which found that the self-insured employer unreasonably failed to pay temporary disability benefits pursuant to a previous Referee's order. However, we increased the penalty and an accompanying attorney's fee for the employer's unreasonable conduct. In addition, we found that the Referee had erroneously closed the claim and allowed an offset.

On reconsideration, claimant asserts that he is entitled to additional awards of attorney fees. He bases his contentions on two grounds. First, he contends that he should receive an attorney's fee for prevailing on the employer's cross-request. The employer had filed a cross-request for review, arguing that the previous Referee's order should not be enforced and that a penalty was unwarranted. Secondly, claimant asserts that he is entitled to an attorney's fee for prevailing on the "premature claim closure" issue, and thereby the offset issue. Claimant argues that his success on these latter issues has, in effect, entitled him to increased temporary disability compensation. In response to claimant's arguments, the employer suggests that we modify the $1,500 attorney's fee award to include all issues, not just the penalty issue.

In support of his first contention claimant relies on the recent Court of Appeals' decision in Travis v. Liberty Mutual Insurance, 79 Or App 126 (1986). In Travis, the claimant had requested that the Board award permanent total disability or additional permanent partial disability. The insurer had filed a cross-request, contending that the Referee's permanent partial disability award be reduced. The Board affirmed the Referee's order and declined to award an attorney's fee. Relying on ORS 656.382(2), the Travis court held that claimant was entitled to an attorney's fee. The court concluded that the insurer's cross-request constituted a request for review "initiated by an employer or insurer."

Rules relating to the payment of attorney fees are set forth in OAR 438-47-000 et. seq. The Travis decision does not address a section of these rules, OAR 438-47-075, which provides as follows:

> "In the event of a cross appeal by either party, [OAR 438-] 47-000 to 47-095 shall be applied as if no cross appeal was taken, unless the party initiating the appeal withdraws his appeal and the cross appellant proceeds; in which case the cross appellant shall be considered the initiating party."

Our interpretation of the aforementioned rule leads us to conclude that barring the subsequent withdrawal of a request for Board review, the cross appellant is not considered the initiating party for purposes of awarding attorney fees pursuant to ORS 656.382(2). The court's recent holding in Travis certainly supports claimant's request for an additional award of attorney fees. However, we are bound to follow the clear and unambiguous dictates of our administrative rules. See Wattenbarger v. Boise Cascade Corp. 301 Or 12, 15 (1986); Bratt v. SIAC, 114 Or 644 (1925).

Therefore, since claimant did not withdraw his appeal, the employer, as cross appellant, is deemed to have not initiated an appeal. OAR 438-47-075. Accordingly, claimant is not entitled to an insurer-paid attorney's fee for responding to the employer's cross appeal.

Finally, we conclude that claimant is entitled to a reasonable attorney's fee based on the increased compensation resulting from our decision that the Referee erroneously closed the claim. We note parenthetically that the modification of the amount of a future offset is not equivalent to an award of additional temporary disability and does not entitle claimant to an attorney's fee pursuant to OAR 438-47-030. Nonda G. Henderson, 37 Van Natta 425 (1985); Aff'd mem 77 Or App 314 (1986). Yet, pursuant to OAR 438-47-040, claimant's attorney is entitled to a fee equal to 25 percent of the amount of the increased compensation awarded by the Board's order, not to exceed $3,000.

The employer contends that claimant's success on the "premature closure" issue has not resulted in any increased compensation. That may, or may not, be the case. However, this potential issue is not before us and shall not be addressed.

ORDER

The Board's Order on Review dated May 5, 1986 is supplemented insofar as claimant's attorney is awarded an additional fee equal to 25 percent of the increased temporary disability compensation, if any, resulting from our order, not to exceed $3,000. This attorney fee award, if any, is payable out of claimant's compensation. Except for this supplementation, the Bord's order is adhered to and republished in its entirety, effective this date.

ERICA E. MORENO, Claimant
Evohl F. Malagon, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 85-12643
July 9, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The self-insured employer requests review of that portion of Referee Seymour's order which assessed a penalty and accompanying attorney fees for an unreasonable delay in paying temporary disability pursuant to a prior Referee's order. On review, the employer contends that the penalty and attorney fee were not justified.

The Board affirms the order of the Referee with the following comment. Subsequent to the Referee's order, the Board reversed that portion of the prior Referee's order which directed the employer to pay temporary disability. Erica E. Moreno, 38 Van Natta 137 (1986). Inasmuch as the prior Referee's award of temporary disability was reversed, the employer contends that there were no "amounts then due" upon which to base a penalty pursuant to ORS 656.262(10). We disagree.

In Harold A. Lester, 37 Van Natta 745 (1985), we concluded that the reasoning behind the "amounts then due" language is to provide a means by which to make the punishment fit the crime. Thus, we reasoned that it is important to pay close attention to what conduct is being penalized in deciding whether amounts were "then due." 37 Van Natta at 747, emphasis in original.

Applying the Lester analysis, we find that the conduct being penalized is the employer's refusal to timely comply with a prior Referee's order directing the payment of temporary disability benefits. Thus, at the time of the employer's unreasonable conduct, there were "amounts then due" which took the form of these unpaid temporary disability benefits.

The fact that the employer subsequently paid the temporary compensation or that the prior Referee's order was eventually reversed does not relieve the employer of its obligation to timely comply with a Referee's directive. Had we acceded to the employer's argument we would be implicitly encouraging other insurers/employers to refuse to timely comply with Referees' orders in the hope that the order would ultimately be overturned. Inasmuch as full compliance with litigation orders is critical not only to the efficiency, but to the integrity of the workers' compensation system, the employer's conduct cannot be condoned. See ORS 656.313.

We also agree with the Referee's conclusion that the conduct of the employer's claims processor was unreasonable. We are persuaded that the processor believed that she should not pay temporary disability benefits while settlement negotiations were proceeding. However, such actions or inactions, no matter how innocent the intention, are unreasonable when they are committed in contravention of a Referee's order.

Finally, we find that this case is of ordinary difficulty and usual probability of success for claimant. Accordingly, a reasonable attorney fee is awarded. ORS 656.382(1); OAR 438-47-055.

ORDER

The Referee's order dated January 7, 1986 is affirmed. Claimant's attorney is awarded $400 for services on Board review, to be paid by the self-insured employer.

CLAUDE SAGRAVES, Claimant
Emmons, Kyle, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 84-03289
July 9, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of those portions of Referee McCullough's order that set aside its back-up denial of claimant's injury claim for his low back and awarded claimant's attorney a fee of $4,000. Claimant contends that the Referee should have awarded penalties and attorney fees for the employer's failure to pay compensation awarded by an earlier Referee's order pending the hearing on the employer's back-up denial. The issues are the back-up denial, penalties and attorney fees.

The Board affirms and adopts the order of the Referee on the issues raised by the employer. On the issue of penalties and attorney fees for the employer's failure to pay compensation awarded in an earlier Referee's order pending the hearing on the employer's back-up denial, we affirm the order of the Referee with the following comment.

In refusing to award penalties and attorney fees, the Referee relied upon Patrick M. Hannum, 36 Van Natta 1680 (1984). This reliance was misplaced. Hannum was not decided until after the hearing in this case. It, therefore, could have had no bearing upon the employer's decision to suspend payment of compensation pending the hearing on its back-up denial. Nonetheless, in view of the uncertainty of the law prior to Hannum, we do not find the employer's action unreasonable and thus do not award penalties and attorney fees. We hasten to comment that Hannum is no longer the law, see Leokadia W. Piwowar, 37 Van Natta 1591, 1592 (1985), and can no longer be relied upon as a basis for unilaterally terminating the payment of compensation pending the hearing on a back-up denial.

ORDER

The Referee's order dated November 22, 1985 is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the self-insured employer.

SUZANNA M. TIRONE, Claimant
Cowling & Heysell, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-05052
July 9, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Baker's order that upheld the SAIF Corporation's denial of the claim for injury to or occupational disease of claimant's right wrist. In its respondent's brief SAIF questions the Referee's evidentiary ruling

regarding admissibility of a taped interview of claimant which SAIF refused to provide to claimant at any time before her testimony at hearing despite repeated requests. The issues on review are compensability and admissibility of a taped interview.

The Board affirms the order of the Referee with the following comment on the issue of the admissibility of the interview tape. The taped interview was obtained by an investigator from SAIF with the consent of the claimant before the issuance of the denial and before claimant was represented by counsel. Claimant requested disclosure of claims related documents and specifically requested disclosure of her taped statement. The taped statement was withheld and then proffered at the conclusion of claimant's direct testimony during the insurer's case. The Referee decided to exclude the taped statement but allowed the tape to be entered into the record under an offer of proof.

The undergirding policy of the Workers' Compensation Law and the related administrative rules is to promote "full disclosure, expeditious claims administration, and minimization of adversarial practices. . . ." Allen W. Hays, Jr., 37 Van Natta 1179, 1182 (1985). We believe that all three policy considerations stated above in Hays are violated in spirit by the withholding of a claimant's recorded statement for possible use as technical impeachment some time later in the heat of a contested case hearing. We have also considered the practical problems which probably would develop should we allow our rule of non-discovery of impeachment evidence to include statements made by a claimant during the sixty-day investigation period provided by ORS 656.262(6). We conclude that the exception contained in OAR 438-07-015(2) relating to the non-disclosure of impeachment evidence should not apply to written or taped statements of a claimant made to the employer or insurer in the course of investigation of his or her workers' compensation claim before obtaining legal representation. Therefore, claimant was entitled to obtain the statement in either tape recorded or accurately transcribed form. The excluded taped statement was not considered on review.

ORDER

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

GERALD L. LARSON, Claimant
Pozzi, et al., Claimant's Attorneys
John E. Snarskis, Defense Attorney

Own Motion 86-0323M
July 11, 1986
Own Motion Determination

On June 16, 1986 we issued our Own Motion Determination closing claimant's claim under the provisions of ORS 656.278. Based upon the record submitted for claim closure, we concluded that claimant's claim was voluntarily reopened by the insurer after the expiration of claimant's aggravation rights, ORS 656.278(4).

Claimant has since completed the record and has established that, although the claim was reopened after the expiration of his aggravation rights, his aggravation claim was made prior to that time and was accepted pursuant to a stipulation that set aside the formal denial of aggravation. The acceptance, therefore, relates back to the date claim was made for

aggravation. See Coombs v. SAIF, 39 Or App 293 (1979). Claimant is entitled to claim closure under the provisions of ORS 656.268(4).

The Own Motion Determination dated June 16, 1986 is withdrawn. The insurer is directed to submit the claim to the Evaluation Division for closure pursuant to ORS 656.268(4).

IT IS SO ORDERED.

HOPE G. MATTOX, Claimant
Baldwin & Brischetto, Claimant's Attorneys
Moscato & Byerly, Defense Attorneys

WCB 84-06763 & 84-10409
July 11, 1986
Order Denying Motion to Strike Brief

The employer has moved the Board to strike a portion of claimant's appellant's brief. The ground upon which the motion is made is that the objectionable portion of the brief recites verbatim and discusses a piece of evidence that was not considered by the Referee. In addition, the employer seeks a preliminary ruling on the admissibility of the excluded evidence and a stay of the briefing schedule pending disposition of the motion. Claimant opposes all aspects of the motion.

We recently adopted a rule that provides for tolling the time for next event in the review process upon the filing of certain motions. OAR 438-11-011(3)(e). A motion to strike a brief is such a motion. Our order is required only for exceptions to this rule.

The piece of evidence to which the employer objects, while not considered by the Referee, is included in the record compiled by the Referee pursuant to ORS 656.295(3) and, therefore, can be reviewed by the Board pursuant to ORS 656.295(5). See Patricia A. Martin, 38 Van Natta 439 (1986); Robert A. Leppla, 37 Van Natta 1698 (1985). The issue of the admissibility of the evidence is properly a subject for our consideration and, therefore, appropriately included in the briefs. We decline to issue a preliminary order regarding the admissibility of the evidence.

The motion to strike claimant's appellant's brief is denied. The motion for a preliminary ruling on the admissibility of Exhibit 94A is denied. The employer's respondent's brief is due 21 days from the date of this order. Claimant's reply brief will be considered if mailed within 14 days from the mailing date of the employer's brief.

IT IS SO ORDERED.

BRIAN K. MUCHMORE, Claimant
Leo R. Probst, Claimant's Attorney
EBI Companies, Defense Attorney

Own Motion 86-0235M
July 11, 1986
Own Motion Determination on Reconsideration

Claimant has requested reconsideration of our Own Motion Determination of May 1, 1986. Claimant asserts that he is entitled to claim closure under the provisions of ORS 656.268(4), with attendant rights of appeal and review. See Coombs v. SAIF, 39 Or App 293 (1979). The basis of claimant's assertion is that he allegedly made his claim for aggravation four days prior to the expiration of his five-year aggravation rights. ORS 656.273(4).

Claimant's statutory aggravation rights expired October 22, 1984. It has been represented to the Board that claimant verbally notified the insurer on October 18, 1984 that he required additional medical services. Although this representation falls short of proof in the evidentiary sense, we accept it for the purposes of analysis. The first written notice that claimant required additional medical services or disability compensation on account of the original injury was dated December 13, 1984.

ORS 656.273(2) provides that:

> "To obtain additional medical services or disability compensation, the injured worker must file a claim for aggravation with the insurer or self-insured employer. . . ."

A medical report may be a claim for aggravation, ORS 656.273(3); however, a "claim" must be written. ORS 656.005(7); 656.265(2); Billy J. Eubanks, 35 Van Natta 131 (1983). In this case, no written claim for aggravation was made until after the expiration of claimant's aggravation rights. We, therefore, conclude that the insurer's action in accepting the claim was a voluntary reopening of claimant's claim under the provisions of ORS 656.278(4). In the absence of any circumstances compelling a different result, see Coombs v. SAIF, supra, claimant's claim must be closed under the provisions of ORS 656.278. No such circumstances exist in this case.

The request for reconsideration is allowed. On Reconsideration, we adhere to and republish our Own Motion Determination of May 1, 1986, effective this date.

IT IS SO ORDERED.

RONALD J. RUST, SR., Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-11893 & 84-03839
July 11, 1986
Order Denying Motion for Reconsideration

Claimant and the SAIF Corporation have both requested that the Board reconsider its Order on Review dated May 27, 1986. Prior to the filing of both requests for reconsideration, claimant filed a petition for judicial review. Our reconsideration is, therefore, governed by ORS 183.482(6). Fischer v. SAIF, 76 Or App 656, 659 (1985). In their requests, neither party has advanced any reasons why or stated in what particular way our previous order should be changed. We decline to withdraw our order from the Court of Appeals for reconsideration. The requests for reconsideration are denied.

IT IS SO ORDERED.

MARY I. SPENCER, Claimant
Wausau Insurance Co.

Own Motion 86-0270M
July 11, 1986
Own Motion Order

The insurer has submitted to the Board claimant's claim for an alleged worsening of her January 28, 1975 industrial injury. Claimant's aggravation rights have expired. The insurer opposes reopening as claimant has not been employed for many years.

Claimant apparently underwent surgery in February 1986 which was accepted by the insurer. She seeks temporary total disability for the period of time she was disabled due to her worsened condition and also seeks an increased award for permanent partial disability. Claimant has not been regularly and gainfully employed since her injury in 1975. She contends that after only 1-1/2 to 2 hours work, she required an hour rest before she could continue working and she felt employers would not hire her under those conditions. We find that claimant has received awards totalling 30% unscheduled disability for injury to her right shoulder. There is nothing in the evidence to indicate that for the past ten or more years claimant was unable to perform regular employment. The permanent disability award would indicate that claimant has a good portion of the job market still available to her. We conclude claimant is not entitled to compensation for temporary total disability. Cutright v. Weyerhaeuser Company, 299 Or 290 (1985). When claimant's condition becomes medically stationary again, she may request that the Board consider any possible increase in her permanent disability.

The request for own motion relief is hereby denied.

IT IS SO ORDERED.

ANITA J. STRATTON, Claimant
Francesconi & Cash, Claimant's Attorneys
John E. Snarkskis, Defense Attorney
Bottini & Bottini, Defense Attorneys
Lindsay, et al., Defense Attorneys

WCB 85-14038, 85-11963 & 85-00105
July 15, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Industrial Indemnity Company requests review of Referee T. Lavere Johnson's order that: (1) set aside its denial of medical services for claimant's May 14, 1979 industrial injury; (2) upheld denials by SAFECO Insurance Company and Aetna Casualty Insurance Company of claimant's low, mid and cervical spine conditions; and (3) awarded a $2,000 attorney fee to be paid by Industrial Indemnity Company. The Referee also entered his recommendation regarding Board action requested by claimant pursuant to ORS 656.278. Action on that recommendation is the subject of our Own Motion Order in WCB Case No. 84-0537M, issued this date.

The Board adopts the Referee's findings and conclusions and affirms the order of the Referee, with the following comments regarding the attorney fee awarded by the Referee.

Industrial Indemnity has objected to the award of an insurer paid attorney fee on the basis of Petshow v. Farm Bureau

Ins. Co., 76 Or App 563, 569 (1985) and Stanley C. Phipps, 38 Van Natta 157 (1986). In Petshow and Phipps, the hearings were held pursuant to an order of the Director of the Workers' Compensation Department which appointed a paying agent under the provisions of ORS 656.307. In Petshow, the court said of such ".307 cases," "Unless the claimant takes a position concerning which of the insurers is responsible and actively litigates that point, his role in the hearing is merely that of a witness. An award of attorney fees in such a case would generally be inappropriate."

We believe that Industrial Indemnity's reliance upon Petshow and Phipps is misplaced. All three denials were couched in terms of denial of the compensability of claimant's current medical condition and disability. At the beginning of the hearing the Referee summarized the issues as involving compensability of claimant's current low, mid and cervical spine condition and the attorneys for all four parties agreed with the Referee's summation of the issues. We, therefore, conclude that this case was not one where the only issue was which of multiple insurers was ultimately going to be responsible for payment of benefits to which claimant was concededly entitled. We also note that, because claimant's aggravation rights for her original injury at Industrial Indemnity's insured had expired, ORS 656.273(4), none of the three insurers could have been appointed as a paying agent under ORS 656.307. OAR 436-60-180(3).

Because this was not a case that falls under the Petshow/Phipps criteria, an insurer-paid attorney fee was appropriate. The fee awarded by the Referee was within the range of his discretion, OAR 438-47-020(1), and Industrial Indemnity has not persuaded us that the Referee abused his discretion.

ORDER

The Referee's order dated March 28, 1986 is affirmed. Claimant's attorney is awarded a reasonable attorney fee for services on Board review of $550, to be paid by Industrial Indemnity Company.

LEONA I. (WILSON) BROWN, Claimant
Quintin B. Estell, Claimant's Attorney
Cummins, Cummins, et al., Defense Attorneys

WCB 83-07512
July 17, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Seifert's order which: (1) found that her low back injury claim was not prematurely closed; (2) declined to award additional temporary total disability; (3) affirmed a July 26, 1983 Determination Order which awarded no unscheduled permanent disability for a low back injury; and (4) upheld the self-insured employer's partial denial of her current upper and lower back conditions. On review, the issues are premature closure, compensability of claimant's current upper and lower back conditions, and entitlement to temporary and permanent disability.

The Board affirms the order of the Referee with the following comments concerning the issues of the extent of permanent disability and of the partial denial.

Depending on the circumstances, post-injury earnings may

be of great, little, or no importance in determining loss of earning capacity. Jacobs v. Louisiana-Pacific, 59 Or App 1, 3 (1982). Accordingly, we have not considered claimant's eventual successful return to work without physical restrictions as determinative evidence that she did not sustain permanent disability as a result of her compensable injury.

Following our de novo review of the medical and lay evidence, the preponderance of the persuasive evidence fails to establish that claimant has suffered a permanent loss of earning capacity due to her compensable injury. See ORS 656.214(5). Consequently, we agree with the Referee that claimant has not proven that she is entitled to an award of unscheduled permanent disability.

Finally, we are not persuaded that claimant's compensable injury was a material contributing cause of her current upper and lower back condition. However, we agree with the Referee that the employer's denial should be upheld insofar as it denies responsibility for current medical treatment. Pursuant to ORS 656.245(1), claimant remains entitled to continuing medical services for conditions resulting from her compensable injury.

ORDER

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

PAULETTE R. NELSON, Claimant
Vick & Associates, Claimant's Attorneys
Bottini & Bottini, Defense Attorneys

WCB 85-01435
July 17, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer review of those portions of Referee Baker's order which: (1) set aside its denial of chiropractic services; and (2) awarded 32 degrees for 10 percent unscheduled permanent partial disability in lieu of the Determination Order dated January 28, 1985 which awarded no compensation for temporary or permanent disability. The issues on review are compensability and extent of unscheduled permanent partial disability.

Claimant injured her neck and upper back on May 16, 1984 while working as a hostess at a restaurant. She sought chiropractic treatment for her injuries and returned to work. The treating chiropractor diagnosed spinal instability and fixation or "joint lock." Claimant has changed jobs but has lost no time from work due to her injury.

When the insurer requested independent examinations, the treating chiropractor referred claimant to two chiroporactic clinics for consultations regarding treatment. The final result was that claimant was independently examined by four chiropractors and an orthopedic surgeon. One chiropractor generally supported the treating chiropractor's diagnoses and course of treatment and suggested that even more treatments should be provided. One chiropractor recommended continuing treatment for 60 to 90 days, and then evaluating for permanent disability. The denial was issued about three and one-half months after this opinion. The other two chiropractors and the orthopedic surgeon ultimately concluded that chiropractic treatment was not necessary after the denial was issued.

The Referee found that claimant testified credibly about her symptoms. Claimant testified that she has headaches and pain in her neck for about one week per month. The headaches have been worse since the injury. The pain would go away if she did not get the chiropractic treatments, but it went away more quickly if she did go to the chiropractor.

The record is persuasive that claimant's continuing symptoms of neck pains and headaches are related to preexisting conditions and subsequent events in claimant's life rather than to the single incident that caused a muscular strain in May 1984. There is some confusion among the health care practitioners about what is ailing claimant and what can be done to improve her condition. However, there is a preponderance of opinion that chiropractic treatment after December 1984 was neither reasonable and necessary nor related to the industrial injury of May 1984. Claimant's testimony is not sufficient in this case to prove that the chiropractic treatments are necessary and related to the industrial injury. Therefore, on the issue of the compensability of chiropractic treatment after December 1984, the Referee's order is reversed.

To prevail on the issue of unscheduled permanent partial disability, a worker must demonstrate by a preponderance of the evidence that as a result of the industrial injury there has been a permanent loss of earning capacity. The extent of disability is measured by the loss of earning capacity caused by the industrial accident and "taking into consideration the worker's loss of earning capacity, if any, resulting from symptoms caused by the injury." Barrett D & H Drywall, 300 Or 325 (1985), reconsidered, 300 Or 553 (1986). "Earning capacity" is defined as a worker's "ability to obtain and hold gainful employment in the broad field of general occupations" and considers the medical assessment of impairment as well as social and vocational factors. Surratt v. Gunderson Bros., 259 Or 65 (1971). Subsequent wages may be considered an indication of the extent of lost earning capacity although it is not determinative. Jacobs v. Louisiana Pacific, 59 Or App 1 (1982); Ford v. SAIF, 7 Or App 549 (1972).

We rely on medical assessment and claimant's credible testimony to establish the degree of impairment. See Garbutt v. SAIF, 297 Or 148 (1984). Social and vocational factors are considered in the totality of claimant's circumstances. OAR 436-30-380 et seq.; Howerton v. SAIF, 70 Or App 99 (1984); Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982).

Considering the evidence of impairment with claimant's return to work, and considering the relevant social and vocational factors, the Board finds that claimant has not proven that she has suffered a loss of earning capacity as a result of her industrial injury. Consequently, claimant is not entitled to an award for unscheduled permanent partial disability and the Referee's order is reversed on this issue.

ORDER

The Referee's order dated September 20, 1985 is reversed in part and affirmed in part. Those portions of the order which set aside the insurer's denial of chiropractic services, awarded attorney fees for services related to setting aside the denial, and which awarded compensation for unscheduled permanent partial disability are reversed. The insurer's denial dated December 27,

1984 is reinstated. The Determination Order dated January 28, 1985 is affirmed. The remainder of the Referee's order is affirmed.

BENJAMIN G. PARKER, Claimant
Heiling & Morrison, Claimant's Attorneys
Rod R. Johnson, Defense Attorney

WCB 85-01799
July 17, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Seifert's order that denied claimant's request for penalties and attorney fees for the insurer's refusal to pay medical benefits pursuant to a Board order and that dismissed as premature claimant's request for penalties and attorney fees for the insurer's refusal to pay temporary disability benefits pursuant to the same order. The issues are jurisdiction, penalties and attorney fees.

Claimant filed a claim in early 1982 alleging that he had injured his back at work. The claim was formally accepted. Several months later, the insurer issued a back-up denial alleging that claimant had injured his back off the job. Claimant requested a hearing and the Referee upheld the denial. Claimant requested Board review and the Board affirmed. Benjamin G. Parker, 36 Van Natta 69 (1984). Claimant then appealed to the Court of Appeals. The Court of Appeals concluded that the insurer had failed to carry its burden of proving fraud, misrepresentation or other illegal activity under Bauman v. SAIF, 295 Or 788 (1983), reversed the Board's order and remanded the case to the Board. Parker v. D.R. Johnson Lumber Co., 70 Or App 683 (1984).

In an Order on Remand dated January 15, 1985, the Board vacated its previous order and remanded the claim to the insurer for acceptance and payment of benefits in accordance with law. On January 18, 1985 the insurer moved for a new hearing on the issue of claimant's alleged misrepresentation in filing the original claim. Without abating its Order on Remand, the Board denied the insurer's motion in an Order on Reconsideration dated January 30, 1985. The insurer appealed the Board's Order on Reconsideration on February 27, 1985. The Court of Appeals affirmed without opinion. D.R. Johnson Lumber Co. v. Parker, 76 Or App 212 (1985).

In the meantime, on February 11, 1985, claimant filed the present request for hearing. The request sought penalties and attorney fees for the insurer's failure to pay medical and temporary disability benefits pursuant to the Board's January 15, 1985 Order on Remand. The insurer finally paid a portion of the temporary disability compensation due on claimant's claim on March 26, 1985.

On May 22, 1985, at the hearing on claimant's request for penalties and attorney fees, the insurer moved to dismiss. Under OAR 436-60-150(3)(e) (formerly OAR 436-54-310(3)(e)), an insurer has 14 days after the date of a litigation order requiring payment of temporary disability compensation to make payment. The insurer argued that this 14-day period did not begin to run in the present case until January 30, 1985 the date of the Board's Order on Reconsideration. Because claimant's request for hearing had been filed only 12 days after the issuance of that order, the insurer argued that claimant's request for hearing was premature by two days.

The Referee accepted the insurer's argument and dismissed that portion of claimant's request for hearing that related to the payment of temporary disability benefits. With regard to that portion of the request that related to the payment of medical services, the Referee ruled that medical services were not "compensation" within the meaning of ORS 656.313(4) and concluded that the insurer had properly withheld payment of such services pending its appeal of the Board's Order on Reconsideration to the Court of Appeals.

We affirm that portion of the Referee's order that relates to the payment of medical services. We note that an insurer has 90 days from the date of an unappealed litigation order within which to make payment for such services. Daniel J. Cannon, 35 Van Natta 1181, 1182-83, 35 Van Natta 1623 (1983). Because claimant's request for hearing was filed only 27 days after the Board's Order on Remand, an alternative basis for the Referee's conclusion is that the claimant's request for hearing was premature on this issue.

With regard to that portion of the Referee's order that relates to payment of temporary disability compensation, we reverse. In its Order on Remand dated January 15, 1985, the Board ordered the insurer to accept claimant's claim and to pay benefits in accordance with law. The Order on Remand was not expressly abated nor withdrawn by the Board in response to the insurer's motion for a further hearing and was not impliedly withdrawn by the Board's subsequent Order on Reconsideration. See Chisholm v. SAIF, 277 Or 51, 53 (1977); Fischer v. SAIF, 76 Or App 656, 659-60 (1985). Hence, the insurer's duty to pay temporary disability compensation ripened on January 29, 1985, 14 days after the issuance of the Board's Order on Remand. Neither the Order on Reconsideration nor the insurer's appeal from this order did anything to alter this duty. ORS 656.313(1), (4). Claimant's request for hearing was filed more than 14 days after the Board issued its Order on Remand and thus was not premature with regard to the insurer's refusal to pay temporary disability compensation.

Under the circumstances, we conclude that a 10 percent penalty, an attorney fee of $900 for services at the hearing and an attorney fee of $450 for services on Board review are appropriate.

ORDER

The Referee's order dated August 21, 1985 is affirmed in part and reversed in part. That portion of the order that dismissed as premature claimant's request for penalties and attorney fees for the insurer's failure to pay temporary disability compensation due under the Board's Order on Remand dated January 15, 1985 is reversed. Claimant is awarded a penalty of 10 percent on the amounts due under the Order on Remand. Claimant's attorney is awarded $900 for services at the hearing and $450 for services on Board review to be paid by the insurer. The remainder of the Referee's order is affirmed.

LINDA PUTNAM, Claimant
Steven Pickens, Claimant's Attorney
Cowling & Heysell, Defense Attorneys

WCB 85-01479
July 17, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The self-insured employer requests review of Referee Brown's order which set aside its denial of claimant's left dorsal spine injury claim. On review, the employer contends that the evidence does not establish the compensability of claimant's condition. We agree and reverse.

Claimant was 26 years of age at the time of hearing. On November 30, 1984, while throwing a piece of veneer off the dryer chain, she felt a "very burning, sharp pain in the left side of [her] back/shoulder area." Since she "assumed it was just a muscle" that would eventually subside, she continued to work without seeking medical treatment.

On December 4, 1984 claimant, who was six and one-half months pregnant, was examined by Dr. Schroeder, her obstetrician. Claimant recalled describing her upper back complaints to Dr. Schroeder's nurse and being advised that these problems were not attributable to her pregnancy. However, the chart notes concerning this examination neither refer to any back complaints nor to an incident at work.

Claimant was off work between December 23 and 27 for the Christmas holidays. On returning to work she felt much better. However, on December 29, again while pulling veneer, her pain returned. Claimant reported her complaints to the acting foreman, who allowed her to switch to a lighter job.

In January 1985 claimant was examined by Dr. Maukonen, neurologist. Claimant reported that she had no shoulder or dorsal problems prior to the November 1984 work incident. Since she had stopped working, her upper dorsal pain had been decreasing. Dr. Maukonen concluded that claimant's dorsal condition was not related to her pregnancy. In Dr. Maukonen's opinion, claimant had sustained a November 1984 dorsal strain with intermittent flare-ups as she continued to work.

Claimant has previously sought medical treatment for back complaints. In September 1983 she was examined by Dr. Matthews, orthopedist. During this examination, claimant complained of thoracolumbar back pain which had been fairly persistent since July 1983. Claimant also noted "some old head and neck soreness radiating into the trapezius" area. X-rays revealed disc degeneration in the thoracic spine. Dr. Matthews diagnosed: (1) thoracolumbar back pain with some underlying disc degeneration; and (2) chronic head and neck discomfort.

Dr. Maukonen was advised of claimant's past treatment with Dr. Matthews. Inasmuch as claimant had denied that she had sustained any previous injury, Dr. Maukonen questioned her reliability as a historian. Therefore, because he had attributed claimant's upper dorsal and shoulder condition to the November 1984 work incident based solely on her history, Dr. Maukonen concluded that he was presently unable to state the cause of her current condition.

Claimant conceded that she sought treatment from Dr. Matthews, but she recalled that the examination concerned a stiff and sore neck. She also acknowledged that she denied any previous back problems when asked by Dr. Maukonen. Though she admits that she has experienced prior neck and back problems, she insists that these problems were unlike her current complaints.

Claimant's foreman testified that claimant had experienced back or neck problems prior to 1984. The foreman recalled that claimant had mentioned that she had hurt her back while playing with her dog. The foreman stated that the incident could have been in September or December 1983.

In the months preceding the November 1984 incident claimant was attempting to arrange modifications in her work activities. Apparently, she was advised that she could not receive a paid pregnancy leave unless she was suffering from other work-related physical limitations. In January 1985 claimant was released to work, subject to a light-duty restriction. However, upon returning to her employer, she was placed on pregnancy leave.

Based on claimant's demeanor and testimony, the Referee found no reason to question her credibility. Satisfied by claimant's explanations concerning her incomplete medical histories, the Referee concluded that the preponderance of the evidence established compensability.

To establish compensability, claimant must prove that the incident at work was a material contributing cause of her need for medical services. Summit v. Weyerhaeuser Co., 25 Or App 851, 856 (1976). Compensability must be proven by a preponderance of the evidence. Hutcheson v. Weyerhaeuser Co., 288 Or 51, 56 (1979). 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 opinions to resolve the issue. Uris v. Compensation Department, 247 Or 420, 424 (1967); Kassahn v. Publishers Paper Co., 76 Or App 105, 109 (1985).

Following our de novo review of the medical and lay evidence, the preponderance of the persuasive evidence fails to establish that the aforementioned work incident was a material contributing cause of claimant's current dorsal spine condition. Consequently, we conclude that her claim is not compensable.

Dr. Maukonen initially related claimant's condition to the November 1984 work incident. However, this opinion was based on the erroneous impression that claimant had not suffered previous back problems. Inasmuch as Dr. Maukonen's initial opinion was based on an inaccurate history, it is entitled to little probative weight. Miller v. Granite Construction Co., 28 Or App 473 (1977); Mark T. Sturgis, 37 Van Natta 715, 718 (1985). Moreover, once Dr. Maukonen learned of claimant's prior back problems, he withdrew his earlier opinion, declaring that he was unable to state the cause of claimant's current upper dorsal spine and shoulder condition.

Like the Referee, we have no reason to question claimant's credibility. However, we do question her accuracy as a historian. We find two instances particularly noteworthy. First, claimant recalled that she told Dr. Schroeder's nurse of the

November 1984 incident and her dorsal complaints. Yet, Dr. Schroeder's chart notes neither mention the incident nor claimant's problem. Furthermore, claimant acknowledged that she had not told Dr. Maukonen of her prior back problems. She explained this oversight by distinguishing her current complaints from her previous problems, testifying that Dr. Matthews had treated her for a sore and stiff neck. Although Dr. Matthews' report does indeed refer to "old head and neck soreness", which also radiated into the right trapezius area, claimant's primary complaint was, in fact, thoracolumbar pain.

Considering claimant's prior back complaints, her inaccurate medical histories, and the lack of a persuasive medical opinion supporting a causal relationship between the work incident and claimant's dorsal spine condition, we find claimant's testimony insufficient to establish the compensability of her claim.

ORDER

The Referee's order dated October 25, 1985, as amended October 28, 1985, is reversed. The self-insured employer's denial is reinstated.

SHIRLEY N. BURKE, Claimant
Kenneth D. Peterson, Claimant's Attorney
Mitchell, et al., Defense Attorneys

WCB 84-05677 & 84-00043
July 21, 1986
Order on Review

Reviewed by the Board en banc.

Claimant requests review of that portion of Referee Neal's order that upheld the self-insured employer's denial of claimant's cervical and right shoulder and arm conditions. The issue is compensability.

The Board affirms the order of the Referee.

ORDER

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

Board Member Lewis, Dissenting:

At issue is the compensability of claimant's cervical spine, right shoulder and right arm conditions. Claimant claims that these conditions arise from an October 4, 1983 fall on the job. In rejecting claimant's claim, the Referee held:

> "While I did not get the impression from observing claimant's demeanor at the hearing and reading the medical reports that claimant was deliberately lying, I did get the impression that she was suggestible and that she, together with her roommate, tried to come up with a job injury to explain her problems and this later colored her memory to some extent. . . .
>
> ". . . . .
>
> "According to Dr. Pfeiffer, his opinion was based on claimant's history. It can only

be accurate as far as claimant's history was accurate. [Citations omitted.] He did not read the medical reports and did not satisfactorily explain why he thought claimant's degenerative spine condition was related to her fall in 1984 [sic, 1983]. He was under the impression, apparently, that the fall was more severe than it was. He did not see claimant until at least seven or eight months after the injury. His reports are inconsistent also. He testified that claimant had been disabled since May 1984 but reported to the Employment Division that she was able to work. I do not accept his opinion.

"Since I do not rely on [Dr. Pfeiffer's] testimony and find the other evidence does not establish compensability, I find the denial was properly issued."

On my review of this record, I conclude that without claimant's and Dr. Pfeiffer's testimony the evidence on compensability is evenly balanced. However, I believe the Referee and the majority of the Board have erred in rejecting claimant's and Dr. Pfeiffer's testimony.

The inconsistencies focussed upon by the Referee, if they are inconsistencies at all, are insignificant. Claimant's description of her October 4, 1983 fall and its severity is consistent with the descriptions provided by independent eyewitnesses. Medical histories taken from claimant by Drs. Lahiri, Nathan, Gehling and Pfeiffer are not significantly different. Dr. Lahiri's opinion on the relationship between the fall and claimant's current cervical and right arm and shoulder problems is the same as Dr. Pfeiffer's. Finally, I conclude that claimant's testimony regarding whether she could perform any work, rather than being a source of impeachment, was the result of inartful questioning and confusion.

I believe based on the preponderance of the evidence that claimant has proven that her cervical and right arm and shoulder conditions are materially related to her October 4, 1983 injury and are compensable. Therefore I respectfully dissent.

WILLARD HOLLY, Claimant
Velure & Bruce, Claimant's Attorneys
Schwabe, et al., Defense Attorneys

Own Motion 86-0237M
July 21, 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 December 6, 1976 industrial injury. Claimant's aggravation rights have expired. The self-insured opposes reopening of this claim. There is a pending request for hearing on matters related to this claim; however, the Board finds no purpose would be served by postponing action on the own motion request.

Claimant has submitted a report from Dr. Otoski in which he states that claimant has a chronic irritation of the stump of his left leg and it appears he needs a new prosthesis. The doctor felt claimant should be off his leg as much as possible until the

new prosthesis could be fitted. He stated that the prosthesis claimant was using in 1986 was the same one he was using in 1984 when last seen by Dr. Otoski.

The insurer has advised that claimant was provided with a new prosthesis in the fall of 1984. After he complained the prosthesis was not fitting correctly, the insurer set him up with a prosthetist in Portland. Claimant apparently missed at least two appointments with this prosthetist in late 1984 and early 1985. The insurer states that claimant found a new prosthetist in Ashland in November 1985. Then in January 1986, the insurer authorized payment for a new prosthesis made by a prosthetist in Los Angeles. Apparently, this prosthesis was only partially made when claimant returned to Oregon and he had no plans to return to Los Angeles for fitting. The insurer advises that the new prosthesis has now been shipped to Portland to be completed. Claimant apparently provided none of this information to Dr. Otoski. Dr. Otoski now states there was no evidence of skin infection at the time he examined claimant in April 1986. He stated the irritation claimant was experiencing could only be improved by removing the cause of the irritation and treatment was palliative.

Claimant was laid off by Weyerhaeuser in March 1985. There is no evidence that he has been gainfully employed since then.

After thorough consideration of the evidence before us, we conclude the request for own motion relief should be denied. We find that the insurer has been willing to provide claimant with a correctly fitted prosthesis long before his problems in April 1986. Yet claimant apparently failed to follow through on more than one occasion and irritation of the stump resulted. We do not find this justification for claim reopening pursuant to ORS 656.278. In addition, it would appear that claimant has not been gainfully employed since early 1985 and, pursuant to Cutright v. Weyerhaeuser Company, 299 Or 290 (1985), would not be entitled to temporary total disability benefits. The request for own motion relief is hereby denied.

IT IS SO ORDERED.

DANNY D. KISHPAUGH, Claimant
Leo R. Probst, Claimant's Attorney
Roberts, et al., Defense Attorneys
Moscato & Byerly, Defense Attorneys

WCB 83-10077
July 21, 1986
Order on Review Dismissing

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Presiding Referee Daughtry's order that dismissed claimant's request for a hearing for failure to respond to a show cause order. The underlying hearing request has become moot because of final action by the Supreme Court and Court of Appeals in a related case, therefore the issue in this case is moot. The Board's jurisdiction is limited to matters concerning a claim, therefore the Board is without jurisdiction in this matter and the request for review is dismissed.

IT IS SO ORDERED.

JOHN F. LLOYD, Claimant
Carney, et al., Claimant's Attorneys
Mitchell, et al., Defense Attorneys

WCB 83-02109
July 21, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of that portion of Referee Peterson's order which granted claimant permanent total disability, whereas a May 15, 1985 Determination Order and prior Determination Orders had awarded a total of 50 percent (160 degrees) unscheduled permanent disability for a low back injury. On review, the employer contends that claimant is not permanently and totally disabled.

Following our de novo review of the medical and lay evidence, we are persuaded that, at the time of the hearing, a combination of claimant's medical and non-medical conditions have effectively foreclosed him from gainful employment. Consequently, we find that he is permanently incapacitated from regularly performing work at a gainful and suitable occupation. ORS 656.206(1)(a). Furthermore, the evidence preponderates that claimant is willing to seek regular gainful employment and that he has made reasonable efforts to obtain such employment. ORS 656.206(3). Accordingly, we affirm the Referee's order which granted claimant permanent total disability.

Finally, inasmuch as this case is of ordinary difficulty and usual probability of success for claimant, a reasonable attorney fee is awarded.

ORDER

The Referee's order dated December 9, 1985 is affirmed. Claimant's attorney is awarded $650 for services on Board review, to be paid by the self-insured employer.

DAVID L. MALLETTE, Claimant
Glenn D. Ramirez, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-06242 & 85-12802
July 21, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Myers' order that awarded claimant five percent (16 degrees) unscheduled permanent partial disability for injury to his low back and approved the SAIF corporation's termination of temporary total disability benefits based upon an oral release for regular work. SAIF contends that the Referee did not have jurisdiction to grant claimant an award of permanent partial disability for his low back. The issues are jurisdiction, extent of disability and temporary disability compensation.

The Board affirms the order of the Referee on the issue of SAIF's termination of temporary disability benefits. On the issue of permanent partial disability for injury to claimant's low back, we reverse the order of the Referee on jurisdictional grounds.

Claimant injured his left knee in November 1983. Claimant returned to work and injured his low back the following

month. In April 1984, claimant filed requests for hearing prior to the closure of either the knee or low back claim on a variety of issues including extent of disability. Claimant's low back claim was closed by Determination Order in July 1984 with no award of permanent disability. A consolidated hearing on the April 1984 requests for hearing was held in August 1984 before Referee Leahy. In an Opinion and Order issued in October 1984, Referee Leahy dismissed claimant's requests for hearing as premature. At the conclusion of his order, Referee Leahy stated: "The requests for hearing, but not the issues, are dismissed." Claimant's left knee claim was closed by Determination Order in May 1985 with an award of 10 percent (15 degrees) scheduled permanent partial disability.

In May 1985, claimant requested a hearing in connection with his knee claim on the issue of the termination of temporary total disability benefits. In October 1985, claimant amended his hearing request to include his low back claim on the issue of extent of disability. At the hearing, SAIF questioned whether the Referee had jurisdiction to decide the issue raised in connection with claimant's low back claim in that the amended request for hearing had been filed more than one year after the issuance of the Determination Order in the low back claim. See ORS 656.268(6).

The Referee concluded that he had jurisdiction over the low back claim on the theory that Referee Leahy's October 1984 Opinion and Order was a request for hearing on claimant's behalf. In reaching this conclusion, the Referee relied upon Burkholder v. SAIF, 11 Or App 334 (1972), where the Court of Appeals held that a letter written by a claimant's attorney to the Board inquiring about the status of a nonexistent request for hearing was itself a request for hearing. The Referee proceeded to award claimant five percent (16 degrees) unscheduled permanent partial disability for his low back based upon claimant's testimony of disabling pain.

We conclude that Referee Leahy's October 1984 Opinion and Order did not have the effect of a request for hearing on claimant's behalf. Referee Leahy's order dismissed claimant's April 1984 hearing requests as premature. It did not preserve the jurisdiction of the Hearings Division over claimant's claims and in no way requested a further hearing on those claims. We read the statement in Referee Leahy's order which dimissed "the requests for hearing, but not the issues" as dismissing claimant's hearing requests "without prejudice." It was up to claimant, if he so desired, to file further requests for hearing in a timely fashion. Claimant failed to do so with regard to his low back claim and hence the Referee lacked jurisdiction to decide the issues raised in connection with that claim. The holding of Burkholder v. SAIF the facts of this case.

ORDER

The Referee's order dated January 29, 1986 is reversed in part. That portion of the order that awarded claimant five percent (16 degrees) unscheduled permanent partial disability for injury to his low back is reversed. The remainder of the Referee's order is affirmed.

DORIS STAACK, Claimant
Vick & Associates, Claimant's Attorneys
Acker, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorneys
Williams & Zografos, Attorneys

WCB 85-01511, 85-03614 & 85-01512
July 21, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Seifert's order that: (1) set aside its denial of claimant's occupational disease claim for the right ankle; (2) affirmed Liberty Mutual Insurance Corporation's (Liberty Mutual) denial of claimant's right ankle aggravation claim on behalf of Santiam Memorial Hospital; and (3) affirmed Liberty Northwest Insurance Corporation's (Liberty Northwest) denial of claimant's right ankle claim on behalf of Salem Memorial Hospital. The issues are whether claimant has a compensable right ankle claim and, if so, which of the insurers joined to this proceeding is responsible.

Claimant is a former surgical nurse who worked in that capacity for various employers for 30 years. In 1967 she suffered a noncompensable right ankle fracture. She began work at Santiam Memorial Hospital, insured by Liberty Mutual, in 1974. By June of 1976 claimant sought treatment from Dr. Paluska for bilateral knee pain. In addition to recommending a right knee arthroplasty, Dr. Paluska noted claimant's complaints of right ankle pain. He diagnosed degenerative arthritis in the previously fractured ankle.

Claimant filed a workers' compensation claim with Liberty Mutual on August 1, 1976. The claim form refers to degenerative arthritis in "Both knees and Rt. ankle." Liberty Mutual issued a denial which, inexplicably, is not a part of the record. It is therefore impossible to determine whether Liberty Mutual denied both the bilateral knee and right ankle conditions alleged by claimant, or whether it merely denied one of those conditions.

Claimant requested a hearing on the denial. In an April 1977 Opinion and Order Referee Seifert set it aside, holding that claimant had proved the compensability of her occupational disease claim. Although the Opinion and Order makes brief reference to claimant's ankle condition, it is clear that the purpose of the order was to determine the compensability of the bilateral knee condition.

Between the date of the 1977 Opinion and Order and September 1984 claimant received considerable medical treatment for her knees. A March 27, 1979 Determination Order granted claimant 25 percent and 35 percent scheduled disability awards for the right and left legs respectively. By a later Opinion and Order those awards were raised to 35 percent and 55 percent scheduled permanent disability. It appears from the record that claimant received no treatment specifically for her right ankle during the 1977-1984 period.

Claimant began work at Salem Memorial Hospital in January 1980. SAIF insured the hospital at that time. Although she had continuing treatment for her knees, claimant did not seek treatment for her right ankle until September 22, 1984 when she returned to Dr. Paluska complaining of right ankle pain. Dr. Paluska's September 27, 1984 report suggests that claimant was doing well at work until a fall necessitated her seeking

treatment. Claimant testified, however, that the fall to which Dr. Paluska apparently referred occurred several months before she sought treatment, and that the fall did not contribute to her ankle pain. X-rays revealed degenerative osteophytes and Dr. Paluska recommended surgery to remove them. On October 1, 1984 Salem Memorial Hospital changed insurers from SAIF to Liberty Northwest Insurance Corporation. Four days later claimant underwent surgery for the removal of the osteophytes. She left work and did not return, based on Dr. Paluska's recommendation.

Claimant submitted three claims for her ankle condition. The first was an aggravation claim filed with Liberty Mutual, as insurer for Santiam Memorial Hospital. It was based on Dr. Paluska's request that claimant's claim be reopened. Claimant asserted that her ankle condition was materially related to the knee condition she had developed at Santiam Hospital. Claimant then filed claims with Liberty Northwest and SAIF, both of which insured Salem Hospital at different times during claimant's employment. Claimant asserted that her work as a surgical nurse caused or worsened her ankle condition, thereby creating the need for surgery.

Liberty Mutual issued a denial of the compensability of claimant's ankle condition, asserting that claimant had never filed an ankle claim and that reopening, therefore, could not be effected. In the alternative, Liberty Mutual denied that claimant's ankle problem was related to her compensable knee condition. SAIF also denied the compensability of the claim, asserting that the ankle condition was caused by the 1967 noncompensable ankle fracture and that the SAIF-insured employment neither caused nor worsened the condition. Liberty Northwest denied both the compensability of the claim and its responsibility therefor.

As treating physician, Dr. Paluska issued several reports in which he discussed the various causes of claimant's ankle problem. Although he found the "primary" cause to be the 1967 noncompensable ankle fracture, Dr. Paluska felt that the knee problem that developed at Santiam Hospital caused a "waddling" type of gait that resulted in increased stress on the right ankle. Dr. Paluska also stated: "[Claimant's] normal work activities as a surgical nurse [at Salem Memorial Hospital] was the material contributing factor to the worsening of her condition, necessitating the need for further care." Thus, Dr. Paluska felt that both the Santiam and Salem Hospital employments materially contributed to claimant's need for ankle surgery.

Dr. Norton reviewed claimant's medical file on SAIF's behalf. In a July 3, 1985 report, he attributed claimant's current condition to the noncompensable fracture. He did not find claimant's employment at Salem Hospital to have been contributory.

Although the Referee initially framed the issue as one of compensability, he analyzed the case in terms of responsibility, citing Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984). He ultimately found that while claimant's last four days of employment at Salem Hospital (while Liberty Northwest was on the risk) were capable of contributing to claimant's disability, they did not in fact do so. The Referee consequently held SAIF, as insurer for Salem Hospital during the majority of claimant's employment, to be responsible for claimant's condition.

SAIF argues on review that the Referee prematurely applied the Starbuck last injurious exposure rule because claimant's ankle claim is not compensable in the first instance. SAIF asserts that claimant's ankle claim is one for a new occupational disease and that claimant must, therefore, prove that her work at Salem Memorial Hospital was the major contributing cause of a worsening of her condition. SAIF further asserts that the medical evidence does not support such a finding. Claimant responds that although her current claim is framed as one for occupational disease, she need only prove that her employment at Salem Hospital materially contributed to her need for ankle surgery because the ankle condition was part and parcel of the 1976 compensable knee claim and, thus, is not now a "new" claim.

After a review of the record, we agree with SAIF that claimant's claim is one for a new occupational disease and that the major contributing cause standard applies. While we note that claimant's original knee claim filed with Santiam Memorial Hospital does peripherally mention degenerative right ankle arthritis, the medical record generated subsequent to claim filing is nearly devoid of information regarding claimant's ankle. Virtually all of the treatment provided during the ensuing period was for claimant's bilateral knee condition. Claimant lost no time from work as a result of her right ankle. In addition, when claimant's claim went to hearing the Referee discussed only claimant's knee condition in the "Opinion" portion of his order. Claimant did not request clarification or reconsideration of that order. We interpret the Referee's April 1977 order to have found claimant's knee condition alone to constitute a compensable occupational disease, and we find that the Referee made no ruling with regard to claimant's right ankle. We further find that when claimant submitted claims against Salem Memorial Hospital in late 1984 and early 1985, they were for the original compensability of an occupational disease involving the right ankle. It was, therefore, incumbent on claimant to prove that the Salem Hospital employment was the major cause of the worsening of her disease. Wheeler v. Boise Cascade Corp., 298 Or 452 (1985); Dethlefs v. Hyster Co., 295 Or 298 (1983).

Claimant has failed to meet her burden of proof as against Salem Memorial Hospital. Because Dr. Paluska's reports are the most favorable to her claim, claimant must necessarily rely on them. Dr. Paluska, however, states that claimant's Salem Hospital employment was merely one of several material contributing causes of her need for ankle surgery. In fact, Dr. Paluska unequivocally states that the "major" cause of claimant's condition is her 1967 noncompensable ankle fracture. Claimant's occupational disease claims for the right ankle are not compensable. SAIF's denial must be reinstated.

With regard to the aggravation claim filed with Liberty Mutual, we find that we have no ORS 656.295 jurisdiction to consider its compensability. The first Determination Order on that claim issued on March 27, 1979. Claimant failed to file a claim for aggravation within five years of that order, thereby extinguishing her aggravation rights. ORS 656.273(4)(a). Claimant's remaining avenue of appeal is under ORS 656.278.

ORDER

The Referee's order dated January 13, 1986 is reversed in part and affirmed in part. That portion of the order that set aside the SAIF Corporation's denial of claimant's claim for right ankle occupational disease is reversed and the denial is reinstated. The remainder of the order is affirmed.

JAMES E. CARLSON, Claimant
David C. Force, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-02203
July 24, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Carlson v. SAIF, 79 Or App 298 (1986). The court has mandated that claimant's occupational disease claim for bilateral rotator cuff tendinitis be accepted. Therefore, the SAIF Corporation's denial dated February 17, 1984 is set aside and this matter is remanded to SAIF for acceptance and further processing in accordance with law.

IT IS SO ORDERED.

BRENDA MILLER-ELLS, Claimant
Francesconi & Cash, Claimant's Attorneys
Cowling & Heysell, Defense Attorneys

WCB 85-07050
July 24, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The self-insured employer requests review of Referee Brown's order that: (1) found claimant's injury claim for the low back to have been timely filed; and (2) set aside the employer's denial of that industrial injury claim. In addition, the employer has requested that we remand this case to the Referee for the consideration of evidence generated after the hearing record was closed.

With regard to the remand issue, we find that the evidence now sought to be admitted into the record could have been produced with due diligence before or at the time of the hearing. Remand, therefore, is not appropriate. See Richard G. Kennedy, 37 Van Natta 1468 (1985).

On the merits we affirm the Referee's order. We consider this case to have been of ordinary difficulty and usual probability for success for claimant. A reasonable attorney fee is, therefore, awarded.

ORDER

The Referee's order dated November 14, 1985 is affirmed. Claimant's attorney is awarded a fee of $650 for services on Board review, to be paid by the self-insured employer.

J.L. MOORE, Claimant
Evohl F. Malagon, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 85-05577
July 24, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of Referee Seymour's order which: (1) granted claimant permanent total

disability, whereas an April 29, 1985 Determination Order had awarded 50 percent (160 degrees) unscheduled permanent disability for a low back injury; and (2) awarded claimant an attorney fee for the employer's unreasonable delay in providing reimbursement for mileage expenses. On review, the employer contends that claimant is not entitled to permanent total disability and that nc attorney fee is warranted.

The Board affirms the order of the Referee.

Furthermore, we find that this case is of ordinary difficulty and has the usual probability of success for claimant. Therefore, a reasonable attorney fee is awarded. This award pertains to claimant's attorney's services concerning the permanent total disability issue and not to the attorney fee issue. See ORS 656.382(2); Dotson v. SAIF, 80 Or App 233 (July 2, 1986).

ORDER

The Referee's order dated December 17, 1985 is affirmed. Claimant's attorney is awarded $650 for services on Board review, to be paid by the self-insured employer.

CLARA J. PETERSEN, Claimant
Evohl F. Malagon, Claimant's Attorney
Foss, et al., Defense Attorneys

WCB 83-05423
July 24, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Petersen v. SAIF, 78 Or App 167, rev den, 301 Or 193 (1986). The court has mandated that claimant's occupational disease claim for a mental disorder be accepted. Therefore, the SAIF Corporation's denial of June 3, 1983 is set aside and this matter is remanded to SAIF for acceptance and further processing in accordance with law.

IT IS SO ORDERED.

MILTON E. GARRETT, Claimant
Evohl F. Malagon, Claimant's Attorney
Garrett, et al., Defense Attorneys

WCB 85-02457
July 25, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Nichols' order that upheld the self-insured employer's denial of claimant's injury claim for a torn esophagus. The issue is compensability.

Claimant, age 62, has worked for the employer for 37 years, the last 27 as a "cook" in a pulp mill. He suffered from preexisting, nondisabling chronic asthma and mild emphysema, but was otherwise in good health. During the graveyard shift on January 7-8, 1985 claimant became weak and faint and, at the end of his shift, was taken by ambulance to the emergency room of a hospital. He was diagnosed as suffering from upper gastro-intestinal bleeding, which ultimately was determined to be the result of a "Mallory-Weiss tear" at the gastroesophageal junction. The tear was ultimately repaired surgically. Claimant filed a claim for industrial injury, which was denied by the employer.

The only physician to render an opinion as to the industrial cause of claimant's torn esophagus was Dr. McCafferty, claimant's treating internist. He concluded, based upon the history related by claimant, that the "Mallory-Weiss tear" was caused by coughing during claimant's shift on January 7-8, 1985. He further opined that whatever caused claimant to cough caused the tear. We find that Dr. McCafferty's testimony is both persuasive in its own right and uncontroverted by any other medical evidence. On the Form 801, claimant stated, "[B]reathing strong and irritating fumes - led to coughing spells - [led] to internal bleeding - led to surgery."

The issue, as framed by both parties at the hearing and as we see it now, is whether a preponderance of the evidence establishes that claimant was exposed to noxious fumes on the night and morning in question. The Referee concluded, "The claimant could believe he smelled fumes but I am not convinced that he has carried his burden of proof in this matter . . . ." The Referee did not make a finding as to claimant's credibility beyond the statement that, "The claimant has made some statements which contradict the history given at the time he was taken to the emergency room."

On de novo review of the entire record, we find as follows. Claimant reported for duty at 11:30 p.m. January 7, 1985. Approximately one hour later the shift foreman, Mr. Euhus, passed through claimant's work area, which was a control room about four stories above ground over one of seven digester tanks at the mill. In about the middle of the shift, approximately 3:30 a.m. January 8, 1985, Euhus came into claimant's area again and informed claimant that the recovery section of the mill was unable to handle the liquor flowing into its tanks and that it would be necessary to close the valve from the "WX tank" to recovery. The "WX tank" is the middle point in the flow of the liquor from the digesters to recovery. Euhus asked claimant if he (claimant) knew where the appropriate valve was located. Claimant directed Euhus in the right direction. About 30 minutes later Euhus returned and informed claimant that he had located the valve and closed it.

"Valving down the 'WX tank'" is an unusual occurrence that takes place only two or three times per year. Euhus left and went to the "WX tank" where he monitored the level in the tank over the next two hours. Euhus did not return to claimant's work area between that time and the end of claimant's shift. One of the things Euhus was monitoring for was siphoning between either the digester and the "WX tank" or the recovery and the "WX tank." Some siphoning was expected, but none occurred.

Claimant testified that shortly after the "valving down" he began smelling "rotten egg fumes" that he thought were coming into his station up through the elevator shaft and through holes in the floors. Claimant's station was adjacent to the "WX tank" and about 20 feet higher. Although most of the system is closed, any overflow from the "WX tank" would have gone into an open sump next to the tank. By 4:30 a.m. claimant was coughing up blood. Soon thereafter he noticed bloody diarrhea. By the time his shift ended at 7:30 a.m. January 8, 1985 he was faint and unable to stand unassisted. Dr. McCafferty estimated claimant had lost about two units of blood by the time claimant arrived at the hospital.

The fumes are easily detectible in small amounts. Euhus testified that he did not smell any fumes where he was located. He further testified that no one else at the mill complained to him of fumes, although he had received complaints when fumes had been present in the past. However, he also testified that it would be possible for there to have been fumes at claimant's station without him having been able to smell them and that he was not at or near claimant's work area during the time in question. The Form 801 recites and claimant testified that three other people were in his station and noticed the fumes. Because of claimant's asthma and emphysema, his reaction to such fumes would be more extreme than that of a person without those conditions.

Based upon these findings, we conclude that claimant has at the very least established a prima facie case that he was made to cough because he was breathing fumes that entered his work station during the valving down procedure. Although Euhus' testimony establishes that he did not smell any fumes, that testimony does not establish that claimant was not exposed to fumes and was made to cough as a result. We do not believe that any inconsistencies between claimant's initial history given in the emergency room and his other statements and testimony make his overall testimony any the less credible. Neither do we attach much significance to the failure of claimant's three coworkers to appear and testify at the hearing. Any negative inferences flowing from such a failure would apply equally to both parties. While claimant does have the burden of proof, in this case there is no requirement that claimant provide corroborative evidence. Based upon the entire record, we find nothing that causes us to disbelieve claimant's testimony.

Although a finder of fact is not bound to believe a prima facie case, in the absence of any reason to disbelieve claimant, we find that he has proven by a preponderance of the evidence that he was exposed to fumes which caused him to cough excessively, leading to the "Mallory-Weiss tear." Claimant's claim is compensable.

Finally, we find that this case is of ordinary difficulty with the usual probability of success for claimant. Accordingly, a reasonable attorney fee is awarded.

ORDER

The Referee's order dated September 27, 1985 is reversed. The self-insured employer's denial dated February 5, 1985 is set aside and the claim is remanded for processing according to law. Claimant's attorney is awarded a reasonable attorney fee of $1,650 for services at hearing and an additional reasonable attorney fee of $600 for services on Board review, both fees to be paid by the self-insured employer in addition to compensation.

LOUIS HARON, Claimant
Rick Roll, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

Own Motion 83-0348M, 83-0349M & 83-0350M
July 25, 1986
Own Motion Order

The Board issued an Own Motion Order on December 19, 1983 whereby the request for own motion relief was denied. Claimant has requested that the Board reconsider its order, alleging entitlement to several types of relief. The Board abated its order on January 10, 1984 to allow time for the parties to submit further arguments and evidence.

The relief claimant seeks is as follows: (1) psychiatric treatment, (2) medical treatment for all other related conditions, (3) treatment for a new left knee condition, (4) vocational rehabilitation, (5) temporary total disability in late 1983, and (6) permanent disability.

After thorough review of the rather voluminous record, the Board makes the following conclusions. Claimant has shown entitlement to a short period of temporary total disability compensation in late 1983. Dr. Hunt took claimant off work on October 25, 1983 and indicated that claimant was able to return to his regular employment in December 1983. We find that during that period of time, claimant was more disabled than he had been previously and he was, therefore, entitled to medical benefits and compensation for temporary total disability.

Claimant is a significantly disabled individual who has required medical treatment frequently over the years. Rarely, if ever, has claimant's compensable condition surpassed the level of disability which would be expected with the significant permanent disability awards claimant has received. Claimant's right knee and low back injuries occurred in 1959 and 1960 respectively and were not included in the 1966 law which allowed continuing medical benefits for compensable conditions. The Board reviews each of these cases individually and has made it a general practice to reopen for medical treatment only for periods of time during which the injured worker's condition is not medically stationary. There is no persuasive evidence that claimant's compensable right knee and low back conditions ever worsened to the point that he was not medically stationary except during late 1983 for which claimant will be compensated. As we stated in our earlier order, claimant continues to be entitled to medical services for his compensable 1972 neck condition. Should SAIF decline to pay these benefits, claimant would be entitled to a hearing pursuant to ORS 656.245.

The Board finds no persuasive evidence upon which to base any increased awards for permanent partial disability. The preponderance of the evidence persuades us that claimant's condition has remained relatively chronic for many years. It would appear that much, if not all, of claimant's left knee problems are related to his 1959 injury; however, there is no clear medical evidence of permanent impairment upon which to base any award.

Claimant has admirably continued to work even with the level of disability he experiences. It appears that recently his disability has begun to take its toll on claimant's psychiatric

condition. We are persuaded that the need for psychiatric treatment is related to the combination of claimant's injuries, but most specifically to his 1959 and 1960 right knee and low back injuries. We feel that claimant was probably not medically stationary psychiatrically in 1984 and, therefore, is entitled to claim reopening for psychiatric treatment only until he again becomes stable.

ORDER

Claimant is entitled to compensation for temporary total disability from October 25, 1983 through December 21, 1983, less time worked. Claimant's 1960 claim (A 795581) is hereby reopened for the payment of medical services provided by Dr. Ruth Jens for depression commencing July 21, 1984 and continuing until closure pursuant to ORS 656.278. Claimant's attorney is awarded 25% of the additional compensation granted by this order, not to exceed $800 as a reasonable attorney's fee.

EARL P. HOUSTON, Claimant
Richard O. Nesting, Claimant's Attorney
Lindsay, Hart, et al., Defense Attorneys

WCB 83-00851
July 25, 1986
Order on Reconsideration

The insurer has requested that we reconsider our Order on Review dated March 16, 1986, in which we affirmed, without comment, that portion of Referee Mulder's order that found claimant entitled to temporary total disability for the period of March 18, 1980 through July 15, 1980. We abated our order to allow claimant an opportunity to respond. However, claimant's response to the request for reconsideration was received outside the 21-day period allowed for claimant's response. We have therefore not considered it on reconsideration. See Vanessa M. Dortch, 37 Van Natta 1207 (1985).

The insurer points out on reconsideration that our order failed to note its request that we review the Referee's award of temporary total disability. The insurer had filed no cross-request of the Referee's order subsequent to claimant's request for review, but it did mention the issue of temporary total disability in its response to claimant's arguments on review. Our order should have so noted.

On reconsideration, we remain persuaded that the Referee's award of temporary total disability was proper, because claimant was not medically stationary until July 15, 1980. We therefore modify our prior order to note that the insurer did raise the temporary disability issue on review. We also affirm the Referee's award of temporary total disability.

IT IS SO ORDERED.

THOMAS W. MATTHEWS, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-00122
July 25, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee Galton's order that: (1) denied its request to offset an alleged overpayment; and (2) awarded claimant 25 percent (80 degrees)

unscheduled permanent partial disability for injury to his right shoulder and upper back, in lieu of a Determination Order that had awarded no permanent partial disability. SAIF contends that the Referee erred in not reopening the record for the receipt of evidence it anticipated receiving after the hearing. We treat this argument as a request for remand. See Richard A. Scharback, 37 Van Natta 598, 600 (1985). Claimant contends that his disability award should be increased. The issues are remand and extent of disability.

SAIF's request for remand is denied. The additional exhibit could have been obtained prior to the hearing with the exercise of due diligence. See Bernard L. Osborn, 37 Van Natta 1054, 1055 (1985), aff'd mem., 80 Or App 152 (June 18, 1986). On the merits, the Board affirms and adopts the order of the Referee.

Furthermore, we find that this case is of ordinary difficulty with the usual probability of success for claimant. Accordingly, a reasonable attorney fee is awarded.

ORDER

The Referee's order dated October 18, 1985 is affirmed. Claimant's attorney is awarded $600 for services on Board review, to be paid by the SAIF Corporation.

JEFFREY S. SCHWAB, Claimant
Galton, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-03093 & 84-06747
July 25, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

EBI Companies request review of those portions of Referee Thye's order which: (1) set aside its denial of claimant's aggravation claim for a low back condition; (2) upheld the SAIF Corporation's denial of claimant's aggravation claim; and (3) assessed EBI a penalty and accompanying attorney fee for unreasonably opposing the issuance of an order pursuant to ORS 656.307. On review, EBI contends that: (1) claimant's condition did not worsen or, if it did, that SAIF is responsible; and (2) penalties and accompanying attorney fees are not justified.

The Board affirms the order of the Referee with the following comments concerning the penalty issue.

Relying on SAIF v. Moyer, 63 Or App 498 (1983), the Referee assessed a penalty and accompanying attorney fees for EBI's unreasonable opposition to claimant's and SAIF's request for the issuance of an order pursuant to ORS 656.307. The Referee distinguished EBI v. Thomas, 66 Or App 105 (1983), and Sylvia A. Weaver, 37 Van Natta 656, 659-60 (1985), reasoning that those cases did not involve an unreasonable denial of compensability.

We recently discussed this issue in Dorothy M. Pitcher, 37 Van Natta 1700, 1701 (1986). In Pitcher, we followed the rationale of Weaver which had held that there was no statutory authority: (1) to require an insurer to concede compensability for the purpose of obtaining a .307 order; nor (2) to penalize

delays in requesting or acquiescing in the issuance of a .307 order. In Pitcher, we also interpreted SAIF v. Moyer, supra, to stand for the proposition that penalties are allowable where an insurer's unreasonable denial of compensability results in the delay of temporary total disability payments that would have otherwise issued had a paying agent order been requested.

Following our de novo review of the record, we find that EBI's eventual denial of compensability was unreasonable. This conduct has resulted in an unreasonable delay of compensation to claimant which would have otherwise issued had a .307 order been requested. Consequently, we conclude that penalties and accompanying attorney fees are justified. See ORS 656.262(10); SAIF v. Moyer, supra.

Finally, we find that this case is of ordinary difficulty with the usual probability of success for claimant. Accordingly, a reasonable attorney fee is awarded.

ORDER

The Referee's order dated December 6, 1985 is affirmed. Claimant's attorney is awarded $550 for services on Board review, to be paid by EBI Companies.

SHIRLEY A. SCHWEITZ, Claimant
Cash Perrine, Claimant's Attorney
Horne, et al., Defense Attorneys

WCB 85-08480
July 25, 1986
Order Denying Motion to Dismiss

Claimant has moved for an order dismissing the insurer's request for Board review of Referee Howell's order dated May 14, 1986 on the ground that the request was untimely. An original request for Board review was received by the Board in an envelope bearing a postage meter imprint dated June 13, 1986, a Friday. The request was received by the Board on the following Monday, June 16, 1986. Where a request for Board review is actually received in the ordinary course of the mails and bears a postmark or postage meter imprint reflecting timely mailing, the request is timely. Robert L. Diehr, 38 Van Natta 813 (WCB Case No. 85-02242, July 1, 1986). The motion to dismiss is denied.

IT IS SO ORDERED.

THOMAS C. WEST, Claimant
Royce, et al. Claimant's Attorneys
Keith D. Skelton, Defense Attorney

WCB 85-01044
July 25, 1986
Order on Review (Remanding)

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Thye's order which upheld the insurer's denial of his occupational disease claim for a low back condition. On review, claimant contends that his current condition is compensable. Alternatively, he moves for remand for the taking of additional evidence. We grant claimant's motion for remand.

This matter went to hearing in September 1985. Following the hearing, the Referee concluded that claimant had failed to establish that his work activities as a package sorter for a parcel service company were the major contributing cause of

his low back condition. As of the hearing, claimant's condition was essentially diagnosed as a chronic lumbosacral strain. At that time there were no objective findings to further clarify his condition.

In November 1985 claimant sought treatment from Dr. Tilson, orthopedist. This was Dr. Tilson's first opportunity to examine claimant and to review the medical record. Dr. Tilson scheduled a CT scan. Previously, claimant's diagnostic testing had primarily consisted of x-rays and a bone scan. The CT scan has apparently revealed, for the first time, the presence of a central L4-5 disc and a "very tiny central disc protrusion" at the L5-S1 level. Based on claimant's work history, his medical history, his current complaints, and the objective physical findings, Dr. Tilson has opined that claimant's work activities were the major contributing cause to his current disability.

Claimant seeks remand for the taking of the aforementioned additional evidence. He contends that this evidence has established a new diagnosis for his condition which directly affects the issue of compensability.

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).

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 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.

The Egge rationale was followed in Edith Grimshaw, 36 Van Natta 63 (1984), aff'd mem. 79 Or App 545 (1986). See also Ronald J. Gazely, 36 Van Natta 212 (1984). In Grimshaw, the claimant appealed from a Referee's order that had declined to award permanent disability and which upheld an aggravation denial. On Board review, claimant requested remand for the consideration of a post-hearing CT scan which revealed "an obvious herniated disc" and a physician's opinion relating claimant's current condition to a prior compensable injury. We granted remand, reasoning that claimant had never obtained a satisfactory explanation for the cause of her medical condition, but had finally been rewarded for her continued diligence with an objective medical explanation of her problem.

Here, as in Grimshaw, claimant had never obtained a satisfactory explanation for the cause of his low back condition. His continuing vigilance has apparently culminated in an objective medical explanation for his problem. Under these circumstances, we conclude that the record has been incompletely and insufficiently developed. See Duckett v. SAIF, 79 Or App 749 (1986). Furthermore, we are persuaded that this additional evidence was not obtainable with due diligence prior to the hearing.

Accordingly, this matter is remanded for the taking of additional evidence in light of this newly discovered objective evidence. However, as in Grimshaw, we caution the parties that claimant retains the burden of proving a causal relationship between the protruding discs and his work activities.

ORDER

The Referee's order dated October 15, 1985 is vacated and this matter is remanded to the Hearings Division for further proceedings consistent with this order.

TONY W. BRAZIL, Claimant
Brasch & Messoline, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-03887
July 29, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of that portion of Referee Michael V. Johnson's order requiring it to provide claimant additional vocational assistance. The issue is entitlement to vocational assistance.

Claimant injured his right knee in October 1982 in the course of his employment as a heavy equipment operator for a logging and road building company. Prior to his industrial injury, claimant worked as a heavy equipment operator during the summer season and as a millwright for another employer during the winter season. Claimant also worked as a self-employed carpet installer during the winter.

In April 1984, SAIF referred claimant for vocational assistance and the vocational assistance provider initiated a direct employment program. The following month, claimant returned to full-time employment with his summer employer as a heavy equipment operator. 60 days after claimant returned to work, the vocational assistance provider closed its file. Claimant's claim was closed by Determination Order in January 1985 with a 5 percent scheduled permanent partial disability award.

Claimant worked full time for his summer employer during the entire summer 1984 season. He then worked full-time as a millwright for his winter employer during the winter of 1984-85. At the beginning of the summer 1985 season, claimant contacted his summer employer. However, he was not hired because of insufficent work. Claimant has not returned to his summer employer since that time, although he testified that he would do so if given the opportunity. Due to his knee injury he feels incapable of returning to laying carpet.In July 1985 he sold his carpet tools. In September 1985, a month prior to the hearing, claimant returned to work for his winter employer. Claimant conceded at the hearing that the lumber and construction industries were depressed in the area where he lived.

SAIF argues on Board review that claimant is not entitled to further vocational assistance because his eligibility for such assistance ended 60 days after he returned to work for his summer employer. We agree. Claimant's entitlement to vocational assistance is governed by the rules in effect in April 1984 when the assistance was provided. See former OAR

436-61-004(1); see also OAR 436-120-003(1). Under former OAR 436-61-126(3), a worker's eligibility for vocational assistance ends if "[t]he worker has been suitably employed after the injury for 60 days." Suitable employment was defined under former OAR 436-61-005(8) as follows:

> "(8) 'Employment' has its ordinary meaning except that the wage must be as close as possible to the wage under the worker's regular employment. When used in connection with 'employment':
>
> "(a) 'Suitable' means the employment is of the kind for which the worker has the ability, physically and otherwise, and the training or experience, and is located where the worker customarily worked or within commuting distance of the worker's residence at the time of injury or current residence. In the context of a return-to-work plan, 'suitable employment' also includes the objective that the nature of the employment be as close as possible to the worker's regular employment."

With the exception of carpet installation, claimant returned to and was able to perform in a satisfactory manner the employment that he held prior to his injury. Claimant thus returned to "suitable employment" within the meaning of former OAR 436-61-005(8) and his eligibility for further vocational assistance ended 60 days later pursuant to former OAR 436-61-126(3). Claimant has received all the vocational assistance that SAIF is required to provide him.

ORDER

The Referee's order dated January 7, 1986 is reversed in part. Those portions of the order requiring the SAIF Corporation to provide claimant with additional vocational assistance and awarding claimant's attorney a fee for his services in connection with this issue are reversed. The remainder of the order is affirmed.

DENNIS S. CURRENT, Claimant
Haugh & Foote, Claimant's Attorneys
Bottini & Bottini, Defense Attorneys
Roberts, et al., Defense Attorneys
Moscato & Byerly, Defense Attorneys

WCB 85-00567, 85-05038, 85-06679, 85-08416, 85-08417 & 85-08418
July 29, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

EBI Companies requests review of those portions of Referee Podnar's order which: (1) set aside its denial of responsibility for claimant's low back injury aggravation and upheld the new injury denial of Wausau Insurance Company and aggravation denial of Mission Insurance Company; and (2) awarded attorney fees of $2,500 for services related to responsibility. In the event it is not found responsible for claimant's current claim, EBI requests review of the extent of claimant's unscheduled permanent partial disability related to the accepted 1983 injury which was closed by Determination Order dated October 23, 1984 with an award of 48 degrees for 15 percent unscheduled permanent partial disability. Claimant cross-requests

review on the issue of extent of unscheduled permanent partial disability in the event EBI is not found responsible for claimant's current condition. The issues on review are responsibility, attorney fees for services before publication of a an order pursuant to ORS 656.307 order, and extent of unscheduled permanent partial disability.

On the issues of responsibility and extent of unscheduled permanent partial disability the Board affirms the order of the Referee.

EBI argues that there should be no fee paid to claimant's attorney because there was an order published pursuant to ORS 656.307 and cites Petshow v. Farm Bureau Ins. Co., 76 Or App 563 (1985); Timothy W. Evans, 38 Van Natta 48 (1986); and Stanley C. Phipps, 38 Van Natta 13 (1986). Those cases are devoted to the issue of whether claimant is entitled to attorney fees for services after publication of a .307 order at hearing, on Board review, or at the court level.

This case presents the issue of whether claimant's attorney is entitled to a fee for services before the publication of a .307 order. Compensability was denied by EBI for three months. It withdrew this denial two weeks before the hearing. The .307 order was published 10 days before the scheduled hearing. Claimant's attorney submitted an affidavit of services performed through the time of the hearing which shows 13 hours devoted to the case before publication of the .307 order and seven hours after publication. The Referee awarded $2500 attorney fees.

There was no hearing on a denial of compensability. Services performed by claimant's attorney after publication of the .307 order were not instrumental in obtaining compensation for claimant. However, our attorney fee rules provide for an award of attorney fees for services performed which are instrumental in obtaining compensation for an injured worker without a hearing. OAR 438-47-015. The Board finds that claimant's attorney was instrumental in obtaining compensation for claimant.

The procedure followed by the Referee and parties is exactly that procedure which has been approved for the awarding of attorney fees without a hearing when there is a dispute about the entitlement to or the amount of attorney fees. See Harold Dotson, 37 Van Natta 759 (1985), affirmed, Dotson v. Bohemia, Inc., 80 Or App ___ (July 2, 1986). In this case there was the added factor of doubt about which insurer would be responsible for paying the attorney fee.

Although the amount awarded by the Referee was within his discretion, it appears from the record that the Referee included consideration of time spent after publication of the .307 order when awarding the fee. The Board finds that the award should be reduced proportionately according to the affidavit of services performed and that $1600 would be an appropriate attorney fee for services which were instrumental in obtaining compensation for the claimant without a hearing.

Claimant's attorney is awarded no fee for services on Board review because there was no issue of denial of compensation. Petshow v. Farm Bureau Ins. Co., supra.

ORDER

The Referee's order dated October 28, 1985 is modified. The attorney fee awarded by the Referee is reduced to $1600 to be paid by EBI Companies. The remainder of the order is affirmed.

CLARA L. EDWARDS, Claimant
Gatti, et al., Claimant's Attorneys
Bullard, et al., Defense Attorneys

WCB 85-09369
July 29, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Myers' order that awarded claimant 10 percent (32 degrees) unscheduled permanent partial disability for injury to her neck and upper back. Claimant has submitted an exhibit generated after the hearing and requests that this exhibit be made part of the record. We treat the submission as a request for remand. See Richard A. Scharback, 37 Van Natta 598, 600 (1985). The issues are remand and extent of disability.

Claimant's request for remand is denied. The late exhibit could have been developed prior to the hearing with due diligence. See Bernard L. Osborn, 37 Van Natta 1054, 1055 (1985), aff'd mem., 80 Or App 152 (1986). On the merits, the Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated January 29, 1986 is affirmed.

RUSSELL W. FEIGUM, Claimant
Doblie,et al., Claimant's Attorneys
Tooze, et al., Defense Attorneys

WCB 84-13477
July 29, 1986
Order Denying Motion for Extension to File Appellant's Brief

The insurer, appellant herein, has moved the Board for an extension of two weeks within which to file its appellant's brief. The request, which is appellant's third, was timely filed. Claimant, respondent herein, has no objection to this request.

First requests for extensions of more than 14 days and all requests beyond the first request will be granted for good cause only. OAR 438-11-011(3)(c). Mere press of business without other circumstances is not considered good cause. Id.

Appellant bases its request on its attorney's activities in other cases. Since this basis does not constitute good cause, the request cannot be granted.

Accordingly, the motion is denied, and claimant's respondent's brief shall be due 21 days from the date of this order. The insurer shall be allowed to file a reply brief within 14 days after date of mailing or respondent's brief.

IT IS SO ORDERED.

IRENE M. GONZALEZ, Claimant
Michael B. Dye, Claimant's Attorney
Cummins, et al., Defense Attorneys

WCB 84-12022
July 29, 1986
Order on Reconsideration

The self-insured employer has requested reconsideration of those portions of the Board's Order on Review dated March 27, 1986 that found claimant's right wrist condition compensable and assessed penalties and attorney fees for the employer's improper closure of claimant's claim. Claimant has cross-requested reconsideration on the issue of attorney fees. Claimant asks that we award separate attorney fees for each of what we held to be two acts of unreasonable conduct by the employer. In addition, claimant requests that we award an increased attorney fee for services on Board review. The parties' requests for reconsideration are granted.

After reconsideration, we adhere to those portions of our order that found claimant's right wrist condition compensable, assessed a penalty and an associated attorney fee against the employer for its improper closure, and awarded a single attorney fee for the employer's unreasonable conduct. Upon reconsideration of the $450 attorney fee awarded for services before the Board, however, we agree with claimant that an increased fee is appropriate. Therefore, we hereby award claimant's attorney a fee of $850 for services on Board review. This fee shall be in lieu of the prior fee awarded for services on review.

Now, therefore, having granted the parties' requests for reconsideration, we modify our prior order by awarding claimant's attorney a fee of $850 for services on Board review. We adhere to and republish the remainder of our order.

IT IS SO ORDRED.

CLIFFORD D. HOWERTON, Claimant
Ormsbee & Corrigall, Claimant's Attorneys
Cummins, et al., Defense Attorneys

WCB 85-10769
July 29, 1986
Order Denying Motion to Strike

The employer has moved the Board for an order striking a portion of claimant's respondent's brief on the ground that the portion of the brief moved against amounts to a discussion of matters not in evidence. Claimant has moved the Board for an order striking the employer's reply brief, which includes the employer's motion to strike, on the ground that it was untimely.

The Board concludes that the portion of the brief moved against by the employer represents argument on a policy basis that may have some relevance to the matter in issue. Such argument may be considered on review, ORS 656.295(5), and given weight to the extent that it may be persuasive.

Claimant's motion is based upon the erroneous promise that the employer's reply brief was due 10 days after mailing of the claimant's respondent's brief. A reply brief will be considered if mailed 14 days after mailing of the respondent's brief. OAR 438-11-011(2)(b). The reply brief was timely.

The employer's motion to strike is denied. The employer's request for leave to file a supplemental reply brief is allowed. Said supplemental brief is due 14 days from the date of this order. Claimant's motion to strike is denied.

IT IS SO ORDERED.

JULIO P. LOPEZ, Claimant
Emmons, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 86-00703
July 29, 1986
Order of Dismissal

The self-insured employer has moved the Board for an order dismissing claimant's request for review of Referee Fink's order dated March 18, 1986 on the ground that the request was not timely mailed to the adverse parties.

Claimant's request for review was received by the Board by mail on April 17, 1986 and was, therefore, timely. However, ORS 656.295(2) requires that copies of the request be mailed to all parties. The request for review itself does not represent that it was mailed to anyone other than the Board, and the employer and its attorneys have provided sworn statements establishing that no copies of the request were received by them. The sworn statements further establish that the attorneys' and the employer's first notice of the review was upon receipt of our standard acknowledgment of the request on April 28 and 29, 1986, respectively.

Pursuant to the Court of Appeals decision in Argonaut Insurance v. King, 63 Or App 847, 852 (1983), the notice must either be mailed to all parties or actual notice of the review be received within the statutory 30 day period. The requirement is jurisdictional, and although the employer in this case does not appear to have been prejudiced, "prejudice is not a relevant consideration." Id. We realize that claimant was not represented by counsel when he requested Board review. We further realize that the unrepresented injured worker is not expected to be familiar with administrative and procedural requirements of the Workers' Compensation Law. However, we are not free to relax a jurisdictional requirement, especially in view of Argonaut Insurance v. King, supra, 63 Or App at 851 n. 2.

The self-insured employer's motion to dismiss is granted. Claimant's request for Board review is dismissed. The Referee's order is final by operation of law.

IT IS SO ORDERED.

JOE TEMPLETON, Claimant
David Force, Claimant's Attorney
Schwabe, et al., Defense Attorneys
Zimmerman & Beers, Defense Attorneys
Fishleder & Wheeler, Defense Attorneys
Roberts, et al., Defense Attorneys

WCB 85-03846, 85-04232, 85-04235 & 85-09186
July 29, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Foster's order that: 1) upheld the denials of four insurers with regard to claimant's bilateral ankle condition; and 2) denied claimant's requests for interim compensation and penalties and attorney fees for EBI Companies' alleged failure to properly process a claim filed with its insured. The issues are interim compensation, penalties and attorney fees, whether claimant's claim is compensable and, if so, which insurer is responsible.

We affirm the Referee's order with the following comment regarding the interim compensation, penalty, and attorney fee

issues. Claimant asserts entitlement to interim compensation, penalties and attorney fees in connection with a claim filed with EBI Companies' insured, AAMCO Transmissions. Claimant worked for that employer for a two-week period in October 1984. He testified at hearing that he left that employment as a result of a work shortage layoff rather than as a result of his ankle condition.

After working for a subsequent employer and ultimately leaving work due to ankle pain, claimant filed occupational disease claims with that last employer and three previous ones, including AAMCO Transmissions. The claim filed with AAMCO came five months after claimant left that job. Upon receiving claimant's claim, AAMCO did not submit it to EBI. In fact, although it is uncertain from the record, it appears that EBI was not apprised of the claim filed with its insured until shortly before the hearing. As a result EBI did not pay interim compensation nor issue a denial until the date of the hearing.

The Referee held that EBI had no obligation to pay interim compensation because it did not have knowledge of claimant's claim. Its insured did have knowledge, however, and we interpret ORS 656.262(10) to allocate responsibility for payment of compensation with the insurer, whether or not its insured informs it of claimant's claim. The insurer then is entitled to recoup from the employer any penalty the insurer is required to pay as a result of the employer's failure to report the claim. ORS 656.262(3); James D. Nix, 37 Van Natta 1288 (1985).

To be entitled to interim compensation, however, claimant must prove that he left work as a result of his injury. ORS 656.210(3); Bono v. SAIF, 298 Or 405 (1984). In the present case, claimant testified that he left his job at AAMCO solely because of a work shortage. He is therefore not entitled to interim compensation on the basis of that claim. Further, because there are no amounts due against AAMCO or its insurer, there is no basis for the calculation of a penalty. EBI Companies v. Thomas, 66 OR APP 105 (1983).

ORDER

The Referee's order dated October 11, 1985 is affirmed.

MARK S. WEDERBAUGH, Claimant
Gatti, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-05419
July 29, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Foster's order, as adhered to on reconsideration, that upheld the SAIF Corporation's denial of chiropractic treatment in excess of the guidelines set forth in OAR 436-10-040(2)(a). The issue is whether claimant has proved that excess treatment is reasonable and necessary under the circumstances. We find that he has and we reverse.

Claimant is a former psychiatric aide who compensably strained his low back while restraining a patient in June 1984. The strain resulted in severe low back pain, lumbar spasm and some left leg discomfort. By August 1984 Dr. Whitmire, the initial treating chiropractor, stated that claimant could not work. On

August 31, 1984, consulting chiropractor, Dr. Llewellyn, characterized claimant's prognosis as "extremely guarded" and he recommended "regular consistent treatment . . . on a clinically as-needed basis." Dr. Llewellyn felt that claimant would require similar care in the future, as well. As of September 1984 Dr. Bolin, also a consulting chiropractor, opined that claimant required three-times-per-week treatment. A third chiropractor, Dr. Lommel, became the treating doctor in December 1984.

Claimant was receiving treatments of up to three times per week when he was examined by a panel of Orthopaedic Consultants in March 1985. Although the panel made no specific recommendations regarding the frequency of treatment, it found no reason claimant could not return to work without significant limitations. Two months later claimant received an award of 48 degrees for 15 percent unscheduled partial disability for the low back.

On May 29, 1985 Dr. Lommel submitted a justification statement to SAIF regarding his provision of chiropractic manipulations in excess of the two-treatments-per-month guidelines set forth in OAR 436-10-040(2)(a). In Dr. Lommel's opinion, claimant had sustained a serious tissue injury requiring regular treatments of approximately one per week. Dr. Lommel stated that claimant required treatment in order to maintain his current level of health and to remain free from recurring disability.

SAIF sought an independent chiropractic opinion from Dr. Fechtel. Dr. Fechtel did not examine claimant, but he reviewed claimant's medical record and Dr. Lommel's justification statement. In Dr. Fechtel's opinion, claimant's physical findings were consistent with what Dr. Fechtel termed "regular" treatment, presumably at a rate of no more than that set forth in the administrative guidelines. Dr. Fechtel also felt that Dr. Lommel had failed to present sufficient objective justification for excess treatment.

Following his injury, claimant was unable to find work within his physical limitations until November 1985. He testified that he suffers constant aching in his low back and hip and that he must be treated at least once per week in order to maintain his current level of functioning.

ORS 656.245 provides that for every compensable injury the insurer or self-insured employer shall cause to be provided medical services for conditions resulting from the injury for such period as the nature of the injury or the process of recovery requires. The two-treatment-per-month guidelines set forth in OAR 436-10-040(2)(a) are a general point of reference and are not strict limitations. Celia Garcia, 37 Van Natta 1567 (1985). A claimant is entitled to treatment in excess of the administrative guidelines if he or she proves that excess treatment is both reasonable and necessary to the process of recovery. West v. SAIF, 74 Or App 317 (1985).

We find from our de novo review of the record that claimant has proved the reasonableness and necessity of excess treatment. His treating doctor has indicated that excess treatment is required, and although we note Dr. Fechtel's opinion to the contrary, we find no persuasive reason to discount the treating chiropractor's opinion in this case. See Weiland v. SAIF, 64 Or App 810 (1983). We also note that Dr. Lommel's

opinion gains support from the mid-1984 reports of Drs. Whitmire, Bolin and Llewellyn. Finally, we find claimant's testimony regarding the need for treatment to be probative, if not dispositive. The preponderance of the evidence favors claimant. The Referee's order with regard to the frequency of treatment will be reversed.

ORDER

The Referee's order dated December 31, 1985, as adhered to on reconsideration on January 22, 1986, is reversed in part and affirmed in part. That portion of the Referee's order that affirmed the SAIF Corporation's denial of claimant's excess chiropractic treatment is reversed. For finally prevailing on this issue, claimant's attorney is awarded a fee of $800 for services at hearing and $400 for services on Board review. Both fees shall be paid by the SAIF Corporation. The remainder of the Referee's order is affirmed.

YASMIN J. ABDUL, Claimant
Andrew Josephson, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 85-08596
July 30, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Neal's order which: (1) set aside its partial denial of claimant's psychological treatment; and (2) found that claimant's right wrist injury claim had been prematurely closed. On review, the issues are compensability of the psychological treatments and premature claim closure.

The Board affirms the order of the Referee.

Although neither party filed a brief on Board review, claimant is entitled to a reasonable attorney fee. ORS 656.382(2); OAR 438-47-010(2); 438-47-055; Betty J. McMullen, 38 Van Natta 117 (1986); Arthur D. Roppe, 38 Van Natta 118 (1986). Therefore, considering the nature of the practice in general and the circumstances of this case in particular, we conclude that $250 is a reasonable award for claimant's attorney's services on Board review.

ORDER

The Referee's order dated October 23, 1985, as reconsidered on November 29, 1985, is affirmed. Claimant's attorney is awarded $250 for services on Board review, to be paid by the insurer.

DAVID E. BROCK, Claimant
Malagon & Moore, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Roberts, et al., Defense Attorneys

WCB 85-02765, 85-05238, 85-09130 & 85-09131
July 30, 1986

Reviewed by Board Members McMurdo and Lewis.

EBI Companies requests review of that portion of Referee Brown's order that found it responsible for claimant's carpal tunnel condition and upheld the denials of the SAIF Corporation. The issue on review is responsibility.

Claimant's relevant work history was as a tree planter and as a chopsawyer in a sawmill. Claimant's symptoms of carpal tunnel disease first manifested during employment in a sawmill insured by SAIF. Claimant sought no treatment while employed but sought medical treatment during a layoff. After partial reduction of the carpal tunnel syndrome symptoms, claimant returned to work as a tree planter for nine days for a company insured by EBI and suffered a recurrence of his symptoms.

The only medical opinion on causation of claimant's condition is that of the treating doctor, Dr. Donahoo. The interpretation of Dr. Donahoo's opinion is the determining factor on causation in this case. Dr. Donahoo's opinion was provided by letter as follows:

> "This will confirm our telephone conversation on 7-02-85 with [EBI's attorney] concerning your client [claimant]. It is my opinion that his bilateral carpal tunnel syndrome are [sic] related to mill work, including running the chop saw and handling lumbers which were 2x12x25 feet long in a repetitious fashion. I believe in a more probable than not basis, this is the direct cause.
>
> "In response to [attorney's] specific question, I do not believe once fully established that working 9 days in the woods tree planting, even though the symptoms flared appreciably, contributed to causing underlying condition or aggravation significantly. That is in summary I feel his symptoms are related to his mill work and not to his tree planting.
>
> "I believe this answers your questions."

The Referee interpreted the letter as expressing the doctor's opinion that the mill work was the greater of the causes of claimant's condition but that the tree planting work was slightly contributory. He found that the use of the word "significant" was pregnant with the admission that the tree planting could have contributed to causation of the carpal tunnel disease.

We do not interpret the doctor's opinion to support causation by the tree planting activity. Although the doctor's opinion may leave some question as to whether the doctor thinks that it is possible that the tree planting may have caused a return of symptoms, it seems clear that the doctor does not think the tree planting contributed to or worsened the underlying condition.

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 employer providing potentially causal conditions is deemed to have caused the disease in the absence of evidence to the contrary. Boise Cascade Corp.

v. Starbuck, 296 Or 238 (1984). The onset of disability is the key date for determination of which is the "last potentially causal employer." Bracke v. Baza'r, 293 Or 239 (1982). Where claimant's disease did not result in time loss but merely required medical services the key date is the date claimant first sought medical treatment for the condition. Progress Quarries v. Vaandering, 80 Or App 160 (1986); SAIF v. Carey, 63 Or App 68 (1983). 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." Starbuck, supra at 243 (emphasis added).

After review of the evidence, we find that claimant first sought medical treatment and suffered disability due to his carpal tunnel condition related to employment at SAIF's insured. The subsequent nine days employment as a tree planter for EBI's insured did not contribute to a worsening of the underlying condition but merely coincided with a recurrence of claimant's symptoms. Although the later employment may have been a possible cause it was shown to have been at most either an insignificant cause of the occupational disease or an insignificant cause of a worsening of the occupational disease. Therefore, the responsible insurer is SAIF. Consequently the Referee's order is reversed.

On review claimant argues for a finding that the tree planting labor caused an injury to claimant's carpal tunnels which resulted in symptoms which required medical treatment and caused disability. The Board finds that the evidence does not support claimant's argument.

Upon issuance of the order pursuant to ORS 656.307 there was no longer an issue of compensability. Claimant's attorney is awarded no fee for services at hearing or on Board review. Petshow v. Farm Bureau Ins. Co., 76 Or App 563 (1985).

ORDER

The Referee's order dated October 4, 1985 is reversed in part and affirmed in part. Those portions of the Referee's order which set aside the responsibility denial of EBI Companies and upheld the responsibility denial of the SAIF Corporation are reversed. EBI's denial is reinstated and SAIF's denial is set aside. The claim is remanded to SAIF for payment of compensation and reimbursement to EBI for EBI's claims costs to date. The remainder of the order is affirmed.

THOMAS D. CRAFT, Claimant
Kenneth D. Peterson, Claimant's Attorney
Scott M. Kelley & Assoc., Defense Attorneys

WCB 82-01461
July 30, 1986
Second Order on Remand

Reviewed by Board Members Lewis and Ferris.

This matter was before us on remand from the Court of Appeals. Craft v. Industrial Indemnity Co., 78 Or App 68 (1986). On May 27, 1986 we issued our Order on Remand by which we reinstated and affirmed the June 30, 1983 order of the Referee that granted claimant an award for permanent total disability. The insurer requested that we reconsider our order to the extent that the order did not discuss whether certain benefits paid to claimant during litigation could be offset against the ultimate

award. On June 24, 1986 we withdrew our previous order to consider the question raised by the insurer.

The parties have since submitted for our approval a stipulation resolving all issues now before us. All matters having been resolved by stipulation, the Order on Remand dated May 27, 1986 is withdrawn and this matter is dismissed.

IT IS SO ORDERED.

PETER R. RIOS, Claimant
Pozzi, et al., Claimant's Attorneys
Brian L. Pocock, Defense Attorney

WCB 85-07944 & 84-08085
July 30, 1986
Order on Reconsideration

The Board has received the self-insured employer's request for reconsideration of that portion of the Board's Order on Review dated June 17, 1986 which awarded penalties and attorney fees for unreasonable delay of compensation awarded by a Determination Order. On July 3, 1986 the Board ordered abatement of the Order on Review and sought a response by claimant. A response was filed by claimant on July 10, 1986. The employer filed a reply on July 16, 1986. The employer's motion to reconsider is granted.

At hearing, one of the issues was the period of time during which claimant was entitled to temporary disability compensation for injury to his right hand. At the hearing claimant did not raise an issue regarding failure to pay compensation ordered by the relevant Determination Order and the Referee declined to consider the argument raised by claimant in written closing argument. No evidence was presented regarding whether the compensation ordered by the Determination Order was paid.

The Board should have declined to rule on the issue which was not timely raised in this proceeding and on which no evidence was presented. Neely v. SAIF, 43 Or App 319 (1979), rev. den., 288 Or 493 (1982).

That portion of the Order on Review dated June 17, 1986 which awarded penalties and attorney fees for unreasonable delay of compensation awarded by the Determination Order dated June 24, 1985 as affirmed and republished August 23, 1985 is reversed. The remainder of the order is republished as modified.

IT IS SO ORDERED.

RUSSELL W. FEIGUM, Claimant
Doblie, et al., Claimant's Attorneys
Tooze, et al., Defense Attorneys

WCB 84-13477
July 31, 1986
Order Allowing Extension of Time to File Brief

The insurer has requested reconsideration of our order dated July 29, 1986 that denied the insurer's third request for an extension of time within which to file the appellant's brief. The request for reconsideration is granted. On reconsideration, the insurer has demonstrated that the requested extension is necessitated by more than the mere press of business. OAR 438-11-011(3)(c).

Our order denying the insurer's motion for an extension

of time within which to file the appellant's brief is withdrawn. Claimant's request for an extension of time to August 4, 1986 for filing the appellant's brief is allowed.

IT IS SO ORDERED.

SHARON A. BAUCOM, Claimant
Welch, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 85-07292
August 1, 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) set aside its backup denial of claimant's cervical spine injury; (2) set aside its denial of chiropractic treatment; and (3) awarded attorney fees for prevailing on the two denials. Claimant cross-requests review of those portions of the order which: (1) approved the insurer's reduction of temporary disability compensation from the total disability rate to a partial disability rate; and (2) ordered the claim submitted to the Evaluation Division for closure. The issues on review are: (1) whether the insurer proved grounds for issuing a backup denial; (2) compensability of the injury; (3) compensability of chiropractic services; (4) extent of temporary disability; (5) attorney fees; and (6) the Referee's authority to order the insurer to submit the claim for closure.

Claimant was working as an office cleaning person on January 6, 1985 and was required to remove boxes of computer printout paper from one of the offices. She reported that she had injured her right arm and shoulder and her back due to lifting the boxes, and she left work. She sought medical treatment at a hospital emergency room two days later. A strain was diagnosed. She was given a prescription for pain medication and the doctor recommended a few days off work.

Claimant completed a claim form and submitted it. The insurer investigated the claim and accepted it. Claimant began treatment with a chiropractor when medical treatment seemed not helpful. Aggressive chiropractic treatment produced no long term benefits. Claimant and the insurer sought further medical opinions regarding the persistence of claimant's symptoms and the advisability of chiropractic treatment. Vocational assistance was provided and a modified light-duty job was developed with the employer at date of injury.

The insurer denied chiropractic treatment as not reasonable and necessary in May 1985. Claimant did not attempt the modified job because she felt her condition had worsened and that she could not perform the very light-duty job due to the pain in her neck which would keep her from even driving to the job. The insurer reduced claimant's temporary disability compensation from the total disability rate to a partial disability rate. Later that summer, claimant's ex-husband contacted the insurer and informed it of claimant's medical history which included back and neck pains due to motor vehicle accidents and emotional problems and of claimant's physical activity during the summer. The insurer then issued its backup denial of the compensability of the claim.

At the hearing the first issue tried was whether the insurer had proven a basis for issuing its backup denial. As the issue was developed before the Referee, the insurer relied on claimant's failure to inform the doctors of her prior motor vehicle accidents. Testimony revealed that claimant had recovered fully from her motor vehicle accidents without treatment beyond initial examinations and had returned to work for months and that the employer had full knowledge of the most recent accident. The Referee found that the insurer had not carried the burden of proof that there were reasonable grounds to find that claimant had misrepresented her history to the doctors based on failure to disclose the motor vehicle accidents. He, therefore, set aside the backup denial.

On review the insurer has shifted the legal basis of its argument to claimant's failure to advise the doctors of her medical history involving neck, shoulder, and back pains not related to motor vehicle accidents. Claimant objects to this change in the legal argument as untimely because it was not raised before the Referee. We have considered the insurer's argument on review because it does not present a new issue but merely a different legal interpretation to be applied to the facts which were presented to the Referee in the context of a backup denial. See Anita A. Bade, 36 Van Natta 1093 (1984), aff'd mem., 73 Or App 344 (1985).

Claimant further insists that the insurer must prove that claimant "knowingly" misrepresented material facts in order to sustain its burden of proving that the denial was allowable. In its opinion in Bauman v. SAIF, 295 Or 788 (1983), the court held that an insurer could not issue a backup denial unless there were sufficient grounds and used the terms "fraud, misrepresentation or other illegal activity." Bauman, at 794. In our Order on Review in Robert D. Craig, 37 Van Natta 494 (1985), we stated:

> "In the context of determining whether there has been sufficient misrepresentation to justify a backup denial, we think claimant's duty to disclose information is that he must disclose relevant information about symptoms of pain or distress, regardless of his perception of the cause, and allow his doctor to consider what is relevant and irrelevant. Opinions of medical causation are best left to experienced professionals in complex situations and the more reliable and accurate information that is considered the greater the probability of arriving at a logically sound and correct conclusion." 37 Van Natta at 495.

The evidence is persuasive that claimant had very similar, if not identical, symptomatology before and after January 6, 1985 related to her shoulder, neck, and back that waxed and waned in response to emotional stress. Whether claimant failed to remember and recount this medical history or knowingly concealed it, by presenting only that information which supported her lay theory of causation, claimant prevented the medical professionals from considering relevant information in determining the cause of the observed condition and the best course of

treatment. Claimant did not deny that she knew her medical history, but she denied that her medical history was relevant because in her opinion she had a new set of problems which were all related solely to her industrial injury. We are not persuaded by claimant's lay analysis and we find that the insurer has proven that its backup denial was justified.

Once the insurer proves justification for its denial, then the issue becomes whether the claim was compensable. Parker v. D. R. Johnson Lumber Co., 70 Or App 683 (1984). Claimant has told a consistent story about the mechanism of injury since the beginning of the claim. Doctors confirmed the presence of some potentially pain producing conditions. The Referee found that the medical history provided to Dr. Gatterman at an independent medical examination was complete and accurate, but failed to account for the fact that claimant denied any prior back or shoulder problems when the records of claimant's regular family doctor showed that claimant had a similar problem in 1982. Whether the Referee considered the corroborated testimony of claimant's ex-husband about pain and other symptoms in claimant's shoulder and neck areas before the alleged injury is not evident from the Opinion and Order. Other doctors noted before and after the alleged injury that claimant was a poor historian generally. The Referee did find that claimant was not credible and that her progressive ability to move her arm at the hearing caused him to believe that claimant was deliberately faking her disability. The Referee also found that claimant's ex-husband was not entirely believable, primarily when he testified about his motivations for reporting claimant's activities. As the Referee also noted, claimant controverted few of her ex-husband's relevant observations.

There is further confusion in the record that prevents easy analysis of the causation problem. Claimant has been examined by 13 doctors, not counting radiologists. No definite objective cause for claimant's symptomatology has been identified. No medical opinion other than the psychiatrists' was based on an accurate and complete history of relevant problems. Some of the doctors stated that they were repeating claimant's story, but no analysis of the possible causes of claimant's symptomatology was provided. The focus of the doctors' inquiries and opinions was on treatment options rather than on causation of the condition.

Claimant has received chiropractic manipulation and physical therapy over an extended period without significant relief or improvement. In addition a wide variety of prescription medications have been ineffective. The opinions of some of the doctors who have attempted to treat claimant medically have agreed with the assessment of the two psychiatrists who examined claimant that the symptomatology is a psychogenic pain disorder without organic cause. All diagnoses of organic causes of claimant's symptomatology have been ruled out. Upon careful reading of the opinions which at first appear to support claimant's theory of causation, we realize that the doctors who seem to support claimant's theory are actually only repeating claimant's theory without analyzing the theory in light of relevant facts which claimant did not reveal.

When the difficulties of discerning which testimonial evidence is reliable are considered with the lack of progress of

claimant's subjective condition, despite the application of numerous modalities of therapy and the apparent conclusion that claimant's condition is not a physical injury, we are left with the question whether we have been persuaded that claimant suffered any injury to her shoulder, neck, or back as a result of her work activity. That claimant's psychological or emotional health may have predisposed her to sustain such symptomatology in response to work activity is not dispositive because the employer takes the worker as it finds her. However, for claimant to prevail the evidence must be persuasive that claimant did in fact suffer an injury that is the result of work activity.

In this case, the uncontradicted observation of claimant's ex-husband of boxes of computer paper at claimant's residence provides a believable alternative explanation of the source of the pain and other symptomatology that claimant describes. All the observation does is provide the factfinder with that element of doubt about claimant's denial of other activities that might have caused her symptomatology that in the face of the Referee's doubts about claimant's credibility makes her story that much less persuasive. In the end, we find that claimant has not carried her burden of proof that she suffered an injury to her shoulder, neck, or back as a result of work activity and reinstate the insurer's denial. Loehr v. Liberty Northwest, 80 Or App 264.268(1986).

In the alternative, on the issue of the denial of chiropractic treatment, by the time of the denial claimant had been treated aggressively by Dr. Berry's clinic for four months. Dr. Berry reported that claimant was showing progress and that his treatment was designed to restore claimant to health. His chartnotes and claimant's descriptions of the effectiveness of the chiropractic treatment reveal that claimant obtained no significant relief from her symptomatology as a result of the therapy. The ultimate conclusion by the medical doctors seems to be that claimant has a psychogenic pain disorder unrelated to her alleged industrial injury. There are consistent recommendations that chiropractic treatment be discontinued as unhelpful to restoring claimant to health. Considering the lack of progress that claimant has made with chiropractic treatment over an extended period of time and the recommendations that psychological counseling be provided as the only hope of effective treatment, we would find that the denial of chiropractic treatment was appropriate and reinstate the denial based on the preponderance of the evidence. Nancy Cudaback, 37 Van Natta 1522, amended, 37 Van Natta 1580, abated for reconsideration, 37 Van Natta 1596 (1985), amended order republished, 38 Van Natta 423 (WCB Case Nos. 83-08031, 83-03359, 84-05661; April 9, 1986).

At the time of the reduction of claimant's disability compensation from the total disability rate to a partial disability rate, OAR 436-60-030(5) required a written offer of modified employment to claimant before reduction of temporary disability compensation could be made. No written offer of modified employment was made to claimant, but the Referee found that the insurer and employer had substantially complied with the requirements of the regulation. Since the Referee's order, the Court of Appeals has decided that strict compliance with the regulation is necessary before the insurer may reduce the rate of temporary disability compensation. Eastman v. Georgia Pacific, 79 Or App 610 (1986). The Referee's order upholding the reduction of temporary disability compensation by the insurer is moot but would have to be reversed if the claim were found compensable.

The remaining issues of attorney fees and the Referee's directive to submit the claim for closure are moot, but the Referee was acting pursuant to statute and within his authority on both issues.

ORDER

The Referee's order dated November 7, 1985 is reversed. The insurer's denial of chiropractic treatment dated May 29, 1985 is upheld and reinstated. The backup denial dated August 2, 1985 is upheld and reinstated.

KATHERINE E. CASTEEL, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-03575 & 82-03576
August 1, 1986
Order on Remand

This matter is before the Board on remand from the Supreme Court. SAIF v. Casteel, 301 Or 151 (1986). We are mandated to reconsider the case to determine "the actual character of the claims and the payments at issue." Id. at 154.

This dispute originally arose out of requests for hearings on the SAIF Corporation's denial of a claim for aggravation of an accepted low back injury and a Determination Order closing claimant's injury claim for a fracture of the right hip without an award for permanent disability. The Referee upheld the aggravation denial for the low back and awarded permanent total disability based upon the hip injury and other preexisting conditions. On review of the Referee's order, the Board held that claimant suffered no permanent disability as a result of the hip injury.(We noted that the injury was in fact a fracture of the femur, which was a leg injury. We refer to the injury as "hip injury" for consistency.) Katherine Casteel, 31 Van Natta 127, 128 (1981). However, the Board found that claimant had established an aggravation of her low back injury and granted an award of 32 degrees for 10 percent unscheduled permanent partial disability for that condition. Id. While Board review was pending, SAIF had paid approximately $3,000 to claimant pursuant to the Referee's award of permanent total disability.

Claimant petitioned for judicial review of the Board's order. The court agreed with the Board's finding that there was an aggravation of the low back condition, but modified our order to award compensation for 50 percent unscheduled permanent partial disability. Casteel v. SAIF, 55 Or App 474, 479 (1982). The court did not in any way modify the Board's finding that claimant was not entitled to compensation for permanent disability on account of the hip injury. We conclude that the court affirmed that finding sub silentio. The decision of the Court of Appeals was not reviewed further and became final.

After the Court of Appeals decision awarding 50 percent permanent partial disability, SAIF took the position that the approximately $3,000 in compensation paid pursuant to the Referee's award of permanent total disability should be credited as a prepayment on the 50 percent award. Claimant maintained that such a "credit" was prohibited by ORS 656.313(1) and (2). The question was submitted to the Referee for decision on a stipulation of the relevant facts. The stipulation recites the facts as though all payments in this case had been made on a

single claim. The Referee held that the "credit" should be allowed. We reversed, following our decision in Glenn O. Hall, 35 Van Natta 275 (1983), that benefits paid pending further review were not recoverable by offset or otherwise. Katherine E. Casteel, 36 Van Natta 695 (1984). The Court of Appeals, with one member of the panel in dissent, affirmed our order. SAIF v. Casteel, 74 Or App 566 (1985). The Referee, the Board and the Court of Appeals all decided the case based upon the facts as stipulated by the parties.

The Supreme Court accepted review of the case and stated in its opinion:

> "SAIF points out that the referee, the Board and the Court of Appeals decided this case on a stipulation that SAIF's payments had been made on a single claim, and it asks us to pronounce an interpretation of ORS 656.313 as if that were the fact. Referees, agencies, and other tribunals often must judge between specific parties on facts to which they stipulate, but an appellate court should not pronounce a rule that has importance beyond the particular litigants when the record shows the undisputed facts to be contrary to the stipulation.
>
> "We considered dismissing the petition for review as having been improvidently allowed, but that would have let the decision of the Court of Appeals stand as a precedent though it may have been incorrect. We therefore conclude that the better course is to vacate the decision of the Court of Appeals and remand the case to the Board for reconsideration of the actual character of the claims and the payments at issue."

301 Or at 154.

Although it could be argued to the contrary, we conclude from the Supreme Court's decision that the slate is not entirely clean. We believe it would be error on our part to continue to decide this case based upon the stipulation as to the facts, which the court found to be inconsistent with the record. We, therefore, reject the stipulation.

We find from the record and by taking administrative notice of our agency records that claimant's low back claim is assigned SAIF claim number D210482 and WCB Case No. 80-04530 in the first proceeding. From the same sources, we find that claimant's hip claim is assigned SAIF claim number D313449 and WCB Case No. 80-01021 in the first proceeding.

Pivotal to resolution of the issue in this case is under which claim and case benefits were ordered by the Referee in the first proceeding. The Referee found that claimant had not established an aggravation of the low back injury. He, therefore, upheld the denial in claim number D210482/WCB Case No. 80-04530.

The claim, then, remained closed and no benefits were either ordered or paid on the back injury claim. In claim number D313449/WCB Case No. 80-01021, which was an appeal from a Determination Order closing the hip injury claim, the Referee awarded benefits for permanent total disability. All benefits that were paid pending Board review were paid on the hip injury claim.

The Board's decision on review reversed the Referee's order entirely. The Board found that no benefits were payable on the hip injury claim. However, the Board ordered the back injury aggravation claim accepted and awarded 10 percent unscheduled permanent partial disability, payable under that claim. That award was subsequently increased by the Court of Appeals to 50 percent, but remained payable under the back injury claim. ORS 656.313 provides in relevant part:

> "(1) Filing by an employer or the insurer of a request for review or court appeal shall not stay payment of compensation to a claimant.
>
> "(2) If the board or court subsequently orders that compensation to the claimant should not have been allowed or should have been awarded in a lesser amount than awarded, the claimant shall not be obligated to repay any such compensation which was paid pending the review or appeal."

The issue of concern to the parties is whether this statute allows benefits paid pending review to be treated as a "prepayment" of the ultimate award to the extent that they do not exceed the ultimate award. Because of the posture of this case, we find and conclude that the facts of this case do not present the issue. The ultimate award in the hip injury claim was zero; therefore, any benefits paid pending review were in excess of the ultimate award. No benefits were paid pending review of the back injury aggravation claim; therefore, nothing was "prepaid." We accordingly hold that SAIF's request for offset of the benefits for permanent total disability paid pending review of the Referee's order is denied.

Claimant is entitled to a reasonable attorney fee for services before the Referee, the Board, the Court of Appeals and the Supreme Court, to be paid by the SAIF Corporation. ORS 656.382(2). Because of the protracted nature of the proceedings in this case, we will rule upon the amount of the attorney fee to be awarded upon receipt of a petition for attorney fees from claimant. Said petition shall be filed within seven days of the mailing date of this order, with simultaneous service upon SAIF. SAIF's objections to the petition, if any, shall be filed within seven days from the mailing date of claimant's petition.

ORDER

The Referee's order dated September 23, 1983 is reversed. Further proceedings pertaining to the amount of the attorney fee to be awarded shall be consistent with this order.

MARION (SCHUMACHER) DUCKETT, Claimant
R. Vernon Cook, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-06180
August 1, 1986
Order on Remand (Remanding)

This matter is before the Board on remand from the Court of Appeals. Duckett v. SAIF, 79 Or App 749 (1986) (Per Curiam). The court has mandated that this case be remanded to the Referee for consideration of evidence offered after the hearing while this matter was under review by the Board and for clarification of the issues to be resolved in view of that evidence. Therefore, this matter is remanded to Referee Leahy for further consideration in accordance with the mandate of the court.

IT IS SO ORDERED.

LEONARD L. ERWIN, Claimant
Welch, et al., Claimant's Attorneys
Meyers & Terrall, Defense Attorneys

WCB 84-00836
August 1, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The self-insured employer requests review of that portion of Referee Pferdner's order that found claimant entitled to an award of permanent total disability. The sole issue on review is whether claimant is entitled to that award.

Claimant is a former truck driver who served in that capacity for the employer for 31 years. He has a long history of injuries, including five to the low back between 1957 and 1977. At the time of the hearing, claimant had received unscheduled awards for the low back totalling 40 percent. In addition he had received scheduled awards of 30 percent for the right arm, 20 percent for the left arm, a 24.31 percent scheduled award for binaural hearing loss and a 25 percent unscheduled award for the left shoulder. Claimant's left shoulder was the last body part injured; the injury occurred in May 1982.

Claimant has also undergone several surgeries, including an ulcer operation in 1968, an epicondylar stripping of the right elbow in 1975 and partial acromionectomies of the left and right shoulders in 1981 and 1983.

Following the May 1982 injury, claimant left work for a brief period and then returned to his regular truck driving job. After working in that capacity for several more months he accepted a union retirement package on December 30, 1982. At hearing claimant contended that he left work at the end of 1982 as a result of his physical inability to continue working.

Dr. Utterback was claimant's primary treating physician for many years. Although he had suggested early on that claimant change to a more restricted driving job, Dr. Utterback consistently stated that claimant was capable of light or sedentary work. By June 1984 Dr. Utterback reported that claimant could sit, stand and walk for four hours at a time. He also felt that claimant could frequently lift and carry up to 25 pounds, occasionally lift up to 50 pounds, and repeatedly use his hands for grasping, pulling and pushing. In Dr. Utterback's opinion, claimant's overall impairment in June 1984 was "mild." In a later report, he stated that the most substantial impairment to

claimant's returning to work was his negative attitude toward continued employment. Dr. Oakley, a chiropractor who also treated claimant regularly, agreed with Dr. Utterback's assessment, although he felt claimant's lifting restrictions were greater. Orthopaedic Consultants also felt claimant could return to his previous employment with restrictions.

Claimant was referred to Columbia Rehabilitation Consultants in mid-1984. Noting that Drs. Utterback and Oakley appeared to favor claimant's returning to work, Columbia's rehabilitation counselor reported on September 3, 1984:

> "[Claimant's] self-reported limitations differ from the physical capacities given by Dr. Utterback which would allow a return to work."

The counselor further noted that claimant presented himself as unwilling, as well as unable, to return to wage-earning employment.

In October 1984 claimant changed treating physicians, noting his dissatisfaction with Dr. Utterback's continued urgings that he return to work. Dr. Stiger, an osteopath, became the treating doctor, and in January 1985 he opined that claimant's impairment was "moderately severe." Shortly before the hearing Dr. Stiger reported that claimant was totally disabled from regular employment due to his multiple physical limitations. Dr. Colistro, a psychologist, suggested in August 1985 that claimant also suffered from depression as a result of his diminishing physical capabilities.

Two weeks before the hearing, Mr. Alverson, a rehabilitation counselor from Columbia Rehabilitation Consultants, noted that even though Dr. Stiger had indicated that claimant was incapable of employment, a physical capacities list submitted by the doctor placed claimant in the light-to-sedentary employment category. After speaking with claimant's former employer, Mr. Alverson concluded:

> "I believe employment for [claimant] not only exists [with the former employer], but also in the local market, per recent placement and labor market activity."

Claimant testified at the hearing that he was 57 years of age and that he had completed his GED. He indicated that subsequent to his last injury he returned to his former 32-hour-per-week truck driving job until he retired. At the time of the hearing claimant was receiving approximately $1,500 per month in various union and retirement benefits. He has not worked, nor has he looked for work, since his December 1982 retirement.

Mr. Meyer, claimant's former supervisor, testified that subsequent to his last injury, claimant did not request lighter employment. In fact, claimant performed his regular job in an average-to-above-average fashion up to the time of retirement. Mr. Meyer indicated that claimant represented that he was taking a simple age-related retirement and that he did not mention that his leaving work was necessitated by his disabilities.

Mr. Alverson, the rehabilitation consultant, also testified at the hearing. During the course of claimant's rehabilitation, Mr. Alverson met twice with claimant and met both of the then-treating physicians. Mr. Alverson indicated that Dr. Oakley, the treating chiropractor, was clearly supportive of claimant's return to work on a trial basis and that Dr. Utterback felt claimant could work, but that his attitude was precluding a return to employment. Mr. Alverson also met with claimant's prior employer and determined that the employer was willing to rehire claimant in a light-to-sedentary capacity. In fact, the employer identified six jobs within its organization that coincided with claimant's capabilities. Mr. Alverson felt that although claimant was capable of employment, he was not motivated to return to work. This was evidenced by claimant's refusal of vocational services offered before the hearing.

It is claimant's burden to prove that as a result of his compensable injuries and preexisting disabilities, he is currently incapable of regular, gainful employment. ORS 656.206(1),(3). 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. Lee v. Freightliner Corp., 77 Or App 238 (1986); Clark v. Boise Cascade Corp., 72 Or App 397 (1985); Wilson v. Weyerhaeuser, 30 Or App 403 (1977). Generally, if a claimant's physical disability is less than total, he must prove that he is willing to seek regular employment and that he has made reasonable efforts to do so. Home Insurance Co. v. Hall, 60 Or App 750, rev den 294 Or 536 (1983).

In the present case, the preponderant medical evidence is that claimant's physical incapacity is less than total. That is the opinion of the long-time treating physicians. Although the most recent treating doctor has indicated that claimant is totally disabled, the physical capacities chart submitted by the doctor places claimant in at least the sedentary employment range. We therefore find from the record that claimant is not permanently totally disabled from a physical standpoint alone. If he is to prove entitlement to an award of permanent total disability he must prove that the combination of his physical and non-medical disabilities has rendered him unemployable. We find that claimant has failed to sustain his burden of proof.

When the various opinions in this case are synthesized, it is clear that the only person who feels that claimant is unemployable is claimant himself. While claimant's opinion is probative evidence, See Garbutt v. SAIF, 297 Or 148 (1984), it is not persuasive when compared with the remainder of the record. See Kassahn v. Publishers Paper Co., 76 Or App 105 (1985). The remaining record strongly suggests that although claimant is capable of work, he is simply no longer motivated to be employed.

In finding claimant permanently totally disabled, the Referee found that claimant was so impaired as to be excused from the seek-work requirement of ORS 656.206(3). See Butcher v. SAIF, 45 Or App 313 (1980). We disagree. Because claimant is capable of work, either for his previous employer or in the hypothetically normal labor market, ORS 656.206(3) applies. Further, because claimant has not only made no effort to seek employment, but has thwarted any attempt at returning him to the work force, we find that claimant has failed to meet his burden of proving that he is willing to be reemployed. An award of permanent total disability is inappropriate. Vernita V. Thompson, 38 Van Natta 152 (1986).

ORDER

The Referee's order dated January 9, 1986 is reversed in part and affirmed in part. That portion of the order that awarded claimant permanent total disability is reversed. The remainder of the Referee's order is affirmed.

CRAIG M. PENCE, Claimant
Francesconi & Cash, Claimant's Attorneys
Rankin, et al., Defense Attorneys

WCB 85-01909
August 1, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

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

Claimant is a fire fighter who has been employed by the City of Salem for about nine years. His employment has exposed him to a variety of noises, including sirens, power saws and air chisels. Duration and intensity of exposure have varied, depending on claimant's duty and work location. He wore no ear protection on the job until September 1984. His off-job exposures included several years of shooting handguns, motorcycle riding and a non-combat tour of Navy duty.

Claimant sought treatment for what he perceived to be progressive hearing loss in October 1984 from Dr. Cooper. Audiogram testing revealed a high frequency hearing deficiency. Dr. Cooper compared claimant's current audiogram to one performed in November 1977 and reported a "significant" binaural high frequency hearing loss. Dr. Cooper opined that the loss resulted from occupational exposure, but he felt that claimant could continue fire fighting so long as he wore ear protection. Dr. Cooper did not recommend time off from work or medical treatment.

Claimant was seen by Dr. Mettler in June 1985. A second audiogram was performed. Dr. Mettler calculated a zero percent hearing loss in both the left and right ears. Although claimant demonstrated a high frequency deficit, his hearing was not abnormal when the preexisting loss was factored into Dr. Mettler's calculations.

In July 1985 the employer retained a certified industrial hygienist to perform a noise level analysis of the various sites in which claimant had worked. After collecting relevant data, the hygienist concluded that claimant's average work load would have exposed him to well below the 85 decibel, eight-hour weighted average limit recommended by state officials. The hygienist also noted, however, that claimant would occasionally be exposed to noise exceeding the 90 decibel permissible level.

In August 1985 Dr. Mettler stated that, considering the data gathered by the hygienist, it was unlikely that claimant's work caused his high frequency hearing loss. Dr. Mettler suggested off-the-job factors as the more likely cause. He also reiterated that claimant had no ratable loss in the first instance. Dr. Cooper disagreed, reporting that claimant

demonstrated a 14.75 percent loss in the right ear and a 2.25 percent loss in the left, for a binaural loss of 3.81 percent. Dr. Cooper did not factor in claimant's preexisting loss, however.

The Referee properly found that claimant does not demonstrate a ratable hearing loss, as loss is measured in the Workers' Compensation Department's rules for rating scheduled hearing loss disability. The rules require use of the most recent audiogram with the highest retained level of hearing. OAR 436-30-360(3). The rating is also to account for preexisting loss and presbycusis. Dr. Mettler's 1985 audiogram is the most recent. Accounting for claimant's preexisting loss, Dr. Mettler's audiogram reveals no ratable loss.

Although the Referee found claimant to have experienced no ratable loss, she found his claim compensable. In George J. Koronaios, 37 Van Natta 263 (1985), a case cited but not discussed by the Referee, the claimant was a 61-year-old machinist who demonstrated an obvious high frequency hearing loss in the left ear. Although the loss was measurable, it was not "ratable" using the formulas established by the Department. We found most persuasive the opinion of a physician who, after applying the generally accepted formulas and measuring methods for the calculation of hearing loss, concluded that the claimant had no ratable hearing impairment nor handicapping hearing loss in either ear. Persuaded by the medical evidence that the claimant's hearing was in the normal range, we found his claim for occupational disease to be not compensable. 37 Van Natta at 264.

The present case is similar to Koronaios. As noted, the present claimant has a measurable high frequency hearing loss, but it is the opinion of Dr. Mettler, the physician who conducted the most recent audiogram, that claimant's hearing is not so deficient as to be abnormal. We find Dr. Mettler's opinion most persuasive. Unlike Dr. Cooper, Dr. Mettler considered claimant's preexisting hearing loss in determining whether a ratable hearing impairment existed. Moreover, Dr. Mettler also suggested that off-the-job factors were the more likely cause of claimant's high frequency hearing loss. Since claimant has failed to prove that he suffers from work-related, abnormal hearing loss, his occupational disease claim is not compensable.

ORDER

The Referee's order dated December 30, 1985 is reversed.

WALTER A. PICKTHORN, Claimant
Roll, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 84-03700
August 1, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The self-insured employer requests review of that portion of Referee St. Martin's order that awarded 192 degrees for 60 percent unscheduled permanent partial disability in addition to the Determination Order dated February 21, 1984 that awarded 48 degrees for 15 percent unscheduled permanent partial disability for injuries to claimant's back. The issue on review is extent of unscheduled permanent partial disability.

Claimant was first injured on December 12, 1980 when he jumped from his parcel delivery truck and suffered back pain. He obtained chiropractic treatment and the claim was closed by Determination Order with no award for permanent disability on October 27, 1981. The claim was reopened in May 1983 and claimant was off work until July 1983. On July 14, 1983 claimant returned to work as a parcel delivery truck driver "singing and whistling" but in the course of the day he injured himself in a motor vehicle accident. He again obtained chiropractic treatment for a time then changed to medical treatment with Dr. Berselli.

Several doctors have examined claimant and assessed claimant's impairment. Dr. Berselli has rated claimant's back impairment in the mildly moderate range. The other examiners have not reported so great an impairment. No surgery has been performed, although at one time there was a suggestion made to consider a fusion.

Claimant has returned to full-time work at the employer as a security person and freight checker. Claimant suffers from pain and his work is limited by the permanent effects of his back injuries. He is able to lift objects of about 25 pounds occasionally. Claimant sought re-employment as a truck driver but was unable to obtain a physician's approval.

Claimant's recreational and social activities have been impacted by his limitations. The Referee expressed strong reliance on the credible opinion of a son of claimant who felt that claimant was now "a cripple," based on his inability to romp with grandchildren and participate in sporting activities.

The Referee also found credible a truck driver's description of claimant's limitations on the job and from that description the Referee inferred that claimant's current job was a sheltered position with limited future employment potential. There is no other evidence to support the Referee's finding that claimant's current job is sheltered. We are not persuaded that claimant's current job is a sheltered position as much as it is a regular job with the employer at time of injury that is within claimant's physical limitations. There is no evidence that the current job was created or modified to accommodate claimant's performance limitations.

The extent of unscheduled permanent partial 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), affirmed on reconsideration 300 Or 553 (1986). "Earning capacity" is defined as a worker's "ability to obtain and hold gainful employment in the broad field of general occupations" and considers the medical assessment of impairment as well as social and vocational factors. Surratt v. Gunderson Bros., 259 Or 65 (1971). Subsequent wages may be considered an indication of the extent of lost earning capacity although it is not determinative. Jacobs v. Louisiana Pacific, 59 Or App 1 (1982); Ford v. SAIF, 7 Or App 549 (1972).

We rely on medical assessment and credible lay 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).

The Board finds that the impairment assessment by Dr. Berselli is persuasive when compared with the credible lay testimony regarding claimant's limitations. Claimant is age 58 and has a GED certificate. The vast majority of his employment experience has been as a parcel delivery driver for this employer. Considering all of the relevant impairment and social and vocational factors, the Board finds that claimant would be appropriately compensated by an award of 112 degrees for 35 percent unscheduled permanent partial disability for the permanently disabling effects of his low back injuries.

ORDER

The Referee's order dated October 28, 1985 is modified. Claimant is awarded 112 degrees for 35 percent unscheduled permanent partial disability in lieu of all prior awards of permanent disability compensation for his back injuries. The remainder of the Referee's order is affirmed.

MARK L. QUEENER, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Atherly, et al., Defense Attorneys
Cummins, et al., Defense Attorneys
Schwabe, et al., Defense Attorneys

WCB 85-08542, 85-10120, 85-10639 & 85-13873
August 1, 1986

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of that portion of Referee Seymour's order that awarded claimant's attorney an insurer-paid fee for services rendered before the hearing. The issue is attorney fees.

This is a successive injury case. Claimant was initially injured in November 1982 while employed by Bohemia, Inc., then insured by SAIF. The accepted claim was ultimately closed by Determination Order with a small permanent disability award. The employer switched its insurance coverage from SAIF to the Liberty Northwest Insurance Corporation on July 1, 1984. Claimant continued to work for the employer until he was laid off in February 1985. Three months later he began working for Ty Logging, also insured by Liberty Northwest. His back pain returned. A month later claimant went to work for a third employer and his back pain worsened to the point where he could no longer work. The issue before the Referee was which of the employers was responsible. Compensability was not an issue; the insurers had each issued denials based solely on responsibility.

The Referee found that claimant had incurred an aggravation of the original claim and that SAIF was responsible. With regard to attorney fees, the Referee properly found that under Petshow v. Farm Bureau Ins. Co., 76 Or App 563 (1985), he could not award claimant's attorney a fee for services at hearing, for the issue of compensability had been resolved with the issuance of an order pursuant to ORS 656.307 before the hearing was held. He concluded, however, that claimant's attorney was entitled to a fee for his participation in procuring a .307 order before the hearing. He ultimately awarded a fee of $1,200 for the attorney's pre-hearing services, and ordered that the fee be paid by SAIF.

On review, SAIF does not oppose the Referee's holding regarding responsibility. Neither does it oppose the award of an attorney fee. SAIF does oppose, however, the Referee's decision to award an insurer-paid attorney fee for pre-hearing services. SAIF argues that there is no statute nor administrative rule supporting such an award, and that the attorney fee should come from claimant's award of compensation.

From the outset, we agree with the Referee that claimant's attorney was entitled to a fee for services rendered prior to the hearing. As the court held in Hanna v. McGrew Bros. Sawmill, 44 Or App 189, modified 45 Or App 757 (1980), a claimant may be entitled to an attorney fee in certain .307 cases. See also Nat. Farm Ins. v. Scofield, 56 Or App 130 (1982). The present case is one of those cases. Here, although neither insurer denied the compensability of claimant's claim on behalf of its insureds, the ultimate denials of responsibility could have resulted in an indeterminate delay in claimant's compensation had his attorney not taken substantive and affirmative steps to have a paying agent named pursuant to ORS 656.307. The attorney's actions included numerous conferences with the insurers and multiple correspondences with the Workers' Compensation Department. An attorney fee was appropriate.

The remaining issue is whether the Referee properly ordered SAIF to pay claimant's attorney's fee. We find that he did not. Attorney fees in workers' compensation cases are to be awarded in strict compliance with the controlling statutes. See Forney v. Western States Plywood, 297 Or 628 (1984); Brown v. EBI Companies, 289 Or 905 (1980). In all cases except those specified by statute, a claimant must pay his attorney from the award of compensation. ORS 656.386(2); OAR 438-47-010(5). The primary situation giving rise to an insurer or employer-paid attorney fee is that in which a Referee reverses the employer's or insurer's denial of the compensability of a claimant's claim. ORS 656.386(1); OAR 438-47-020(1)(a). As the court noted in Petshow, supra, however, the "simple ORS 656.307 proceeding" does not involve a denial of the compensability of claimant's condition. It therefore falls into the "all other cases" category under ORS 656.386(2) in which a claimant must pay his attorney from the award of compensation. 76 Or App at 571. The present case is a simple .307 case; the insurers conceded compensability and denied the claims made against them solely on the basis of responsibility. Although claimant's attorney was entitled to a fee, therefore, the fee must be paid from the award of compensation.

ORDER

The Referee's order dated January 31, 1986 is reversed in part and affirmed in part. That portion of the order that directed SAIF Corporation to pay claimant's attorney's fee for services before the hearing is reversed. The fee awarded by the Referee is allowed but it shall be paid from claimant's award of compensation. The remainder of the Referee's order is affirmed.

TOBER B. ROBINSON, Claimant
Gale K. Powell, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 85-06984
August 1, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Tenenbaum's order that affirmed the Determination Order dated May 3, 1985 as reconsidered and republished May 16, 1985 which awarded compensation only for temporary disability. Claimant argues that the claim was prematurely closed or that she is entitled to an award of compensation for unscheduled permanent partial disability for injury to her low back. Claimant submits one document in support of her argument for premature closure. The insurer requests authorization to offset overpaid temporary disability in the event the Board finds that the claim was not prematurely closed and that claimant is entitled to an award of compensation for permanent disability. Claimant submits one document in support of her argument against allowance of the offset. The issues on review are premature closure, extent of unscheduled permanent partial disability, offset, and remand.

We treat claimant's offer of documents as a request to remand to the Referee. The Board finds that the document submitted to support the argument for premature closure establishes only that the insurer continues to process the claim while litigation is pending and does not have any bearing on the determination whether there was any improvement reasonably expected by treatment or the passage of time at the time of the closure. Sullivan v. Argonaut Ins. Co., 73 Or App 694 (1985). The other document reflects the direction by the evaluator at the Evaluation Division of the Workers' Compensation Department to delete the language from the Determination Order that would have authorized an offset out of a permanent disability award by the amount of overpaid temporary disability compensation because there was no permanent disability compensation awarded. The authorization to offset overpaid temporary disability compensation may be raised at any time there is an award for permanent disability. Travis v. Liberty Mutual Ins., 79 Or App 126 (1986). The Board finds that the record was adequately and properly developed before the Referee and denies the request to remand. ORS 656.295; Bailey v. SAIF, 296 Or 41 (1983).

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

ORDER

The Referee's order dated December 12, 1985 is affirmed.

ARTICE WRIGHT, Claimant
Francesconi & Cash, Claimant's Attorneys
David O. Horne, Defense Attorney

Own Motion 86-0011M
August 4, 1986
Own Motion Order

Claimant requested that the Board exercise its own motion authority and reopen his claim for an alleged worsening of his 1967 industrial injury. Claimant's aggravation rights have expired. Wausau opposes reopening of this claim as they contend claimant has removed himself from the work force.

Claimant filed his original request with the Board in January 1986. The Board initially postponed action on the own motion request until resolution of WCB Case No. 85-13122 then pending in the Hearings Division. That matter has been settled with Wausau agreeing to provide the requested medical services pursuant to ORS 656.245, in addition to certain penalties and attorney fees.

At no time since January 1986 has either party provided the Board with any medical evidence. However, we find medical reports would not serve to change our decision and have elected to proceed without them. Wausau contends claimant is retired from the work force; claimant has submitted a letter from his church which indicates he has been pastor of the church for the past thirteen years and, therefore, is not retired. We note that in April 1983 we issued an Own Motion Order which denied the request for reopening on this very point. Claimant was gainfully employed for American Ship Dismantlers until January 1980 at which time he quit his job for reasons unrelated to the industrial injury. At that time, and apparently for about seven years prior, claimant had been pastor of his church along with the other full time employment. He advised the Board that he worked for the church, but that he received no salary from them. The job of pastor is generally considered to be gainful employment; however, claimant apparently donates his services to his church and, as such, cannot be considered to be regularly and gainfully employed. There is no evidence that claimant's relationship with his church has changed in any way during the past several years. We conclude claimant has removed himself from the work force and is not entitled to compensation for temporary total disability. The request for own motion relief is hereby denied.

IT IS SO ORDERED.

LEONA I. (WILSON) BROWN, Claimant
Quintin B. Estell, Claimant's Attorney
Cummins, et al., Defense Attorneys

WCB 83-07512
August 5, 1986
Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Review dated July 17, 1986 which, among other findings, affirmed the Referee's order that upheld the self-insured employer's partial denial of her current upper and lower back conditions. Claimant contends that she is entitled to an attorney fee for, in effect, setting aside the denial insofar as it purportedly attempted to deny responsibility for future medical services stemming from her compensable injury.

The request for reconsideration is granted. Our previous order is withdrawn for reconsideration.

After reconsideration, we conclude that claimant is

entitled to an attorney's fee. 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). However, an attorney's fee is warranted for clarifying inartful language which attempts to deny further treatment for a compensable injury. Karola Smith, 38 Van Natta 76, 78 (1986).

Since the employer's denial attempted to deny responsibility "for any further treatment" under claimant's low back injury claim, we find that she is entitled to an attorney's fee. Consequently, claimant is awarded an attorney's fee of $500 for services at the hearing and on Board review.

Accordingly, except as modified herein, the Board adheres to and republishes its former order, effective this date.

IT IS SO ORDERED.

STEVEN M. DEMARCO, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-01456
August 5, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Leahy's order which: (1) upheld the SAIF Corporation's denial of his aggravation claim for a low back condition; (2) declined to assess penalties and accompanying attorney fees for an allegedly unreasonable delay in paying interim compensation and for an allegedly unreasonable failure to timely deny the aforementioned claim; and (3) declined to assess penalties and accompanying attorney fees for an allegedly unreasonable delay in providing vocational assistance. On review, claimant contends that his condition has worsened and that penalties and accompanying attorney fees are justified.

Claimant was 26 years of age at the time of hearing. In July 1982, while working as a drywall apprentice, he sustained a compensable low back injury. His condition was diagnosed as a unilateral transitional lumbosacral vertebra, moderate degenerative joint disease, and acute/chronic lumbosacral strain. Following conservative treatment, the claim was eventually closed in April 1984. Claimant was awarded 15 percent unscheduled permanent disability. This award was eventually increased to 25 percent by virtue of a Referee's order issued November 30, 1984.

The hearing which preceded the aforementioned Referee's order occurred on November 1, 1984. On November 27, 1984 Dr. Crandell, claimant's treating chiropractor, reported that claimant's recent work activities had caused a "severe aggravation" which had prevented him from working since November 14, 1984. Attributing claimant's condition to his original injury, Dr. Crandell suggested that claimant was eligible for temporary disability. Dr. Crandell reiterated these conclusions in December 1984 and again in February 1985. In addition, in January 1985 claimant's attorney requested that SAIF reopen the claim.

SAIF did not begin paying interim compensation until March 1985, at which time claimant received benefits retroactive to the date he was taken off work. SAIF continued to pay interim compensation until it issued its denial on April 19, 1985.

The Referee was persuaded that claimant was not medically stationary as of November 30, 1984, which the Referee found was the time of the last award of compensation. Since claimant was taken off work before the prior Referee's order, the Referee concluded that claimant should have requested reconsideration rather than accept the increase in his permanent disability award. Therefore, the Referee held that claimant had waived his right to raise the aggravation and interim compensation issues. In addition, since claimant was not entitled to further compensation, the Referee concluded that there were no "amounts then due" upon which to base a penalty for a late denial.

We disagree with the Referee's analysis. Claimant was entitled to have the aforementioned issues considered.

Initially, we disagree with the date chosen by the Referee as the last award or arrangement of compensation for purposes of determining whether claimant's condition had worsened. We previously discussed this issue in Joseph R. Klinsky, 35 Van Natta 332, 333-34,)aff'd mem., 66 Or App 193 (1983). In Klinsky, we concluded that as between the date of the Referee's order and the date of final opportunity to present evidence, the latter date was the appropriate date from which to establish a worsening. We reasoned that to measure worsening from any point other than the date of the prior extent hearing was illogical because: (1) Board and judicial review of a claimant's extent of disability is based on the record made at the hearing, subject to very rare exceptions; and (2) Board and judicial decisions about extent of disability are decisions about disability as of the time of the hearing. See also Gettman v. SAIF, 289 Or 609 (1980). Accordingly, we find that the date of the last award or arrangement of compensation was November 1, 1984, the date of claimant's hearing on the extent of permanent disability issue.

Furthermore, we disagree with the Referee's conclusion that claimant waived his right to assert his claim for aggravation. A physician's report indicating a need for further medical services or additional compensation is a claim for aggravation. ORS 656.273(3). Smith v. SAIF, 78 Or App 443 (1986). Dr. Crandell's November 27, 1984 report clearly meets this statutory definition. Therefore, upon receipt of this claim, SAIF had 60 days within which to accept or deny it. ORS 656.273(6); ORS 656.262(6). The statutory scheme does not reasonably permit a hearing on the compensability of the aggravation claim prior to a timely acceptance or denial or prior to the expiration of the time in which the carrier may investigate and consider the claim without risking penalties. Syphers v. K. W. Logging, 51 Or App 769, 771, rev den 291 Or 151 (1981). Until one of those events occurs, it is not known whether a hearing will be necessary or, if so, what issue or issues will be presented at the hearing. Syphers, supra.

The aggravation claim was filed well within 60 days of the date of claimant's prior hearing. Moreover, at the time of claimant's prior hearing, SAIF had neither accepted nor denied the claim. Consequently, we conclude that the issue was not ripe for consideration at the time of the prior Referee's order and that claimant was entitled to raise the aggravation issue. However, we find that he has failed to establish that the aggravation claim is compensable.

To establish his claim for aggravation, claimant must prove: (1) that his condition has worsened since the last award of compensation; and (2) a relationship between that worsening and his compensable injury. Hoke v. Libby, McNeil & Libby, 73 Or App 44, 46 (1985). Following our de novo review of the medical and lay evidence, we find no persuasive objective evidence that claimant's compensable back condition has worsened. Furthermore, we are not persuaded that claimant is more disabled as a result of his pain since his last award of compensation. See Johnson v. Argonaut Insurance Co., 79 Or App 230 (1986); Smith v. SAIF, supra.

Although we find the aggravation claim noncompensable, we conclude that claimant was entitled to penalties and accompanying attorney fees for SAIF's unreasonable conduct in processing the claim. Therefore, we reverse that portion of the Referee's order which declined to address these issues.

The first installment of compensation shall be paid no later than the 14th day after the subject employer has notice or knowledge of medically verified inability to work resulting from the worsened condition. ORS 656.273(6); Jones v. Emanuel Hospital, 280 Or 147 (1977). When the underlying claim is determined to be noncompensable, interim compensation is due from the date of effective notice of the claim until the date of denial. Sally K. Cutts, 36 Van Natta 641 (1984); Donald Wischnofske, 34 Van Natta 664 (1982).

As previously discussed, we find that Dr. Crandell's November 27, 1984 medical report constituted an aggravation claim. Moreover, the report provided medical verification of claimant's inability to work as a result of his compensable injury. Consequently, SAIF had 14 days to begin paying interim compensation and 60 days to accept or deny the claim. ORS 656.273(6); ORS 656.262(4), (6). SAIF did not begin paying interim compensation until March 1985 and did not issue its denial until April 19, 1985.

Under these circumstances, we conclude that SAIF's failures to timely pay interim compensation and to timely issue its denial were unreasonable. Therefore, we find it appropriate to assess a penalty and accompanying attorney fees for SAIF's unreasonable conduct. ORS 656.262(10). This penalty is based on the "amounts then due" at the time of the objectionable conduct. See Harold A. Lester, 37 Van Natta 745, 747 (1985). Accordingly, SAIF is assessed a penalty equal to 25 percent of the interim compensation it paid in March 1985.

Finally, we lack jurisdiction to address the issue of SAIF's alleged unreasonable delay in referring claimant for vocational assistance. We are not authorized to grant the relief requested by claimant. Joel I. Harris, 36 Van Natta 829, 840 (1984), aff'd mem, 72 Or App 591 (1985). The authority to impose penalties for such conduct lies with the Director of the Workers' Compensation Department. ORS 656.745; OAR 436-61-981 (Renumbered 436-120-270, May 1, 1985); James T. Harvey, 37 Van Natta 960, 962-63 (1985).

ORDER

The Referee's order dated October 8, 1985 is affirmed in

part and reversed in part. The SAIF Corporation is assessed a penalty for its unreasonable delays in paying interim compensation and in issuing its denial. The penalty shall be equal to 25 percent of the interim compensation it retroactively paid in March 1985. Claimant's attorney shall receive $750 for services rendered at the hearing level and on Board review concerning this issue, to be paid by the SAIF Corporation. The remainder of the Referee's order is affirmed.

RUBIN L. HINKLE, Claimant
Welch, et al., Claimant's Attorneys
Mitchell, et al., Defense Attorneys

WCB 85-03555
August 5, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

The insurer requests review of Referee Mulder's order that set aside its denial of claimant's medical services claim for bilateral ulnar nerve transposition surgery. The issue is medical services.

Claimant compensably strained his low back, bruised his buttocks and sustained abrasions to his hands in August 1978 when he fell approximately 15 feet from a ladder. Another insurer, not a party to this proceeding, was on the risk at that time. The abrasions on claimant's hands were the result of his grasping a chain which was hanging from the ceiling in an attempt to break his fall. Claimant was treated conservatively by Dr. Weibe, a general practitioner. A month after the accident, Dr. Weibe declared claimant medically stationary and rated him as without permanent impairment. The claim was closed by Determination Order in October 1978 with no award of permanent partial disability.

Claimant returned to his former job and for the next several years complained intermittently of back pain. On July 1, 1979, the employer transferred its workers' compensation coverage to the insurer. In early to mid-1982 one of claimant's fellow employes was fired, and claimant was required to do much more bending and lifting than he had previously. Soon thereafter, claimant experienced a major flareup of low back pain. He filed aggravation and occupational disease claims against the prior insurer and an occupational disease claim against the insurer. Both insurers denied responsibility. In an Opinion and Order in March 1984, Referee Galton concluded that claimant's work activity after July 1, 1979 had independently contributed to claimant's low back condition and assigned responsibility for that condition to the insurer.

Claimant began treating with Dr. Misko, a neurologist, in July 1981. In August 1982, Dr. Misko referred claimant to the Portland Back and Rehabilitation Center for treatment of his continuing low back complaints. The report issued by the Center on August 24, 1982 (just over four years after the injury) contains the first mention of ulnar nerve symptoms in the medical record. It gives no explanation of the source or cause of these complaints.

The first mention of ulnar nerve symptoms by Dr. Misko was in a chart note dated June 20, 1984. Initially, Dr. Misko could see no connection between claimant's employment and his ulnar nerve problems. Late in 1984, however, claimant told Dr. Misko that he had experienced ulnar nerve symptoms ever since

his 1978 industrial accident. Dr. Misko then stated that assuming the correctness of this history, claimant's ulnar nerve problems were related to the August 1978 accident. In January 1985, Dr. Misko requested authorization to perform surgery to transpose claimant's left ulnar nerve.

Claimant was examined by two other neurologists, Drs. Anderson and Raaf, in mid-1985. Both questioned the diagnosis of ulnar nerve compression although neither provided a definite alternative diagnosis. Both expressed considerable doubt that the problem was related to claimant's 1978 industrial accident. The insurer subsequently denied authorization for surgery.

Claimant testified that he first noticed problems with his hands nearly a year after his 1978 industrial accident in June or July 1979 as he was driving to Reno, Nevada. Other than a cut finger, claimant denied any further injuries to his hands or arms after August 1978. He testified that when his coworker was fired in 1982, he had to use his hands and arms to a much greater extent than previously. He noticed at that time that his grip was weaker than it had been before his 1978 accident and that he tended to drop things. He also testified, however, that his symptoms remained basically the same from the time that he first noticed them until the time of the hearing in November 1985.

The Referee ordered the insurer to pay for claimant's surgery, stating that "[t]he weight of the medical evidence, especially that of Dr. Misko, the treating doctor, is that the need for surgery is related to claimant's work at [the employer] and that it is reasonable and necessary." We disagree with the Referee's analysis. Even accepting Dr. Misko's opinion as correct, claimant's need for surgery was related to his 1978 industrial injury while the prior insurer was on the risk. Claimant denied any further injuries to his hands or arms after August 1978 other than a cut finger. To hold the insurer responsible for the medical services related to his ulnar nerve condition, therefore, claimant would have to establish that his work activity while the insurer was on the risk pathologically worsened his condition. Wheeler v. Boise Cascade, 298 Or 452, 456-58 (1985); Weller v. Union Carbide, 288 Or 27, 35-36 (1979). The record does not support such a conclusion. In addition, Referee Galton's March 1984 Opinion and Order did not shift responsibility for claimant's ulnar nerve condition to Argonaut. That order dealt only with claimant's clearly separable low back condition. Cf. Susan K. Bell, 38 Van Natta 252, 255 (1986).

ORDER

The Referee's order dated December 23, 1985 is reversed. The insurer's denial is reinstated.

BONNIE L. ANDERSON, Claimant
Coons & Cole, Claimant's Attorneys
Edward C. Olson, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-10480 & 85-00789
August 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

North Pacific Insurance Company requests review of those portions of Referee Foster's order which: (1) set aside its denial of claimant's occupational disease claim for a right arm condition; (2) upheld the SAIF Corporation's denial of claimant's aggravation claim for the aforementioned condition; and (3) assessed North Pacific a penalty and accompanying attorney fees for an unreasonable failure to pay interim compensation and for a late denial. On review, the issues are compensability, responsibility, and penalties.

The Board affirms the order of the Referee.

Although no briefs were filed on Board review, claimant is entitled to a reasonable attorney fee. ORS 656.382(2); OAR 438-47-010(2); 438-47-055; Betty J. McMullen, 38 Van Natta 117 (1986); Arthur D. Roppe, 38 Van Natta 118 (1986). Therefore, considering the nature of the practice in general and the circumstances of this case in particular, we conclude that $200 is a reasonable award for claimant's attorney's services on Board review.

ORDER

The Referee's order dated January 13, 1986 is affirmed. Claimant's attorney is awarded $200 for services on Board review, to be paid by North Pacific Insurance Company.

GREGORY C. BARLOW, Claimant
Merrill Schneider, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 85-05757
August 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Quillinan's order that: (1) held that claimant had failed to prove the compensability of his aggravation claim; (2) denied claimant's request for penalties and attorney fees for the insurer's alleged improper claim closure; and (3) denied claimant's request that his claim be remanded to the Evaluation Division of the Workers' Compensation Department for the issuance of a Determination Order. The issues are aggravation, penalties and attorney fees, and whether claimant's claim should be remanded to the Evaluation Division.

We agree with the Referee that claimant has failed to prove a compensable aggravation. We further agree that although the insurer's failure to timely process claimant's aggravation claim was unreasonable, there are no amounts due upon which to calculate a penalty. We also hold, however, that claimant has a right to a determination of his claim by the Evaluation Division, and we remand to the insurer for the submission of the claim for an evaluation pursuant to law.

Claimant sustained a compensable injury to his arms,

right leg and lower back on April 9, 1982. His doctor found him stationary without permanent disability on April 28, 1982. The insurer subsequently issued a Notice of Closure on the claim. The insurer paid temporary total disability through April 28, 1982.

On December 28, 1982, (within one year following the Notice of Closure), claimant requested a determination of his claim from the Evaluation Division. Instead of processing the claim, however, the Division directed claimant to contact the employer's insurer and it sent a copy of claimant's request to the insurer. Having fulfilled its obligations by properly processing claimant's claim, the insurer took no further action. Claimant requested a hearing.

The Referee found that despite the Evaluation Division's apparent improper failure to process the claim:

> " . . . there is nothing in this file which indicates that a redetermination by the Evaluation Division would give any other result than that already determined by the insurer's notice of closure. Claimant was deemed to have no permanent partial disability as of April 28, 1982 and there is no other medical evidence indicating otherwise as of the date of closure. . . Therefore, there is nothing for the Evaluation Division to determine, and it would be an exercise in futility to remand this issue to the Evaluation Division for a Determination Order."

The Referee's finding is beside the point. As claimant correctly points out on review, he has an absolute right to a determination of his claim so long as he requests it within the time set forth in ORS 656.268(3). That statute reads, in pertinent part: "Within one year of the date of the notice of [an insurer-initiated nondisabling claim closure], a determination order shall be issued on the claim at the request of the claimant . . ." (emphasis added). The Evaluation Division has no discretion under the aforementioned circumstances. Whether or not the record appears to suggest that an award of permanent disability will be forthcoming is irrelevant, both in this forum and in the Hearings Division. Claimant has a right to a determination and a remand for that purpose is appropriate.

ORDER

The Referee's order dated November 25, 1985 is reversed in part and affirmed in part. That portion of the order that denied claimant's request for remand to the Evaluation Division is reversed and the claim is hereby remanded to the insurer for processing according to law. The remainder of the Referee's order is affirmed. Claimant's attorney's fee for prevailing on the determination issue shall consist of 25 percent of the permanent partial disability and temporary total disability, if any, awarded by the Determination Order once an evaluation occurs. The attorney fee shall not exceed $3,000.

DIANA BEAR, Claimant
Jolles, et al., Claimant's Attorneys
Beers, et al., Defense Attorneys

WCB 85-07573
August 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Mongrain's order that: (1) found that the claim was not prematurely closed by the Determination Order dated May 16, 1985; and (2) awarded claimant 18 degrees for 12 percent scheduled permanent partial disability for loss of use or function of each leg in lieu of a Determination Order award of 7.5 degrees for 5 percent scheduled disability for each leg. The issue are premature closure and extent of scheduled permanent disability.

We affirm the Referee's order with the following comment. The May 16, 1985 Determination Order found claimant medically stationary as of January 4, 1985. It did not award temporary total disability for the period between April 25, 1984 and June 21, 1984, a period in which claimant's physician had removed her from work as a result of her compensable bilateral knee condition. The Referee's order agrees that claimant was stationary as of January 4, 1985, but it does not address claimant's entitlement to temporary disability compensation for the April-to-June 1984 period in which claimant was off work. We wish to clarify that claimant is entitled to temporary total disability compensation for that period.

ORDER

The Referee's order dated January 13, 1986 is affirmed. Claimant's attorney is allowed a fee equal to 25 percent of the increased compensation, if any, awarded by virtue of this order. The fee shall not exceed $3,000.

CECIL DAVIS, Claimant
David Force, Claimant's Attorney
Brian Pocock, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-00779 & 85-09053
August 6, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

F.A. Bartlett Tree Company, a self-insured employer, requests review of those portions of Referee Baker's order that: 1) set aside its denial of claimant's low back injury claim; 2) affirmed the SAIF Corporation's denial of claimant's aggravation claim for the low back; and 3) awarded claimant's attorney a fee of $1,600 for services rendered prior to the hearing. The issues are responsibility and attorney fees.

We affirm that portion of the Referee's order that found the self-insured employer responsible for claimant's low back condition. We modify the Referee's order of attorney fees.

While we agree with the Referee that claimant's attorney is entitled to a fee for services rendered prior to the hearing, we find that the fee should have been allowed out of claimant's compensation. We also find it to be excessive. Claimant's attorney's involvement consisted primarily of arranging for the issuance of an order pursuant to ORS 656.307. We recently held that in a responsibility case, under these circumstances, the

attorney's fee is to be paid out of, rather than in addition to, claimant's compensation. Mark Queener, 38 Van Natta 882 (August 1, 1986). In addition, considering the efforts expended, results obtained and other relevant factors, Barbara A. Wheeler, 37 Van Natta 122 (1985), we find that claimant's attorney is adequately compensated by a fee of $800 for services rendered before the hearing. No fee shall be awarded on Board review, however, because the compensability of claimant's claim was never an issue in this forum. Claimant's attorney's "active and meaningful participation" was not required on Board review in order for claimant to receive the compensation to which he is entitled. See OAR 438-47-090(1); Stanley C. Phipps, 38 Van Natta 13, 16 (1986).

ORDER

The Referee's order dated November 19, 1985 is modified in part and affirmed in part. That portion of the order that awarded claimant's attorney a fee of $1,600 is modified. In lieu of the Referee's attorney fee award, claimant's attorney is awarded a fee equal to 25% of claimant's compensation, not to exceed $800 for services rendered prior to the hearing. The remainder of the order is affirmed.

PATRICIA G. DEBATES, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-04388
August 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee Baker's order that: 1) awarded claimant an attorney fee of $3,000 for prevailing at hearing on the compensability of a claim for mental stress; 2) assessed a penalty and an associated attorney fee for SAIF's alleged unreasonable denial of the claim; and 3) assessed a penalty and an associated attorney fee for SAIF's alleged unreasonable delay in the payment of interim compensation. The issues are whether claimant's attorney's fee was excessive and whether SAIF's denial and its payment of interim compensation were unreasonable.

We affirm those portions of the Referee's order pertaining to claimant's attorney's fee and penalties and fees for SAIF's unreasonable denial. On the penalty issue involving payment of interim compensation, we reverse.

On February 6, 1985 claimant complained of chest pains to her employer. She did not allege at the time that her pain was related to her employment. Claimant testified, in fact, that at the time she spoke with her employer, she felt that her pain was due to off-the-job causes. It was not until she consulted a psychiatrist that she was made aware of a possible work connection. She signed and presented a claim form to the employer on March 4, 1985, asserting entitlement to compensation for a stress-induced mental disorder. The claim form listed February 6, 1985 as the date the condition arose. SAIF commenced interim compensation payments on March 20, 1985.

ORS 656.262(4) provides that the first installment of compensation shall be paid no later than the 14th day after the employer has notice or knowledge of the claim. The Referee held that the employer had knowledge of claimant's claim on February 6, the day claimant complained of chest pains. He held, therefore,

that SAIF's commencement of interim compensation on March 20, 1985 was unreasonably late. We disagree. While it is true that the employer was made aware of claimant's pain on February 6, 1985, there is no persuasive evidence that the employer had knowledge of a "claim" on that date.

In Sally K. Cutts, 36 Van Natta 641 (1984), we held that interim compensation is due only from the date the employer has notice or knowledge of a potentially compensable claim. In other words, the duty to begin interim compensation begins only when the employer is apprised that claimant is asserting a connection between his or her employment and the need for treatment or time off from work. See also Stone v. SAIF, 57 Or App 808 (1982); Donald Wischnofske, 34 Van Natta 664 (1982). In the present case, claimant's employer was not made aware of a potentially compensable claim until claimant filed her claim form on March 4, 1985. The insurer then had 14 days in which to begin interim compensation. Payments were begun on the 16th day. Technically, therefore, payments were delayed. As we held in Susan Wageman, 37 Van Natta 973 (1985), however, a two-day delay in the payment of interim compensation is not unreasonable.

ORDER

The Referee's order dated November 8, 1985 is reversed in part and affirmed in part. That portion of the order that assessed penalties and attorney fees for SAIF's alleged unreasonable delay in the payment of interim compensation is reversed. The remainder of the order is affirmed. Claimant's attorney is awarded $350 for services on Board review, to be paid by the SAIF Corporation.

FRANCISCA A. DURAN, Claimant
Michael B. Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-03909 & 85-06267
August 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Daron's order which: (1) upheld the SAIF Corporation's denial of her occupational disease claim for mental stress; (2) declined to admit the testimony of a clinical social worker; and (3) declined to admit a medical report offered by claimant at the hearing. On review, claimant contends that the Referee's evidentiary rulings should be reversed and that her claim is compensable.

We affirm the order of the Referee with the following comments.

In conducting our de novo review, we have applied the compensability test enunciated in McGarrah v. SAIF, 296 Or 145 (1983), which asks the following questions: (1) what were the "real" events and conditions of claimant's employment; (2) were those real events and conditions capable of producing stress when viewed objectively; (3) did claimant suffer a mental disorder; and (4) were the real stressful events and conditions the major contributing cause of claimant's mental disorder. Although the stress-causing work conditions must be "objective" in the sense that the conditions must be real rather than imaginary, their medical effect on the worker is measured by the worker's actual reaction rather than by an objective standard. Petersen v. SAIF, 78 Or App 167, 170, rev. den., 301 Or 193 (1986). Claimant's reaction to

the stressful conditions, discriminatory actions, and harassment she allegedly experienced from her work environment need not be reasonable. Petersen, supra, 78 Or App at 171 (1986). However, her "honest perception" of work-related stress as the cause of her need to seek medical treatment does not meet the McGarrah test when the "honest perception" is unfounded. Leary v. Pacific Nothwest Bell, 67 Or App 767, 769 (1984); Barbara A. Lusey, 37 Van Natta 265 (1985), aff'd mem., 77 Or App 567 (1986).

Following our review of the medical and lay evidence, we find that claimant experienced real events and conditions while performing her work activities which, when viewed objectively, were capable of producing stress. However, the evidence preponderates that most of her stress was the result of her unfounded perception that she was being subjected to harassment. Furthermore, we are not persuaded that the stress of her work conditions, when compared to her off-the-job stressors, was the major contributing cause of her mental disorder, if indeed she suffers from such a condition. Accordingly, we agree with the Referee that claimant has failed to prove a compensable occupational disease claim.

While conducting our review, we have considered the testimony of the clinical social worker. The fact that the social worker was neither a licensed medical practitioner nor clinical psychologist is a factor to consider when determining the degree of weight to apply to his opinion. However, the lack of a professional license does not bar the social worker from expressing that opinion. Although we have considered the social worker's opinion, we do not find it as persuasive as that rendered by Dr. Kleen, an examining psychiatrist.

Finally, we agree with the Referee's decision to exclude the medical report from Dr. Sheff. The report was not furnished to the Referee in a timely manner. Moreover, claimant failed to establish good cause for her failure to file the report within the prescribed time limit. Finally, we are persuaded that SAIF would have been surprised and prejudiced by the admission of the report. Under these circumstances, the Referee was well within his discretion in refusing to admit the aforementioned report. See OAR 438-07-005(4).

ORDER

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

ROCKY J. GAMBREL, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-11183
August 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Mulder's order which: (1) increased his award of temporary total disability; and (2) declined to direct the SAIF Corporation to refer him for vocational training in recreational diving. On review, claimant contends that: (1) his claim was prematurely closed; (2) SAIF's conduct in submitting the claim for closure was unreasonable; and (3) he is entitled to receive the aforementioned vocational training.

The Board affirms the order of the Referee with the following comments concerning the premature closure issue.

Following our de novo review of the record, we agree with the Referee's finding concerning the date claimant's condition became medically stationary. 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).

ORDER

The Referee's order dated January 3, 1986 is affirmed.

RANDY L. JACKSON, Claimant
Quintin B. Estell, Claimant's Attorney
Schwenn, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney
Michael G. Bostwick, Defense Attorney

WCB 85-00010, 85-03014 & 85-03015
August 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

United Pacific Insurance Company requests review of that portion of Referee Lipton's order which: (1) set aside its denial of claimant's medical services claim for a back condition; and (2) upheld the SAIF Corporation's denials, on behalf of two subsequent employers, of claimant's "new injury" claims. Claimant cross-requests review of those portions of the Referee's order which: (1) found that he had not filed a valid aggravation claim within the statutory five-year period; and (2) awarded an attorney fee of $1,100. On review, the issues are responsiblity for the medical services claim, the validity of the aggravation claim, and the reasonableness of the attorney fee award.

We affirm the order of the Referee with the following comments.

After the last award or arrangement of compensation, an injured worker is entitled to additional compensation, including medical services, for worsened conditions resulting from the original injury. ORS 656.273(1). The claim for aggravation must be filed within five years after the first determination made under ORS 656.268(4). ORS 656.273(4)(a). A physician's report indicating a need for further medical services or additional compensation is a claim for aggravation. ORS 656.273(3).

Not every medical report is an aggravation claim. Wetzel v. Goodwin Brothers, 50 Or App 101 (1981). However, almost anything more than a statement that the claimant's condition is not changing can be an aggravation claim. Haret v. SAIF, 72 Or App 668, 671-72, rev den 299 Or 313 (1985). The physician's report need not adduce facts sufficient to show an aggravation; it need only show the need for further treatment of the compensable injury. la k . SAIF, Or App 139, 143 (1981).

Following our de novo review of the record, we find that Dr. Deshaw's July 1983 and December 1983 medical reports constituted a claim for aggravation. Neither report specifically requested claim reopening or suggested that claimant refrain from working. However, the reports discussed the need for further treatment of claimant's back condition as a result of his compensable injury. Since the reports were filed within the prescribed five-year period, claimant has perfected an aggravation claim.

Although claimant perfected an aggravation claim, we are not persuaded that his compensable condition has worsened since his last award or arrangement of compensation. The objective evidence does not support his contention that his condition has further deteriorated. Such medical evidence is not necessarily required to establish an aggravation claim. Garbutt v. SAIF, 297 Or 148, 151-52 (1984). However, claimant's subjective complaints may or may not sustain his burden of proof. Garbutt v. SAIF, supra. Furthermore, it is sufficient to show that the symptomatology of claimant's condition has worsened so that he is more disabled than at the time of the last arrangement of compensation. Consolidated Freightways v. Foushee, 78 Or App 509, 512 (1986). "More disabled" means less able to work. Smith v. SAIF, 78 Or App 443, 448 (1986). After conducting our review of the medical and lay evidence, we conclude that claimant has failed to establish that he is more disabled than he was at the time of his last award or arrangement of compensation. Accordingly, he has not proven his aggravation claim.

SAIF did not issue a denial to the aforementioned claim for aggravation as required by ORS 656.273(6) and 656.262(6). However, neither report verified claimant's inability to work as a result of his compensable injury. In fact, the reports suggest that claimant was continuing to work. Thus, claimant was not entitled to interim compensation. See ORS 656.273(6); Bono v. SAIF, 298 Or 405, 410 (1984). Furthermore, there is no contention that the medical bills attributable to Dr. Deshaw's services were left unpaid. Finally, the aggravation claim has been found to be noncompensable. Under these circumstances, there were no "amounts then due" upon which to base a penalty for SAIF's failure to issue a timely denial. ORS 656.262(10); Weyerhaeuser Co. v. Bergstrom, 77 Or App 425, 428 (1986). Moreover, since SAIF did not unreasonably resist the payment of compensation, there is no basis for an attorney fee award. ORS 656.262(10); 656.382; Miller v. SAIF, 78 Or App 158, 162 (1986).

As a final matter, we agree with the Referee that United Pacific remains responsible for claimant's current medical treatment of his back condition and that the attorney fee award for setting aside United Pacific's denial was reasonable.

ORDER

The Referee's order dated October 11, 1985 is affirmed.

CHRISTOS KEKRIDES, Claimant
Pozzi, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 84-08670
August 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Podnar's order which awarded 144 degrees for 45 percent unscheduled permanent partial disability in addition to prior awards by Determination Orders dated June 23, 1983 and August 2, 1984 which awarded a total of 96 degrees for 30 percent unscheduled permanent partial disability for injury to claimant's low back. The self-insured employer cross-requests review of the award for permanent disability and requests either that the Referee's award be affirmed or that claimant's compensation be reduced to the level awarded by the Determination Orders. The issue on review is extent of permanent disability including permanent total disability.

Claimant was employed as a janitor. He injured his low back when he slipped and fell on January 12, 1982. Computerized tomography established that claimant has preexisting degenerative osteoarthritis and a lumbar myelogram revealed no surgically correctable condition. The various medical examiners and treating doctors agree that claimant should not return to heavy physical labor but that claimant could perform work in the medium to light category. Most of the doctors have reported that claimant's physical impairment is very difficult to assess because of claimant's inconsistencies and exaggerations. The most severe limit suggested by any doctor was a 20-pound lifting limit. Claimant refused a suggestion of psychological assistance as unnecessary according to the report of one of the vocational counselors.

Claimant submitted to work tolerance screening at two hospitals, and their tests revealed an inconsistent effort. Claimant focused his attention on returning to work but eventually accepted early retirement. A potential job placement was available for claimant in the shoe manufacturing industry in which he had extensive experience, but he refused two times to meet the potential employer. Claimant's work search activities consisted of meeting his counselor and unverified conversations with social acquaintances whom claimant refused to identify.

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). 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).

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.

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 is based 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).

After review of the record we are persuaded that claimant is not permanently and totally disabled due to medical factors, although he is significantly impaired. There is no persuasive evidence that the functional overlay which has been reported is a permanent impairment or permanent cause of loss of earning capacity. Considering the social and vocational factors with the medical assessments, we are not persuaded that claimant is permanently and totally disabled under the odd-lot doctrine. Neither are we persuaded that the social and vocational factors combined make it futile for claimant to attempt to seek work. We also find that claimant has not conducted a reasonable search for work and therefore is not entitled to compensation for permanent total disability.

Although claimant is not permanently and totally disabled, he has suffered a significant loss of earning capacity related to his industrial injury. Claimant was 53 years old at the time of the hearing. He has roughly the equivalent of an elementary school education obtained in Greece and Russia. He has been in the United States more than twenty years. He has some difficulty conversing in English and cannot read or write in any language. His vocational history includes several years experience making ladies shoes in his own shop in Europe in addition to laboring jobs in the United States. Vocational counselors identified claimant's language shortcomings as significant barriers to reemployment, but occupations were suggested which claimant could perform even with the language problems. Considering all of the relevant factors, the Board finds that claimant would be appropriately compensated for the permanent loss of earning capacity due to his industrial injury by an award of 160 degrees for 50 percent unscheduled permanent partial disability in lieu of all prior awards.

ORDER

The Referee's order dated November 13, 1985 is modified. Claimant is awarded 160 degrees for 50 percent unscheduled permanent partial disability for injury to his low back in lieu of all prior awards of permanent disability compensation for this injury.

GARY A. LAFARGE, Claimant
Gracey & Davidson, Claimant's Attorneys
Rolf Olson, Defense Attorney
Roberts, et al., Defense Attorney

WCB 84-03677
August 6, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of that portion of Referee Quillinan's Order on Reconsideration that construed a guaranty contract filed by the insurer in connection with one business operated by the employer to extend coverage to another business operated by the employer. The issue is coverage of the guaranty contract.

The employer in this case was a partnership consisting of a husband and wife, Pete and Bernadine Ward. In early 1983, the Wards obtained workers' compensation coverage through EBI Companies (EBI) for a grocery store which they owned and operated. The policy provided coverage from March 23, 1983 to April 1, 1984. EBI filed a guaranty contract with the Workers' Compensation Department in accordance with ORS 656.419(2). The only business location listed on the guaranty contract was the grocery store.

On August 18, 1983 claimant was injured in the course of his employment on a farm also owned and operated by the Wards. Claimant filed a claim with EBI which was subsequently denied. One basis for the deial was that EBI had not provided coverage for the Wards' farm. EBI is the only potential insurer of the Wards' farm. The Compliance Division of the Workers' Compensation Department has not issued an order of noncompliance in this case. See ORS 656.052(2).

The Referee concluded that the guaranty contract filed by EBI in connection with the Wards' grocery store also provided coverage for the Wards' farm and set aside EBI's denial. EBI contends that the Referee misconstrued the terms of the guaranty contract, the policy issued by EBI and applicable law. EBI asks us to declare the Ward partnership a noncomplying employer with regard to its farm operation.

In Susan K. Bell, 38 Van Natta 152, 254 (1986), we recently reiterated that questions of compliance are not "matters concerning a claim" within the meaning of ORS 656.708(3) and thus are not within the jurisdiction of the Hearings Division unless otherwise provided by law. The issue raised by EBI is whether the Ward partnership was a complying employer with regard to its farm operation at the time of claimant's injury. This is an issue of compliance and is not within the jurisdiction of the Hearings Division under ORS 656.708(3). Jurisdiction is not otherwise provided by law under the circumstances of this case. See ORS 656.052(2); 656.740. We conclude, therefore, that the Referee was without jurisdiction to decide the issue presented by EBI and that we are unable now to entertain the issue for the same reason.

The parties cite Joseph C. Sells, 13 Van Natta 170 (1975), as evidence that the Hearings Division has jurisdiction to decide the issue raised in this case. That case was decided before the creation of the Workers' Compensation Department, see 1977 OR Laws Ch. 804 §25, and hence before the respective jurisdiction of the Board and the Department had been defined by statute or case law. We conclude that Sells is not controlling in this case.

Because the Compliance Division has not issued an order of noncompliance and EBI is the only potential insurer of the Ward's farm operation, we must assume that the Wards had coverage for their farm operation through EBI at the time of claimant's injury. See ORS 656.052(2). We affirm the Referee's finding of coverage on this basis.

ORDER

The Referee's Order on Reconsideration dated September 4, 1985 is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by EBI Companies.

JERRY LARSON, Claimant
Flaxel, et al, Claimant's Attorneys
Cummins, et al., Defense Attorneys

WCB 85-08359
August 6, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Brown's order that upheld the self-insured employer's denial of the occupational disease claim for a left shoulder condition. The employer has cross-requested review in its brief in the event the left shoulder is found compensable to consider whether the claim was timely filed or precluded by a claim for benefits from a non-industrial insurer. The issues on review are compensability and timeliness.

Claimant was working as a green veneer puller in a mill when he began having pain in his left shoulder associated with his work activity in the autumn of 1984. His duties at the mill were reduced to light activity and a company nurse suggested that claimant see his doctor. Claimant continued to work for about seven months while he obtained medical treatment from his family doctor without time loss. When the condition worsened in May 1985 to the point where surgery was necessary, claimant filed a claim for workers' compensation benefits. Resection of the clavicle and coracoacromial ligament was performed on June 20, 1985 to repair the shoulder joint.

The opinion of the surgeon was sought whether claimant's shoulder condition was related to his work. His letter opinion states in full:

> "According to my history on [claimant] and that which you provided in your letter, I have no other reason to believe that the patient had a causation of his injury other than his work relationship. Therefore, it appears, at this time, to be a major contributing cause."

The Referee found no reason to question claimant as a

witness and the testimony given at hearing was consistent with the history reported by the treating surgeon. The Referee found that the doctor's opinion provided support for a work-related worsening of only the symptoms of claimant's condition. We disagree with the Referee's finding because we are persuaded by the context of the answer that the doctor's letter expresses the opinion that work was probably the sole cause of the "injury" which produced symptoms in claimant's left shoulder. McClendon v. Nabisco Brands, 77 Or App 412 (1986). Based on that finding we are persuaded that claimant has proven that his shoulder condition was caused by work activity and that the denial should be set aside.

The employer requests that the Board then consider whether the claim is precluded by claimant's application for benefits from a non-industrial health insurance carrier and the delay in filing the claim for benefits under the Workers' Compensation Law until June 3, 1985. The employer was aware of claimant's left shoulder condition from the time it became symptomatic and modified claimant's job to allow him to continue to work while obtaining medical services. Claimant credibly testified that he did not claim workers' compensation benefits, although he suspected the condition was caused by work, because no doctor told him the condition was work related until May 1985. He was able to continue working full-time until the condition required surgery and his work unit was participating in a company sponsored safety incentive program which would have been jeopardized by any claim. We find the claim was timely filed. Summit v. Weyerhaeuser Co., 25 Or App 851, rev. den. (1976).

ORDER

The Referee's order dated January 7, 1986 is reversed. The self-insured employer's denial of July 3, 1985 is set aside and the claim is remanded for acceptance and payment of compensation. Claimant's attorney is awarded $1,250 for services at hearing and $500 for services on Board review to be paid by the self-insured employer.

DELBERT E. NORTON, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-04904
August 6, 1986
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of Referee Podnar's order that set aside a Determination Order that terminated claimant's previous award for permanent total disability, thereby reinstating the award. The issue is whether SAIF has established a sufficient change of circumstances to warrant termination of the award for permanent total disability. There are also issues relating to whether certain evidence should have been considered.

The background facts are not disputed. Claimant sustained a low back injury on March 25, 1968 while employed as a green chain offbearer. He has not worked since this injury. He had previous injuries to his low back, neck and left leg, none of which have required more than conservative treatment. On May 7, 1971 claimant was awarded permanent total disability by a determination of the Closing and Evaluation Division. At the time claimant was awarded compensation for permanent total disability, the medical data established that, although claimant suffered some

pain based upon degenerative changes in his back, the majority of claimant's extensive pain behavior was completely out of proportion with objective medical findings.

In 1979 ORS 656.206 was amended to require periodic reexamination of permanent total disability awards. 1977 Or Laws, Ch. 430, § 1. The claim was reexamined for the first time during March and April of 1981 and on April 1, 1981 the Evaluation Division issued its determination continuing claimant's award for permanent total disability. In September 1981 SAIF requested further reexamination and on November 9, 1981 the Evaluation Division issued another determination continuing the permanent total disability award.

In April 1982 SAIF referred claimant to the Northwest Pain Center for evaluation. SAIF furnished the pain center reports to the Evaluation Division along with another request for further reexamination of claimant's award. On May 19, 1982 the Evaluation Division issued its determination terminating claimant's permanent total disability award as of that date and making no award for permanent partial disability. This proceeding followed.

We look first at the evidentiary questions raised by both parties. Hearings in this forum are not conducted according to formal or rigid rules of evidence. ORS 656.283(6). Substantial justice usually is served by including all material and relevant evidence in the record. The evidence in dispute in this case consists of several reels of surveillance films taken by SAIF's investigator and six medical and vocational reports offered by claimant. SAIF also objected at the hearing to the Referee's denial of its request for an independent orthopedic examination.

All of the disputed evidence was generated prior to the hearing. The Referee considered only those surveillance films made between November 1, 1981 and May 19, 1982. He reasoned that because claimant's permanent total disability award was affirmed in November 1981 that was the last arrangement of compensation and, therefore, the baseline for determining claimant's current status. He apparently further reasoned that since the determination in issue was made May 19, 1982 SAIF's case should have been "solidified" as of that date. The Referee, however, admitted the six reports offered by claimant even though they were generated after May 19, 1982, reasoning that claimant had no reason to seek further evidence of his disability until that time.

Disability is rated as it exists at the time of the hearing. Gettman v. SAIF, 289 Or 609, 614 (1980). All parties are afforded the opportunity to develop additional evidence to attempt to establish facts and circumstances arising during the interval between the event in question (i.e. claim closure, denial of benefits) and the date of the hearing, most particularly the party bearing the burden of persuasion. In this case, that burden lies with SAIF. We conclude that the Referee correctly considered the reports offered by claimant, but erred in not considering all of the surveillance films offered by SAIF. All of the disputed evidence is included in the record compiled by the Referee and we have considered it. ORS 656.295(3), (5); see Edward Morgan, 34 Van Natta 1590 (1982).

Regarding the independent medical examination requested by SAIF, we note that the record contains no clear statement of

the Referee's ruling or the reason(s) he ruled as he did. We conclude that because of the length of the proceedings there would have been sufficient time to perform the examination. However, there has been no assertion that the failure to obtain the examination resulted in an incompletely or insufficiently developed record. See ORS 656.295(5). Although SAIF may have been denied the opportunity to develop additional, possibly relevant, evidence, we are unable on this record to say that the Referee erred. Cf. Victoria K. Napier, 34 Van Natta 1042 (1982). Given our conclusion on the merits, if there was error, it was harmless.

When an injured worker has received an award for permanent total disability, the award may be revoked or diminished only upon a showing by a preponderance of the evidence by the employer or insurer that the worker is capable of performing work at a gainful and suitable occupation. Harris v. SAIF, 290 Or 683, 696-97 (1982). The employer or insurer may do so by proving "that a claimant is presently capable of performing some work and that . . . capacity may be indicated either by proof of improvement in the claimant's medical condition or by circumstantial evidence of his employability." Kytola v. Boise Cascade Corp., 78 Or App 108, 111 (1986) (emphasis in original).

On this entire record, we conclude that SAIF has not proved that claimant's medical condition has improved since he was awarded compensation for permanent total disability in 1971. SAIF's position, therefore, may only prevail if it has proved by a preponderance of the evidence that claimant is employable.

Contrary to claimant's statements reported in the medical and vocational documents that he always must use a cane or crutches to walk, that he had not driven a motor vehicle in over 13 years and that he can perform almost no physical activity due to disabling pain, are the surveillance films. These films show claimant walking without a cane, including walking up the steps to his home, driving his car, mowing his lawn, including an embankment, with a push mower, pushing and pulling a tent trailer, working in his yard and lifting and carrying boxes of building materials estimated to weigh at least 50 pounds each. Claimant was shown engaging in all of these activites without apparent discomfort.

We conclude that the surveillance films represent persuasive circumstantial evidence that claimant is capable of performing some gainful and suitable employment that would include walking, standing, stooping, bending, pushing, pulling, climbing stairs and lifting and carrying objects weighing up to 50 pounds. This circumstantial evidence was not controverted at the hearing. Claimant did not appear or testify at the hearing. Any inference that the activites claimant is shown engaging in may have caused periods of increased disability or required long periods of rest is simply not supported by any evidence in the record. We conclude that SAIF has proved by a preponderance of the evidence that claimant is currently capable of performing some work at a gainful and suitable occupation. He is, therefore, not permanently and totally disabled.

Although claimant is not permanently and totally disabled, we conclude that he has sustained a loss of earning

capacity due to his industrial injury. ORS 656.214(5). We find that claimant's physical impairment due to disabling pain is in the mild category. Claimant was 64 years old as of the hearing and had only a third grade education. Claimant has a borderline intelligence and is illiterate, indicating that formal vocational training would be difficult. At the time of his injury he was employed in heavy labor pulling on the green chain. He has done only heavy labor during his working life. Although his physical impairment due to his injury is not great, the other relevant social and vocational factors combine to increase the effect of that impairment on his earning capacity. We conclude that claimant should be compensated by an award of 160 degrees for 50 percent unscheduled permanent partial disability for injury to his low back.

ORDER

The Referee's order dated June 18, 1984 is reversed. The Determination Order dated May 19, 1982 is modified to grant claimant an award of 160 degrees for 50 percent unscheduled permanent partial disability for injury to the low back. Claimant's attorney is allowed a reasonable attorney fee of 25 percent of the compensation awarded by this order not to exceed $3,000, payable out of claimant's compensation.

Board Member Lewis, Dissenting:

The majority has concluded that claimant's medical condition is unchanged from when he was awarded permanent total disability in 1971. I agree. I also agree that SAIF "may only prevail if it has proved by a preponderance of the evidence that claimant is employable." I respectfully dissent because I do not believe that SAIF has sustained its burden of proof.

The majority relies on Kytola v. Boise Cascade Corp., 78 Or App 108 (1986), and concludes that SAIF has provided circumstantial evidence that claimant is employable. This evidence is in the form of several surveillance films that show claimant performing activities that are inconsistent with statements made by claimant to some of his doctors and vocational assistance providers. These films admittedly show that claimant can engage, for brief periods of time, in activities such as walking without a cane, carrying boxes, driving a car and mowing a lawn. They do not, however, support "a specific finding that the claimant presently is able to perform a gainful and suitable occupation." Gettman v. SAIF, 289 Or 609, 614 (1980).

In the Kytola case, there was direct evidence that the claimant earned money from chopping, unloading and stacking firewood, that the claimant worked at a job as a tree faller, that the claimant worked at a job as firewatcher and that the claimant worked at a job as a welder. There is no such evidence in this case. The evidence in this case shows only that claimant can do things like wash his car and walk without a cane. Claimant's work experience has been in heavy labor. He can no longer do that kind of work. While claimant can engage in some activites, there is no persuasive evidence, circumstantial or otherwise, that those activites show an ability to perform work at a gainful and suitable occupation.

In this case, claimant does not have to show that he is unable to work. On the contrary, SAIF has to show that he is able to work at a gainful and suitable occupation. SAIF has not done so. I would affirm the Referee's decision. I, therefore, respectfully dissent.

ERNIE E. NAZARIO, Claimant
Pozzi, et al., Claimant's Attorneys
Bottini, et al., Defense Attorneys

Own Motion 86-0334M
August 7, 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 August 31, 1979 industrial injury. Claimant's aggravation rights have expired. The insurer opposes reopening of this claim.

Claimant recently received an Opinion and Order authored by Referee St. Martin which found the insurer responsible for his 1985 medical expenses pursuant to ORS 656.245. The insurer has not appealed the Referee's order. Claimant seeks compensation for temporary total disability from May 20, 1985 through June 21, 1985 and an award for permanent partial disability.

The insurer contends claimant cannot now raise these issues as he failed to raise them before the Referee at hearing. The cited case, Million vs. SAIF, 45 Or App 1097 (1980), is not considered on point here as this case involves issues which can be resolved solely under ORS 656.278. As claimant does not have a right to hearing on his entitlement to temporary total and permanent partial disability compensation, he cannot lose his right to Board consideration of those issues by failing to raise them at the hearing. The insurer also points out that the temporary total disability compensation requested by claimant was paid. The insurer requests that no award for permanent disability be granted as there are no reports establishing claimant's entitlement to such compensation.

After thorough review of the evidence, the Board reaches the following conclusions. The temporary total disability compensation claimant seeks has already been paid on an interim basis pending issuance of the July 19, 1985 denial. Pursuant to our own motion authority, we will not again order this compensation paid. We also find no indication that claimant's condition has permanently worsened since the last arrangement of compensation. Claimant's request for claim reopening for temporary total disability and permanent partial disability compensation is hereby denied.

IT IS SO ORDERED.

MACK E. STONE, Claimant
Bischoff & Strooband, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-11642
August 7, 1986
Order Denying Request to Dismiss

The Board has received claimant's request to dismiss SAIF Corporation's request for Board review on the grounds SAIF has not filed its appellant's brief.

There is no requirement in the workers' compensation law or the Board rules which indicates that a brief must be filed by

appellant or respondent before the Board will review the case. ORS 656.295(5). While briefs are a significant aid in the review process, the failure to file a brief is not grounds for dismissal of a request for review. The request for dismissal hereby is denied.

IT IS SO ORDERED.

RICHARD M. DESKINS, Claimant
Evohl F. Malagon, Claimant's Attorney
Rankin, et al., Defense Attorneys

WCB 85-00088
August 8, 1986
Second Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Reconsideration dated July 9, 1986 which declined to award him a reasonable attorney fee for responding to the self-insured employer's cross-request for review. Claimant filed a Petition for Judicial Review on July 23, 1986. On August 5, 1986 he requested our reconsideration.

We are authorized to withdraw an order for reconsideration after the filing of a petition for judicial review with the Court of Appeals. Fischer v. SAIF, 76 Or App 656 (1985); Dan W. Hedrick, 38 Van Natta 208 (1986). However, we choose not to exercise our authority in this instance.

Accordingly, we adhere to our Order on Reconsideration. The issuance of this Second Order on Reconsideration does not "stay" our Order on Reconsideration nor extend the time for seeking review. International Paper Company v. Wright, 80 Or App 444 (July 23, 1986). As the court stated in Fischer:

> "Because the Board neither expressly withdrew [its Order on Reconsideration] nor modified it, we hold that ORS 183.482(6) did not require claimant to file an amended petition for review after the [Second Order on Reconsideration]. We have jurisdiction of the case." 76 Or App at 660.

IT IS SO ORDERED.

VICTORIA L. VANCE-NELSON, Claimant
Pozzi, et al., Claimant's Attorneys
Schwabe, et al., Defense Attorneys

WCB 85-05286 & 84-13005
August 8, 1986
Order on Reconsideration

Claimant has requested reconsideration of our Order of Dismissal dated July 25, 1986. The request is granted and our previous order is withdrawn for reconsideration.

The basis of claimant's motion is that while review was not requested within 30 days of the Referee's order, it was requested within 30 days of the Referee's letter decision that refused to amend her order. The Referee's order was mailed June 19, 1986 and the letter refusing to amend the order was mailed July 11, 1986. The Referee did not abate or otherwise stay the June 19 order, nor did she purport to "republish" the order. See International Paper Co. v. Wright, 80 Or App 444 (July 23, 1986). To be timely, a request for review of that order was due no later than July 19, 1986. The request was not mailed until July 23, 1986.

In our previous order, we erroneously stated that the Referee's order was mailed June 17, 1986 and that timely review had to be requested by July 17, 1986. The order is modified to correct the dates to read June 19, 1986 and July 19, 1986, respectively. As modified, we adhere to and republish the Order of Dismissal, effective this date.

IT IS SO ORDERED.

PEGGY L. BONES, Claimant
Vick & Associates, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-12741
August 12, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of those portions of Referee T. Lavere Johnson's order which: (1) awarded 80 degrees for 25 percent unscheduled permanent partial disability in addition to the Determination Order dated February 28, 1985 which awarded no compensation for unscheduled permanent partial disability for injury to claimant's low back; and (2) awarded additional temporary total disability compensation computed on tip income. The issues on review are extent of unscheduled permanent partial disability and computation of the wage base on which temporary disability compensation is figured.

On the issue of the computation of the wage base the Board affirms the order of the Referee.

Claimant was working as a dining room employe when she suffered a non-disabling injury to her back on July 5, 1983 when she slipped and fell. Then she suffered a strain due to carrying tubs of dishes and began to lose time from work. She obtained medical treatment, vocational assistance and returned to work in a temporarily modified position. The employer began a systematic program of reducing the lifting requirements of all dining room employes to prevent other injuries. Claimant ultimately stopped working outside her home because her expenses of working exceeded her income.

Claimant was released to return to regular work without restrictions related to her industrial injury by her treating medical doctor, Dr. Scheinberg. He agreed with the assessment by Orthopaedic Consultants that claimant had no impairment related to the industrial injury.

Claimant has been discovered to have an anomalous sacralization of her fifth lumbar vertebra. Dr. Cassell opines that claimant's industrial injury has affected this preexisting hereditary condition. His assessment of claimant's impairment was that she would suffer recurrences of back pain related to activity. We are not persuaded by Dr. Cassell's brief and unexplained opinion that claimant has suffered a permanent impairment caused in material part by the industrial injury.

The Referee found that claimant was credible and relied on her testimony to assess the loss of earning capacity which she has suffered. We do not disagree with the Referee's general finding that claimant is physically limited and that some portions of the labor market are unavailable to her. However, we are not

persuaded by the evidence that claimant's limitations are related to her industrial injury as opposed to the discovery of her preexisting unrelated unaffected spinal abnormality. Brian L. Hayes, 37 Van Natta 1447 (1985); Liz A. Destael, 37 Van Natta 453 (1985); see also, Barrett v. D & H Drywall, 300 or 325 (1985), affirmed on reconsideration 300 Or 553 (1986).

Claimant's retirement from the workforce was not precipitated by the industrial injury but by claimant's desire to remain at home with her three children. Her former employer desired to have her return to full-time employment. Her treating doctor felt claimant could perform her regular job as it had been modified for all employes. On the whole, we are persuaded that claimant has suffered no loss of earning capacity as a result of her industrial injury and therefore the Referee's order is reversed on the issue of the extent of claimant's unscheduled permanent partial disability.

ORDER

The Referee's order dated January 29, 1986 is reversed in part and affirmed in part. That portion of the order which awarded 80 degrees for 25 percent unscheduled permanent partial disability is reversed and the Determination Order dated February 28, 1985 is reinstated. The remainder of the order is affirmed. Claimant's attorney is awarded $350 for prevailing on the issue of computation of claimant's temporary disability compensation for services on Board review, to be paid by the SAIF Corporation.

SHARON L. BRACKE, Claimant
Parker, et al., Claimant's Attorneys
Cheney & Kelley, Defense Attorneys

WCB 83-02130
August 12, 1986
Order on Remand (Remanding)

This matter is before the Board on remand from the Court of Appeals. Bracke v. Baza'r, 78 Or App 128 (1986). The court concluded that claimant is not medically stationary and is entitled to compensation for temporary total disability, less time worked, from May 14, 1977 until claim closure. The court, on the basis of the record before it, could not determine whether claimant worked and if so what wages were earned after January 1981. The court has ordered that further evidence be taken on those matters. The taking of further evidence is the function of the Hearings Division. ORS 656.295(3), (5). It is, therefore, necessary to remand this case to the Hearings Division for further proceedings.

In order to prevent further protraction of this case, we note that we have already decided that this claimant's compensation for temporary disability is to be on the basis of a five-day work week. Sharon L. Bracke, 38 Van Natta 809 (WCB Case No. 84-06207, July 1, 1986). Because the court has decided that claimant is entitled to compensation for temporary total disability from May 14, 1977 until claim closure, less time worked, the scope of this remand order is limited to calculation of the amount of such compensation. We take official notice of our own files and records to note further that as of April 4, 1985 compensation for temporary disability had been paid in the amount of $53,162.72. The insurer is entitled to credit this amount and any additional temporary disability compensation paid to date against the compensation ultimately determined to be due.

By a separate order, the court remanded claimant's petition for attorney fees before the Board and the Court of Appeals for our determination. Because of the reasonable likelihood that further participation by claimant's attorney will occur on remand, we also remand this issue. The Referee shall allow a reasonable attorney fee, payable out of and not in addition to, claimant's compensation, taking into account claimant's attorney's services before the Board, the Court of Appeals and, if any, the Referee on remand. ORS 656.388(1).

The court reinstated the Referee's award of a penalty and attorney fee. The penalty is 25 percent of the sums due and unpaid as of December 5, 1983 and the insurer-paid attorney fee is $1,500. Bracke v. Baza'r, supra, 78 Or App at 136. Because clearly mandated by the court, these sums are not subject to further modification on remand and our order is final as to this issue. See Price v. SAIF, 296 Or 311, 314 (1984).

ORDER

The Referee's order dated December 9, 1983 is affirmed in part and vacated in part. That portion of the Referee's order that awarded a penalty of 25 percent of temporary disability compensation due and unpaid between June 1, 1977 and December 5, 1983 together with an insurer paid attorney fee of $1,500 is reinstated and affirmed. The remainder of the Referee's order is vacated. This matter is remanded to the Hearings Division for further proceedings consistent with this order.

WILFRED A. BREWSTER, Claimant
Roger D. Wallingford, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-11206
August 12, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of that portion of Referee Pferdner's order which upheld the SAIF Corporation's partial denial of claimant's epididymitis. SAIF cross-requests review in its brief of that portion of the Referee's order which awarded interim compensation to be paid at the temporary total disability rate from April 10 to June 7, 1985. The issues on review are compensability, the rate of interim compensation, and the date on which interim compensation should begin.

On the issue of compensability of claimant's epididymitis condition, the Board affirms the order of the Referee.

On the issues related to interim compensation, the Board modifies the order of the Referee. Claimant worked part-time at a job other than his regular employer until May 1, 1985. Claimant was disabled from performing his regular job as of the date of the claim for the epididymitis condition. The order is modified to award ínterim compensation beginning April 10, 1985. This compensation shall be paid at a temporary partial disability compensation rate, considering claimant's earnings, until May 1, 1985. After May 1, 1985, until the date of the denial, the interim compensation is to be paid at the temporary total disability rate.

ORDER

The Referee's order dated October 16, 1985 is affirmed in part and modified in part. Claimant is awarded temporary partial disability compensation, reduced by earnings, from April 10, 1985 through May 1, 1985. The remainder of the order is affirmed, including the award of temporary total disability compensation from May 2, 1985 through June 7, 1985.

CHARLES C. CANTRELL, Claimant
Gatti, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Liberty Northwest, Defense Attorney

WCB 84-11827 & 84-13683
August 12, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of that portion of Referee T. Lavere Johnson's order that set aside its denial of claimant's aggravation claim for the neck and upper back and affirmed Liberty Northwest Insurance Company's new injury claim for the same condition. Liberty Northwest cross-requests review of those portions of the order that found claimant entitled to interim compensation for the period of September 20, 1984 through December 20, 1984 and assessed a 15 percent penalty and an associated attorney fee for its failure to pay interim compensation up to the time of its denial. The issues are responsibility, interim compensation, penalties and attorney fees.

We affirm that portion of the Referee's order finding SAIF responsible for claimant's condition. We modify the Referee's award of interim compensation.

The Referee found claimant entitled to interim compensation beginning September 20, 1984, the day he left his employment after an alleged new injury while at Liberty Northwest's insured's. Although claimant did in fact leave work on September 20, the record reveals that he did not inform the employer of the reason for his leaving on that date. He did not file a claim until October 16, 1984. The Referee found that the employer had knowledge of claimant's claim on the date he left work. He consequently ordered Liberty Northwest to pay claimant interim compensation beginning September 20 and continuing up to the date Liberty Northwest ultimately denied the claim on December 20, 1984.

We disagree with the Referee's analysis. ORS 656.262(4) provides that the first instalment of compensation shall be paid no later than the 14th day after the employer has notice or knowledge of the claim. We have recently held that the employer acquires "notice or knowledge" of the claim only when it is made aware that claimant is asserting a compensable connection between his disability or need for medical treatment and an injury related to his employment. Patricia Debates, 38 Van Natta 894 (August 6, 1986). In other words, the employer must be made aware that claimant is asserting a potentially compensable claim.

The present employer was made aware of claimant's asserted entitlement to compensation for the first time on October 16, 1984, the date a claim form was filed. Until that time, the employer knew that claimant had left work, but it did not know why. October 16, 1984, rather than September 20, was therefore the date triggering the employer's duty to commence

interim compensation. The Referee's award of interim compensation shall be adjusted. We agree with the Referee, however, that it was unreasonable for the insurer to delay payment of any interim compensation until the date of its denial. A penalty and attorney fee, therefore, are warranted.

ORDER

The Referee's order dated July 11, 1985 is modified in part and affirmed in part. That portion of the order that awarded claimant interim compensation for the period of September 20, 1984 through December 20, 1984 is modified. In lieu of the Referee's award, claimant is awarded interim compensation from October 16, 1984 through December 20, 1984. In lieu of the Referee's award of penalties and attorney fees, Liberty Northwest Insurance Corporation is assessed a penalty of 15 percent of the interim compensation awarded by this order. For prevailing on the penalty issue on Board review, claimant's attorney is awarded a fee of $500 for services at hearing and $200 for services on Board review. Both fees shall be paid by Liberty Northwest Insurance Corporation. The remainder of the Referee's order is affirmed.

WAYNE D. COOPER, Claimant
Pater O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-11959
August 12, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee Peterson's orders which: (1) awarded claimant additional temporary total disability; and (2) assessed a penalty and accompanying attorney fees for an unreasonable unilateral termination of claimant's temporary disability benefits following the termination of an authorized training program. On review, SAIF contends that claimant was not entitled to temporary total disability following the termination of the training program because his aggravation rights had expired prior to the commencement of the program.

We affirm that portion of the Referee's order which awarded temporary total disability with the following comments.

In February 1978 claimant sustained a compensable low back injury. His claim was initially closed by a September 1978 Determination Order. To date, he has been awarded 15 percent unscheduled permanent disability. Claimant's aggravation rights pursuant to ORS 656.273 expired in September 1983.

In approximately December 1983 claimant requested relief pursuant to the Board's own motion jurisdiction under ORS 656.278. SAIF opposed the request for own motion relief, contending that claimant's condition was no different than it had been at the time of the last arrangement of compensation. Claimant also filed a hearing request, asserting that he was in need of further medical treatment and entitled to additional permanent disability. In February 1984, the Board issued an Own Motion Order which deferred any decision concerning claimant's request until the resolution of the pending hearing request.

In June 1985 claimant began a one-year authorized training program. SAIF notified claimant that he would be paid temporary disability compensation provided he followed the

training program. Once he had completed the program and been found to be medically stationary, claimant was advised that a full determination of his benefits would be made by the Workers' Compensation Department.

Claimant entered the program and began receiving temporary total disability. However, his low back pain became increasingly debilitating, eventually forcing him to stop participating in his training program.

In August 1985 SAIF notified claimant that his vocational training and assistance was ending because his current medical status prevented him from actively participating in his training program. SAIF also terminated claimant's temporary disability compensation. The claim was neither closed by means of a Notice of Closure nor by a Determination Order. However, SAIF issued a Determination Request, seeking an Own Motion Determination.

Thereafter, claimant filed an amended hearing request. In addition to the issues raised in his December 1983 hearing request, claimant contended that he was entitled to penalties and attorney fees as a result of SAIF's unilateral termination of compensation.

The Referee found that claimant's temporary disability compensation should not have been terminated. In so doing, the Referee relied on OAR 436-61-410 and 436-61-420 (Renumbered OAR 436-120-230 and 436-120-240, May 1, 1985), which provide as follows:

> "TEMPORARY DISABILITY COMPENSATION DURING TRAINING. (1) Workers injured after December 31, 1973, are entitled to temporary disability compensation while enrolled and actively engaged in training under these rules. During periods of interruption in the training, temporary disability compensation shall not be due unless the worker is not medically stationary."
>
> "TEMPORARY DISABILITY COMPENSATION DURING TRAINING - PAYMENT BY INSURER; AMOUNT. (1) The insurer shall pay temporary disability compensation to a worker who is entitled to the compensation under OAR 61-410(1). The payments shall continue until termination of compensation is authorized as provided in ORS 656.268."

Inasmuch as claimant's condition was not medically stationary when he left the vocational program and since his compensation had not been terminated pursuant to ORS 656.268, the Referee concluded that claimant was entitled to a continuation of temporary disability compensation. The Referee reasoned that claimant's entitlement to temporary disability compensation while enrolled in the training program was not a discretionary award of benefits issued pursuant to the Board's "own motion" authority. Furthermore, the Referee found no authority to suggest that claimants whose aggravation rights had expired should be treated any differently under these rules. Finally, finding SAIF's

conduct to have been unreasonable, the Referee assessed a penalty and accompanying attorney fees.

Two days prior to the Referee's order, the Board issued an "Own Motion Determination." The Board's order stated that claimant's authorized training program had been terminated and that his claim had been submitted for closure. The order granted claimant temporary total disability, but apparently only during the time he participated in the training program.

Upon receipt of the Board's Own Motion Order, SAIF requested reconsideration of the Referee's order. A hearing was reconvened, at which time the Referee concluded that the Board's order did not preclude claimant from receiving compensation to which he was entitled as a matter of law. Consequently, the Referee reaffirmed his prior order.

We concur with the Referee's analysis. Claimant was entitled to temporary disability compensation while he was enrolled in his vocational training program. His right to these benefits was not contingent on his aggravation rights. The applicable statute and administrative rules make no distinction between injured workers with aggravation rights and those without aggravation rights.

Had claimant's compensable injury occurred prior to December 31, 1973, his entitlement to temporary disability benefits during an authorized training program would be a proper subject for the Board's "own motion" relief as per ORS 656.278. See Mary Fraley, 35 Van Natta 1107 (1983); Victor Vanderschuere, 35 Van Natta 1074 (1983). However, inasmuch as claimant was injured after December 31, 1973 he was entitled to temporary disability benefits while enrolled and actively engaged in an authorized training program. OAR 436-61-410 (Renumbered OAR 436-120-230, May 1, 1985). These benefits should have continued unless: (1) the program was interrupted and claimant was medically stationary; See OAR 436-61-420(1) (Renumbered OAR 436-120-230(1), May 1, 1985); or (2) his claim was closed pursuant to ORS 656.268. See OAR 436-61-420 (Renumbered OAR 436-120-240, May 1, 1985). Neither of these events occurred. Therefore, SAIF should have continued to pay temporary disability compensation and its failure to do so was unreasonable.

The Board's Own Motion Determination has no effect on the Referee's order. Claimant's right to temporary disability under these circumstances is specifically governed by OAR 436-61-410 and 436-61-420 (Renumbered OAR 436-120-230 and 436-120-240, May 1, 1985). Furthermore, an application to the Board to exercise its "own motion" authority under ORS 656.278 will not be acted on while other administrative or judicial remedy is available. OAR 438-12-005(1)(a). Thus, the issuance of the Board's Own Motion Determination was contrary to the aforementioned rules. Moreover, the Board's order directly contravened the Board's previous order which had stayed further proceedings in anticipation of the pending hearing.

In the interests of correcting any possible ambiguity, the Board's Own Motion Determination has been vacated and the matter dismissed. See Wayne D. Cooper, Own Motion Order (Decided this date). In addition, claimant has been directed to repetition

the Board to exercise its authority pursuant to ORS 656.278 should he desire further "own motion" relief. Cooper, supra.

As a final matter, we modify the Referee's award of an insurer-paid attorney fee for increasing claimant's temporary disability award. Although this issue was not raised by the parties on review, we may make such disposition of the case as we determine to be appropriate. Miller v. SAIF, 78 Or App 158, 161 (1986); Russell v. A & D Terminals, 50 Or App 27, 31 (1981).

The Referee awarded claimant an insurer-paid attorney fee in the amount of $1,100 for "successfully contesting SAIF's de facto denial of TTD compensation." This award was contrary to OAR 438-47-030 which provides that under these circumstances, claimant is entitled to an attorney fee equal to 25 percent of the additional temporary disability awarded, not to exceed $750. Accordingly, claimant's attorney fee for increasing his temporary disability benefits shall be payable out of his compensation, rather than in addition to it. Claimant's attorney fee award concerning the penalty issue shall remain unchanged.

ORDER

The Referee's orders dated November 20, 1985 and December 12, 1985 are affirmed in part and modified in part. That portion which awarded claimant an insurer-paid attorney fee of $1,100 is modified. Claimant is awarded an attorney fee equal to 25 percent of the additional temporary disability awarded by the Referee, not to exceed $750. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded $750 for services on Board review, to be paid by the SAIF Corporation.

WAYNE D. COOPER, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-0387M
August 12, 1986
Own Motion Order of Dismissal

On November 18, 1985 the Board issued an Own Motion Determination. By virtue of that order, claimant was awarded temporary disability from June 10, 1985 through July 31, 1985, the period that he was apparently actively involved in an authorized training program.

This date we have concluded that the aforementioned order should not have been issued. See Wayne D. Cooper, 38 Van Natta 913 (Decided this date). Accordingly, the Board's Own Motion Determination dated November 18, 1985 is vacated and this matter is dismissed. Should claimant desire further "own motion" relief, he is directed to repetition the Board to exercise its authority pursuant to ORS 656.278.

IT IS SO ORDERED.

LEON E. COWART, Claimant
Galton, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-02070
August 12, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee Peterson's order that found claimant's late filing of a request for hearing to be excused because of the alleged impropriety of SAIF's partial denial and, in the alternative, because claimant

had established good cause for failure to timely file. Because the Referee declared SAIF's denial invalid, he set aside a February 28, 1984 Determination Order that did not consider the extent of claimant's disability arising from a low back condition, which the Referee held had been accepted by SAIF by operation of law. Further, the Referee held that because the Determination Order was invalid, claimant's claim remained open, thereby rendering moot claimant's claim for an aggravation since the Determination Order.

The issues are whether claimant's request for hearing was timely filed, either for good cause or due to the alleged invalidity of SAIF's partial denial, and if not, whether claimant has established a compensable aggravation since the Determination Order. If claimant has failed to prove a compensable aggravation, he contests the adequacy of unscheduled permanent partial disability awarded by the February 28, 1984 Determination Order.

Claimant has a long history of compensable injuries. The subject of the present controversy is a July 1981 injury to claimant's neck and shoulders. He incurred a cerebral concussion and a neck strain when the truck he was driving collided with an automobile. The long-term treatment that followed included treatment for claimant's low back, as well as for his neck and shoulders. The claim was initially closed in January 1983 with an award of 20 percent unscheduled disability. This award was in addition to prior awards. The claim was reopened in July 1983 by way of stipulation and then closed once again by Determination Order on February 28, 1984.

In the interim, SAIF issued a partial denial of claimant's low back condition based on the treating doctor's opinion that claimant's low back problems did not result from the July 1981 compensable neck and shoulder injury. The denial issued December 13, 1984, and while affirming SAIF's responsibility for claimant's neck and upper back conditions, the denial specifically denied further treatment and disability connected with the low back condition. The February 28, 1984 Determination Order made no determination concerning the denied low back condition. SAIF's denial was sent to claimant, but not to his attorney. Claimant did nothing on the denial on the assumption that his attorney would care for the matter. The attorney did not become aware of the denial until 73 days after it issued. He thereafter promptly filed a request for hearing.

SAIF asserted at hearing that the Referee was without jurisdiction to entertain claimant's hearing request because it was untimely filed. ORS 656.319(1). The Referee disagreed, holding that SAIF's partial denial was invalid as a violation against the rule of Bauman v. SAIF, 295 Or 788 (1983), which holds that once an insurer has accepted a claim it cannot deny it after 60 days has passed, absent a showing of fraud, misrepresentation or other illegal activity. The Referee held that SAIF's silence regarding claimant's low back condition, references to which appeared during the treatment period following the 1981 injury, and SAIF's payment for low back treatment, together constituted a "de facto acceptance" of the low back condition that could not be retroactively denied.

In the alternative, the Referee held the partial denial to be improper under Roller v. Weyerhaeuser Co., 67 Or App 583 (1984), which holds that an insurer may not terminate future

responsibility for an accepted condition before the extent of the claimant's disability has been determined.

Last, the Referee held that even if Bauman and Roller were inapplicable, claimant had shown good cause for failure to timely request a hearing by establishing that SAIF had failed to send a copy of the partial denial to his attorney.

We disagree with the Referee's findings. First, we find Bauman and Roller inapplicable under the present facts. Bauman and Roller prohibit denials of previously accepted conditions. We find that SAIF's silence regarding claimant's post-injury low back complaints, as well as the treatment it provided therefor, did not constitute an "acceptance" of the low back condition. Payment for treatment does not constitute an acceptance of a claim. ORS 656.262(9).

We also disagree that claimant has established good cause for failure to timely request a hearing. We find no statutory or case authority requiring an insurer to send copies of correspondence to persons other than the parties involved. While claimant's attorney acted as his client's representative, he was not a party to claimant's claim. See ORS 656.005(19). The denial sent to claimant contained the required bold type warning that an appeal therefrom required timely filing. Once he received the denial it was ultimately claimant's responsibility to ensure that his request for hearing was timely filed, either by himself or by his representative. We conclude that claimant's request for hearing was untimely filed and that the Referee was without jurisdiction to entertain the appeal from SAIF's partial denial. The partial denial shall be reinstated.

Because the partial denial was proper, the February 1984 Determination Order was also proper and shall be reinstated. We must therefore address whether claimant has sustained a compensable aggravation of his compensable condition or, if not, whether he is entitled to additional unscheduled permanent partial disability. After a review of the record we are not persuaded that claimant has sustained his burden of proving either a compensable aggravation or entitlement to an increased award.

ORDER

The Referee's order is reversed. The SAIF Corporation's denials of December 13, 1983 and October 10, 1984 are reinstated. The Determination Order dated February 28, 1984 is reinstated.

DUANE B. DRIVER, Claimant
Welch, et al., Claimant's Attorneys
Lindsay, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-10533 & 84-10534
August 12, 1986
Order on Reconsideration

On May 13, 1986 we received the SAIF Corporation's motion for reconsideration of our order on review dated May 6, 1986. In that order we reversed that portion of a Referee's order that affirmed SAIF's denial of the compensability of claimant's occupational disease claim. The Referee had also affirmed the denial of an earlier insurer. In order to allow adequate time to consider SAIF's motion, we abated our order effective May 22, 1986 and allowed the remaining parties to respond. We have now received those responses, and we hereby withdraw our prior order for reconsideration.

On reconsideration, we remain persuaded that claimant's occupational disease claim for vocal cord polyps is compensable and that Farmers Insurance Group's denial of claimant's aggravation claim therefor should be affirmed. Further, after considering SAIF's motion, we find that SAIF's denial of claimant's claim should also be affirmed.

Claimant is an evangelist minister whose work involves strenuous use of his vocal cords. He first noticed problems with his voice in late 1980 or early 1981 in California. A left vocal cord polyp was removed in February 1981.

Claimant began working for a church insured by Farmers Insurance Group in August 1981. He continued working there through June 1983 and, although he experienced symptoms, claimant lost no time from work and sought no treatment during that employment.

In our prior order we found that claimant began working for SAIF's insured in June 1983 and that he continued working there up to the time of a second surgery in May 1984. We erred. Claimant worked for several other churches after leaving Farmers' insured's, but he did not commence employment with SAIF's insured until October 30, 1983. He worked for SAIF's insured only through November 13, 1983, or for approximately two weeks. He then left that job and worked for up to 12 other churches before ultimately requiring his second surgery. Claimant testified that the work he performed after leaving SAIF's insured was similar to the work he had done there, and that his condition worsened during his subsequent employments. His treating doctor ultimately opined that "any vocal activity to the extent [claimant] uses his voice could have predictably caused worsening of his condition."

Because we erroneously found in our prior order that claimant remained employed by SAIF's insured up to the time of his May 1984 surgery, we held SAIF, as the last insurer, to be responsible for claimant's worsened vocal cord condition. In its motion for reconsideration, SAIF points out our error and asserts that claimant sought treatment for his condition even before beginning work at SAIF's insured. SAIF argues that in an occupational disease context where time loss is not involved, the need to seek medical treatment is the tolling event for purposes of establishing responsibility. SAIF further argues that if either insurer has the burden of proof, it is Farmers, for it was during Farmers' employment that claimant's symptoms recurred.

Farmers responds that no disability ever occurred during claimant's employment with its insured, and that claimant's work after leaving that employment was of the type that could cause a worsening of his condition. It appears, in fact, that it did, as evidenced by claimant's receipt of medical treatment beginning in late 1983.

On reconsideration, we find that this case is controlled by the principles set forth in SAIF v. Luhrs, 63 Or App 78 (1983), and more recently in Runft v. SAIF, 78 Or App 356 (1986). In Luhrs, the claimant filed an occupational disease claim for carpal tunnel syndrome with SAIF's insured. After leaving his employment with SAIF's insured, the claimant worked for several other employers whose work caused an increase in his symptoms until surgery was ultimately required. None of the subsequent employers was joined by the claimant. SAIF asserted the last injurious

exposure rule as a defense, arguing that because subsequent employments contributed to the claimant's condition, it should no longer be responsible.

The court held that whether the last injurious exposure rule may be asserted as a defense depends on whether the employer asserting it is the last employer where working conditions were such that they could have caused the disease. If so, the rule may not be asserted as a defense. Where, however, the employer is not the last employer where working conditions were potentially injurious, that employer may defensively assert the rule. Whether the defense is successful will depend on the medical evidence regarding the contribution, if any, to claimant's condition by a subsequent employment. Luhrs, 63 Or App at 83. Because SAIF was not the last employer it was allowed to assert the rule as a defense. The medical evidence, however, dictated that SAIF remain responsible for claimant's condition. Id. at 85.

In Runft, supra, claimant filed a claim for asbestosis with SAIF's insured, but did not file a claim against an employer with whom claimant was employed for four years after leaving SAIF's covered employment. The evidence was that the subsequent employment not only could have caused claimant's disease, but was in fact injurious. SAIF asserted the last injurious exposure rule as a defense, citing Luhrs, supra. The court allowed the defense and affirmed the Board's approval of SAIF's denial. Runft, 78 Or App at 360.

In the present case, claimant filed claims with only two of his many employers. The record reveals that he was employed by up to 15 employers between his employment with Farmers and SAIF's insureds, and up to 12 after leaving the SAIF covered employment. The record also strongly suggests that the employments subsequent to that covered by SAIF not only could have contributed, but did contribute to claimant's ultimate need for surgery and time off from work. Under these circumstances, where SAIF's employer was not the last, SAIF is allowed to assert the last injurious exposure rule as a defense. Further, because the medical and lay evidence points to a work-related worsening of claimant's condition subsequent to the SAIF employment, the defense succeeds. SAIF's denial shall be reinstated.

Now, therefore, having granted SAIF's request for reconsideration, we withdraw that portion of our order on review dated May 6, 1986 that set aside the SAIF Corporation's denial of claimant's occupational disease claim and remanded the claim to SAIF for processing. SAIF's denial is reinstated. Except as otherwise modified herein, we adhere to and republish the remainder of our prior order.

IT IS SO ORDERED.

FLORA I. JOHNSTON, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 81-09784
August 12, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of those portions of Referee Pferdner's order that: (1) awarded claimant a 25 percent penalty and $350 attorney fee for the SAIF Corporation's failure to pay temporary disability compensation in accordance

with an earlier order by Referee Foster; (2) awarded another 25 percent penalty and $350 attorney fee for SAIF's failure to pay the same compensation in accordance with the Board's summary affirmance of Referee Foster's order; and (3) awarded another 25 percent penalty and $350 attorney fee for SAIF's failure to pay the same compensation in accordance with a subsequent Determination Order. SAIF's major argument is that the penalties awarded exceed the 25 percent maximum of ORS 656.262(10). Claimant contends that a penalty of 25 percent is statutorily permissible for each of the three orders with which SAIF refused to comply and also contends that the Referee erred in finding that the claim was not prematurely closed. The issues are premature closure, penalties and attorney fees.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated November 29, 1985 is affirmed. Claimant's attorney is awarded $650 for services on Board review, to be paid by the SAIF Corporation.

JOHN N. TUTTLE, Claimant
Coons & Cole, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-07534
August 12, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee T. Lavere Johnson's order which: (1) set aside its de facto denial of claimant's aggravation claim for a low back condition; (2) awarded 20 percent (64 degrees) unscheduled permanent disability for a low back injury, whereas an April 26, 1983 Determination Order had awarded no permanent disability; and (3) admitted two medical reports received by claimant's attorney within seven days of the hearing. On review, the issues are compensability of the aggravation claim, admissability of evidence, and extent of unscheduled permanent disability.

Following our de novo review of the medical and lay evidence, including claimant's and his brother's credible testimony, we are persuaded that claimant's earning capacity has diminished since the last award of compensation as a result of his disabling pain from his original industrial injury. Johnson v. Argonaut Insurance Co., 79 Or App 230 (1986); Smith v. SAIF, 78 Or App 443 (1986); Miller v. SAIF, 78 Or App 158 (1986). Therefore, we affirm that portion of the Referee's order which found that claimant had established a compensable aggravation claim.

Furthermore, we find that the Referee was justified in admitting additional medical reports from claimant's treating physician. The reports were received by claimant's attorney within seven days of the hearing. Under these circumstances, the Referee would generally have no discretion to exclude these documents. OAR 438-07-005(3)(b); Susan F. Vernon, 37 Van Natta 1562 (1985). Moreover, SAIF declined the opportunity to cross-examine the physician.

We modify that portion of the Referee's order which awarded claimant 20 percent unscheduled permanent disability.

Claimant was 32 years of age at the time of hearing. In November 1982, while working as a maintenance worker for a rest home, he sustained a low back "lifting" injury. Dr. Ray, his treating chiropractor, diagnosed lumbosacral strain with sciatic radicular pain. Treatment has been conservative, primarily consisting of chiropractic adjustments, orthopedic support, ultrasound, physical therapy, and corrective exercise.

In April 1983 a Determination Order issued, closing the claim. Claimant received no award of unscheduled permanent disability. Following his compensable injury, claimant returned to his primary occupation of commercial fishing. However, his pain soon increased, eventually requiring Dr. Ray to implement physical restrictions.

Dr. Ray has recommended a 30-pound lifting restriction and has suggested that claimant refrain from repetitive bending and twisting. Although Dr. Ray has opined that claimant has suffered permanent impairment, he has not recently quantified the degree of that impairment. Prior to claimant's aggravation claim, Dr. Ray had rated claimant's permanent impairment at approximately five percent. Dr. Pasquesi, an examining orthopedist, agreed that claimant probably had sustained permanent impairment. Dr. Pasquesi's opinion was also based on claimant's condition before this recent aggravation.

Claimant and his brother described claimant's pain and physical limitations. Although claimant continues to perform the duties of a commercial fisherman, he does so less productively and often with the aid of his brother. These accomodations have reduced claimant's income by approximately one-half, since he previously worked as a one-man crew. Furthermore, his work activities increase his "pretty constant" pain. Claimant describes the pain as an "aching, stabbing" sensation which is located in his lower left back. As a result of his constant pain, claimant has curtailed, if not eliminated, most of his recreational activities. These activities include basketball, tennis, sports fishing, and dancing.

Claimant has a twelfth grade education, with no additional formal training. In addition to his maintenance work and commercial fishing, he has worked as a drywaller and carpenter. He considers the latter two activities beyond his current physical capabilities.

The Referee found claimant and his brother to be credible witnesses. After considering the guidelines contained in OAR 436-30-380 et seq. and claimant's residual impairment and limitations, the Referee awarded 20 percent unscheduled permanent disability.

We agree that claimant is entitled to an award of unscheduled permanent disability. However, we find that the Referee's award should be reduced.

In rating the extent of claimant's permanent disability, we consider his physical impairment, which includes credible testimony concerning 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). Depending on the circumstances, claimant's post-injury earnings may be of great, little, or no importance in determining loss of earning capacity. Jacobs v. Louisiana Pacific, 59 Or App 1 (1982).

After conducting 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 is adequate compensation for claimant's compensable injury.

Finally, we find that this case is of ordinary difficulty with the usual probability of success for claimant. Accordingly, a reasonable attorney fee is awarded for services concerning the aggravation issue.

ORDER

The Referee's order dated January 29, 1986 is affirmed in part and reversed in part. In lieu of the Referee's award of unscheduled permanent disability, claimant is awarded 10 percent (32 degrees) unscheduled permanent disability, which is his total award to date. Claimant's attorney's fee concerning this issue shall be adjusted accordingly. The remainder of the Referee's order is affirmed. Claimant is awarded $500 for services on Board review concerning the aggravation issue, to be paid by the SAIF Corporation and not from compensation.

GEORGE A. ZACHARY, Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-00512
August 12, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Daron's order, as affirmed on reconsideration, that: 1) found claimant's claim to have been properly closed by the Determination Order dated September 11, 1984; 2) affirmed the March 28, 1985 Determination Order that awarded no additional unscheduled permanent partial disability for the low back over the 80 degrees for 25 percent previously awarded; 3) denied claimant's request for an attorney fee related to a denied medical service ordered performed by the Referee; and 4) refused on reconsideration to reopen the hearing record for the admission of CT scan results that became available after the record was closed. The issues are premature closure, extent of unscheduled disability, attorney fees and whether the claim should be remanded for the taking of additional evidence.

We affirm the Referee's order with the following comments on the remand issue. Prior to the hearing, claimant had undergone numerous tests in an effort to establish the pathology of his low back condition. The tests included X-rays, a myelogram and a CT scan performed approximately 10 months before the hearing. All results were essentially negative and claimant was diagnosed as suffering from a chronic lumbar strain. Shortly after the hearing, claimant had a second CT scan that revealed nerve root impingement from a protruding disk. Claimant sought to have the post-hearing evidence admitted, and now seeks remand for its admission, citing Egge v. Nu-Steel, 57 Or App 327 (1982), Ronald J. Gazely, 36 Van Natta 212 (1984), and Edith Grimshaw, 36 Van Natta 63 (1984), as authority.

We find the cases cited by claimant to be distinguishable from the present controversy. In the cited cases, the claimants had long sought diagnoses of their conditions prior to their hearings, and only when CT scans were performed for the first time after the hearings were definitive diagnoses made. In the present case, on the other hand, claimant had numerous tests prior to the hearing, including a CT scan. The results were normal and a definitive diagnosis of lumbar strain was made. The post-hearing CT scan provided a different diagnosis, but there is no persuasive evidence that claimant's post-hearing condition could not be previously diagnosed because an appropriate testing procedure had theretofore not been performed. Cf. Duckett v. SAIF, 79 Or App 749 (1986). The cases cited by claimant are not controlling.

ORDER

The Referee's order dated November 19, 1985, as affirmed on reconsideration on December 17, 1985 is affirmed.

CLIFFORD HOWERTON, Claimant
Ormsbee & Corrigall, Claimant's Attorneys
Cummins, et al., Defense Attorneys

Own Motion 85-0196M
August 13, 1986
Order to Show Cause

Claimant alleges:

(1) A Board's order requiring the insurer to pay or provide claimant compensation was entered.

(2) The insurer has not paid or provided compensation as required by law.

Claimant seeks:

(1) The prompt payment or provision of all compensation due, and

(2) Penalties and attorney fees for unreasonable claims processing.

Administrative Rules, of which the insurer is presumed aware, clearly specify the time within which compensation ordered by the Board shall be paid or provided. It appears the insurer has failed to comply with those rules.

THEREFORE, the insurer is hereby ordered to Show Cause within 15 days from the date of this order why compensation ordered by the Board has not been paid or provided as required by law, why that compensation should not be immediately paid or provided in full, and why additional compensation in the form of a penalty and the payment of an attorney fee to claimant's attorney should not be ordered. Insurer shall Show Cause in writing to the undersigned at Workers' Compensation Board, 480 Church Street SE, Salem, Oregon 97310.

BENJAMIN G. PARKER, Claimant
Heiling & Morrison, Claimant's Attorneys
Rod R. Johnson, Defense Attorney

WCB 85-01799
August 13, 1986
Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Review dated July 17, 1986. He asks the Board to rule on the issue of whether he should have been awarded penalties and attorney fees pursuant to ORS 656.262(10) for the insurer's allegedly unreasonable refusal or delay in paying attorney fees and costs awarded by the Court of Appeals in connection with its decision in Parker v. D.R. Johnson Lumber Co., 70 Or App 683 (1984). He also asks the Board to increase the awards of attorney fees granted in our Order on Review. Claimant's request is allowed and our previous order is withdrawn for reconsideration.

Regarding the first issue, we have grave doubts concerning whether we have jurisdiction to award penalties and attorney fees for nonpayment of attorney fees and costs awarded by the Court of Appeals. Even assuming that we do have jurisdiction and that such attorney fees and costs are "compensation" within the meaning of ORS 656.262(10) (which also is doubtful) no such compensation was due pending the employer's appeal of the Board's Order on Remand and Order on Reconsideration. See ORS 656.313(1), (4). Claimant contends that the employer's appeal was frivolous and interposed for purposes of delay and harassment and thus that the employer's action was unreasonable regardless of the provisions of ORS 656.313. The employer's appeal concerned its right to a further hearing under a newly clarified burden of proof in back up denial cases and the Board's interpretation of the Court of Appeals' previous opinion. These issues were not frivolous and do not allow claimant to sidestep the provisions of ORS 656.313. No compensation, therefore, was "then due" under ORS 656.262(10) and no penalties or attorney fees are warranted.

Regarding the second issue, we conclude that the attorney fees previously awarded were adequate.

After reconsideration, the Board adheres to and republishes its previous order as supplemented herein, effective this date.

IT IS SO ORDERED.

SIDNEY M. BROOKS, Claimant
Richard O. Nesting, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-09356
August 14, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Tuhy's order which: (1) affirmed the Determination Order dated October 24, 1984 which awarded 48 degrees for 15 percent unscheduled permanent partial disability for injury to claimant's low back; and (2) upheld the SAIF Corporation's July 27, 1984 partial denial of carpal tunnel syndrome as not related to claimant's low back injury. Claimant's statement of issues includes: (1) premature closure; (2) compensability of carpal tunnel syndrome as a separate disease claim; (3) improper backup denial of carpal tunnel syndrome; (4) interim compensation on an aggravation claim; (5) improper backup denial of the aggravation

claim; (6) temporary total disability compensation since the date of the Determination Order; (7) penalties and attorney fees for each backup denial and for late payment of interim compensation on both the original and aggravation claims; (8) improper advisory findings by the Referee with regard to claimant's unaccepted disease conditions; and (9) remand. In its brief, SAIF argues for reversal of those portions of the Referee's order which: (1) set aside its June 13, 1985 denial of the aggravation claim related to claimant's accepted low back injury; and (2) awarded penalties and attorney fees for late payment of interim compensation on the original injury claim.

On the issues of premature closure and carpal tunnel syndrome as a related condition to the accepted low back injury, the Board affirms the order of the Referee. In addition, the Board finds that the evidence upon which claimant relies to show that she made a claim for carpal tunnel syndrome constitutes assessments of the extent of disability which claimant suffered from the condition which was neither claimed nor determined to be work-related. SAIF's precautionary partial denial of carpal tunnel syndrome was appropriate to avoid the appearance of having accepted an unrelated condition because claimant's doctors were investigating it at the same time they were treating claimant's accepted low back strain injury. Claimant offered no good cause for remand to the Referee. Therefore the request to remand is denied. Claimant's other requests for relief are denied.

On the issue of aggravation of claimant's accepted low back strain, the Board finds that the opinions of claimant's treating doctors are persuasive that the worsening of claimant's condition is due to the progression of unrelated preexisting congenital and hereditary abnormalities which were not worsened by the minor industrial injury. The industrial insurer is responsible for those aspects of claimant's condition of which the industrial injury is a material contributing factor. See Sharon L. Novak, 38 Van Natta 601 (1986). The Board is persuaded that claimant's accepted low back injury condition has not worsened since the last arrangement of compensation but has continued to be symptomatic without prospect of correction and for which an award for permanent disability was made. Those conditions which have worsened are unrelated to claimant's industrial injury. Therefore, the Referee's order is reversed on the issue of aggravation.

On the issue of penalties and attorney fees for late payment of interim compensation on the original injury claim, the Board finds that SAIF was first notified that claimant was losing time from work due to the industrial injury on December 1, 1983 and that it paid the first installment of temporary disability compensation on December 8, 1983. The law requires payment of temporary disability compensation within fourteen days of notice or knowledge of the claim. ORS 656.262(4). SAIF's payment was made in a timely fashion. Claimant argues that she was entitled to compensation from the date of the injury. However, the original notice of the claim was for a non-disabling injury without time lost from work. When claimant made a claim for disability compensation it was accepted and payment was timely. The Referee's award of penalties and attorney fees for unreasonable delay of payment of interim compensation on the original injury claim is reversed.

ORDER

The Referee's order dated October 16, 1985 is reversed in part and affirmed in part. Those portions of the order which set aside the SAIF Corporation's aggravation denial dated June 13, 1985 and which awarded penalties and attorney fees for unreasonable delay of payment of temporary disability compensation due for the period from November 10, 1983 through December 8, 1983 are reversed. SAIF's denial dated June 13, 1985 is reinstated and approved. The remainder of the order is affirmed.

LEONA I. (WILSON) BROWN, Claimant
Quintin B. Estell, Claimant's Attorney
Cummins, et al., Defense Attorneys

WCB 83-07512
August 14, 1986
Second Order on Reconsideration

The self-insured employer has requested reconsideration of the Board's Order on Reconsideration dated August 5, 1986. The request is granted and our Order on Reconsideration is withdrawn.

Following our reconsideration of this matter, we continue to find that claimant is entitled to an attorney's fee for clarifying a denial which attempted to deny responsibility "for any further treatment" under a compensable claim. See Karola Smith, 38 Van Natta 76, 78 (1986).

Consequently, on reconsideration, the Board adheres to and republishes its former order on reconsideration, effective this date.

IT IS SO ORDERED.

CONNELL R. CAMBRON, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-07620
August 14, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

The SAIF Corporation requests review of Referee Michael Johnson's order which set aside the Callahan Center's consent to the suspension of claimant's compensation. On review, SAIF contends that the suspension should be reinstated. We agree and reverse.

In April 1984 claimant was referred to the Callahan Center for a physical rehabilitation program. At the commencement of the program he was advised that his compensation benefits could be suspended if he failed to participate.

While participating in the Center's rehabilitation program, claimant was found to be noncooperative. Specifically, he was intoxicated on two separate occasions, made physical advances to female clients and staff, and caused some damage to the facility.

Because of this disruptive behavior, the Center issued an administrative discharge and consented to the suspension of claimant's compensation benefits. The notice of suspension relied on ORS 656.325 and OAR 436-67-138 (renumbered OAR 436-20-100, May 1, 1985), which provide for suspension of benefits pursuant to OAR 436-54-000, et seq. (renumbered OAR 436-60-000, et seq., May 1, 1985), when a subject worker refuses to submit or fails to

participate in a program at a physical rehabilitation center. To attempt to reinstate his benefits, claimant was directed to request either reconsideration from the Compliance Division or a hearing from the Hearings Division.

The Referee concluded that OAR 436-54-284 (renumbered OAR 436-60-100, May 1, 1985), the relevant administrative rule, was invalid in that the consent to the suspension of benefits was neither preceded by some form of notice to the claimant of the contemplated action nor by an opportunity for the claimant to be heard informally if the action was contested. The Referee relied on Carr v. SAIF, 65 Or App 110 (1983). In Carr, pursuant to a similar administrative rule and section of ORS 656.325, the claimant's benefits were suspended because he failed to submit to an independent medical examination. The court invalidated the rule and reinstated the benefits, concluding that due process required, at a minimum, that a governmental deprivation of a property interest be preceded by some form of notice of the contemplated action and some opportunity to be heard informally if the action is contested. Carr, supra, at pages 118-19.

We find that the Referee lacked jurisdiction to consider the validity or invalidity of the aforementioned administrative rule. James R. Frank, 37 Van Natta 1555, 1557 (1985); Tim R. Dugan, 38 Van Natta 929 (Decided this date). That authority rests with the Oregon Court of Appeals. ORS 183.400.

Although we cannot consider the validity of former OAR 436-54-284, we can determine whether the Center complied with the rule in consenting to the suspension of benefits. The Referee alternatively found that the notice of suspension was deficient because: (1) it failed to cite the enabling statute or rule; and (2) a copy was not sent to claimant's attorney. We disagree and find that the Center's notice of consent contained the information required by the aforementioned administrative rule.

In suspending claimant's compensation, the notice cited ORS 656.325 and former OAR 436-67-138. The notice did not refer to former OAR 436-54-000, et seq., which is specifically set forth in the information required pursuant to former OAR 436-54-284. However, since former OAR 436-67-138 actually refers to "OAR 436-54" as well as to the suspension of benefits procedures, we find that the notice's recitation of the requisite statutory authority and a relevant administrative rule meets the requirements of former OAR 436-54-284.

Furthermore, we conclude that the notice was sent to the "interested part[ies]" as required by the rule. These parties included not only claimant, the insurer, and the Compliance Division, but claimant's attending physician as well. The record does not suggest that claimant was involved in any litigation during the time in question. Moreover, there is no indication that the Center was aware that claimant was represented by an attorney at the time of his suspension. To require the Center to direct a copy of the notice of suspension to an unidentified legal counsel would seem to be a burden not contemplated by the administrative rule. Finally, as a practical matter, claimant's rights to a reconsideration of the suspension were fully realized since his attorney and his attending physician promptly requested his reenrollment in the program.

ORDER

The Referee's order dated December 18, 1985 is reversed.

TIM R. DUGAN, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-07516
August 14, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Michael Johnson's order which set aside the Callahan Center's consent to the suspension of claimant's compensation. On review, SAIF contends that the suspension should be reinstated.

We affirm the Referee's order with the following comments.

In January 1985 claimant was referred to the Callahan Center for a physical rehabilitation program. At the commencement of the program he was advised that his compensation benefits could be suspended if he failed to participate.

Claimant was absent from the program for four consecutive days in late May 1985. He credibly testified that he was at home bedridden during this time, suffering from severe abdominal cramps, diarrhea, and other assorted stomach problems. His attending physician's report and chart notes support claimant's contention that he was experiencing stomach ailments and was unable to attend the rehabilitation program during the time in question.

In June 1985 the Callahan Center administratively discharged claimant and suspended his compensation benefits. The suspension was based on claimant's absences "without a valid reason." Apparently the aformentioned medical verification for his absences was not presented to the Center. To attempt to reinstate his benefits, claimant was directed to request either reconsideration from the Compliance Division or a hearing from the Hearings Division.

The Referee found that claimant's stomach problems constituted a "valid reason" for his failure to attend the rehabilitation program. Accordingly, claimant's compensation was reinstated. Alternatively, the Referee concluded that OAR 436-54-284 (renumbered OAR 436-60-100, May 1, 1985), the administrative rule which allowed the Center to consent to a suspension of benefits, was invalid in that the suspension was neither preceded by some form of notice to the claimant of the contemplated action nor by an opportunity for the claimant to be heard informally if the action was contested. The Referee relied on Carr v. SAIF, 65 Or App 110 (1983).

Following our de novo review of the medical and lay evidence, which includes claimant's credible testimony, we are persuaded that claimant's stomach ailments provided a "valid reason" for his absences from the Callahan Center. Consequently, we agree with the Referee that claimant's compensation should be reinstated. However, we disagree with the Referee's alternative

finding that former OAR 436-54-284 is invalid. We have no authority to determine the validity or invalidity of an administrative rule. James R. Frank, 37 Van Natta 1555, 1557 (1985); Connell R. Cambron, 38 Van Natta 927 (Decided this date). That authority lies with the Oregon Court of Appeals. ORS 183.400.

Finally, we find that this case is of ordinary difficulty with the usual probability of success for claimant. Therefore, a reasonable attorney fee is awarded.

ORDER

The Referee's order dated December 18, 1985 is affirmed. Claimant's attorney is awarded $300 for services on Board review, to be paid by the SAIF Corporation.

WALTER LaCHAPELLE, Claimant
Evohl F. Malagon, Claimant's Attorney
Liberty Northwest, Defense Attorney

WCB 85-01426
August 14, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee McCullough's order that set aside its denial of claimant's claim for an injury-related worsening of his alcoholism. The insurer also asks that certain evidence it obtained after the hearing record was closed be made a part of the record at this time. We interpret the insurer's request to be one for remand to the Hearings Division. The issues are compensability and remand.

On the remand issue, we are not persuaded that the record has been incompletely, improperly or insufficiently developed. ORS 656.295(5). Further, we are not persuaded from the insurer's representation that the evidence now sought to be introduced could not have been obtained with due diligence before the hearing record was closed. The insurer's request for remand is denied.

On the compensability issue, we affirm the Referee's order with the following comment. Claimant's alcoholism preexisted his 1975 compensable low back injury. It appears that prior to the injury, however, claimant's drinking had lessened from what appears to have been its peak in 1971 when he was hospitalized for treatment of alcoholism. Claimant testified that the pain, depression and surgeries resulting from his injury eventually resulted in increased alcohol consumption. Claimant ultimately sought treatment from an alcoholism treatment center.

Dr. Ulman, the long-time treating doctor, stated in his deposition that while claimant's alcoholism clearly preceded his compensable injury, the effects of the injury more probably than not motivated claimant to drink more, thereby materially contributing to his need for treatment. Dr. Ulman also suggested, however, that claimant's underlying alcoholism condition was not worsened by the injury.

As was the Referee, we are persuaded that the effects of claimant's injury at least temporarily worsened the symptoms of his alcoholism. The symptoms are, therefore, compensable. We wish to make clear, however, that because there is no persuasive evidence that claimant's underlying condition was worsened by the

injury, the insurer is liable only for claimant's worsened symptoms. It shall remain liable for all symptoms shown to result from the compensable injury. Sharon L. Novak, 38 Van Natta 601 (1986).

ORDER

The Referee's order dated October 31, 1985 is affirmed. Claimant's attorney is awarded $600 for services on Board review, to be paid by the insurer.

WESLEY E. CROOKE, Claimant
Francesconi & Cash, Claimant's Attorneys
Moscato & Byerly, Defense Attorneys

WCB 83-11486
August 20, 1986
Order Denying Motion for Reconsideration and Abatement

Claimant has moved the Board for an order withdrawing our May 28, 1986 Order on Review for reconsideration pursuant to ORS 183.482(6) and Fischer v. SAIF, 76 Or App 656 (1985). Claimant's petition for judicial review was filed June 10, 1986. In our initial review of this case we thoroughly considered all of the evidence and issues, including those raised by Board Member Lewis' dissent, prior to rendering our decision. The motion is denied.

IT IS SO ORDERED.

DAVID F. BARRETT, Claimant
Merrill Schneider, Claimant's Attorney
Meyers & Terrall, Defense Attorneys

WCB 81-02757
July 11, 1986
Order of Abatement

Claimant has requested reconsideration of our Order on Remand issued June 19, 1986. The request for reconsideration is allowed. In order to allow sufficient time to fully consider the request, our order dated June 19, 1986 is withdrawn. The insurer's response to claimant's request for reconsideration is due 21 days from the date of this order.

IT IS SO ORDERED.

DAVID F. BARRETT, Claimant
Merrill Schneider, Claimant's Attorney
Meyers & Terrall, Defense Attorneys

WCB 81-02757
August 22, 1986
Order on Reconsideration

Claimant has requested reconsideration of our June 19, 1986 Order on Remand. We granted the request and withdrew our order pending reconsideration. See International Paper Co. v. Wright, 80 Or App 444, 447 (1986). Claimant advances four points in his brief in support of reconsideration. We address each point, although not in the order presented.

Claimant asserts that our denial of his motion to remand this case to the Hearings Division for the taking of further evidence is unjust. We disagree. The lengthy litigation history of this case belies the point that this is a one-issue case: extent of unscheduled disability. The taking of further evidence is appropriate only if the "case has been improperly, incompletely or otherwise insufficiently developed or heard by the referee . . . ." ORS 656.295(5). Claimant has not advanced any reason for us to depart from the usual rule that extent of disability is

determined on the basis of the facts and circumstances existing at the time of the hearing. See Gettman v. SAIF, 289 Or 609, 614 (1980); Livesay v. SAIF, 55 Or App 390, 394 (1981). No additional evidence has been identified, nor has there been any suggestion that any additional evidence bearing on the issue of claimant's disability as of the hearing was not obtainable at or before the time of the hearing. See Kienow's Food Stores v. Lyster, 79 Or App 416, 420 (1986). If claimant wishes to assert that he is more disabled now than he was as of the hearing, the appropriate way to do so is by making an aggravation claim.

Claimant asserts that he was denied a fair opportunity to be heard because we issued our order without having received briefs on the issue of the extent of claimant's disability. Prior to issuing our order, we specifically called for supplemental briefs from the parties. Claimant's submission dealt solely with his motion to remand. The insurer's submission responded to claimant's motion. Claimant now argues that the motion to remand should have suspended proceedings until the motion was ruled upon. See OAR 438-11-011(3)(e) (motion to remand tolls time for next event in review process). We do not customarily call for supplemental briefs when cases are remanded to us by the courts. The rule impliedly relied upon by claimant applies to Board review in the first instance. We do not believe we erred in issuing our decision on remand as and when we did, particularly in view of our call for supplemental argument, to which claimant chose to respond by requesting us to remand the case. In any event, claimant's complaint is moot by virtue of this reconsideration.

Claimant's most vehement argument is that our principal finding in the Order on Remand is contrary to the evidence. Specifically, claimant objects to the statement:

> "We conclude that the medical evidence does not differentiate between claimant's low back symptoms on the basis of which are due to osteoarthritis and which are due to the industrial injury. . . . Because we are bound by the court's finding that claimant's pre-existing osteoarthritis was not worsened by the industrial injury, we find that all of claimant's low back symptoms are due to the industrial injury."

We agree with claimant that the statement needs to be refined.

We continue to be bound by the courts' express finding that the industrial injury did not worsen claimant's underlying osteoarthritis. However, all that finding means is that claimant failed to prove that his osteoarthritis is compensable as an occupational disease and, therefore, cannot be rated as a primary disabling condition. From our review of the record we conclude that no party nor any fact finder has ever disputed that claimant has degenerative disc disease of the lumbar and thoracic spine. Neither has there been any dispute over the mechanics of the June 5, 1980 injury to claimant's lumbosacral area. Claimant urges that he had no back pain before the 1980 accident and that he became symptomatic thereafter. We find that the evidence supports a conclusion that claimant did have some back pain before the 1980 accident, but that any such pain was not disabling. The back pain claimant experienced as of the hearing was disabling.

The whole issue in this case is whether that disabling pain was "due to" the industrial injury.

Most of the medical evidence generated between February 1981 and the time of hearing relates that claimant had a back strain "by history" or "resolved." Claimant's treating physician, Dr. Burke, was the only doctor to state that the lumbosacral strain worsened the underlying disease. As we have already stated, we are not free to accept that opinion, which in any event is not persuasive. It could be argued from a review of the medical evidence that the June 5, 1980 injury caused no permanent impairment. However, we find most persuasive the report of the Kaiser-Permanente Intensive Diagnostic Advisory Board's (IDAB) closing examination of February 13, 1981:

> "Diagnosis: Lumbosacral strain and contusion, June 5, 1980, by history, resolved. Degenerative disc disease, lumbar and thoracic spines, with disc space narrowing, L5 and S1. Compression at T11, possibly due to fracture many, many years ago.
>
> ". . . Vocational assistance is recommended, as the [IDAB] feels that this patient will have difficulty if he returns to his former employment.
>
> ". . . The [IDAB] feels that [claimant] has a physical impairment in the category of mild. There is felt to be a mild contribution to this impairment due to the on-the-job injury." (Emphasis added.)

Claimant acknowledges in his brief on reconsideration that the IDAB report stands for the proposition, "That only a small part of the impairment is due to the on-the-job injury . . . ." We find that a preponderance of the persuasive evidence supports this proposition, which was the basis of our previous Order on Remand.

Claimant finally argues that he is entitled to an award for permanent total disability, or, in the alternative, to a permanent partial disability award in the 75 to 90 percent range. The Referee granted claimant an award of 35 percent unscheduled permanent partial disability, which was an increase of 10 percent over that awarded by Determination Order.

We find that there is insufficient evidence to show that claimant is permanently and totally disabled from physical impairment alone, taking into consideration the preexisting degenerative disc disease in the statutory calculus. ORS 656.206(1)(a). With the exception of Dr. Burke, no physician has so stated. Dr. Burke's opinion is conclusory and unpersuasive. We also conclude that a combination of physical impairment and social and vocational factors does not establish that claimant was permanently and totally disabled as of the hearing or prior thereto. Claimant made no showing that he made reasonable efforts to obtain employment, ORS 656.206(3), and there

is no persuasive medical evidence that it would be futile for him to do so. Claimant's withdrawal from vocational assistance because of his belief that he was too disabled to continue is not supported by any persuasive evidence. Claimant has not established that he is permanently and totally disabled.

Claimant is, however, entitled to an award of permanent partial disability. Claimant's permanent physical impairment is in the form of disabling pain, which is properly included in the rating of permanent disability. Harwell v. Argonaut Ins. Co., 296 Or 505 (1984). The evidence establishes by a preponderance that claimant's physical impairment from all causes is mild, with the permanent residuals of the industrial injury making a mild contribution to that impairment. Although this results in a physical impairment "due to" the injury that is not great, the relevant social and vocational factors heighten the impact of the impairment.

Claimant was age 41 as of the hearing. While age has some effect on his overall disability, the effect is not great due to his relative youth. Claimant has a seventh grade formal education and no GED. The evidence establishes that claimant has few transferable skills and will most likely experience difficulty in retraining. His only work experience has been in heavy labor, which he is no longer capable of performing. A preponderance of the evidence persuades us that claimant has been unable to adjust to his injury, which has an effect on his overall disability. Combining the effects of the relevant social and vocational factors with the minimal physical impairment "due to" the injury, we remain of the opinion that claimant's disability as of the hearing was appropriately compensated by an award of 112 degrees for 35 percent unscheduled permanent partial disability for injury to the lumbosacral spine.

ORDER

Our Order on Remand dated June 19, 1986, as supplemented by this order, is republished effective this date.

OSCAR L. DREW, Claimant
Pozzi, et al., Claimant's Attorneys
Foss, et al., Defense Attorneys

WCB 84-00506
August 22, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of those portions of Referee Daron's order which: (1) awarded temporary total disability pursuant to a prior Referee's order; and (2) assessed penalties and accompanying attorney fees for a failure to comply with the aforementioned order. On review, the employer contends that the Referee erred in enforcing the prior Referee's order which required payment of temporary disability benefits to a worker who had retired. Claimant cross-requests review, contending that he is entitled to additional temporary disability, penalties, and accompanying attorney fees for the employer's unreasonable conduct in processing his claim. We agree with claimant's contentions and modify the Referee's order.

Claimant was 68 years of age at the time of hearing. In March 1978 he sustained a compensable back, right shoulder, and left knee injury. His claim was initially closed in November 1978

with an award of 10 percent unscheduled permanent disability for his back and right shoulder injury. By virtue of a September 1980 Referee's order, the last award of compensation, claimant had received a total of 40 percent unscheduled permanent disability.

In January 1981 Dr. Bert, claimant's treating orthopedist, reported that claimant was complaining of left leg and knee pain. Dr. Bert recommended further evaluation by means of an arthrography. The employer denied claimant's aggravation claim. This denial was set aside by a November 1981 Referee's order. The aggravation claim was remanded to the employer for "payment of compensation from March 3, 1981 until termination is authorized pursuant to ORS 656.268."

In December 1981 the employer requested a Determination Order. The employer reported that claimant had received temporary disability from March 3, 1981 until May 8, 1981. The latter date coincided with Dr. Bert's recommendation that the claim could be closed. In its request, the employer further noted that claimant had retired in December 1978.

In January 1982 the Evaluation Division reported that the employer's request had been submitted without sufficient medical documentation concerning claimant's knee condition. Consequently, the Division requested further medical reports. At hearing, the employer stipulated that the Division's request for further information was either not received until July 5, 1982, or was received prior to that date, but misplaced.

On July 30, 1982, the Board reversed the Referee's order, thereby reinstating the employer's denial. Oscar Drew, 35 Van Natta 1067 (1982). Thereafter, the employer advised the Evaluation Division of the Board's action and requested to be kept informed if further processing was required.

On July 27, 1983, the Court of Appeals reversed the Board's order. Finding the claim compensable, the court reinstated the Referee's order. Drew v. Weyerhaeuser Co., 64 Or App 62 (1983).

The following day the Compliance Division notified the employer that the prior request for further medical information had been reinstituted. On August 17, 1983, the employer provided additional medical reports. The Evaluation Division apparently found this information inadequate, because on August 23, 1983 the employer was directed to schedule an orthopedic examination.

On September 1, 1983, the employer advised claimant that an examination had been scheduled with Dr. Bert for October 21, 1983. Thereafter, Dr. Bert performed the examination as scheduled. The employer received Dr. Bert's report on November 1, 1983. On December 6, 1983, claimant's attorney asked the Evaluation Division why a Determination Order had not issued. On December 16, 1983 the Evaluation Division responded that it had not received a closing report stemming from the October 1983 examination.

On January 13, 1984 a Determination Order issued. Claimant was awarded temporary disability between March 3, 1981 and May 8, 1981, in addition to 25 percent scheduled permanent disability for his left knee injury. Claimant's condition was found to be medically stationary on May 8, 1981.

Claimant retired in approximately December 1978. Following the November 1981 Referee's order, he received the aforementioned two months of temporary disability. However, the employer did not pay further compensation until the January 1984 Determination Order.

The Referee stated that, as a general rule, a retired worker is not entitled to temporary disability benefits for an aggravation of an industrial injury. See Cutright v. Weyerhaeuser Co., 299 Or 290 (1985). However, the Referee concluded that claimant was entitled to temporary disability compensation pursuant to the prior Referee's order. The Referee relied on the "enforcement" case concerning the aforementioned Cutright decision. See Ralph Cutright, 35 Van Natta 1647 (1983), aff'd mem. 69 Or App 208 (1984). In Cutright, the Board found that an employer could not unilaterally terminate temporary disability benefits directed by a Referee's order until that order was reversed or otherwise modified on appeal. Since the Board's decision in the primary Cutright case was virtually simultaneous with the Court of Appeals' decision in Drew, the Referee reasoned that claimant was entitled to temporary disability benefits only until the Board's July 1982 Order on Review.

We agree that claimant is entitled to temporary disability compensation pursuant to the prior Referee's order. However, we find that this disability should extend until the claim was closed on January 13, 1984.

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 436-60-150(3)(c); C.D. English, 37 Van Natta 572 (1985).

The employer argues that since claimant had retired at the time of the prior Referee's order he was not entitled to any further temporary disability benefits. Citing Cutright v. Weyerhaeuser Co., supra, the employer contends that whatever compensation may have been payable pursuant to the prior Referee's order, that compensation would not have included temporary disability benefits.

The employer's argument has some appeal, particularly if viewed with the luxury of hindsight. However, to follow the employer's contentions we would be overlooking its defiance of a clear direction from a prior Referee to pay compensation until formal claim closure. Should we accede to such an argument we would be sending a message that it is not always necessary to comply with a Referee's order. This is a message which could have severe repercussions to a system which relies, to a great extent, on the basic principle that Referee's orders will be followed. Moreover, the employer's argument is in direct contravention of the holding of Ralph Cutright, 35 Van Natta 1647 (1983), aff'd mem. 69 Or App 208 (1984).

Contrary to the prior Referee's order, the employer unilaterally terminated claimant's temporary disability benefits effective May 8, 1981 and did not process the claim to closure until January 13, 1984. The Board's July 1982 Order temporarily relieved the employer of its processing duties. However, the Court of Appeals' July 1983 decision reversed the Board's order. This decision resulted in the reinstatement of the Referee's

directive to pay compensation until the claim was closed. The employer failed to comply with this directive.

We conclude that the prior Referee's order must be enforced. Thus, the employer was required to pay temporary disability until the claim was formally closed pursuant to ORS 656.268. Accordingly, we find that claimant is entitled to temporary disability benefits from May 8, 1981 through January 13, 1984.

Although we find that claimant is entitled to benefits payable through the January 1984 Determination Order, we do not consider the employer's conduct throughout this matter entirely unreasonable. We agree with the Referee that the employer's unilateral termination of benefits shortly after the November 1981 Referee's order was unreasonable. However, the Board's July 30, 1982 order released the employer from its previously unreasonable conduct. Consequently, we concur with the Referee's assessment of a 25 percent penalty and attorney fee based upon the temporary disability benefits due between May 9, 1981 and July 30, 1982.

The Board's July 1982 order was subsequently reversed and the Referee's order reinstated on July 27, 1983. Yet, the following day, the Board issued its opinion in Ralph R. Cutright, 35 Van Natta 1142 (1983), which found that retired workers were not entitled to temporary disability benefits. Consequently, considering claimant's retired status, we conclude that there was some justification for the employer's subsequent failure to reinstate temporary disability. However, we still consider the conduct unreasonable since it was directly contrary to the instructions given in the reinstated Referee's order. Accordingly, we assess a 10 percent penalty and accompanying attorney fees based on the temporary disability benefits due between July 27, 1983 and January 13, 1984.

Finally, we conclude that the employer should not be assessed a penalty and attorney fees for an unreasonable delay in requesting either medical information or a Determination Order. The employer has offered a plausible explanation for its initial failure to procure a Determination Order, prior to the Board's July 1982 reversal of the Referee's November 1981 order. Furthermore, following the Court of Appeals' July 1983 reversal of the Board's order, the employer took steps to close the claim and comply with the Evaluation Division's request for further information. Admittedly, the employer received the required medical information on November 1, 1983 and did not forward the data to the Evaluation Division until sometime after December 16, 1983. However, in view of the protracted, undulating and sometimes complex nature of this claim's processing history, we do not consider this conduct unreasonable. See Lester v. Weyerhaeuser Co., 70 Or App 307, rev den, 298 Or 427 (1984) (seven month delay in requesting medical claim closure data constituted unreasonable delay); and Georgia Pacific v. Awmiller, 64 Or App 56 (1983) (one year delay in requesting a Determination Order was unreasonable conduct).

ORDER

The Referee's order dated December 13, 1985 is affirmed in part and modified in part. In addition to the temporary disability benefits awarded by the Referee, the self-insured

employer shall pay temporary disability from July 30, 1982 through January 13, 1984. Claimant's attorney is entitled to 25 percent of this increased compensation, not to exceed $2,250. The employer is also assessed a penalty equal to 10 percent of the temporary disability benefits payable between July 27, 1983 and January 1984. The employer shall pay a $500 attorney fee concerning this penalty issue. The remainder of the Referee's order is affirmed.

MILTON E. GARRETT, Claimant
Evohl F. Malagon, Claimant's Attorney
Garrett, et al., Defense Attorneys

WCB 85-02457
August 22, 1986
Order on Reconsideration

Claimant has requested reconsideration of our Order on Review dated July 25, 1986. Claimant argues that the employer-paid attorney fee for services on Board review was inadequate. In this denied claim case, we reversed the Referee's order and set aside the denial of the compensability of claimant's industrial injury. We awarded claimant's attorneys employer-paid fees of $1,650 for services at hearing and $600 for services on Board review.

Claimant disagrees with our finding that this was a case of ordinary difficulty and usual probability of success for claimant. In support of his position, claimant asserts that a review of cases published in the most recent volume of Van Natta's Workers' Compensation Reporter indicates that claimants appealing from a Referee's order upholding a denial of compensability have a very low probability of success. We have serious doubt of the scientific validity of claimant's survey over time.

This case involved two witnesses, 17 documents and less than one-half day of hearing. Board review was limited to a purely factual determination, which was not complex. We adhere to our finding that this was a case of ordinary difficulty and usual probability of success.

ORDER

The request for reconsideration is allowed. Our Order on Review dated July 25, 1986 is withdrawn for reconsideration, adhered to and republished effective this date.

DENTON C. MARK, Claimant
Steven C. Yates, Claimant's Attorney
Davis, Bostwick, et al., Defense Attorneys
Beers, et al., Defense Attorneys

WCB 85-14280
August 22, 1986
Order Denying Motion to Remand

Aetna Casualty Company has moved the Board for an order remanding this matter to the Referee for consideration of additional evidence. In the alternative, Aetna moves the Board to consider the evidence in its review of the case.

We may not consider evidence on review that is not a part of the record compiled by the Referee. ORS 656.295(3), (5); Bailey v. SAIF, 296 Or 41, 45 (1983). We may, however, remand a case to the Referee if we conclude that the "case has been improperly, incompletely or otherwise insufficiently developed or heard by the Referee . . . ." ORS 656.295(5). We have reviewed the proferred evidence and have concluded that its omission from the record does not warrant remand under the statutory standard. The motion is denied.

IT IS SO ORDERED.

ERICA E. MORENO, Claimant
Evohl F. Malagon, Claimant's Attorney
Roger Luedtke, Defense Attorney

Own Motion 85-0572M
August 22, 1986
Own Motion Order on Reconsideration

Claimant asks the Board to reconsider its July 2, 1986 Own Motion Order whereby her request for own motion relief was denied.

The Board continues to hold the position that claimant is not entitled to reopening for the payment of temporary total disability for any worsening of her compensable condition. Claimant's failure to be gainfully employed over the past 12 years and the lack of medical evidence to support her contention that she was unable to work, preclude her from such benefits.

Claimant's entitlement to vocational rehabilitation services is not contingent on whether the Board reopens her claim for temporary total disability. If claimant is otherwise entitled to vocational rehabilitation services, she remains entitled to such services regardless of the Board's action on this own motion proceeding.

The Board's July 2, 1986 Own Motion Order is hereby reaffirmed and republished.

IT IS SO ORDERED.

DONALD B. O'DELL, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-05083
August 22, 1986
Order on Remand

Reviewed by Board Members Ferris and Lewis.

This matter is before the Board on remand from the Court of Appeals. O'Dell v. SAIF, 79 Or App 294 (1986). We have been mandated to determine an attorney fee associated with a penalty for delay in payment of "interim" compensation. ORS 656.382(2).

The delay in payment was 16 days. On account of this delay, the Referee assessed a penalty of $50 under the provisions of ORS 656.262(10) and an attorney fee of $1,000. The Referee based the attorney fee both on the penalty and for "establishing a new date for future aggravation rights" and for "getting SAIF to, in effect, withdraw [its] denial . . . ." We reversed the Referee's order on all three grounds. The court affirmed our order on the latter two grounds, but held that a penalty and associated attorney fee should be awarded. 79 Or App at 297 n.1. Therefore, we determine a reasonable attorney fee based solely upon the fact that claimant received a $50 penalty for delay.

The "relative unreasonableness" of the penalized behavior is not a factor in arriving at a reasonable attorney fee. Charlene K. Brotherton, 38 Van Natta 256 (1986). Considering the factors recited in Muncy v. SAIF, 19 Or App 783, 787-88 (1974); Barbara A. Wheeler, 37 Van Natta 122, 123 (1985), we determine that a reasonable attorney fee is $250.

ORDER

The Referee's order dated June 6, 1984 is modified to award claimant's attorney a reasonable attorney fee of $250 in conjunction with the Referee's award of a $50 penalty for delay in payment of "interim" compensation, to be paid by the SAIF Corporation in addition to compensation, and to delete reference to any other basis for an insurer-paid attorney fee. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded a reasonable attorney fee of $400 for services on Board review in connection with the premature claim closure issue, to be paid by the SAIF Corporation in addition to compensation.

ESPERANZA L. PEQUENO, Claimant
Michael B. Dye, Claimant's Attorney
Liberty Northwest, Defense Attorney

WCB 84-09008
August 22, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of Referee McCullough's order, as adhered to on reconsideration, that set aside its denial of claimant's medical services claim. The issue is compensability. The insurer does not contest that claimant's claim is legally compensable; it merely asserts that claimant has failed to adduce facts sufficient to satisfy her burden of proof.

Claimant filed a workers' compensation claim on July 26, 1984, alleging that in September 1983 she had lost her lower dentures in connection with her employment at a cannery. Claimant's claim form alleged that she lost the dentures while rinsing them in a wash basin after lunch. She testified at hearing, however, that she lost the dentures while applying medicine to sore gums. Specifically, claimant testified that she visited a company nurse and asked for gum medication. Upon receiving the medicine claimant went to a restroom to apply it. According to claimant, she removed her lower dentures in order to apply the medicine. Then, while rinsing the dentures over a wash basin, she accidently dropped them and they went down the drain. The drain was uncovered at the time.

Claimant testified that shortly after the alleged incident, several women entered the restroom and claimant related the incident to them. None of the women testified at the hearing. A company maintenance man did testify. He related that he was summoned to the restroom shortly after the alleged incident and was directed to retrieve claimant's dentures. He made several attempts, using various tools and a flashlight, but was unable to see or feel a set of dentures in the drain pipe.

The insurer produced the testimony of the employer's personnel supervisor, who related an experiment conducted in January 1985. The experiment was designed to reconstruct claimant's version of the alleged incident, using the same wash basin and a set of dentures borrowed from a plant employe. The personnel supervisor testified that she measured the wash basin drain and the set of dentures, and that the dentures were clearly too large to fit down the drain. She further testified that an attempt at forcing the dentures down the drain was unsuccessful because of the dentures' size. The wash basin, the drain and the experiment are depicted in photographic evidence offered by the insurer.

The Referee found claimant, the maintenance man and the personnel supervisor all to be credible witnesses. He found that claimant's testimony as to the alleged incident established her prima facie case. He further found that the insurer had failed to meet claimant's proof because the experiment conducted by the employer representative was faulty. He found that while the experiment proved that the dentures used by the employer would not go down the wash basin drain, it did not prove that claimant's dentures did not go down the drain. The Referee found that the size of claimant's dentures may have differed from that of those used by the employer, and that the weight of the evidence supported claimant's version of the facts.

We disagree with the Referee. While we understand his concern regarding the precision of the employer's experiment, we think that the experiment at least met claimant's proof, which consisted almost exclusively of her testimony as to an unwitnessed incident. We are simply not persuaded that the incident to which claimant testified happened as she described. We find it improbable, after viewing the documentary evidence, that claimant's dentures were forced from her hand by what appears to us to have been a stream of water under very little pressure. We find it even more improbable that the dentures fell directly into the drain and traveled so far that they could not be seen or felt by the tools used by the maintenance man. It is claimant's burden to prove by a preponderance of the evidence that the incident occurred. We find that claimant has failed to meet her burden.

In the alternative, we find that even if claimant has satisfied her burden on the facts, her claim is not legally compensable. We make this finding even though the insurer has not asserted that the claim is not compensable under the law. See Destael v. Nicolai Company, 80 Or App 596 (filed August 13, 1986); Russell v. A & D Terminals, 50 Or App 27 (1981). It is fundamental that in order for claimant to be entitled to payment for medical services under the Workers' Compensation Law, there must be some connection between her employment and her need for services. In the present case, the only asserted connection is that claimant happened to be at work when she allegedly dropped her dentures down a drain. There has been no assertion that she lost them as a result of a job-related accident or injury. Rather, it appears that claimant was engaged in a wholly personal activity, the compensability of which is not contemplated by Oregon law.

ORDER

The Referee's orders dated August 28, 1985 and October 10, 1985 are reversed and the insurer's denial is reinstated.

TIMOTHY C. PRATT, Claimant
Haugh & Foote, Claimant's Attorneys
Rankin, et al., Defense Attorneys

WCB 85-12259
August 22, 1986
Order on Review

Reviewed by Board en banc.

The insurer requests review of that portion of Referee Lipton's order that set aside its denial of claimant's occupational disease claim for complications arising from a right leg traumatic amputation. The issue is compensability.

Claimant is a former machinist who, as a child, suffered a traumatic below-the-knee right leg amputation in a farming accident. After initially being fitted with a prosthesis claimant received replacement prostheses every two to three years. The last fitting was completed on or about November 26, 1984. Whereas all prior prostheses had been fit by means of a leather sleeve with laces, the last one had a plastic sleeve designed to fit over the stump of the amputated leg. Claimant testified that with all of his prostheses, it was normal to experience skin and muscle soreness for approximately one month after fitting. The Referee found claimant to be a credible and reliable witness.

The medical record reflects that claimant visited his physician on December 6, 1984 complaining of an ill-fitting prosthesis. It further notes that sometime before Christmas 1984, claimant experienced what his physicians described as a "breakdown" of the tissue on the posterior surface of the stump. Claimant testified that the irritation began as a sort of rash, but later progressed to the development of cysts.

Before beginning work for the employer subject to this claim, claimant worked as a machinist for approximately eight years in several other shops. He testified that all of his prior employments had consisted of job duties similar to those of his most recent employment, but that some had involved more strenuous work. According to claimant, he did not experience serious leg symptoms on any of the prior employments.

Claimant testified that he began working for the instant employer during the second week of January 1985. He indicated that his work initially required up to 14 hours per day, six days per week. Eventually, however, he assumed a 10 hour per day, six day per week schedule. He testified that his work often involved the operation of two machines at the same time, and that he was on his feet up to 95 percent of the time when he first began. He sat the remainder of the time, reading blueprints and inspecting parts. Claimant further testified that his work environment was normally warm and humid, that by late April 1985 the shop was routinely reaching 100 degrees, and that no fans were available to cool the workplace.

According to claimant, he first noticed symptoms on the posterior surface of his stump in February 1985. The initial symptoms resembled a "heat rash," but as the seasons changed and the shop reached high temperatures, the rash progressed into a cyst condition. Although initial treatment was conservative, claimant ultimately underwent a surgical amputation above the knee in an attempt to arrest the worsening cysts and a folliculitis condition.

Claimant left work on June 12, 1985. He filed a claim for occupational disease two days later, asserting that the combination of being on his feet for extended periods and the hot, humid shop environment caused or worsened his right leg condition.

The medical record consists primarily of the opinions of claimant's two treating physicians. Dr. Ebner stated that if he assumed that claimant had to work standing up most of the time in a hot and humid environment, the work would be a major contributing factor. Dr. Ebner further stated, however, that if he were to assume that claimant's work involved primarily sitting in a comfortable environment, the work would not be contributory. He also noted that claimant's plastic sleeved prosthesis promoted the growth of bacteria and that the folliculitis condition would have resolved with a change of prosthesis. Dr. Ebner believed the folliculitis would have occurred whether or not claimant had worked.

Dr. Gerhardt was the other treating doctor. He stated:

> "It is my impression at this time . . . that the breakdown of the below-knee stump which led to the patient's disability and eventual above-knee amputation was caused first by adherent scarring, and second, the use of the elastic sleeve suspension and the heavy duty work as a machinist requiring wearing of the prosthesis for 8 to 10 hours."

Dr. Gerhardt did not indicate whether claimant's work was a major, as opposed to a material, cause of his condition.

In addition to claimant, three witnesses testified regarding compensability. Two were former fellow workers of claimant, while the remaining witness was claimant's former supervisor. The Referee found the fellow workers' testimony not credible and unreliable. He found the testimony of the former supervisor to be both credible and reliable. The supervisor testified that he worked approximately 10 feet from claimant's work station and that he regularly observed claimant's work. He indicated that claimant worked in a sitting position most of the time and rarely worked more than one machine. The supervisor further testified that the shop temperature was normally 70 to 75 degrees except in mid-summer, that fans were made available for cooling, and that the doors of the shop could be opened for ventilation.

The supervisor also produced documentary evidence establishing the amount of time claimant worked standing, as opposed to sitting. The evidence, which consisted of work orders and claimant's timesheet, demonstrated that claimant's work involved three primary duties: "set up", "programming" and "running." According to claimant's supervisor, "set up" involves primarily standing, while "programming" and "running" involve sitting almost exclusively. The work orders show that claimant's work involved "programming" and "running" approximately 78 percent of the time. The supervisor testified that work orders are compiled by employes themselves.

Claimant's timesheet reveals the number of hours he worked while employed by the instant employer. The sheet shows that during claimant's tenure, he worked an average of 9.38 hours

per day. It also demonstrates that for the first month of claimant's employment, his average number of hours per day was 8.27, rather than the 10-to-14 hours per day to which he testified.

The Referee found that claimant's condition preexisted his employment. He therefore applied the standard of Weller v. Union Carbide, 288 Or 27 (1979), in determining whether claimant's employment was the major contributing cause of a worsening of the preexisting condition. The Referee found that it was, holding:

> "It is not refuted that claimant worked 10 to 14 hours per day as a matter of course . . . His work conditions made [his condition] serious by providing an environment which allowed the condition to incubate or fester."

The Referee apparently found claimant's testimony more persuasive than that of his supervisor, despite the specific finding that the supervisor was credible and reliable. The Referee did not address the documentary evidence outlining claimant's job duties.

After reviewing the entire record, we are persuaded that claimant's work did not involve long hours standing in a hot and humid environment. To find that it did we would have to accept claimant's testimony over the remainder of the record, which includes the testimony of all other witnesses and the documentary proof of claimant's work duties and schedule. We are persuaded by the record that claimant generally worked less than 10 hours per day, primarily sitting down, in an environment that was usually comfortable. One of the treating doctors, Dr. Ebner, has opined that these working conditions would not be a contributing factor to claimant's condition. The other merely stated that the work environment was contributory. We do not know to what degree, nor do we know whether Dr. Gerhardt had an accurate description of claimant's duties or environment. Under these circumstances, claimant has failed to prove that his work was the major contributing cause of his condition or that it was a major cause of a worsening of that condition. The insurer's denial must be reinstated.

ORDER

The Referee's order dated December 6, 1985 is reversed in part and affirmed in part. That portion of the order that set aside the insurer's denial is reversed and the denial is reinstated. The remainder of the order is affirmed.

Board Member Lewis Dissenting:

I respectfully dissent.

Claimant had a fragile below-knee stump when he was hired. He had successfully worked in machine shops without damage to the leg for about eight years. His credible and reliable testimony was that he had been required to spend more time standing and walking at the prior machine shops than at this employer's shop. He also testified that he did not wear the prosthesis after he got off work.

The work order records submitted with analysis by the employer purport to corroborate the testimony of the coworkers and the foreman that claimant spent little time standing. I would agree with the Referee that claimant's testimony about extensive standing

was unrebutted because the work orders analysis accounts for less than 60 percent of claimant's time on the job. The employer's time records substantiate claimant's testimony that he frequently worked 10 to 12 hours per day during the first "couple months" because he was paid for 123.5 hours of overtime for the first 10 weeks of employment.

Dr. Ebner, the surgeon who operated on claimant's leg, stated his opinion:

> "I would like to state that I do not feel that [claimant] had a leg that was capable of withstanding a job which required him to be on his feet for up to 10 hours per day or one in which there is a [sic] excessive heat or humidity. As mentioned earlier, the stump was quite short, fragile, had a lot of scarring and this would have prohibited effective prosthesis wear for an extended period of time especially with weight bearing."

As the Referee found and I would find, the doctor felt that either the amount of time at work up to 10 hours per day, or exposure to humidity or exposure to excessive heat would be enough to have caused claimant's condition to worsen. The doctor also stated that it was not weight-bearing alone which caused the worsening but the wearing of the prosthesis for extended periods.

The evidence about the heat and humidity in the shop was divided. There was no objective evidence to substantiate any of the estimates of the temperature or the humidity at any place within the shop. There was also no evidence to impeach or rebut the credible and reliable testimony of the claimant that the sock he wore on his stump would become saturated with moisture within 15 to 20 minutes in the shop atmosphere. I would rely on the claimant's testimony to find that the shop was sufficiently hot or humid to cause his leg to sweat which contributed to the subsequent infections.

Claimant had obtained a new prosthesis every two to three years. The inference is that claimant obtained at least three changes of his prosthesis during prior machine shop employment. Claimant's prior work history established that merely wearing a prosthesis and long periods of standing did not cause infections in the stump. Claimant began wearing this prosthesis before he began to work for the employer. The employer would not allow claimant to work in the shop without his prosthesis. I would find that the shop conditions were the major cause of claimant's worsened condition and affirm the well-reasoned order of the Referee.

RAY A. STERN, Claimant
Francesconi & Cash, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney
Roberts, et al., Defense Attorneys

WCB 83-05299 & 82-11791
August 22, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Fred Shearer & Sons v. Stern, 77 Or App 607 (1986). Pursuant to the mandate, EBI Companies' formal denial dated December 7, 1983 is reinstated and affirmed. The SAIF Corporation's formal denial dated February 18, 1983 is set aside

and this claim is remanded to SAIF for acceptance and processing according to law as an aggravation of claimant's November 10, 1981 industrial injury. Claimant's attorney is awarded a reasonable attorney fee of $500 for services at hearing, to be paid by the SAIF Corporation in addition to compensation.

IT IS SO ORDERED.

CARL W. BENNETT, Claimant
Welch, et al., Claimant's Attorneys
Mitchell, et al., Defense Attorneys

WCB 85-01558
August 25, 1986
Order on Review (Remanding)

Reviewed by Board Members McMurdo and Ferris.

The self-insured employer requests review of that portion of Referee Podnar's order which awarded compensation for permanent total disability effective November 16, 1984 in addition to prior awards of 96 degrees for 30 percent unscheduled permanent partial disability. The employer also cites as error the Referee's denial of an independent medical examination scheduled for 12 days before the scheduled hearing date and requests remand to reconsider the extent of claimant's disablity after an independent medical examination. The issues on review are remand, the employer's right to schedule a medical examination, and extent of unscheduled permanent partial disability including permanent total disability.

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).

Claimant submitted to independent medical examinations pursuant to ORS 656.325(1) on December 16, 1982 and July 23, 1984. A subsequent medical examination in November 1984, obtained at the request of the Workers' Compensation Department, was not an independent medical examination pursuant to ORS 656.325. OAR 436-10-100(2). The hearing request was filed in February 1985 and in July the hearing date was set for September 24, 1985. Five weeks before the hearing the insurer made arrangements to have claimant examined on September 12, 1985.

Claimant opposed the medical examination and requested the equivalent of a protective order. The Referee agreed with claimant and denied authorization for the examination. The Referee reasoned that the request for the medical examination was untimely and would delay a decision.

ORS 656.325 provides that the employer has the right to obtain three independent medical examinations without prior authorization. The only restrictions on the first three examinations are that they shall be "at a time and from time to time at a place reasonably convenient for the worker and as may be provided for by the rules of the director." ORS 656.325(1); see OAR 436-10-100. The Board finds that the insurer was entitled to have its independent medical examination as scheduled and, therefore, that the record was insufficiently developed before the Referee. Consequently the case is remanded to the Referee to reconsider the issue of the extent of claimant's permanent disability after the employer submits the report of its third independent medical examination.

The award of compensation for permanent total disability shall continue to be paid pending further proceedings on remand.

ORDER

The case is remanded to the Referee for further proceedings consistent with this order.

ROY E. GUGGISBERG, Claimant
Coons & Cole, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-08425
August 25, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of Referee Myers' order which granted claimant permanent total disability, whereas a July 8, 1985 Determination Order awarded 35 percent (112 degrees) unscheduled permanent disability for a low back injury. On review, SAIF contends that claimant is not entitled to an award of permanent total disability.

The Board affirms the order of the Referee. SAIF is entitled to offset any permanent partial disability compensation paid after July 8, 1985 as prepayment of the permanent total disability award. Pacific Motor Trucking Co. v. Yeager, 64 Or App 28 (1983).

Furthermore, we find that this case is of ordinary difficulty with the usual probability of success for claimant. Acccordingly, a reasonable attorney's fee is awarded.

ORDER

The Referee's order dated February 12, 1985 is affirmed. Claimant's attorney is awarded $650 for services on Board review, to be paid by the SAIF Corporation.

RANDY L. JACKSON, Claimant
Quintin B. Estell, Claimant's Attorney
Schwenn, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney
Michael G. Bostwick, Defense Attorney

WCB 85-00010, 85-3014 & 85-03015
August 25, 1986
Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Review dated August 6, 1986. On reconsideration, claimant asserts that on page two of our prior order we erroneously refer to the SAIF Corporation, rather than North Pacific Insurance Company. Claimant's assertion is accurate. Consequently, the references to SAIF in the third paragraph of page two of our prior order are deleted and replaced with the words "North Pacific." This substitution of insurers has no effect upon the conclusions expressed in our previous order.

Furthermore, we note that, due to a printing malfunction, an incomplete citation appears on the final line of page one of our prior order. The full citation should have been Clark v. SAIF, 50 Or App 139, 143 (1981).

Finally, claimant contends that he is entitled to an award of attorney fees for services on Board review. We disagree. North Pacific requested review of the Referee's order which set aside its partial denial of responsibility for claimant's current medical treatment. North Pacific did not contest compensability. Since insurer responsibility was the sole issue raised by North Pacific, claimant is not entitled to an attorney's fee. Petshow v. Farm Bureau Ins. Co., 76 Or App 563 (1985); Stanley C. Phipps, 38 Van Natta 13, 16 (1986).

In conclusion, claimant's request for reconsideration is granted and our prior order is withdrawn. On reconsideration, the Board adheres to and republishes its former order, as supplemented herein, effective this date.

IT IS SO ORDERED.

KERRY STRAND, Claimant
David C. Force, Claimant's Attorney
Rankin, et al., Defense Attorneys

WCB TP-86008
August 25, 1986
Third Party Order

This matter has been submitted to the Board to resolve a dispute as to whether the insurer has lien rights under the provisions of ORS 656.576 to 656.595 (the "third party" law) entitling it to share in any proceeds that may be realized from a federal civil action against the employer. We treat the insurer as the petitioner.

There is no dispute as to the relevant facts. Claimant has an accepted occupational disease claim for a mental disorder arising out of employment-related stress. Benefits have been paid on account of this claim. Claimant also has a pending civil action in the United States District Court in which it has been alleged that he has suffered damages as a result of the employer's willful and intentional conduct. The insurer asserts that it is entitled to share in the proceeds of the civil action, if any, whether by judgment or settlement, under the provisions of ORS 656.593, to the extent of the benefits it has paid and those it may reasonably be required to pay in the future. Claimant asserts that the insurer has no rights under ORS 656.593.

It is the insurer's position that the employer is also a "third person" for the purpose of establishing its right to a paying agent lien under the third party law. The insurer bases this position on ORS 656.578, which provides in relevant part:

> "If a worker of a noncomplying employer receives a compensable injury in the course of employment, or if a worker receives a compensable injury due to the negligence or wrong of a third person (other than those exempt from liability under ORS 656.018), entitling the worker under ORS 656.154 to seek a remedy against such third person, such worker or, if death results from the injury, the other beneficiaries shall elect whether to recover damages from such employer or third person. . . ."

The insurer argues that if claimant's allegations that the employer willfully and intentionally caused claimant's disease (which is considered an injury, ORS 656.804) are upheld, the

employer is not exempt from liability under ORS 656.018. ORS 656.018(3)(a). Thus, the insurer argues that an employer who willfully and intentionally injures a worker is a "third person" under the Workers' Compensation Law. We disagree with the insurer's argument because we find that the employer has met only half the test of becoming a "third person."

ORS 656.578 defines a "third person" as one who is not exempt from liability under ORS 656.018 and a person the worker is entitled to seek a remedy against "under ORS 656.154." ORS 656.154 grants the worker a right to seek a remedy against "a third person not in the same employ." In this case, the worker's right to seek a remedy against the employer does not arise under ORS 656.154. The right arises under ORS 656.156(2), which grants the worker the right to seek a remedy against a complying employer "for damages over the amount payable under [the Workers' Compensation Law]."

Because claimant's action is not against a "third person or noncomplying employer," the lien provisions of the third party law do not apply in this case. The petition is, therefore, dismissed.

IT IS SO ORDERED.

DAVID L. FLEMING, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-09300
August 27, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The SAIF Corporation requests review of that portion of Referee Howell's order which set aside its partial denial of claimant's low back condition. The issue on review is compensability.

Claimant was injured in September 1983. He first sought chiropractic treatment on September 16, 1983. The chiropractor diagnosed cervical strain.

Claimant filed a report on September 26, 1983 of injury to the neck and shoulder related to driving a skidder on September 15, 1983. The claim was accepted and treatment commenced for claimant's headaches, dizziness, nausea, and left arm numbness. Subsequent medical examinations reported complaints in the cervical and thoracic spine. Subsequent reports of examinations and diagnostic testing by two neurologists, an orthopedic surgeon, and a general practitioner revealed no complaint of low back pain and normal low back examination. The reports of claimant's accident remained consistent relating the neck and thoracic complaints to the twisting and turning involved in driving a logging skidder.

On March 29, 1984 claimant was examined by a neurosurgeon. In the report of the examination was a passing reference to the recent onset of low back pain. The doctor's report also contained the first mention of a spectacular event involving a tree falling on claimant. Since this report claimant relates all of his complaints to the tree falling incident.

No doctor persuasively opines that claimant's low back condition is probably related to an industrial injury. The subsequent opinions by four of the examining physicians express doubt that claimant's low back complaints are related to the accepted industrial injury. They deferred to the records of the first two doctors to see claimant: the chiropractor and the general practitioner. The general practitioner's chartnotes and opinion as a whole establish that it was possible there was a contribution to claimant's low back condition by the industrial injury but that such a contribution was not a probability. The general practitioner also deferred to the chiropractor's report. The chiropractor reported no complaint of low back symptoms.

At hearing claimant testified that he was injured when a tree fell on him and rolled down his back from the head to the buttocks approximately September 7, 1983. He said he lost consciousness and suffered scratches, swelling, and bruises from the event and was limited in his ability to continue working for a few days. He suffered pain and stiffness but continued to work until he felt the pain in his neck and shoulders related to the operation of the skidder. Claimant's wife and mother testified that claimant had complained of low back pain during the month of September 1983. Claimant's wife also testified that claimant had complained of low back pain to the general practitioner and the chiropractor.

The Referee found that claimant greatly exaggerated his complaints and that his testimony was inconsistent with the medical histories and examination reports of some of the examining physicians. The Referee relied on the credible testimony of claimant's wife and mother to find that the evidence preponderated in favor of a finding that claimant's low back condition was related to the accepted industrial injury.

Ordinarily a case involving an injury to a logger's low back resulting from a blow by a tree would not present a complex question of medical causation. In Uris v. Compensation Department, 247 Or 420, 426 (1967), the court stated:

> "In the compensation cases holding medical testimony unnecessary to make a prima facie case of causation, the distinguishing features are an uncomplicated situation, the immediate appearance of symptoms, the prompt reporting of the occurrence by the workman to his superior, and consultation with a physician, and the fact the claimant was theretofore in good health and free from any disability of the kind involved. A further relevant factor is the absence of expert testimony that the alleged precipitating event could not have been the cause of the injury."

However, in this case we are not persuaded that credible testimony by a lay person is sufficient to carry the burden of proof of medical causation. Experienced examining physicians opined that the proof of medical causation is too doubtful to express an opinion or too weak to support an opinion of medical causation. In this case, claimant did not report the tree falling

incident to his employer, the incident was not corroborated, the objective signs of scratches and bruises were not corroborated, claimant continued to work full-time, he did not seek medical attention until more than a week had passed, the initial reports of injury did not substantiate complaints of low back pain, the first complaint of low back pain was reported six months after the allegedly injurious event, and the doctors who have examined claimant have expressed doubt about the contribution of an industrial accident to claimant's low back condition.

Considering the medical examiners' doubts and the Referee's finding that claimant greatly exaggerates his complaints of pain and disability, we are not persuaded by the credible reports by the wife and mother of claimant's complaints that claimant's low back condition is related to an industrial injury. We find that claimant has failed to carry the burden of proof that his work or an incident in the course of his work was a material contributing cause of his low back condition. Therefore, the Referee's order which set aside SAIF's partial denial of claimant's low back condition is reversed.

ORDER

The Referee's order dated January 30, 1986 is reversed in part and affirmed in part. That portion of the order which set aside the partial denial by the SAIF Corporation is reversed. The partial denial dated June 25, 1985 is reinstated. The remainder of the order is affirmed.

WANDA M. WOOD, Claimant
Olson Law Firm, Claimant's Attorneys
David Horne, Defense Attorney

WCB 84-10885
August 27, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of that portion of Referee Leahy's order which awarded claimant 25 percent (80 degrees) unscheduled permanent disability for chronic depression. On review, the insurer contends that: (1) claimant's underlying mental condition has not worsened; (2) the alleged worsening was neither caused by her compensable injury nor its sequela; and (3) any emotional disability claimant sustained was not permanent.

This matter was remanded to obtain a deposition which had inadvertently been omitted from the record. Wanda M. Wood, 38 Van Natta 471 (1986). The deposition has now been inserted into the record. Its inclusion has not altered the Referee's previous finding.

Following our de novo review of the medical and lay evidence, we are persuaded that: (1) claimant's underlying mental condition has worsened; (2) a material contributing cause of claimant's worsened condition is her compensable injury; and (3) claimant has sustained a permanent loss of earning capacity as a result of this compensable condition. However, we find that the Referee's award should be reduced. Accordingly, we modify the Referee's order.

Claimant was 47 years of age at the time of hearing. In April 1981, while working as an accountant for a manufacturing company, she tripped and fell down some stairs. Claimant broke

her right elbow, sustained a hair-line fracture to her right foot, and suffered multiple contusions to her right wrist, right shoulder, and knees.

From the outset, Dr. Donkle, her treating physician since 1971, has also diagnosed a depressive reaction. Claimant has a prior history of complaints concerning a nervous and depressive behavior. However, Dr. Donkle has attributed 85 percent of claimant's current emotional problems to her compensable injury.

In September 1981 Dr. Donkle referred claimant to Dr. Roberts, psychiatrist. Dr. Roberts testified that he has remained claimant's treating psychiatrist since, except for the past nine months. Her condition has been diagnosed as major depressive disorder, which has left her unable to cope with stress. Thus, whereas she was formerly able to work 12 hour days, six days a week, a 40 hour work week is now arduous.

Dr. Roberts concluded that claimant's condition was permanent and directly related to her compensable injury. In Dr. Roberts' opinion, she would probably continue to need anti-depressant medication and would be limited in her ability to function on the job. Considering claimant's difficulties with stress, Dr. Roberts recommended that she avoid "hard physical and secretarial-type problems."

Dr. Turco, psychiatrist, reviewed claimant's medical history and performed two independent medical examinations. The first examination occurred in June 1983 and the second in July 1984, approximately one year prior to the hearing. Dr. Turco diagnosed a resolving passive-aggressive personality disorder and adult situational stress reaction. Rather than representing a permanent worsening of claimant's underlying personality structure, Dr. Turco opined that claimant's injury had exacerbated her symptoms.

In addition to a high school education, claimant has completed two years of college, majoring in business administration. She also has taken "a couple of courses" at a local community college. Since her compensable injury, she becomes "very flustered" or "shaky" whenever she is confronted with a stressful situation. This uneasiness has limited her abilities to function as an accountant and secretary. For instance, prior to her injury she worked a great deal of overtime and on weekends. However, she now limits her work activities to a regular eight hour a day, 40 hour week. She presently is taking prescribed tranquilizers and anti-depressants.

Following her April 1981 injury, claimant did not return to work until August 1983. At that time she obtained employment as a secretary at a food processing company. She worked in this position until August 1984, when she moved to Texas. Since November 1984 she has worked as a financial accountant for a Texas church.

Relying on Dr. Roberts' opinion and claimant's testimony, the Referee found that claimant was suffering from a permanent, psychiatric problem. Although claimant had made a "relatively excellent recovery", the Referee concluded that she had sustained a permanent psychiatric disability. Accordingly, claimant was awarded 25 percent unscheduled permanent disability.

We agree that claimant's compensable injury has materially contributed to a permanent worsening of her mental condition. Moreover, this worsening has resulted in a permanent loss of earning capacity. ORS 656.214(5). However, we consider the Referee's award to be excessive.

In rating the extent of claimant's unscheduled permanent disability, we consider her psychiatric impairment, which includes her testimony concerning her 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). 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 her compensable mental condition.

ORDER

The Referee's order dated June 6, 1985 is affirmed in part and modified in part. In lieu of the Referee's award of unscheduled permanent disability, claimant is awarded 10 percent (32 degrees) unscheduled permanent disability, which is her total award to date for her compensable chronic depression. Claimant's attorney's fee shall be adjusted accordingly. The remainder of the Referee's order is affirmed.

KATHERINE E. CASTEEL, Claimant
Pozzi, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-03575 & 82-03576
August 28, 1986
Order Awarding Attorney Fee

We issued our Order on Remand from the Supreme Court on August 1, 1986, 38 Van Natta 873. In that order we reserved ruling upon the amount of a reasonable attorney fee for claimant's attorneys pending receipt of a petition for attorney fees. The petition having been received and the SAIF Corporation having responded thereto, the Board finds that claimant's attorneys should be awarded a reasonable attorney fee in the sum of $4,100, apportioned as follows: For services before the Hearings Division, $2,000; for services on Board review, $500; for services before the Court of Appeals, $587.50; for services before the Supreme Court, $1,012.50. Said fee is to be paid by the SAIF Corporation in addition to compensation.

On account of the Board's earlier disposition of the case, claimant's attorneys have been paid $793.98 out of compensation awarded to claimant. Because of the current disposition of the case, all of claimant's attorney fees are payable by SAIF in addition to compensation. ORS 656.382(2). Accordingly, SAIF shall pay the sum of $793.98 directly to claimant and shall pay the sum of $3,306.02 to claimant's attorneys.

IT IS SO ORDERED.

IRENE M. GONZALEZ, Claimant
Mike Dye, Claimant's Attorney
Cummins, et al., Defense Attorneys

WCB 85-09023
August 28, 1986
Amended Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Quillinan's order that denied claimant's request for penalties and attorney fees for the self-insured employer's failure to pay temporary total disability compensation as ordered by Referee Foster in WCB Case No. 84-12022. The issues are penalties and attorney fees.

The factual background of this case is set out in our Order on Review in WCB Case No. 84-12022, Irene M. Gonzalez, 38 Van Natta 257 (1986) and will not be fully repeated here. Suffice it to say that claimant sustained a minor injury to her right wrist which combined with preexisting psychological problems and eventually resulted in a "psycho-flexed" right hand. The employer initially accepted the claim, but when the psychological component of claimant's condition became manifest, the employer attempted to separate the physical and psychological aspects of the claim by issuing a notice of claim closure for the physical injury and issuing a partial denial for the psychological condition.

The matter came to hearing before Referee Foster in April 1985. In an Opinion and Order dated June 26, 1985 Referee Foster set aside the notice of claim closure and the partial denial and remanded the claim to the employer for "payment of compensation as authorized by law until closure pursuant to ORS 656.268" including the payment of "temporary total disability commencing November 2, 1984," the date of the employer's notice of claim closure. After Referee Foster's order issued, the employer failed to begin payment of temporary disability benefits. Claimant requested a hearing asking that penalties and attorney fees be assessed for this failure.

Claimant's request came to hearing before Referee Quillinan in August 1985. The employer argued that Referee Foster's order was so unclear that it could not tell whether or not it had been ordered to accept claimant's psychological condition and contended, in any event, that it was excused from paying temporary disability benefits by the rule announced by the Board in Sharon Bracke, 36 Van Natta 1245 (1984). (The Board's decision in the Bracke case was recently reversed. Bracke v. Baza'r, Inc., 78 Or App 128 (1986). Although the court's disposition of the case did not make it necessary for the court to directly address the rule announced by the Board the court did express reservations about the rule that have subsequently caused us to remark that our decision in Bracke is of "questionable precedential value." Richard M. Deskins, 38 Van Natta 494, 497 (1986).) Referee Quillinan accepted the employer's arguments and in an Opinion and Order issued August 30, 1985 declined to assess penalties or attorney fees against the employer. The Referee reaffirmed her conclusions in an Order on Reconsideration dated October 9, 1985.

On Board review, claimant contends that Referee Quillinan redecided issues disposed of by the litigation before Referee Foster. She contends that only two issues should have been addressed by Referee Quillinan: (1) whether Referee Foster

ordered the payment of temporary disability compensation, and (2) whether the employer complied with that order. The employer argues that Referee Quillinan did not relitigate issues raised or raisable before Referee Foster, but merely interpreted Referee Foster's order to allow application of the Bracke rule. In any event, the employer contends that claimant was the party who insisted on pursuing the Bracke issue before Referee Quillinan.

An employer or insurer must pay temporary disability compensation ordered by a Referee within 14 days of the issuance of the order regardless of whether it believes that the order is legally or factually correct. ORS 656.313(1) & (4); OAR 436-60-150(3)(e) (formerly 436-54-310(3)(e)); Hutchinson v. Louisiana Pacific, 67 Or App 577, 581 (1984). Failure to pay compensation in the face of a clear order to do so is an unreasonable delay or refusal in the payment of compensation and exposes an employer or insurer to liability for penalties and attorney fees. ORS 656.262(10); 656.382(1).

The situation becomes more complicated when the employer or insurer contends that the Referee's order is so ambiguous that it is honestly uncertain of its duties under the order. See David A. Kimberly, 35 Van Natta 1607 (1983); Daniel J. Leaton, 34 Van Natta 1481 (1982); Albert Nelson, 34 Van Natta 1077 (1982); Kathie L. Cross, 34 Van Natta 1064 (1982); Frank R. Gonzales, 34 Van Natta 551 (1982). In such cases, the Referee in the enforcement action must examine the alleged ambiguity in light of the order as a whole and, if necessary, in light of as much of the record in the original action as has been submitted by the parties and determine the most reasonable interpretation of the order. See David A. Kimberly, supra, 35 Van Natta at 1608-10; Daniel J. Leaton, supra, 34 Van Natta at 1481-82; Kathie L. Cross, supra, 34 Van Natta at 1064-65; Frank R. Gonzales, supra, 34 Van Natta at 551-53; cf. Alaene R. Smith, 35 Van Natta 310, 312-13 (1984)(same issue in res judicata context); Lewis Twist, 34 Van Natta 290, 291-93 (1982)(same issue in res judicata context), aff'd, Tektronix Corp. v. Twist, 62 Or App 602, rev den 295 Or 259 (1983). The role of the Referee in the enforcement action is not to correct legal or factual errors committed by the Referee in the original action; but simply to determine: (1) the precise nature and amount of compensation due under the order of the Referee in the original action, (2) the nature, amount and timing of any payment by the employer or insurer; and (3) the reasonableness or unreasonableness of any deficiency or tardiness in payment. See David A. Kimberly, supra, 35 Van Natta at 1609-11; Daniel J. Leaton, supra, 34 Van Natta at 1482-83; Frank R. Gonzales, supra, 34 Van Natta at 553-54; see also Richard M. Deskins, 38 Van Natta 494, 496 (1986) (emphasizing the importance of enforcing Referees' orders).

The nature of the ambiguity in the Referee's order in the original action is a key factor in determining the reasonableness of any deficiency or tardiness in the payment of compensation. If the order is so ambiguous that a reasonable argument can be made that it did not require the payment of the disputed compensation, failure to have timely paid compensation ultimately determined to be due under the order is not unreasonable and penalties are inappropriate. See David A. Kimberly, supra, 35 Van Natta at 1611; Daniel J. Leaton, supra, 34 Van Natta at 1483. If, however, the alleged ambiguity in the original order is nonexistent or contrived, failure to make timely payment of the compensation due is unreasonable and penalties are

appropriate. See Frank R. Gonzales, supra, 34 Van Natta at 553-55. Attorney fees may be awarded if compensation ultimately is determined to be overdue under the order in the original action regardless of whether the employer or insurer was unreasonable in its interpretation of the order. See Daniel J. Leaton, supra, 34 Van Natta at 1483; Kathie L. Cross, supra, 34 Van Natta at 1066; Mary Lou Claypool, 34 Van Natta 943, 948 (1982).

In the present case, the employer's initial argument before Referee Quillinan was that the nature and amount of the compensation awarded by Referee Foster was so unclear that its refusal to pay temporary total disability beyond the date of its notice of claim closure on November 2, 1984 was reasonable and should not give rise to penalties and attorney fees. Although we agree that the reasoning reflected in Referee Foster's opinion is susceptible to differing interpretations, we do not find his order ambiguous at all. Referee Foster set aside the employer's notice of claim closure, set aside the partial denial of claimant's psychological condition and ordered the payment of compensation "as authorized by law" including temporary disability benefits from November 2, 1984 until claim closure pursuant to ORS 656.268. The only reasonable interpretation of this action, regardless of the reasoning offered therefor, was that the employer was required to accept claimant's psychological condition and pay temporary total disability benefits for the period from November 2, 1984 until the claim was closed by the Evaluation Division under ORS 656.268.

The employer's second argument, as we understand it, is that the phrase in Referee Foster's order which required payment of "compensation as authorized by law" allowed it unilaterally to apply the rule of Sharon Bracke, supra to the facts of this case and terminate its liability for temporary disability benefits as of November 2, 1984. This may have been a reasonable reading of the order had Referee Foster employed the above-quoted phrase in isolation. See Daniel J. Leaton, supra, 34 Van Natta at 1481. In light of the fact, however, that the same paragraph of the order contains a clear mandate to begin payment of temporary total disability benefits as of November 2, 1984, this reading of the order was unreasonable. The employer extracted one phrase from its context and then employed that phrase to render the order a nullity.

Further, even giving the employer the benefit of the doubt on this point, Bracke was not applicable to this case. Bracke applies only in situations where a denied claim has been ordered accepted and the claimant has been declared medically stationary prior to the order or mandate setting aside the denial but has not returned or been released to return to regular work. 36 Van Natta at 1247-49; see Richard M. Deskins, supra, 38 Van Natta at 497. Such was not the situation here. From the employer's perspective, this case involved two claims: a physical injury claim for the right wrist and a psychological claim for a psycho-flexed right hand. Bracke did not apply to the physical injury claim because that claim was not in denied status. Bracke did not apply to the psychological claim because there was no evidence at the time of the hearing before Referee Foster that claimant's psychological condition had been declared medically stationary. Under any possible reading of Referee Foster's order, therefore, the employer unreasonably failed to pay compensation due.

We conclude that a penalty of 25 percent of the temporary disability compensation due in accordance with Referee Foster's order for the period from November 2, 1984 to the date of the hearing before Referee Quillinan on August 26, 1985 is appropriate in addition to the attorney fees provided below. See Bracke v. Baza'r, Inc., supra, 78 Or App at 136.

ORDER

The Referee's order dated August 30, 1985 and the Order on Reconsideration dated October 9, 1985 are reversed. Claimant is awarded a penalty of 25 percent of the compensation due in accordance with Referee Foster's order for the period from November 2, 1984 to the date of the hearing before Referee Quillinan on August 26, 1985 to be paid by the self-insured employer. Claimant's attorney is awarded $1,250 for services at the hearing and $600 for services on Board review, to be paid by the self-insured employer.

ROBERTO I. MEZZANATTO, Claimant
Malagon & Moore, Claimant's Attorneys
Davis, et al., Defense Attorneys

WCB 86-08790
August 28, 1986
Order on Remand

The insurer has requested Board review of Referee Nichols' Order on Reconsideration dated August 13, 1986, which republished her withdrawn Interim Order dated July 17, 1986. See International Paper Co. v. Wright, 80 Or App 444, 447 (1986). Ordinarily, an "interim order" is not reviewable by the Board or the courts. See Lindamood v. SAIF, 78 Or App 15, 17-18 (1986) (Interim order setting aside disputed claim settlement); Mendenhall v. SAIF, 16 Or App 136 (1974) (Interim order finding claim not untimely). However, an order that finally decides one aspect of a case and leaves other aspects, severable from that decided, for further proceedings may be reviewable. Price v. SAIF, 296 Or 311, 316 (1984).

On its face, the order in this case is labeled as an "interim order" and does not contain a notice of appeal rights. The order also appears to decide only whether claimant has the right at this time to raise and litigate the question of the compensability of a thoracic outlet syndrome condition. On the other hand, taken in context with the communications in the record between the parties and the Referee, the order is subject to the interpretation that it finally decides the question of the compensability of claimant's thoracic outlet syndrome, while leaving for further consideration whether ongoing medical treatment for that condition is reasonable and necessary under ORS 656.245.

We conclude that if the order we are asked to review decides only whether claimant has the right to raise and litigate the compensability of thoracic outlet syndrome, it is an "interim order" and not currently reviewable. However, if the order finally decides the compensability of the thoracic outlet syndrome, leaving only the issue of the reasonableness and necessity of treatment of the condition to be decided, the order is reviewable under the rule of Price v. SAIF, supra. Because the order is equally subject to either interpretation, we conclude that the record is incompletely developed, ORS 656.295(5), and remand the matter to the Referee for clarification.

ORDER

The Referee's orders dated July 17, 1986, July 28, 1986 and August 13, 1986 are vacated. This matter is remanded to Referee Nichols for further proceedings consistent with this order.

ERNIE E. NAZARIO, Claimant
Pozzi, et al., Claimant's Attorneys
Bottini, et al., Defense Attorneys

Own Motion 86-0334M
August 28, 1986
Own Motion Order Abated

The Board issued an Own Motion Order on August 7, 1986 whereby all relief sought by claimant was denied. Claimant has requested that the Board abate its order and that further consideration be given to the issues of temporary total disability and permanent partial disability.

After thorough review of the recent arguments presented to the Board, we conclude that it would be in the best interest of the parties to abate our order pending further consideration of the issues involved. We hereby direct the insurer's attorney to provide to the Board and claimant's attorney copies of the cancelled checks purportedly paid to claimant for the period May 20, 1985 through June 21, 1985. All other pertinent documents should also be provided to claimant's attorney. The Board will not order a copy of the hearing transcript for consideration in this case. Claimant may choose to do so at his own expense.

Both parties should gather their evidence together as expeditiously as possible in order that the record be complete within 30 days of the date of this order.

IT IS SO ORDERED.

GERALD N. AHLSTROM, Claimant
John J. Lannan, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
David L. Jorling, Defense Attorney

WCB 85-06434, 85-07135 & 85-07136
August 29, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

The City of Portland, a self-insured employer, requests review of Referee Neal's order that set aside its denial of responsibility for claimant's low back condition as a new injury and upheld the SAIF Corporation's denial of claimant's low back condition as an aggravation. The issue on review is responsibility.

Claimant injured his low back in 1983 while working for SAIF's insured, a rural fire district, as a firefighter. The claim was accepted as a "non-disabling compensable injury." ORS 656.005(8)(c). Claimant lost no time from work. The employer was subsequently absorbed by the self-insured City of Portland. Claimant continued to work as a firefighter until he suffered a recurrence of back pain in 1985. The claim was accepted by the City of Portland as a "non-disabling compensable injury." Claimant received conservative symptomatic treatment and returned to work. More than 60 days after the date of injury the City of Portland denied responsibility for claimant's low back condition because doctors uniformly opined that claimant's condition was not worsened by the second injury, but was merely temporarily symptomatically exacerbated.

The Referee found that the medical opinion was persuasive that claimant's condition represented an aggravation of the accepted 1983 industrial injury and that the 1985 incident did not worsen claimant's condition. The Referee concluded, however, that the City of Portland was precluded from issuing its backup denial of responsibility by: (1) its acceptance of a new injury claim; (2) failure to deny responsibility within 60 days of the date of notice of the claim and; (3) failure to show good cause for issuing a backup denial as allowed by Bauman v. SAIF, 295 Or 788 (1983). The Referee relied on Jeld-Wen, Inc. v. McGehee, 72 Or App 12, rev. den., 299 Or 203 (1985), and Johnson v. Spectra Physics, 77 Or App 1 (1985), rev. allowed, 301 Or 165 (1986).

In McGehee the court held that the general prohibition of backup denials in Bauman applied in responsibility cases. The claimant was injured while working for Jeld-Wen and the claim was accepted, processed, and closed. The claimant subsequently worked for another employer and suffered an increase in symptoms. An aggravation claim was accepted by Jeld-Wen and compensation paid. After more than 60 days had passed Jeld-Wen retroactively denied responsibility for the claimant's condition and claimant filed a claim for a new injury with the subsequent employer. The court found that the only issue before it was responsibility and that compensability was not an issue. The court considered the policy reasons supporting the Bauman rule proscribing backup denials: "Those considerations are as weighty in claims involving responsibility as in those involving compensability." 78 Or App at 15. The court finally concluded that backup denials of responsibility were prohibited except as authorized by the rule in Bauman.

Since the McGehee case, the court has repeated that backup denials in responsibility cases are not permissible except when one of the exceptions permitted by Bauman is proven. In Chastain v. SAIF, 72 Or App 422, rev. den., 299 Or 251 (1985) the court held that the acceptance by the insurer of a new injury claim precluded a backup denial of responsibility and cited McGehee. The Board had upheld backup denials of compensability and responsibility issued by both the aggravation insurer and the new injury insurer after publication of an order by the Workers' Compensation Department pursuant to ORS 656.307. Darrell Chastain, 35 Van Natta 1781 (1983). SAIF, the new injury insurer, conceded that its backup denial of compensability was prohibited by Bauman, but argued that its backup denial of responsibility was permitted.

In Retchless v. Laurelhurst Thriftway, 72 Or App 728, rev. den., 299 Or 251 (1985), the court held that the acceptance of an aggravation claim did not preclude a backup denial of responsibility based on an intervening injury claim if the aggravation insurer continued to pay compensation until there was a determination that a subsequent insurer or employer was responsible for compensation. The court cited Jeld-Wen, Inc. v. McGehee supra, as direct support for its conclusion.

In Liberty Northwest Ins. Corp. v. Powers, 76 Or App 377 (1985), the court held that the acceptance of an aggravation claim precluded a subsequent backup denial of responsibility based on an intervening industrial injury. The intervening injury claim had

been denied and the denial was final because the claimant failed to timely request a hearing. The court: "In Jeld-Wen, Inc. v. McGehee, [cite omitted], we held that the Bauman rule is equally applicable to denials of responsibility." 76 Or App at 380.

In Johnson v. Spectra Physics, 77 Or App 1 (1985), rev. allowed, 301 Or 165 (1986), the court held that the backup denial of responsibility by one of three employers was illegal, citing McGehee, supra. In Johnson there were two denials of compensability and one accepted claim with a backup partial denial of responsibility issued by three different insurers relative to a carpal tunnel condition. The court stated in a footnote, "An accepting employer is required to continue compensation and cannot retroactively deny the claim unless and until someone else is determined to be responsible." 77 Or App at 6n.1 (Emphisis the court's.) The court concluded that the claim was compensable and remanded the claim for acceptance by the first insurer and set aside the retroactive responsibility denial of the third insurer.

The Board discussed the cases on backup denials of responsibility in Mary G. Mischke, 37 Van Natta 1155 (1985). The Board stated that the apparent common thread was that there could be no backup denial of compensability without proving a Bauman exception, but the insurers could litigate responsibility at any time provided that a claimant's right to compensation was not interrupted.

The most recent word on the issue of whether and when a backup denial may be issued in a responsibility case is Fred Shearer & Sons v. Stern, 77 Or App 607 (1986). EBI Companies accepted a new injury claim. More than 60 days later it issued a retroactive denial of responsibility for compensation because it believed that the claimant's condition was an aggravation of a prior industrial injury covered by SAIF. SAIF was designated the paying agent by an order of the Worker's Compensation Department pursuant to ORS 656.307 and the issue of responsibility was referred to the Board for a hearing. The Board concluded that EBI's responsibility denial was precluded by Bauman because the new injury claim was accepted and EBI did not deny responsibility within 60 days of the date of notice of the claim. The Board stated that it would have found SAIF responsible for compensation but for the rule in Bauman as the Board had applied it in Cleve A. Retchless, 35 Van Natta 1788 (1983), reversed, Retchless v. Laurelhurst Thriftway, supra. 36 Van Natta 1328 (1984). The court found that the situation was analagous to Retchless v. Laurelhurst Thriftway, supra, except that the roles of the insurers were changed:

> "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." 77 Or App at 610.

We conclude from the court's opinions that retroactive denials of a claimant's right to compensation are not allowed, except as permitted by the exceptions authorized in Bauman, but that retroactive denials of employer or insurer responsibility are allowed if and only if there is an interim official designation of responsibility by the Workers' Compensation Department by means of an order pursuant to ORS 656.307. An insurer may issue such a retroactive or backup denial of responsibility without having to show fraud, misrepresentation, or other illegal activity. According to the court's rationale, backup denials of responsibility may be issued at any time in the life of a claim.

In this case, SAIF accepted the 1983 injury claim. The City of Portland accepted the 1985 injury claim then issued its backup denial of responsibility more than 60 days after the date of notice. An order pursuant to ORS 656.307 was issued so that there was no risk to claimant that his compensation would be interrupted. The medical evidence is persuasive that claimant suffered an aggravation of the injury for which SAIF is responsible rather than a new injury for which the City of Portland would be responsible. There is no evidence to support a finding of fraud, misrepresentation, or other illegal activity. Based on our interpretation of the relevant case law, the Board finds that the City of Portland's backup denial of responsibility should be reinstated and SAIF's denial of aggravation set aside.

Claimant did not appear on review and there was no issue of compensability. Therefore there is no attorney fee award.

ORDER

The Referee's order dated January 31, 1986 is reversed. The City of Portland's denial dated May 20, 1985 is reinstated. The SAIF Corporation's denial dated April 30, 1985 is set aside and the claim is remanded to SAIF for acceptance and processing.

MASON L. ASBURY, Claimant
Pozzi, et al., Claimant's Attorneys
Cliff, Snarskis & Yager, Defense Attorneys
Beers, Zimmerman & Rice, Defense Attorneys

WCB 85-05592 & 85-08339
August 29, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Industrial Indemnity Co. requests review of Referee Fink's order which: (1) set aside its denial of claimant's aggravation claim for a neck and right shoulder condition; and (2) upheld EBI Companies' denial of claimant's aggravation claim for the same condition. Claimant has filed a cross-request, but raises no issue on Board review. On review, Industrial Indemnity contends that EBI's denial was procedurally improper. We agree and reverse.

Claimant was 37 years of age at the time of hearing. In September 1983, while working as a truckdriver, he was injured when his truck overturned. Industrial Indemnity was on the risk at the time. The diagnosis was cervical strain with radicular symptoms, but without neurologic deficit. Claimant also experienced tingling, numbness, and weakness in his right arm and

shoulder. A myelogram and an EMG study were essentially normal. X-rays demonstrated minimal disc space narrowing in the cervical spine. Treatment has been conservative, primarily consisting of physical therapy and cervical traction.

In June 1984 Dr. Helle, neurosurgeon, released claimant to full-time work, without restrictions. Thereafter, claimant returned to his truck driving duties with his employer, who was then insured by EBI. Claimant worked approximately 60 hours a week between July and October 1984. Although his symptoms increased, he did not miss any work nor did he seek medical treatment.

In October 1984 claimant fell on some pipe, landing on his right shoulder. Claimant sought medical treatment and was advised to remain off work until he felt that he was able to return. A few days later he returned to Dr. Helle, who diagnosed a contusion of the right arm, with possibly a transient concussion of the associated nerves. Finding no neurological abnormality, Dr. Helle concluded that claimant could return to work. Claimant returned to his employer, but was terminated for reasons not germane to this review.

Claimant filed a new injury claim, stemming from the October 1984 incident. The claim indicated that claimant had returned for work approximately six days after the incident. EBI accepted the claim, but misclassified it as nondisabling.

Between November 1984 and February 1985 claimant worked as a fishing guide. His duties included transporting, assisting, and instructing fisherman. He performed these duties from three to seven days a week. While working as a guide claimant was not involved in any accidents.

In March 1985 claimant began receiving treatments from Dr. Cichoke, chiropractor. Claimant's complaints included right arm and shoulder pain, right hand numbness, and neck cramps. He attributed his symptoms to the September 1983 motor vehicle accident, while Industrial Indemnity was on the risk. Dr. Cichoke diagnosed "chronic cervical sprain with subluxations, nerve root irritation, and extension type brachial neuralgia." Dr. Cichoke did not release claimant for work and concluded that claimant's condition was not medically stationary.

In April 1985 Industrial Indemnity denied responsibility for claimant's current condition. Inasmuch as claimant had returned to work in June 1984 and worked steadily without need of medical treatment until the October 1984 incident, Industrial Indemnity contended that responsibility for claimant's medical treatment should be borne by EBI. Thereafter, claimant asked his employer to submit his claim to EBI.

In May 1985 the Orthopaedic Consultants performed an independent medical examination. Claimant's complaints included a soreness and tightness in his right shoulder, with pain that extended into his neck and right hand. The Consultants diagnosed acromioclavicular strain of the right shoulder and C-8 sensory radiculopathy. Injection therapy was recommended. If the injection was unsuccessful, the Consultants concluded that claimant's right shoulder loss of function was minimal. In the Consultants' opinion, claimant's September 1983 injury was medically stationary at the time of his October 1984 injury.

In July 1985 a Determination Order issued, closing claimant's 1983 injury claim with Industrial Indemnity. Claimant was awarded approximately nine months of temporary disability, but no permanent disability. The Determination Order noted that it did not determine any conditions denied by Industrial Indemnity's April 1985 denial.

Also in July 1985, claimant requested a hearing concerning EBI's failure to process his claim. Among other grounds, claimant raised the following issues: (1) failure to accept or deny within 60 days; (2) failure to pay interim compensation; (3) failure to supply requested claims documentation; (4) failure to classify the initial claim as non-disabling; and (5) failure to close the initial claim.

In August 1985 EBI denied responsibility for claimant's current medical treatment. EBI contended that claimant's current medical condition was not related to his October 1984 injury.

Dr. Cichoke objected to EBI's denial of claimant's current medical treatment. Both subjective and objective findings persuaded Dr. Cichoke that claimant was in pain and had sustained soft tissue and neurologic damage. Dr. Cichoke reported that claimant attributed his pain to the October 1984 injury.

In September 1985 Dr. Helle reviewed the medical record. Dr. Helle had last examined claimant in October 1984. In Dr. Helle's opinion, the October 1984 injury constituted a temporary worsening of claimant's underlying preexisting condition, which was related to the September 1983 injury. Dr. Helle concluded that there was no permanent worsening of the preexisting condition as a result of the October 1984 injury.

Relying on Dr. Helle's opinion, Dr. Cichoke's initial medical report, and the lack of further objective findings following the October 1984 injury, the Referee concluded that Industrial Indemnity was responsible for claimant's current condition. The Referee further found that EBI had misclassified the October 1984 injury. Therefore, the October 1984 industrial injury claim was remanded for processing. The Referee did not discuss the propriety of the preclosure denials.

We addressed the issue of preclosure denials in Jimmy C. Lay, 37 Van Natta 583 (1985). In Lay, the claimant suffered further injury while a prior injury claim was in open status. The subsequent insurer contended that the prior insurer's preclosure denial was invalid for the reasons stated in Safstrom v. Riedel International, Inc., 65 Or App 728 (1983), and Roller v. Weyerhaeuser Co., 67 Or App 583, aff'd on reconsideration, 68 Or App 743 (1984). We disagreed, stating as follows:

> "We believe that it is the better policy to allow an employer/insurer to issue a preclosing denial of continued responsibility for an accepted condition where it appears that injuries or conditions attributable to a subsequent employment aggravate or exacerbate the condition such as to make a shift of employer/insurer responsibility

appropriate. The practical effect of precluding responsibility denial in such a circumstance would be to make the first employer/insurer responsible for any and all effects of subsequent employments on the accepted condition between the time the claim is accepted and the time it is finally closed. We do not believe that such a result was intended." 37 Van Natta at 584.

Our reasoning in Lay is directly applicable to the preclosure denials issued here. Industrial Indemnity issued its denial prior to the closure of the 1983 injury claim. However, by the time of Industrial Indemnity's denial, claimant had returned to his regular work and sustained a further compensable injury while another insurer was on the risk. Inasmuch as the preponderance of the evidence establishes that this subsequent employment exposure was sufficient to make a shift of responsibility appropriate, we find that Industrial Indemnity's denial was proper.

The same cannot be said for EBI's denial. Since claimant suffered temporary disability as a result of his 1984 injury, EBI should have classified the claim as disabling. Thus, claim closure should have been achieved either through a Notice of Closure or by Determination Order. ORS 656.268(3); Davison v. SAIF, 80 Or App 541 (1986). Neither procedure was followed prior to EBI's denial. Moreover, unlike the facts surrounding Industrial Indemnity's denial, the preponderance of the evidence fails to establish that injuries or conditions attributable to a subsequent employment aggravated or exacerbated claimant's previously accepted condition. Consequently, we conclude that EBI's denial was procedurally improper.

ORDER

The Referee's order dated November 1, 1985 is affirmed in part and reversed in part. Industrial Indemnity Co.'s April 23, 1985 denial is reinstated. EBI Companies' August 19, 1985 denial is set aside and this claim is remanded to EBI for processing according to law. The remainder of the Referee's order is affirmed.

KAREN J. BATES, Claimant
William E. McCann, Claimant's Attorney
Brian L. Pocock, Defense Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-15422 & 85-15423
August 29, 1986
Order Denying Motion to Dismiss

Claimant has moved the Board for an order dismissing Aetna Life and Casualty Company's request for Board review of Referee Nichols' order on the ground that Aetna failed to serve its request on claimant and the other employer in this responsibility case. Claimant acknowledges that Aetna did timely serve the request for review on the attorneys for claimant and the other employer. Claimant does not argue that she was prejudiced by the manner of giving notice.

In the absence of prejudice to a party, timely service of a request for review on the attorney for a party, rather than the party, is sufficient compliance with ORS 656.295(2) to vest

jurisdiction in the Board. Argonaut Insurance v. King, 63 Or App 847, 850-51 (1983); Nollen v. SAIF, 23 Or App 420, 423 (1975), rev den (1976). The motion to dismiss is denied.

IT IS SO ORDERED.

CALVIN C. BOURNE, Claimant
Mike Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Cliff, Snarskis & Yager, Defense Attorneys

WCB 85-01025, 85-12795, 85-12842 & 85-12843
August 29, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Industrial Indemnity Company requests review of that portion of Referee Quillinan's order which set aside its denial of responsibility for claimant's low back condition and upheld the SAIF Corporation's denial of responsibility. Claimant cross-requests review of the Referee's denial of attorney fees for services at hearing after the publication of an order pursuant to ORS 656.307. The issues on review are responsibility and attorney fees.

The Board affirms and adopts the order of the Referee with the following comments. Insurer or employer-paid attorney fees are awarded for obtaining compensation for an injured worker. ORS 656.386(1). These fees can also be awarded in conjunction with penalties for unreasonable claims processing. ORS 656.382. In all other cases, except denial of compensation or penalties for unreasonable claims processing, the injured worker's attorney is allowed compensation out of claimant's compensation. ORS 656.386(2). To the extent an injured worker's attorney is instrumental in obtaining compensation in a responsibility case, an appropriate attorney fee may be allowed. OAR 438-47-015; Dennis S. Current, 38 Van Natta 858 (July 29, 1986). If it appears by the record at the hearing that the provisions of ORS 656.307 were not complied with then a fee may also be awarded. OAR 438-47-090(2); see, Jerry W. Wine, 38 Van Natta 470 (1986).

OAR 438-47-090(1) applies conjunctively where claimant hires an attorney after the publication of an order pursuant to ORS 656.307, in addition to the other specified conditions. In this case claimant hired his attorney long before the publication of the Department's order. Although one insurer delayed more than three months before responding to the Department's request, claimant's attorney apparently did not participate in the obtaining of the Department's order. Had his attorney participated prior to the hearing in procuring an order pursuant to ORS 656.307, claimant would have been entitled to an attorney's fee. See Mark L. Queener, 38 Van Natta 882 (August 1, 1986).

At the time of the hearing there was no denial of claimant's right to compensation, and the record reveals no evidence that the provisions of ORS 656.307 were not adhered to. Therefore, we find that there is neither statutory nor regulatory authorization to award attorney fees. Consequently, claimant's attorney was not entitled to an insurer-paid fee for services at the hearing.

Inasmuch as there was no issue of claimant's right to compensation, claimant's attorney is not entitled to a fee for services on Board review.

ORDER

The Referee's order dated February 26, 1986 is affirmed.

JOYCE GIBSON, Claimant
Welch, Bruun & Green, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-07813
August 29, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The SAIF Corporation requests review of Referee Galton's order which increased claimant's unscheduled permanent disability award for a left shoulder, cervical, and low back injury from five percent (16 degrees), as awarded by a June 11, 1985 Determination Order, to 50 percent (160 degrees). On review, SAIF contends that the award should be reduced. We agree and modify.

Claimant was 37 years of age at the time of hearing. In August 1984, while working as a nurse's aide, she suffered a left shoulder, neck, and low back injury during a lifting incident. Dr. Plewes, her treating chiropractor, diagnosed sprains of the cervical spine, left shoulder, and lumbar spine. These sprains were accompanied by "ligamentous instability myofascitis and localized evidence of nerve root irritation." All treatment has been conservative, primarily consisting of chiropractic manipulation, ultra sound therapy, and lumbar traction.

In December 1984 Dr. Plewes referred claimant to Dr. Franks, neurosurgeon. Dr. Franks diagnosed mild cervical, dorsal and left parascapular strain which had almost completely resolved. A "mild evidence of lumbar interspinous ligamentous strain" was also detected. Concluding that claimant's symptoms were musculoskeletal in nature, Dr. Franks did not recommend further neurosurgical evaluations. Dr. Franks agreed with Dr. Plewes' suggestion that claimant temporarily avoid repetitive lifting or twisting motions and restrict her maximum lifting capacity to 35 pounds.

In April 1985 claimant was referred for vocational assistance. In preparation for this assistance, Dr. Plewes completed a physical assessment form. According to Dr. Plewes' assessment, claimant could stand for two hours, sit for four hours, and walk for two hours. She was able to occasionally lift, carry, push, and pull up to 20 pounds. In addition, she could occasionally engage in bending, twisting, crouching, and kneeling activities. In Dr. Plewes' opinion, claimant could not return to her job as a nurse's aide.

In May 1985 a vocational assessment was performed by Mr. Stein, vocational consultant. Mr. Stein reported that claimant had a high school diploma and had completed a six month course in typing, telephone work, filing, and "a little keypunch." Claimant's work experience consisted of approximately 10 years as a nurse's aide. Work evaluations revealed no average or above average aptitudes. The results reflected a capacity for

non-complex entry level work. Mr. Stein concluded that claimant's prognosis for a successful return to work was good, preferably through a Direct Employment Program. This prognosis was primarily based on her transferable skills in medical terminology, filing, and patient care.

Also in May 1985 Dr. Hardiman, an orthopedist for the Western Medical Consultants, performed an independent medical examination. Dr. Hardiman had previously examined claimant in December 1984. Claimant continued to complain of pain extending into her arm, shoulder, and low back. She also experienced tingling into her left leg and both feet. Dr. Hardiman noted the presence of a significant functional component. Concluding that the claim should be closed, Dr. Hardiman rated claimant's permanent disability as mild from an objective standpoint. Dr. Hardiman predicted that claimant's ability to function would be based on her perception of her discomfort and her motivation to pursue gainful employment.

In June 1985 Dr. Plewes approved a proposed position for claimant as a receptionist and file clerk. The position was described as light, predominantly sedentary duty. This position apparently never materialized. However, immediately prior to the September 1985 hearing, claimant had obtained temporary employment as a companion for an elderly woman. Her duties were not of a physical nature, mainly consisting of fixing lunch and washing the dishes.

In August 1985 Dr. Plewes reported that he had last examined claimant in July 1985. She continued to complain of pain in the left shoulder and middle back, which radiated into her neck, as well as low back and leg pain. Dr. Plewes concluded that claimant had sustained "permanent ligamentous damage to the cervical, thoracic, left glenohumeral, and lumbosacral areas." The permanent impairment to her cervical, thoracic, and left shoulder area was rated as moderate to severe. This rating was based on persistent pain, loss of motion, and loss of strength. Dr. Plewes rated claimant's lower back impairment as mild due to stiffness and soreness, as well as the continual burning sensations in both legs.

Claimant experiences pain in the left shoulder, neck, and mid-back. These symptoms are aggravated by lifting and bending activities. She does not take any prescribed medication or aspirin. Her physical limitations prevent her from returning to her former activities as a nurse's aide. Claimant has applied for a number of positions as a clerk and receptionist. Yet, her typing deficiencies have prevented her from obtaining employment. Claimant testified that she was six credits short of securing a high school diploma. She acknowledged that she had taken a typing and filing course at a business college. However, she had never been employed in such a capacity.

The Referee found that claimant was a totally credible and reliable witness. After considering the relevant social/vocational factors contained in OAR 436-30-380 et seq., the Referee concluded that claimant's permanent physical impairment and restrictions were more devastating upon her wage earning capacity than it would be for most other workers. The Referee reasoned that claimant could only perform non-complex entry-level

work which involved very limited, if any, physical activities. Accordingly, the Determination Order's award of five percent unscheduled permanent disability was increased to 50 percent.

We agree that claimant's compensable injury and resulting 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 her physical impairment, which includes her credible and reliable testimony concerning her 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). Following our de novo review of the medical and lay evidence, and considering the aforementioned guidelines, we conclude that a 20 percent unscheduled permanent disability award adequately compensates claimant for her compensable injury.

ORDER

The Referee's order dated September 16, 1985 is modified. In lieu of the Referee's award, and in addition to the Determination Order's award of five percent (16 degrees) unscheduled permanent disability, claimant is awarded 15 percent (48 degrees), which gives her a total award to date of 20 percent (64 degrees) unscheduled permanent disability for her compensable left shoulder, cervical, and low back injury. Claimant's attorney's fees shall be adjusted accordingly.

WAYNE M. GRAY, Claimant
Emmons, et al., Claimant's Attorneys
Garrett, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-07219 & 85-04216
August 29, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Michael Johnson's order which upheld denials of his occupational disease claims for bilateral carpal tunnel syndrome issued by Safeco Insurance Company and the SAIF Corporation. On review, the issues are compensability and responsibility.

We affirm the order of the Referee with the following comments.

Although we agree with the Referee's ultimate decision, we disagree with his interpretation of Amfac, Inc. v. Ingram, 72 Or App 168 (1985). In drawing a distinction between a carpal tunnel condition and a syndrome, the Referee concluded that he was bound by the "strict guidelines" expressed in Amfac, Inc. v. Ingram, supra. We perceive no guidelines from the Ingram decision. Rather, Ingram merely recited the difference between worsened symptoms, which is not compensable, and a worsened underlying condition, which is compensable, as these terms are expressed in Wheeler v. Boise Cascade Corp., 298 Or 452 (1985), and Weller v. Union Carbide, 288 Or 27 (1979). After applying these principles to the facts as presented, the Ingram court was not persuaded that the claimant's work activities worsened her

underlying disease. Consequently, the Ingram court held that the occupational disease claim for bilateral carpal tunnel syndrome was not compensable.

We consider Ingram limited to its own facts. See William E. McNichols, 38 Van Natta 261 (1986). The medical evidence as presented in Ingram has no application to the medical evidence in this record. However, the legal principles remain constant. Thus, we apply the evidence compiled in this record to the legal principles as enunciated in Wheeler and Weller.

After completing our de novo review of the medical and lay evidence, we are not persuaded that claimant's work activities for either Safeco's or SAIF's insureds was the major contributing cause of his bilateral carpal tunnel condition, or its worsening.

ORDER

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

STEVEN HALL, Claimant
Beers, et al., Defense Attorneys

WCB 85-07253
August 29, 1986
Order of Dismissal

The insurer has moved to dismiss claimant's request for Board review on the ground that the request was not mailed to it within the time required by statute. ORS 656.289(3); 656.295(2). The Referee's order was mailed February 20, 1986. Claimant's request for review was mailed March 19, 1986 and was timely; however, copies of the request for review were not mailed to the insurer, the employer or the attorneys for either the insurer or employer. No other party received actual notice or knowledge of the request for review within 30 days after mailing of the Referee's order.

Compliance with ORS 656.295(2) is jurisdictional. Argonaut Insurance v. King, 63 Or App 847, 851-52 (1983). Having failed to meet the jurisdictional requirement of service on the adverse party or actual notice or knowledge within the statutory time, claimant's request for Board review is dismissed. The Referee's order is final by operation of law.

IT IS SO ORDERED.

DEBORAH McKAY, Claimant
JOSEPH P. GABER & PEGGY J. GABER dba CASCADE ADVENTURES, Employer
Samuel A. Hall, Jr., Claimant's Attorney
Bryant, Fitch & Filer, Attorneys
SAIF Corp Legal, Defense Attorney
Carl M. Davis, Ass't. Attorney General

WCB 85-14831
WCB 85-13839
August 29, 1986
Order of Remand

This matter is before the Board pursuant to the employer's request for review of Referee Myers' order dated April 23, 1986. On May 13, 1986 claimant filed with the Referee a request for reconsideration of the attorney fee awarded. Before the Referee could rule on the request, the employer filed its request for Board review. The employer has since advised the Board that it no longer wishes to contest the Referee's order, but that it agrees that the matter should be remanded to the Referee for reconsideration of the attorney fee award.

Based upon the representations of the parties, we conclude that it is appropriate to remand this matter to the Referee for reconsideration of the attorney fee award.

ORDER

The Referee's order dated April 23, 1986 is modified to strike the award of attorney fees. The Referee's order is affirmed in all other respects. This matter is remanded to Referee Myers for reconsideration of attorney fees.

TERRY E. NOLAN, Claimant
Peter O. Hansen, Claimant's Attorney
Bullard, et al., Defense Attorneys

WCB 84-09603
August 29, 1986
Order on Review

Reviewed by Board Members en banc.

Claimant requests review of Referee Mulder's order that: (1) upheld the insurer's partial denial of the claim for psychiatric services; and (2) awarded 15 degrees for 10 percent scheduled permanent partial disability in addition to the Determination Order dated September 27, 1984 that awarded 15 degrees for 10 percent scheduled permanent partial disability for injury to claimant's left knee. Claimant also requests an award of compensation for unscheduled permanent partial disability for pain in his left hip and penalties and attorney fees for a late and unreasonable denial. The issues on review are compensability, extent of scheduled permanent partial disability, extent of unscheduled permanent partial disability, and penalties and attorney fees.

The Board affirms the order of the Referee.

ORDER

The Referee's order dated December 23, 1985 is affirmed.

Board Member Lewis Dissenting:

I respectfully dissent. I would find that the temporary worsening of claimant's preexisting mental disorders to be a compensable consequence of his industrial injury.

Claimant compensably injured his left leg in 1983. His claim was accepted and eventually closed by Determination Order with an award of compensation for scheduled permanent partial disability of the leg. A complicated program to return claimant to modified work was arranged with the employer's safety and worker's compensation supervisor, the treating doctor, the vocational rehabilitation provider and claimant. The program required a change in the occupational assignments of other employes. All of the employes were covered by a union contract. The owner of the company was not aware of the details of the return-to-work plan.

When claimant returned to work under the plan, the owner discovered that claimant was performing work that the owner believed was not available to claimant under the union agreement. A meeting was held with claimant and claimant's immediate supervisor and the owner told claimant that the union agreement

prevented the claimant from performing the job which had been created for him under the return-to-work plan. Claimant became upset by the owner's statements. Claimant left the owner's office and started to leave the business's premises. In claimant's absence the owner called the safety supervisor and learned the details of the return-to-work plan, that the plan superseded the union seniority rules, and that claimant had the right to perform the job he was performing under the return to work plan. The owner found claimant in the parking lot and told claimant that he could continue to perform the modified job because the law required it.

Claimant was unaware that the owner had not been advised of the development of the return-to-work plan. Claimant believed that the owner had been part of the preparation of the plan and that the actions taken on claimant's return to work were designed to harass claimant and perhaps create grounds for termination.

Claimant left the premises. During the evening claimant became obsessed with thoughts of revenge and violence for what he perceived as trickery and betrayal by his employer. He sought counselling and eventually was admitted to a hospital. Claimant was confined in a hospital for one week and treated for agitation, depression, and violent thinking. The treating doctors, a psychiatrist and an orthopedic surgeon, related claimant's need for hospitalization for the mental disorders to the industrial injury as a material contributing cause. One independent psychiatric examiner opined that claimant had suffered merely a temporary appearance of symptoms of preexisting personality disorders without permanent worsening of the underlying psychological condition. The other independent psychiatric examiner did not believe that there was any reason for claimant's hospitalization.

I would find that the return to modified work program was a natural consequence of claimant's accepted industrial injury. ORS 656.012, 656.340; Cf. Woodman v. Georgia-Pacific Corp. 289 Or 551, 558 (1980). As a natural result of the industrial injury claimant's occupational activities were limited. The employe delegated by the owner to assist injured workers to return to work approved a cooperative modified return-to-work program for claimant. The owner stated his intention to claimant to scrap the return to modified work plan and require claimant to perform work that was beyond claimant's residual functional capacity if he wanted to continue working. Cf. Crosby v. SAIF, 73 Or App 372 (1985). Although the employer was mistaken and quickly resolved the problem, the employer's sudden reversals of position relative to the modified work program led to claimant's agitation, depression, and violent thinking. I would find that the physical effects of claimant's industrial injury were only a minor contribution to the total of the psychological stresses which contributed to claimant's need for psychiatric services. That alone might be sufficient to find the claim compensable. ORS 656.245; Grace v. SAIF, 76 Or App 511 (1985). I would find that all of the natural sequelae of the industrial injury, including the vocational rehabilitation program and the circumstances surrounding the supervised return to modified work program, also contributed to the temporary symptomatic worsening of claimant's preexisting personality

disorders. Grace v. SAIF, supra., (1985); cf. Adsitt v. Clairmont Water District, 79 Or App 1, 6-7 (1986).

I therefore respectfully dissent.

PAUL E. PIER, Claimant
Ann Kelley, Ass't. Attorney General

WCB CV-86003
August 29, 1986
Findings of Fact, Conclusion, and Proposed Order (Crime Victim Act)

Pursuant to notice, a hearing was conducted and concluded by Roger C. Pearson, special hearings officer, on August 20, 1986 at Salem, Oregon. Claimant, Paul E. Pier, was present and not represented by counsel. Claimant's wife, Kara Pier, was also in attendance. The Department of Justice Crime Victim Compensation Fund ("Fund") was represented by Ann Kelley, Assistant Attorney General. The court recorder was Tammy Steinbock. The record was closed August 20, 1986.

Claimant has requested review by the Workers' Compensation Board of the Fund's Findings of Fact, Conclusions and Order on Reconsideration dated February 5, 1986. By its order, the Fund denied claimant's claim for compensation as a victim of a crime under ORS 147.005 to 147.365. The Fund based its denial on: (1) claimant's failure to file a claim for benefits within one year from the date of the criminal injury; and (2) a lack of evidence that claimant was mentally or physically incapable of filing his claim within one year of his injury as a direct result of his injury.

FINDINGS OF FACT

Claimant was physically assaulted on January 21, 1981 in Toledo, Oregon. As a result of this unprovoked attack, he sustained bullet wounds to his neck and left hand. His father was killed during this same attack. Claimant's injuries required emergency treatment and overnight care in a hospital. For the next six months, while convalescing in the Portland / Vancouver area, he sought periodic medical treatment and psychiatric counseling. Thereafter, his condition stabilized and he has received no further medical or psychiatric treatment stemming from his injuries.

The day after the attack, claimant was told to stay away from the Lincoln County area because of tensions between his family and members of the American Indian Movement. This advice to keep a "low profile" came from both Val Batti, the Chief of Police for the City of Toledo, and Steve Tulliver, a state investigator. Because of this warning, claimant remained in the Portland / Vancouver area while his condition stabilized. During this period, he was unable to work. Based on an estimated income of $1,000 per month, claimant calculates that he sustained approximately $6,000 in lost wages.

Claimant first learned of the Crime Victims' Assistance Program about the same time he was advised to leave Lincoln County. Investigator Tulliver described, in general terms, a program in which claimant could receive compensation for his injuries and lost wages. However, claimant did not receive any information concerning application procedures. He was under the

impression that Mr. Tulliver would provide the application materials. Apparently, Mr. Tulliver forgot to deliver the materials to claimant. In March 1981, claimant also briefly discussed the program with Eric Wasmann, then Lincoln County District Attorney. According to claimant, District Attorney Wasmann recommended that he file his application after the completion of the pending murder trial.

In August 1981, following his period of convalescence, claimant moved to Alaska. He worked in a logging camp until October 1981. Claimant briefly returned to Lincoln County, then soon moved to Crescent City, California. He was employed as a commercial fisherman in California from approximately October 1981 until July 1982. During this period, claimant was physically and mentally capable of transacting business, as well as able to tend to his personal affairs. He also received several threats of physical harm, cautioning him not to assist in the prosecution of his father's alleged murderers. For example, an attempt was made on his life when an Indian tried to drive over him, ramming a vehicle into the front of a building. Claimant was unhurt in the incident.

While in California, claimant periodically traveled to Lincoln County to assist the District Attorney in preparing for the murder trial. In early 1983 claimant returned to Oregon and, eventually, to the Lincoln County area. From the time of the attack until the September 1985 trial, he was in contact with the Lincoln County District Attorney's office about once a month. According to Ronald K. Pomeroy, Chief Deputy District Attorney for Lincoln County, claimant's cooperation was extraordinary, necessitating dozens of missed work days.

The murder trial began in September 1985 and concluded in October 1985. Throughout the event, claimant's security was a major concern. Mr. Pomeroy based these security concerns on: (1) Indian issues in Lincoln County; (2) association of the alleged assailants with the American Indian Movement; and (3) various threats from Movement activists and supporters relative to potential witnesses. Claimant testified at the trial. However, much of his testimony was excluded because of a ruling concerning hypnosis. The alleged assailants were acquitted.

Claimant filed his application for benefits on November 15, 1985. He requested $6,000 in lost wages for his 1981 convalescence and $2,000 in lost wages sustained during the 1985 trial. Claimant received assistance in preparing his application from Joanne M. Bodeen, of the Lincoln County Victims' Assistance Program. In a letter accompanying the application, Ms. Bodeen stated that claimant was unaware of potential benefits available to him until the trial. Claimant acknowledged that this representation was inaccurate since he had discussed the program with law enforcement officials, albeit in a general fashion, shortly after the January 1981 incident.

Mr. Pomeroy conceded that claimant's injuries had healed by the end of 1981 and that there was no indication that the injuries were mentally incapacitating. However, Mr. Pomeroy argued that the "emotional scars" would last forever. Moreover, Mr. Pomeroy pointed out that Lincoln County did not institute a victims' assistance program until early 1985 and then only on a part-time basis. Mr. Pomeroy closed as follows:

"In 13 years of being a lawyer, I've never met a witness/victim who has given so much time, energy, and dedicated cooperation to pretrial and trial matters. Mr. Pier underwent hypnosis and missed dozens of days of work to assist the prosecution of his assailants.

"It would be a crying shame for this individual--much of whose testimony was invalidated due to a judge's ruling regarding hypnosis--to be once again denied justice by the system.

"I implore you to act favorably on his claim."

Claimant testified in an honest and forthright manner. Consequently, based upon my personal observation, I find that he is an entirely credible witness.

CONCLUSIONS

Pursuant to ORS 147.015, claimant is entitled to an award of compensation under the Compensation of Crime Victims Act, if, among other requirements:

"(6) The application for an award of compensation under ORS 147.005 to 147.365 is filed with the department:

" (a) Within six months of the date of the injury to the victim; or

" (b) Within such further extension of time as the department for good cause shown, allows."

Lack of knowledge of the Fund or failure of an investigating officer to provide information as provided for in ORS 147.365 shall be deemed to be "good cause" for extension of the time in which a claim must be filed. OAR 137-76-030(1). The extension consists of an additional six months from the date of the injury. id. In the interest of orderly and consistent administration, no extension of time within which a claim must be filed will be granted beyond one year from the date of the criminal injury for any cause except for mental or physical incapacity directly resulting from the criminal injury sustained. OAR 137-76-030(2).

The standard of review for cases appealed to the Board under the Compensation of Crime Victims Act is de novo on the entire record. ORS 147.155(5); Jill M. Gabriel, 35 Van Natta 1224, 1226 (1983).

Following my de novo review of the documentary and testimonial evidence, I find that the preponderance of the evidence establishes that claimant's application for benefits was filed more than one year after the date of injury. Therefore, the application was untimely. Furthermore, I am not persuaded that claimant's failure to file his claim within one year of his injury was attributable to mental or physical incapacity directly

resulting from her injury. Consequently, I conclude that the Department's Order on Reconsideration should be affirmed.

OAR 436-76-030 was apparently enacted in response to several Board decisions concerning the issue of good cause for late claim filings. These decisions were recently discussed in Lori Beghtol, WCB Case No. CV-86002, (Proposed Order filed August 14, 1986). A review of these decisions follows.

In Ronald E. Bass, 35 Van Natta 1679 (1983), the claim was filed nearly two years after the injury. The claim had not been filed earlier as a result of incorrect information furnished by the local District Attorney's Office. The Justice Department denied the application relying on "administrative policy" as set forth in OAR 436-76-030 (formerly OAR 436-76-105), which at that time was merely a proposed rule. Finding that the Department had not shown that it was prejudiced in processing the claim by the late filing, the Board reversed the Department's denial of benefits. The Board relied on Jill M. Gabriel, supra., and Ivan Ouchinnikov, 34 Van Natta 579 (1982), which also involved claims filed in excess of one year from the date of injury. These late filings were both attributable to law enforcement officials' failures to provide information of potential benefits. In reversing the Department's denial, the Board stated in Gabriel:

> "We believe that the denial of a claim because of late filing (where good cause has been shown) without first making a showing that it was prejudiced by the late filing is an abuse of discretion. We hold, therefore, that the Department abused its discretion in denying this claim." 35 Van Natta 1228.

The Board in Gabriel reasoned that by failing to adopt administrative rules, the Department had failed to provide notice that there was an absolute deadline of one year for filing claims. This reasoning was equally applicable to the Board's subsequent decision in Bass. However, the Board noted in Bass as follows:

> "Although we agree with the Department that it has the power to adopt such rules to define 'good cause,' in the absence of properly promulgated rules to that effect, we decline to limit our review on the basis of 'administrative policy' and proposed rules." 35 Van Natta 1681.

Since these Board decisions, the Department has properly promulgated rules defining "good cause." See OAR 137-76-030. These rules became effective on September 1, 1983. See ORS Chapter 147; JD 4-1983. Thus, these rules are directly applicable in determining whether good cause exists to allow the present claimant's late claim for benefits.

Claimant initially received a brief description of the potential benefits available to him as a crime victim. However, I am persuaded that he was unaware of how to apply for benefits under the Program, either at the time of his injury or during his convalescence. Without information on how to file for benefits, a

cursory synopsis on potential compensation would be of little, if any, use. Moreover, claimant was specifically advised by law enforcement officials to hold his claim in abeyance awaiting the conclusion of the murder trial. Under these circumstances, I find that he has established "good cause" for a six month extension in which to file his claim.

Inasmuch as his injury occurred on January 21, 1981, this "good cause" extension would lapse on January 21, 1982. The claim was not filed until November 15, 1985. Consequently, according to OAR 137-76-030(2), he is entitled to a further extension of time to file his claim only if he was mentally or physically incapable of filing as a direct result of his injury. The preponderance of the evidence fails to support such a finding. Therefore, the claim must fail as untimely.

Parenthetically, assuming that the claim had been timely filed, claimant would only accrue lost earnings for the period of his medical disability as confirmed by a medical practitioner. See OAR 137-76-025(6). Thus, he would not have been entitled to lost earnings sustained while attending the September 1985 trial.

This is a disturbing situation. Claimant emphatically and tirelessly committed himself to assisting law enforcement officials in the prosecution of the alleged assailants. His contributions often necessitated the expenditure of countless hours of travel, as well as a significant loss of income. Furthermore, claimant's cooperation has been willingly offered with the full knowledge that his life could be in peril. Throughout the process, his conduct has been truly exemplary.

Regrettably, claimant received either inadequate or, in some instances, misleading advice. This advice was apparently based on a misunderstanding of the safeguards available to an applicant under the Crime Victims' Program. Considering the heightened tensions surrounding this matter, his application materials and any subsequent proceedings could have been kept confidential. See ORS 147.115(1)(a). Consequently, procedures were available that would have allowed claimant to file for benefits, while still ensuring a "low profile", as recommended by local law enforcement officials.

Given the complex nature of the prosecution and the hostile environment surrounding the criminal proceedings, it likely would have been more convenient for claimant to wait until the end of the trial to file for benefits. From strictly a practical standpoint, it is understandable that law enforcement officials would seek to limit the amount and degree of claimant's extracurricular activities in anticipation of the pending criminal proceedings. Furthermore, it was entirely reasonable for claimant to rely on these officials' representations.

However, ORS 147.015(6) clearly limits the time in which to file a claim for compensation to six months from the date of injury. In anticipation of situations similar to this, the Department allows for an additional six month "grace period" to file for benefits. See OAR 137-76-030(1). Then, pursuant to OAR 137-76-030(2), "in the interest of orderly and consistent administration," further extensions can only be granted under

specific circumstances. Unfortunately, the claim was filed well outside of the six month extension and does not satisfy the requirements for a further extension.

To quote Mr. Pomeroy, it is a "crying shame" for claimant to go uncompensated for his injuries and lost wages. Yet, the claim plainly fails to conform to statutory and regulatory requirements. Although claimant will not receive any monetary benefits as a result of his claim, he can take pride in knowing that his energetic and dedicated cooperation has earned the respect of all officials connected with this matter. In addition, his determination in pressing his case to the ultimate level of appeal has hopefully prompted officials to revitalize procedures designed to fully inform victims of their rights under the Crime Victims' Compensation Program.

PROPOSED ORDER

I recommend that the Findings of Fact, Conclusions and Order on Reconsideration of the Department of Justice Crime Victim Compensation Fund dated February 5, 1986 be affirmed.

DOROTHY RASMUSSEN, Claimant
Churchill, et al., Claimant's Attorneys
Kay E. Kinsley, Defense Attorney

WCB 84-09271
August 29, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The insurer requests review of Referee Michael V. Johnson's order that: (1) awarded claimant 112 degrees for 35 percent unscheduled permanent partial disability in lieu of a Determination Order award of 64 degrees for 20 percent unscheduled disability for the low back; and (2) set aside the insurer's denial of claimant's occupational disease claim for carpal tunnel syndrome. The issues are extent of unscheduled disability and compensability.

We affirm the Referee's unscheduled disability award. On the compensability issue we reverse.

Claimant is a former cannery utility worker who suffered a compensable low back injury in June 1983. She left work as a result of the injury and underwent an L5-S1 laminectomy and disk fragment removal in July 1983. At the time of the hearing, claimant had not returned to work.

Prior to the compensable injury, one of claimant's duties was to break up large chunks of frozen vegetables into smaller pieces. The job involved grasping a five-foot-long steel pole with both hands and repeatedly bringing it down into a cardboard box containing large chunks of ice-encased vegetables. Claimant testified that it took approximately five minutes to penetrate the top layer of frozen product, but she did not indicate how long it took to complete the job. Neither did she testify regarding the amount of time spent on this activity during a typical work shift.

Claimant testified that she first experienced numbness in her hands and wrists during the Spring of 1983, before her compensable back injury. She testified that after a few days of awakening in the morning with numbness, she visited the employer's first aid station and obtained a wrist band for her right wrist.

She used the wrist band for approximately three weeks until the symptoms went away after a change of job duties. The employer has no record of claimant's obtaining a wrist band. The company's nurse testified that it is the usual business practice of company nurses to document worker injuries or health problems. Claimant did not lose time from work nor seek medical attention for her wrist problems while employed. Her treating doctor's chart notes contain no reference to wrist symptoms in the months immediately preceding claimant's disabling back injury.

Claimant testified that she experienced little, if any, wrist symptoms for nearly a year after she left work. The symptoms did return, however, after she began using her wrists more frequently at home doing housework. She visited Dr. Buza, who had been treating her for her back injury, in May 1984. Dr. Buza referred her to Dr. Stoody, whose nerve conduction tests revealed the presence of bilateral carpal tunnel syndrome.

Before the tests were done, claimant's attorney sent a letter to Dr. Buza, outlining claimant's duties while employed at the cannery and asking the doctor to assume that claimant obtained a wrist band while so employed. The letter asked for Dr. Buza's opinion regarding whether the employment was the major cause of claimant's carpal tunnel condition. It also asked the doctor to explain how claimant's symptoms could have occurred nearly a year after she left work. Dr. Buza responded:

> "It would seem that on the basis of the explanation you have provided me, it is medically probable that [claimant's] repetitive movements with her wrists at work was a precipitating cause of her carpal tunnel syndrome . . . The patient's onset of symptoms while she was not working could simply be related to the fact that her condition was progressive and was becoming symptomatic regardless of the excessive motion or lack of motion of her hands. It is consistent that carpal tunnel syndrome may wax and wane in its presentation but usually it is brought about by active use of the hands but it does have periods where it is more symptomatic than at other times."

A month later, Dr. Buza responded to a letter from the insurer regarding claimant's status:

> "I cannot, at this time, verify that [the carpal tunnel] condition is work related, simply because [claimant's] condition is becoming increasingly more severe and she has not been working in the last year while her condition has become more symptomatic."

Six days later, Dr. Buza issued a report in which he stated that he felt claimant's carpal tunnel condition was, in fact, work related, noting that claimant's symptoms had begun to improve spontaneously without specific therapy. The insurer then sent claimant to Dr. Rosenbaum, a neurologist who examined her and reviewed the prior medical records. He noted that claimant's carpal tunnel symptoms had nearly disappeared and that she needed no therapy. He concluded:

" . . . I am unable to determine whether the work at [the employer] caused her carpal tunnel syndrome or simply made the preexisting condition transciently [sic] symptomatic. By the same token, her housework in the Spring of 1984 again made her carpal tunnel syndrome transiently symptomatic."

Dr. Rosenbaum testified at the hearing. When asked whether claimant's onset of symptoms a year after she left work was related to that work, Dr. Rosenbaum stated that there were two sets of possibilities regarding causation. One was that there was a problem with claimant's median nerves prior to the first onset of symptoms in 1983, that the work caused a transient onset of those symptoms, and that the nerves then returned essentially unharmed to their previous state. Then, when claimant took on the new activity of increased housework in 1984, the transient symptoms recurred for a brief period, before the median nerves again returned to a normal, undamaged state.

The second possibility, according to Dr. Rosenbaum, was that the 1983 work activity permanently damaged the median nerves, and that the 1984 off-the-job activity made them transiently symptomatic. Although Dr. Rosenbaum could not definitively support either theory, he favored the scenario in which no permanent damage was done to claimant's median nerves. He concluded by stating that it was not likely that claimant's two weeks of symptoms while on the job in 1983 were related to the 1984 flareup.

It is claimant's burden to prove that her work activity was the major contributing cause of her carpal tunnel condition. Dethlefs v. Hyster Co., 295 Or 298 (1983). If the condition preexisted claimant's employment, she must prove that the employment was the major cause of a worsening of the underlying condition. Wheeler v. Boise Cascade Corp., 298 Or 452 (1985); Weller v. Union Carbide, 288 Or 27 (1979).

The causation of carpal tunnel syndrome presents a complex medical issue best resolved through expert medical opinion. In the present case, two eminently qualified physicians have offered opinions regarding causation. Dr. Buza is the treating neurosurgeon. Dr. Rosenbaum is a neurologist who testified that he treats an average of one carpal tunnel patient per day. We generally afford greater weight to the opinion of the treating physician. See Weiland v. SAIF, 64 Or App 810 (1983). In this case, however, we do not. We find from the context of Dr. Buza's various reports that he is simply uncertain as to the cause of claimant's condition. While at times he has stated that the condition is related to claimant's employment, at other times he has indicated that it may not be. He is concerned that claimant was asymptomatic for nearly a year after leaving her employment, and then developed a recurrence of symptoms while engaged in personal activity. After considering Dr. Buza's reports and the context in which they were written, we conclude that in Dr. Buza's opinion, there is a possibility that claimant's work in 1983 caused her 1984 flareup. A mere possibility of a causal connection, however, is insufficient to sustain claimant's burden of proof. Gormley v. SAIF, 52 Or App 1055 (1981).

We find Dr. Rosenbaum's opinion to be similar to that of Dr. Buza in that it suggests the possibility, but not probability, of a causal connection between claimant's 1983 work and her later-manifested carpal tunnel symptoms. When ultimately asked for his opinion as to the medical probability of a causal connection, Dr. Rosenbaum testified that he could not make the connection to a medical probability. He appears to favor the scenario that claimant's carpal tunnel condition preexisted her employment and that the work activity caused the condition to be transiently symptomatic without damaging the median nerves. In other words, the work caused a symptomatic flareup without a concomitant worsening of the underlying condition. In an occupational disease context, a symptomatic worsening alone is not compensable. Weller, supra.

The remaining evidence consists largely of claimant's testimony regarding a temporal relationship between the 1983 work activity, the initial onset of symptoms and the later return of those symptoms. While claimant's testimony is relevant and probative, Garbutt v. SAIF, 297 Or 148 (1984), it is not sufficient to resolve the complex medical issue posed by this claim. See Kassahn v. Publisher's Paper Co., 76 Or App 105 (1985). We are not persuaded on this record that claimant's employment in 1983 was the major contributing cause of her carpal tunnel condition.

ORDER

The Referee's order dated October 1, 1985 is reversed in part and affirmed in part. That portion of the order that set aside the insurer's denial of claimant's claim for carpal tunnel syndrome is reversed and the insurer's denial is reinstated. The remainder of the order is affirmed. Claimant's attorney is awarded a fee of $450 for services on Board review for prevailing on the extent of disability issue raised by the insurer.

MIKE ALDRIDGE, Claimant
Bottini & Bottini, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-05318
September 3, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Pferdner's order which: (1) upheld the SAIF Corporation's partial denial of his peripheral neuropathy condition; and (2) increased his unscheduled permanent disability award for a neck injury from 20 percent (64 degrees), as awarded by a November 15, 1984 Determination Order, to 40 percent (128 degrees). On review, claimant contends that his peripheral neuropathy is compensable and that his unscheduled permanent disability award should be increased.

We affirm the order of the Referee with the following comments.

In finding claimant's peripheral neuropathy not compensable, the Referee asserted that an opinion from a psychologist or psychiatrist was necessary to establish a causal relationship between the condition and claimant's compensable

injury. We disagree with this assertion. Barrett v. Coast Range Plywood, 294 Or 641, 649 (1983). The lack of such an opinion has had no effect upon our ultimate decision.

Accordingly, after completing our de novo review of the medical and lay evidence, we find that the preponderance of the evidence fails to establish that claimant's compensable neck and arm injury was a material contributing cause of his peripheral neuropathy, or its worsening.

Furthermore, we conclude that a 40 percent unscheduled permanent disability award is adequate compensation for the permanent loss of earning capacity resulting from claimant's compensable injury. See ORS 656.214(5).

ORDER

The Referee's order dated November 19, 1985, as amended December 11, 1985, is affirmed.

GARNER I. EVANS, Claimant
Brian R. Whitehead, Claimant's Attorney
Nelson, et al., Defense Attorneys

WCB 85-10001
September 3, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The insurer requests review of Referee Daron's order that set aside its denial of claimant's left wrist sprain. The issue on review is compensability.

Claimant was leaving work on July 22, 1985 when he slipped on steps and allegedly hurt his wrist when he held onto a railing. The accident was unwitnessed.

When claimant arrived home he told his wife that he hurt his wrist at work. He felt pain and had difficulty sleeping. The next day he went to the employer's nurse who wrapped the wrist in a bandage. Claimant left work in the middle of the day without notice and sought the treatment of Dr. Kelly, chiropractor. Dr. Kelly reported a diagnosis of left wrist sprain.

Claimant testified at the hearing that he saw some swelling and discoloration of the wrist on the day of the injury. Claimant's wife did not testify that she saw swelling or discoloration. The industrial nurse testified that she did not see any swelling or discoloration of claimant's wrist on the morning of July 23, 1985. Dr. Kelly's first report does not state that he observed any swelling or discoloration, but his October 29, 1985 letter does report the observation of "a moderate degree of swelling especially of the anterior aspect of the wrist with mild discoloration." Dr. Kelly felt the swelling and discoloration were consistent with the described accident and with the lapse of time between the accident and his first observation.

The Referee made no finding of credibility based on the demeanor of the witnesses. Claimant admitted that he has a poor memory and his testimony was repeatedly impeached on relevant medical and vocational history. Claimant's wife did not testify about her observations, if any, of the appearance of claimant's wrist on the date of injury. The nurse's testimony of her

observations on the morning of the day after the accident is contradicted by the letter of the treating chiropractor. No chartnote or other contemporaneous report of the chiropractor was offered which might support the observations first reported five months after the accident.

This is a very close case in which the ultimate compensability of the claim depends on the weight to be attached to each witness's relevant testimony and the report letter of the treating chiropractor. Claimant has reported a consistent history of the alleged incident. His injury is consistent with the story of the accident. Cf. Darrell R. Rountree, 38 Van Natta 222 (1986); James D. Stenberg, 38 Van Natta 108 (1986). But there are doubts about claimant's capacity to recall significant recent events in his own life. The belated report of observations by claimant's chiropractor is unsupported by a copy of a contemporaneous chartnote or other relatively easily obtainable evidence. When the evidence which supports the claim is compared with the expert contemporaneously recorded observations reported by the industrial nurse and the impeaching evidence of claimant's recent medical and vocational history, the Board is not persuaded that claimant carried the burden of proof that he suffered an injury related to an incident at work. The Referee's order is reversed.

ORDER

The Referee's order dated January 22, 1986 is reversed. The insurer's denial dated August 9, 1985 is reinstated.

DERYL E. FISHER, Claimant
Emmons, et al., Claimant's Attorneys
Howard Cliff, Defense Attorney

WCB 83-01466
September 3, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of that portion of Referee Quillinan's order which upheld the insurer's denials of aggravation of claimant's low back condition. The insurer cross-requests review of that portion of the Referee's order which awarded compensation for permanent total disability. The insurer argues that the Referee was without jurisdiction to determine the extent of claimant's permanent disability because the denials of aggravation were upheld. The insurer subsequently moved to strike those portions of claimant's reply brief which were not restricted to reply to the insurer's response brief. The issues on review are aggravation, extent of permanent disability, and whether portions of claimant's reply brief will be considered on review.

Considering first the issue raised by the insurer's motion to strike portions of claimant's reply brief, we note that claimant's appellant's brief was submitted to the Board late without a prior request for an extension of time in which to file the brief. The brief was not accepted for review. OAR 438-11-010(3) (effective November 5, 1985). See Leonor S. Martinez, 38 Van Natta 575 (1986). The insurer submitted its response brief which was exclusively devoted to the jurisdiction issue it raised in its cross request. Claimant resubmitted his original brief with the addition of an argument in response to the insurer's issue of jurisdiction to rate permanent disability. Because claimant's appellant's brief was not accepted on

timeliness grounds, the Board will not consider it upon resubmission as a reply brief. Those portions of claimant's reply brief which do not address the issue of the jurisdiction of the Referee to rate the extent of claimant's permanent disability were not considered on review.

On the issue of aggravation, the Board affirms the order of the Referee with the following comment. Claimant has been awarded a total of 240 degrees for 75 percent unscheduled permanent partial disability due to injury to his back. The last arrangement of compensation was the date of the hearing upon which claimant's last award of compensation was made: January 26, 1982. As the Referee found, claimant was awarded compensation on the basis of a fluctuating recurrent back pain condition and the evidence is persuasive that claimant's industrial injury-related condition has not worsened medically since the date of the last arrangement of compensation. What worsening there has been of claimant's leg symptoms is persuasively related to surgery for a prior industrial injury in Washington for which claimant received an award of compensation.

The record in this case is unclear on what basis the Referee proceeded to rate the extent of claimant's disability because the result of the affirmance of the insurer's denials was to cause the claim to remain closed. At the time of the Referee's decision, there was no jurisdictional basis upon which the Referee could rate the extent of disability. However, since the Referee's decision there have been developments in the law relating to aggravation claims that bear consideration in the context of the Referee's findings in this case.

In Smith v. SAIF, 78 Or App 443, 448 (1986), the court held:

> "In order to establish an aggravation claim, claimant must show 'worsened conditions resulting from the original injury.' ORS 656.273. 'Worsened conditions' means a change in condition which makes a claimant more disabled, either temporarily or permanently, than he was when the original claim was closed. [cites omitted] At this point, we reiterate a fundamental principle of workers' compensation law: Because compensation for an unscheduled disability is awarded for loss of earning power see ORS 656.206(1)(a); 656.210; 656.212; 656.214(5), more disabled means less able to work." (Emphasis in original.)

The court further explained its reasoning in Consolidated Freightways v. Foushee, 78 Or App 509, 512 (1986) that a temporary symptomatic worsening may be sufficient proof of worsening to prove an aggravation and "it is not necessary to establish a worsening of the underlying compensable condition." In Short v. SAIF, 79 Or App 423, 427 (1986), the court stated:

> "To establish an aggravation, there must be a worsening of the claimant's condition and a causal relation between that worsening and the compensable injury. . . . If the underlying condition has not worsened, 'it

is sufficient to show that the symptomatology of the condition has worsened so that the claimant is more disabled than at the time of the last arrangement of compensation.'. . . . That she was originally granted only 35 percent unscheduled permanent partial disability and that [a doctor] now believes that she is totally disabled does not establish that her condition has 'worsened.' It may simply be that the prior award was inadequate. . . . An aggravation claim is not a means by which to correct an inadequate permanent disability award. . . . " [Citations omitted.]

In a case subsequent to Short the court restated the holding that claimant "is, however, required to prove that his flare-up of symptomatic pain rendered him more disabled than he was at the time of the last arrangement of compensation." Georgia Pacific Corp. v. Roff, 80 Or App 78, 82 (1986).

After comparing the reports of doctors contemporaneous with the last arrangement of compensation and claimant's testimony at the 1982 hearing with the reports of doctors since the last arrangement of compensation and claimant's testimony at the 1985 hearing, we conclude that claimant has not proven a worsening of his Oregon injury related condition either temporarily or permanently, since the last arrangement of compensation. We, therefore, reverse that portion of the Referee's order which awarded compensation for permanent total disability.

ORDER

The Referee's order dated January 14, 1986 is reversed in part and affirmed in part. That portion of the order which awarded compensation for permanent total disability is reversed. The remainder of the order is affirmed.

JAMIL GHORES, Claimant
Peter O. Hansen, Claimant's Attorney
Schwabe, et al., Defense Attorneys

WCB 83-05191
September 3, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of those portions of Referee Fink's order which: (1) affirmed the Determination Order dated May 18, 1983 which awarded 64 degrees for 20 percent unscheduled permanent partial disability for injury to claimant's neck; and (2) ordered the insurer to refer claimant to a different vocational rehabilitation organization for evaluation, including psychological or psychiatric evaluation, if the rehabilitation counselor recommended such evaluation. Claimant cross-requests review of those portions of the order which affirms: (1) the Determination Order dated May 18, 1983; and (2) the Determination Order dated March 27, 1985 that found claimant medically stationary on January 27, 1982. Claimant argues that he is entitled to additional temporary disability compensation and that he is permanently and totally disabled. The issues on review are extent of unscheduled permanent partial disability including permanent total disability, premature closure, and vocational assessment.

On the issue of premature closure the Board affirms the order of the Referee. On the issue of the referral for vocational assessment the Board affirms the order of the Referee with the following comment. The Referee's order is authorized by OAR 438-07-005(7). Review of the Referee's order is limited to whether the Referee abused his discretion in ordering the assessment and the Board finds that the Referee did not abuse his discretion.

At the time of the hearing claimant was 54 years old. He had the equivalent of an American high school education, obtained before he immigrated. He speaks and reads English in addition to Hebrew and Arabic. His work experience has been as a construction carpenter and contractor.

He sustained a head injury in 1977. Eventually he returned to work as a carpenter, although he continued to suffer from headaches and neck strain. That claim was processed under the laws of the State of Washington. In June 1980 a one-pound object fell about five feet and struck claimant on the back of the neck. His symptoms increased and he has not returned to work since the injury.

Medical examiners have documented the presence of functional overlay related to claimant's injuries. Some examiners have discounted claimant's limitations as a result of the overlay. Vocational assistance providers have not doubted claimant's limitations as they were assessed by the Callahan Center, however. The Callahan Center concluded that claimant's residual work capacity was in the range of occupations considered light.

A training program was authorized to improve claimant's English language skills in order to proceed with a training program in business administration and management based on claimant's construction contracting experience. Before completion of the training program, it was terminated and claimant was assigned to a different vocational rehabilitation organization. A new training program was developed to train claimant as a machinist. At the completion of the training program claimant was not employable as a machinist due to his physical limitations, inadequacies of the training program, and the labor market for machinists without experience.

Based on claimant's appearance at the hearing, the Referee found that he was not a credible witness when describing his own limitations. Consequently, the Referee explicitly decided the case on the substance of the medical and vocational reports.

Dr. Wilson, a neurologist and one of many doctors treating claimant, rated claimant's residual lifting and carrying capacity at 25 pounds occasionally and 10 pounds frequently. Dr. Wilson qualified that rating with the following comment: "Difficult to evaluate because of considerable functional overlay and can not tell if symptoms are real or functional." Dr. Raaf, a neurosurgeon, testified that he believed that claimant had no physical impairment as a result of either injury and that he could not give an opinion whether claimant's functional overlay was related to the 1980 industrial injury. Additional medical conditions have been identified as transient ischemic attacks, hypertension, and hearing loss. These additional conditions arose after claimant's 1980 industrial injury and were denied by the industrial insurer. The denial is final.

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, 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).

Claimant's motivation is also a key factor, and it is his burden 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).

At the time of the hearing, claimant was unable to perform work at a gainful and suitable occupation because his training and experience was in labor which was beyond his residual functional capacity. He was medically stationary and was not participating in an authorized vocational program, therefore he was entitled to a determination of the extent of his permanent disability. Craft v. Industrial Indemnity, 78 Or App 68 (1986). Whether claimant's disability is "real" or "functional" as the medical examiners have distinguished for their purposes, we must consider whatever disability is related to claimant's 1980 industrial injury and its interplay with relevant preexisting factors.

Claimant has participated in two failed vocational rehabilitation attempts and has sought to obtain suitable work with at least 75 employers, which the Board finds is sufficient to prove that claimant made a reasonable effort to seek work. Considering all of the above factors, we find that claimant is permanently and totally disabled.

Claimant's last Determination Order closed the claim at the completion of the latest vocational program. Claimant was medically stationary at that time. Claimant is entitled to compensation for permanent total disability as of the date when all of the elements were established that claimant is permanently and totally disabled. Jephtha Orriggio, 38 Van Natta 559 (1986). We find that claimant's compensation for permanent total disability should begin on March 27, 1985 which was the date of the last Determination Order.

ORDER

The Referee's order is modified. Claimant is awarded compensation for permanent total disability effective March 27, 1985. Claimant's attorney is awarded 25 percent of the additional compensation granted by this order, not to exceed $3,000 as a reasonable attorney's fee. The remainder of the Referee's order is affirmed.

CHRISTENA L. LUPIAN, Claimant
Michael B. Dye, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Acker, et al., Defense Attorneys
Beers, et al., Defense Attorneys

WCB 84-07250, 84-12611 & 85-00972
September 3, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of that portion of Referee Myers' Order on Reconsideration that awarded penalties for an unreasonable denial. The issue is penalties.

Between May 1983 and May 1984, claimant worked for three employers. The first two employers were insured by the SAIF Corporation. The third was insured by EBI Companies. The first employer discontinued its operations on June 30, 1983 and claimant began working for the second employer on July 1, 1983. Claimant left the second employer on November 1, 1983 and began working for the third employer on December 1, 1983.

On May 10, 1984 claimant sought medical attention for low back pain. Claimant told the examining physician that she had injured her low back in May 1983 moving a tray of food from a cart to the back of a van and had experienced persistent low back pain and neurological symptoms in her legs ever since. She also indicated that she had visited a doctor at the time of her injury and had missed four days of work in June 1983. On May 18, 1984 claimant filed a claim with the first employer giving the date of injury simply as "May 1983." In June 1984, claimant's condition was identified as a herniated nucleus pulposus at L4-5 and conservative treatment was prescribed. In a note dated June 28, 1984 the physical therapist described claimant's injury with the words: "[about] 1 year ago, off work for 7 weeks."

By letter dated June 29, 1984 SAIF denied claimant's claim against the first employer stating:

> "You submitted a claim in regard to an injury which allegedly occurred in May of 1983 while you were employed by the [first employer] as a driver. SAIF Corporation is unable to accept responsibility for this injury diagnosed as LS strain acute and chronic.
>
> "There is insufficient evidence to substantiate that your current problems are the direct result of the alleged May, 1983 incident. Furthermore, we have been prejudiced by your failure to file a claim within the time limits set by the Workers' Compensation Department, ORS 656.001 to

656.794. Therefore, without waiving other questions of compensability, this formal denial is issued."

After receiving this denial, claimant filed a claim with the third employer giving the date of injury as May 2, 1983. In subsequent reports generated by an independent medical examiner and claimant's treating doctor, the date of injury was given as May 25, 1983. EBI denied claimant's claim orally on December 27, 1984 at a hearing on another matter and reiterated its denial in a letter dated March 22, 1985.

On December 18, 1984 SAIF received a copy of chart notes by Dr. Sattenspiel dated August 2, 1983. Dr. Sattenspiel had examined claimant on that date and stated that she had hurt her back lifting a heavy tray "last week." This tended to place the date of injury in late July, well after claimant left the first employer and began working for the second employer.

On December 26, 1984 claimant filed a claim against the second employer giving the date of accident as May 25, 1983. SAIF denied the claim on January 4, 1985 on the ground that it could not substantiate that claimant's condition was the result of any accident in the course of her employment for the second employer on or about May 25, 1983.

At the hearing on September 4, 1985 claimant testified that her injury occurred on May 25, 1983 and that she had reported the accident to her employer the same day. The supervisor at the first employer confirmed claimant's testimony and stated that she had given the same information to a SAIF investigator shortly after claimant ultimately filed her claim in May 1984. The Referee concluded that claimant's claim against the first employer was not barred as untimely, found the claim compensable and further found that responsibility for claimant's condition had not shifted to a later employer. None of these findings are contested on Board review.

The Referee also found that SAIF's denial of June 29, 1984 was unreasonable and ordered SAIF to pay a 25 percent penalty on the temporary disability compensation due from the date of the denial until the time of the hearing - a period of fourteen months. SAIF requested reconsideration on the penalty issue and argued that the penalty should be assessed only for the period from the date of the denial to the date it received Dr. Sattenspiel's chart notes - a period of five and one half months. Dr. Sattenspiel's chart notes, it argued, rendered its previous denial reasonable because the notes tended to indicate that responsibility for claimant's condition rested with the second employer. The Referee accepted SAIF's argument and in an Order on Reconsideration dated October 22, 1985 reduced the time period for the computation of the penalty to that between the denial and December 18, 1984, the date on which SAIF received Dr. Sattenspiel's chart notes.

Claimant argues that the reasonableness of a denial must be judged from the facts before the insurer at the time the denial was issued and not from subsequent events. We agree. Ginter v. Woodburn United Methodist Church, 62 Or App 118, 122 (1983); Ruby Schultze, 36 Van Natta 1720 (1984). SAIF apparently concedes that its denial was unreasonable when issued. The original order of the Referee, therefore, was correct in assessing a penalty based

upon the entire period from the date of SAIF's unreasonable denial to the date of the hearing. Under the circumstances of this case, however, we conclude that a 25 percent penalty is excessive. SAIF's denial was timely and given the lateness of the claim and the relative uncertainty of the injury date, was not entirely unreasonable. We conclude that a penalty of 10 percent is sufficient.

ORDER

The Referee's Order on Reconsideration dated October 22, 1985 is reversed. That portion of the Referee's original order dated September 16, 1985 that assessed a penalty against the SAIF Corporation "equal to 25 percent of the temporary disability compensation owing to claimant between June 29, 1984 and the date of the hearing [September 4, 1985]" is modified and the figure "10 percent" is substituted for that of "25 percent." Claimant's attorney is awarded $500 for services regarding the penalty issue at the hearing level and on Board review, to be paid by the SAIF Corporation. This award is in lieu of the Referee's award of an attorney's fee. The remainder of the Referee's order is affirmed.

WILLIAM E. WILLIAMS, Claimant
Kenneth D. Peterson, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-02298
September 3, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of Referee Peterson's order that set aside its denial of claimant's occupational disease claim for grain dust asthma. The issue is compensability. We reverse.

Claimant is a 52-year-old former ranch foreman who had worked on farms for most of his adult life. He had participated in grain harvests for many years without breathing difficulties. In July 1977, however, he developed acute respiratory problems while cleaning the bottom of a grain elevator. He testified that from that time forward, he experienced labored breathing and other symptoms after exposure to grain dust. He did not seek medical attention, however, until July 1982 when he was hospitalized for severe headaches. The medical record reveals that claimant was suffering from an upper respiratory infection at the time of his hospitalization. The treating physician, Dr. Knowles, suspected that claimant suffered from exposure to farm chemicals, and he arranged for him to be seen by occupational health specialists at the University of Utah.

Claimant related to the Utah physicians that he had developed severe headaches while on a fishing trip. He had also had breathing difficulty while merely riding in a car. He related that for the prior six years he had experienced a "choked up" feeling after working around wheat elevators. The physicians concluded that claimant was suffering from simple muscle contraction headaches without damage from chemical exposure. They returned him to his home without a specific treatment recommendation.

Claimant was again seen in a hospital emergency room on December 8, 1982 complaining of progressively worsening shortness of breath, despite the fact that he had not worked for some time and had not been directly exposed to grain dust. Dr. Knowles'

diagnosis was "recurrent asthmatic bronchitis." Following a chest x-ray, Dr. Gehling suggested that claimant was suffering from chronic obstructive pulmonary disease.

Shortly after claimant's hospitalization, SAIF inquired of Dr. Knowles whether he felt there was a correlation between claimant's respiratory problems and his occupational exposure. Dr. Knowles answered in the affirmative, but cited claimant's exposure to farm chemicals as the causal factor. He also indicated that claimant's 30-year smoking habit and family history could be contributing to his reactive airway disease. Dr. Knowles did not believe claimant's respiratory condition preexisted his employment.

Claimant's symptoms continued into early 1983, despite his having not worked for several months. SAIF arranged for him to be examined by Dr. Keppel, a thoracic physician, in mid-February. Dr. Keppel opined that claimant's respiratory symptoms were worsened by his exposure to grain dust, although he found it difficult to state whether there were specific allergic factors responsible for the worsening. Dr. Keppel also apparently assumed that claimant only had respiratory difficulties while working around grain dust. From that assumption, he suggested that grain could be a causal factor. Dr. Keppel also felt that claimant had a "predisposition" to the development of respiratory problems that preexisted his employment.

SAIF then arranged for an internist, Dr. Girod, to review claimant's file. Dr. Girod agreed that claimant suffered from asthma, but he disagreed that it was related to exposure to grain. Noting that claimant's condition deteriorated most during a period after he left the job, Dr. Girod felt that the most likely causes of the respiratory problems were smoking and a positive familial history. Finally, he stated that while exposure to grain dust might cause a temporary symtomatic exacerbation, it would not worsen the underlying disease.

Claimant's medical file was next reviewed by Dr. Campbell, an assistant professor of immunology, allergy and rheumatology at the Oregon Health Sciences University. Dr. Campbell noted that grain dust exposure can be related to disease in two ways: 1) it can be a causal factor in pneumonitis, repeatedly shown to not be a factor in claimant's disease; and 2) it can be a causal factor in reactive airway disease. Noting that claimant's symptoms were present whether or not grain dust was present, Dr. Campbell ruled out occupational exposure as a cause of claimant's disease. He noted that many other irritants, including dust, pollen, chemicals, smoke and infections, can cause symptoms. He felt that claimant's long-time smoking habit was the most likely cause of his condition, but he agreed with Dr. Girod that claimant's symptoms could have been temporarily exacerbated by grain dust exposure.

The file was next examined by Dr. Edwards, who is also a professor of medicine. Dr. Edwards did not feel claimant suffered from significant chronic obstructive pulmonary disease, but opined that claimant's condition was work-related, based on the "clear cut attacks of dyspnea, cough and wheeze on repeated occupational exposures to grain dust." Dr. Edwards did not discuss the fact that claimant's symptoms continued after he was no longer exposed.

Claimant was examined in May 1984 by Dr. Bardana, an allergist with a special interest in occupational diseases. From claimant's history, Dr. Bardana noted that claimant had done well so long as he had not been exposed to irritants of any kind, including common house dust and pollen. Claimant also related that his condition had not changed either for the better or worse since leaving work. Dr. Bardana interpreted the various laboratory results as indicating that claimant's condition actually worsened after he left the job. The data also showed that claimant does not have significant antibodies to wheat, rye, gluten or oats, although his reactivity to wheat and rye was "borderline."

In his 12-page report, Dr. Bardana concluded that there was no medical support for the notion that claimant has an allergy to grain dust. Rather, the data confirmed the presence of chronic obstructive pulmonary disease, with bronchial asthma as its major manifestation. In Dr. Bardana's opinion, claimant suffers from preexisting, adult-onset asthma made symptomatic first by a respiratory infection in mid-1982, and later by exposure to dust on the job. He could find no worsening of the underlying disease.

Drs. Edwards and Bardana testified at the hearing. Although Dr. Edwards admitted that Dr. Bardana should be deferred to regarding allergy-related disease, he opined that claimant developed reactive airway disease in July 1977 and that the disease was worsened by exposure to grain dust. He was not specifically asked for an opinion regarding why claimant's symptoms did not subside once he was no longer exposed to grain. However, Dr. Edwards stated that in most cases, the bronchial effects of exposure subside within two to 12 hours after the irritant is removed.

Dr. Bardana testified that most people develop asthma as a result of an upper respiratory infection. Claimant had such an infection at the time he entered the hospital in 1982. According to Dr. Bardana, a mere five percent develop the disease as a result of occupational exposure. Noting that Drs. Keppel and Edwards partially relied on a journal study involving grain elevator workers in formulating their opinions, Dr. Bardana outlined the factual differences between the work done by those workers and the work history provided by claimant in this case. Whereas claimant was essentially a farm foreman whose work in grain elevators was sporadic, the workers studied in the journal article worked in elevators full-time. In any event, Dr. Bardana opined that the article merely raised the possibility, without medical verification, that grain elevator workers could develop an allergic response to repeated exposure to grain dust. Last, Dr. Bardana opined that when a person has an allergy to grain products, exposure may cause a temporary symptomatic response, but will not cause a worsening of the underlying condition.

Claimant's claim was made out as one for occupational disease. In order to prove entitlement to compensation, therefore, he must prove that he has developed a disease or infection which arose out of and in the scope of his employment. ORS 656.802(1)(a). He must also prove that his exposure was of the type to which he was not ordinarily subjected other than during employment. If claimant's condition preexisted his employment, he must prove that his work exposure actually worsened his condition; a mere symptomatic worsening is not compensable.

Wheeler v. Boise Cascade Corp., 298 Or 452 (1985); Weller v. Union Carbide, 288 Or 27 (1979). Finally, whether or not the condition preexisted claimant's employment, he must prove that his work was the major contributing cause of his disease. Dethlefs v. Hyster Co., 295 Or 298 (1983).

Persuaded that claimant's exposure to grain dust was the major cause of his worsened condition, the Referee found the claim compensable. After reviewing this voluminous record, we disagree, and find that claimant has failed to satisfy his burden of proof. First, we are most persuaded by the testimony and reports of Dr. Bardana. He is the recognized allergy specialist among the physicians involved in this case, and he has a particular interest in occupational diseases. According to Dr. Bardana, claimant has only the faintest of allergic responses to wheat dust. His preexisting asthma was, at most, made occasionally symtomatic by grain dust exposure. There was no worsening of the underlying asthma. See Weller, supra. Dr. Bardana feels that the most likely causes of claimant's respiratory problems are his family history and significant cigarette smoking habit. The basis for that opinion appears to be that claimant's problems did not improve, and in fact worsened, after he was no longer being exposed to grain dust.

Drs. Edwards and Keppel felt that claimant's bronchial asthma was worsened by his employment. After reviewing their opinions, however, it appears the doctors assumed that claimant either worked extensively in grain elevators, was symptomatic only when exposed to grain, or both. Claimant's testimony does not support those assumptions. He testified that his work inside the grain elevators was intermittent, and that he remained symptomatic long after he left the job. Thus, it appears that the opinions of Drs. Edwards and Keppel were at least partially based on inaccurate information. The persuasive value of those opinions is reduced proportionately.

Claimant has failed to prove that he has a compensable occupational disease. The Referee's order shall be reversed.

ORDER

The Referee's order dated December 31, 1986 is reversed and the SAIF Corporation's denial is reinstated.

HAROLD D. BATES, Claimant
Welch, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 82-07108
September 4, 1986
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of that portion of Referee Gemmell's order that approved an offset of overpaid temporary disability compensation against any future award of permanent disability compensation. SAIF contends it should be authorized to offset the overpayment against currently due temporary disability compensation as well as any future permanent disability award.

The Board affirms the order of the Referee.

ORDER

The Referee's orders dated April 30, 1984 and May 18, 1984 are affirmed. Claimant's attorney is awarded $350 as a reasonable attorney fee for services on Board review, to be paid by the SAIF Corporation in addition to compensation.

Chairman Ferris, Dissenting:

The SAIF Corporation requested review of that portion of the Referee's order that denied its request to offset overpaid temporary disability compensation by reducing currently due temporary disability compensation. The Referee allowed the offset to the extent it was collected by reducing currently due or future permanent disability compensation. The majority has affirmed the Referee's order by a memorandum opinion. I respectfully dissent.

The Referee found that claimant was overpaid temporary total disability compensation totalling $5,227.05. Claimant does not dispute the fact of overpayment or the amount.

Prior to December 14, 1983, a rule promulgated by the Director of Workers' Compensation Department, OAR 436-54-320, authorized insurers and self-insured employers to recover overpaid temporary disability compensation by deducting the overpayment from continuing temporary disability compensation at a rate not higher than 25 percent of the benefits as they became due. That rule was invalidated by the Court of Appeals in Forney v. Western States Plywood, 66 Or App 155 (1983), aff'd on other grounds, 297 Or 628 (1984). The court held that the Director's rule authorizing offset of overpayments from currently due benefits could only be based upon ORS 656.268(4), which did not provide for reduction or adjustment of currently due temporary disability compensation. Therefore, the court concluded that former OAR 436-54-320, to the extent it purported to authorize such a reduction or adjustment without prior approval, was beyond the Director's statutory authority.

The subject is now regulated by OAR 436-60-170, which provides:

> "(1) Insurers may recover overpayment of benefits paid to a worker through the procedure specified by ORS 656.268(4).
>
> "(2) Recovery of overpayment by the insurer shall be explained in written form to the worker, and the workers' attorney if represented, or to the dependent(s) of the worker if a fatality, and include:
>
> "(a) an explanation of the reason of overpayment;
>
> "(b) the amount of the overpayment; and
>
> "(c) the method of recovery of the overpayment."

Claimant argues that one of the reasons the Referee's decision should be affirmed is that ORS 656.268(4) does not

specifically authorize the kind of offset SAIF has requested, i.e. recovery of overpaid temporary disability payments out of currently due temporary disability benefits. 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."

As the court pointed out in Forney v. Western States Plywood, supra:

> "[O]ffset 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." 66 Or App at 159.

The court went on to note that, because Department determinations, including offset decisions under ORS 656.268(4), are reviewable by the Board under the provisions of ORS 656.268(6), Referees and the Board also may authorize offsets. Id.

However, the court in Forney did not limit offsets authorized by Referees and the Board to those specifically mentioned in ORS 656.268(4). The court held:

> "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 pursuant to ORS 656.325(6), which provides:
>
> "'Any party may request a hearing on any dispute under this subsection pursuant to ORS 656.283.'
>
> "ORS 656.283 provides, in part:
>
> "'(1) Subject to ORS 656.319 [time limitations], any party or the director may at any time request a hearing on any question concerning a claim. * * * ' . . . " Id. (Emphasis supplied.)

Because ORS 656.268(4) applies only to the Evaluation Division and only to proceedings leading to the issuance of a

Determination Order, I conclude that it would make no sense for that statute to address offset by reduction of continuing temporary disability compensation, for the simple reason that, once a Determination Order is issued, the claim has been closed and there is no further entitlement to such benefits. See ORS 656.268(2); Jackson v. SAIF, 7 Or App 109 (1971). In this case, SAIF sought authorization for its offset through the hearings process, a procedure both authorized and encouraged by Forney, supra. Unlike the majority, I do not believe that SAIF's right to offset the overpayment in this case is limited by ORS 656.268(4) or OAR 436-60-170.

Having sought its offset through the hearings process, SAIF should be entitled to the offset out of currently due compensation if that compensation is "subject to reduction." Claimant has argued that because the kind of compensation SAIF seeks to reduce by way of offset is not enumerated in ORS 656.268(4), it is not "subject to reduction." I do not believe that to be a valid argument. That temporary disability compensation is arguably not subject to reduction under the procedures described in ORS 656.268(4) does not mean that that kind of compensation is not otherwise subject to reduction. Temporary disability compensation clearly is "subject to reduction." See e.g. ORS 656.212; 656.325; OAR 436-60-080 through 436-60-130.

Claimant has also argued that the Referee's order should be affirmed because the issue is moot. Claimant asserts that temporary disability compensation paid pursuant to the Referee's order is not subject to offset by virtue of ORS 656.313(1) and (2). I agree that to the extent temporary disability compensation was paid pending our review, it would not be subject to offset or recovery if it was disallowed or reduced. The fact that it was, in effect, "prepaid," however, is another matter entirely. Even accepting claimant's position for the sake of argument, I disagree that the question is moot. Claimant's present and future entitlements are matters for continuing claim processing.

Because I would allow the requested offset, it becomes necessary to discuss what method I would authorize for the recovery. The rule invalidated by Forney, supra, limited recovery to 25 percent of benefits as they became due. It is apparent that the rule was designed to permit the insurer or employer to recover the overpayment within a reasonable time without at the same time totally depriving the injured worker of compensation. Offsets authorized by Referees and the Board should share that goal; however, a hard and fast percentage rule should not be established. Each case should be decided on its own facts. Substantial justice on a case-by-case basis could run the gamut from disallowing any offset at all to permitting a 100 percent reduction in compensation if such reduction was reasonable. For example, on the facts of this case, I would allow SAIF to reduce ongoing temporary disability benefits by 15 percent as they become due.

For the reasons set forth above, I would modify the Referee's order to allow the overpaid compensation to be credited against both future permanent and temporary disability compensation. Because the majority limits the recovery to future permanent disability awards only, I respectfully dissent.

DEWEY R. BEGLEY, Claimant
Evohl F. Malagon, Claimant's Attorney
Davis, et al., Defense Attorneys

WCB 84-04071
September 5, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee McCullough's order and Order on Reconsideration that set aside the denial of current psychiatric treatment and set aside the denial of claimant's claim for aggravation and surgery for an L4-5 disc protrusion. The issues are aggravation and medical services.

On the issue of aggravation and surgery for the L4-5 disc protrusion, the Board affirms the order of the Referee. See Howard Cooper Corp. v. Fischer, 74 Or App 395 (1985); Leroy E. Leep, 37 Van Natta 1614, 1616 (1985).

On the issue of the denial of ongoing psychiatric treatment, we reverse. Claimant injured his low back in 1981 in a twisting accident. He ultimately had a discectomy and decompression procedure performed on L5-S1. Due to intractable pain, claimant received psychiatric treatment beginning in February 1982. Ultimately the insurer issued a partial denial of continuing psychiatric treatment, which was appealed. In Dewey R. Begley, 36 Van Natta 868 (1984), aff'd mem., 73 Or App 574 (1985), the Board held that, although claimant's psychiatric condition was compensable, the ongoing need for treatment was attributable to an underlying personality disorder which had reverted to its preinjury state. The Board, therefore, approved the denial of psychiatric treatment after January 1983.

We agree with claimant that our approval of the January 1983 denial does not bar claimant from seeking to prove that his current need for psychiatric treatment is once again related to his industrial injury. To do so, claimant must show by a preponderance of the evidence that his current need for psychiatric treatment is related in a material way to his industrial injury. There is no persuasive evidence that claimant's current psychiatric condition is more disabling now than it was in January 1983. See Baustian v. Consolidated Freightways, 79 Or App 700 (1986). Claimant has, therefore, failed to show that his psychiatric condition has become aggravated. ORS 656.273(1). Furthermore, there is no persuasive evidence that claimant's current psychiatric treatment is any different than it has been since its inception in February 1982. It is the law of the case that claimant's need for psychiatric treatment was not materially related to his industrial injury as of January 1983. Because the treatment has not changed fundamentally since that date, we conclude that the need for treatment still is unrelated to the industrial injury. See ORS 656.245(1); Bettie L. Rogers, 36 Van Natta 615 (1984), aff'd mem., 73 Or App 344 (1985).

ORDER

The Referee's Order on Reconsideration dated June 5, 1985 is reversed. The Referee's order dated May 8, 1985 is reinstated and affirmed. Claimant's attorney is awarded a reasonable attorney fee of $550 for prevailing on the aggravation and surgery denial issues, to be paid by the insurer in addition to compensation.

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

WCB 85-01679 & 84-13634
September 5, 1986
Order on Reconsideration

The SAIF Corporation has requested reconsideration of our Order on Review dated January 28, 1986 in which we found SAIF to be the insurer responsible for claimant's contact dermatitis condition. SAIF argues that a later insurer, Liberty Northwest Insurance Corporation (Liberty), is responsible. The request for reconsideration is allowed. After reconsideration, we agree with SAIF and withdraw our prior order.

Claimant was seen by an emergency room physician on August 14, 1983, complaining of a pustular rash on his hands. He had been a dishwasher for SAIF's insured for approximately a year and a half at the time. He related that the rash developed after an equipment failure necessitated his washing dishes by hand for approximately one week.

Claimant's condition was ultimately diagnosed as impetiginized lesions. He filed a claim for that condition on August 20, 1983 and was released for regular work a month later. After returning to work, his symptoms returned. Dr. Wright advised him to avoid wet work. SAIF denied the claim on November 17, 1983. Claimant requested a hearing.

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

In September 1984, SAIF rescinded its previous denial and paid temporary total disability benefits in exchange for claimant's dismissal of his request for hearing. Claimant began working for a cannery insured by Liberty approximately a month later. His job eventually involved working with wet fruit, and his skin symptoms soon returned. He filed a claim for the recurrence of symptoms on October 23, 1984. Liberty issued a responsibility denial on December 13, 1984, and requested that the Workers' Compensation Department designate a paying agent pursuant to ORS 656.307. Approximately six weeks later, SAIF also issued a denial of responsibility and likewise requested that a paying agent be named. On February 19, 1985 the Department ordered Liberty to pay claimant's compensation pending resolution of the responsibility issue.

Dr. Wright found claimant to be medically stationary on March 1, 1985 without permanent, work-related residuals. Thereafter Dr. Wright responded to numerous questions posed by both insurers. He was ultimately deposed. The gist of Dr. Wright's opinion is that claimant suffers from an underlying "dyshydrotic eczema" condition that makes his skin susceptible to the development of contact dermatitis. Dr. Wright indicated that the causes of the eczema condition are unknown and that it was unlikely that claimant's dishwashing employment caused or permanently affected the underlying condition. He also stated, however, that both the dishwashing and cannery employments involved work with irritants capable of producing contact dermatitis symptoms. Finally, it was Dr. Wright's opinion that claimant's second exposure was a new symptomatic episode not related to nor made more likely to occur by the first.

Claimant testified that after developing the rash for the first time at SAIF's insured's, and after a period of resulting time off from work, his symptoms essentially resolved. Before going to work for Liberty's insured he was having no problems whatsoever with his hands. After working with wet fruit at the cannery for approximately one week, however, his symptoms returned and he was again forced to leave work.

The Referee found the medical opinion of Dr. Wright to support the denials issued by both insurers. Accordingly, he found claimant's claims not compensable. On review we found that because the compensability of claimant's condition had effectively been conceded by both insurers when each requested an ORS 656.307 order, the Referee's affirmance of both denials was improper. Having found claimant's claim compensable by operation of law, we endeavored to determine which insurer was responsible.

We found that SAIF had denied claimant's claim in early 1985 after accepting it in September 1984. We then held the supposed "back-up" denial to be prohibited by Bauman v. SAIF, 295 Or 788 (1983), citing as authority Jeld-Wen, Inc. v. McGehee, 72 Or App 12, rev den, 299 Or 203 (1985), and Retchless v. Laurelhurst Thriftway, 72 Or App 729, rev den, 299 Or 251 (1985). Since the issuance of our order the court has decided Fred Shearer & Sons v. Stern, 77 Or App 607 (1986), and has held that in an ORS 656.307 situation in which claimant is not at risk of losing benefits, there is no reason to apply Bauman. Stern applies to the present facts. SAIF's denial was not prohibited by Bauman.

Liberty argues on reconsideration that SAIF's denial is estopped by the principle of Roller v. Weyerhaeuser Co., 67 Or App 583 (1984). In Roller the court held that it is improper for an insurer to issue a partial denial of a previously accepted claim in an attempt to terminate future responsibility before the extent of a claimant's disability has been determined. Id. at 586. In Jimmy C. Lay, 35 Van Natta 583, 584 (1985), however, we found such partial denials to be permissible in responsibility cases. Roller, supra, does not control.

We are left, therefore, with two denials that were procedurally proper, but with one that must be set aside on the merits. In this responsibility case, disposition at least partially depends on whether claimant's disability is characterized as resulting from an occupational disease or from successive injuries. After reviewing the facts, we conclude that claimant's exposures should be characterized as successive injuries. His contact dermatitis condition arose during both of his employments within clearly identifiable time periods i.e., within approximately one week while dishwashing, and within approximately one week after beginning work with wet fruit at the cannery. Thus, although there was apparently no sudden onset of symptoms at either employment, there were discrete periods during both jobs in which claimant's symptoms appeared. See Valtinson v. SAIF, 56 Or App 184, 188 (1982). Claimant's exposures were successive injuries.

In a successive injury context, where a compensable injury at one employment contributes to a disability occurring during a later employment involving working conditions capable of causing the disability, but which did not contribute to the

disability, the first employer remains liable for claimant's condition. Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984). On the other hand, if the second employment independently contributes to claimant's disability, the second employer is responsible. See Olson v. EBI Companies, 78 Or App 261 (1986); Smith v. Ed's Pancake House, 27 Or App 361 (1976).

In the present case, Dr. Wright's persuasive opinion is that the appearance of claimant's symptoms during the second employment was "a brand new episode" not related to the first period of disability. We interpret this opinion to be that the second work exposure independently contributed to claimant's resultant need for medical treatment and time off from work. The independent contribution by the second employment rests liability with the second insurer. Liberty is responsible.

Now, therefore, having granted the SAIF Corporation's request for reconsideration, we withdraw our Order on Review dated January 28, 1986. Liberty Northwest Insurance Corporation's denial of claimant's claim for contact dermatitis is hereby set aside and the claim is remanded to Liberty for processing according to law. SAIF's denial of responsibility is reinstated.

IT IS SO ORDERED.

RANDY L. JACKSON, Claimant
Quintin B. Estell, Claimant's Attorney
Schwenn, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney
Davis, et al., Defense Attorneys

WCB 85-00010, 85-3014 & 85-03015
September 5, 1986
Corrected Order on Reconsideration

On August 25, 1986, the Board issued an Order on Reconsideration. In one portion of the aforementioned order, we deleted several references to the SAIF Corporation from our August 6, 1986 Order on Review. We replaced these "SAIF" references with "North Pacific."

After further investigation, we note that the reference to "North Pacific" was inaccurate. Consequently, we correct our Order on Reconsideration by replacing the terms North Pacific Insurance Company and "North Pacific" with United Pacific Insurance and "United Pacific." This correction has no effect upon the conclusions expressed in our previous orders.

Therefore, except as corrected herein, the Board adheres to and republishes its prior Order on Reconsideration. The parties' rights of appeal shall run from the date of the Order on Reconsideration.

IT IS SO ORDERED.

OSBERT A. JONES, Claimant
RICKEY STEVENS PAINTING, Employer
Zikes, et al., Claimant's Attorney
Michael S. Fryar, Attorney
Rankin, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney
Carl M. Davis, Ass't. Attorney General

WCB 84-00907
September 5, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The alleged employer requests review of Referee Leahy's order which: (1) affirmed the Compliance Order No. 8271-A dated November 17, 1983 which found the appellant to be a non-complying employer; (2) affirmed the denials of coverage of claimant's industrial injury; and (3) found that there was an employer-employe relationship. Additionally the employer argues for the first time on review that claimant failed to produce a claim form at the hearing to prove that a claim had been made. The issues on review are compensability, whether the appellant was a non-complying employer, and coverage.

The Board affirms and supplements the order of the Referee with the following comment. Although the Referee found that claimant's injury was compensable, he neglected to set aside the employer's de facto denial and order acceptance of the claim.

The appellant was an employer. ORS 656.005(14). The relationship between claimant and the appellant was an employer-employe relationship as opposed to an independent contractor relationship. See Ellis L. Pettyjohn, 37 Van Natta 1224 (1985). Even if the relationship were contractual, the appellant by letting a contract for the performance of labor was responsible for providing workers' compensation coverage. ORS 656.029. The employer had actual notice of the claim, it was confirmed by a written report from a doctor, and the issue of notice was not raised at the hearing. ORS 656.265.

ORDER

The Referee's order dated October 15, 1985 as supplemented October 28, 1985 is affirmed. The employer's de facto denial is set aside and the employer shall accept the claim for workers' compensation benefits. Claimant's attorney is awarded $500 for services on Board review, to be paid by the employer.

SEAN M. STODDARD, Claimant
Emmons, et al., Claimant's Attorneys
Kay Kinsley, Defense Attorney

WCB 85-10673
September 5, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The insurer requests review of Referee Baker's order that increased claimant's award for unscheduled permanent partial disability for his low back from the 30 percent (96 degrees) granted by Determination Order to 50 percent (160 degrees). The issue is extent of disability.

Claimant injured his low back in June 1982 in the course of his employment as a truck driver when he lifted several heavy bags of seed. Claimant received conservative care, but his condition gradually deteriorated. In May 1983 claimant's treating neurological surgeon, Dr. Tsai, performed a laminotomy and diskectomy at L4-5.

Claimant was referred for vocational rehabilitation and began an authorized training program (ATP) in August 1983. By November 1983, claimant had decided not to complete the program and opted instead for a direct employment program. There is a dispute between the parties concerning the reasons for claimant's failure to complete the ATP. The employer argues, in essence, that claimant's failure was intentional and was intended to increase his disability rating. Claimant contends that he had attendance problems because of illness and oral surgery. After our de novo review of the record, we are not convinced that claimant deliberately sabotaged his ATP in order to increase his disability.

After the ATP was terminated, the claim was closed by Determination Order in December 1983 with an award of 15 percent unscheduled permanent partial disability. In April 1985, the parties entered a stipulation whereby this Determination Order was "set aside and held for naught." The claim was later closed by another Determination Order in August 1985 with an award of 30 percent unscheduled permanent partial disability.

No doctor has expressly rated claimant's impairment. The only restrictions imposed by claimant's treating neurological surgeon, Dr. Tsai, were a 25 pound lifting limitation and a recommendation that he avoid work which requires prolonged sitting or standing. Claimant testified that he experiences a continuous, sharp pain in his back which radiates into his lower extremities. He testified that this condition severely restricts his ability to perform any work.

Claimant is 27 years old, is of average intelligence and has a tenth grade education. He has worked nearly all of his short work life in the seed industry, but has held a number of positions with varying duties including basic bookkeeping, inventory control, shipping and receiving, operating heavy equipment, truck driving and machinery maintenance and repair. After reviewing the record and listening to claimant's testimony, the Referee increased claimant's permanent partial disability award to 50 percent.

On Board review, the insurer argues that claimant grossly exaggerated his level of permanent impairment. Our review of the record convinces us that the employer is correct. As it appears that the Referee accepted claimant's inflated assessment of his impairment, we conclude that the Referee's award was excessive.

In rating the extent of claimant's permanent disability, we consider his physical impairment as reflected in the medical record and the testimony at the hearing 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 which are determinative of the final result. See 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 an award of 96 degrees for 30 percent unscheduled permanent partial disability adequately and appropriately compensates claimant for the permanent loss of earning capacity due to his compensable injury. We, therefore, reinstate and affirm the Determination Order award.

ORDER

The Referee's order dated December 16, 1985 is reversed. The award of 30 percent (96 degrees) granted by the Determination Order dated August 21, 1985 is reinstated and affirmed.

JOHN R. McDOUGALL, Claimant
Welch, et al., Claimant's Attorneys
Meyers & Terrall, Defense Attorneys
Cummins, et al., Defense Attorneys

WCB 85-07559, 85-07560, 85-07661 & 85-07662
September 8, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of that portion of Referee Quillinan's order that awarded no attorney fees for services at a hearing to decide the issue of responsibility between two self-insured employers after publication of an order appointing a paying agent pursuant to ORS 656.307. The issue on review is attorney fees for services at hearing after publication of a .307 order.

The Board affirms and adopts the order of the Referee. See Calvin C. Bourne, 38 Van Natta 965 (WCB Case No. 85-01025, August 29, 1986); Mark L. Queener, 38 Van Natta 882 (August 1, 1986); Dennis S. Current, 38 Van Natta 858 (July 29, 1986).

ORDER

The Referee's order dated February 13, 1986 is affirmed.

MATTY PALANIUK, Claimant
Ackerman, et al., Claimant's Attorneys
J.W. McCracken, Jr., Defense Attorney

WCB 85-14753 & 85-14291
September 8, 1986
Order of Remand

Claimant requested review of Referee Thye's order that denied claimant's request for an award of compensation for permanent total disability and awarded additional compensation for permanent partial disability. Claimant now moves the Board for an order remanding this case to the Referee for clarification of the award for permanent partial disability. We allow the motion and remand.

We conclude that the record is insufficiently developed, ORS 656.295(5), because we are unable to ascertain from the Referee's order whether he intended to award claimant compensation for 192 degrees (60 percent) or 240 degrees (75 percent) unscheduled permanent partial disability. In our analysis of the order we have considered the "order" portion of the Referee's order and the Determination Order affected thereby. We conclude that the order is equally subject to either interpretation and must be clarified.

ORDER

This case is remanded to Referee Thye for further proceedings consistent with this order.

LORI BEGHTOL, Claimant
Ann Kelley, Ass't. Attorney General

WCB CV-86002
September 10, 1986
Crime Victim Compensation
Order on Review

Claimant requested review by the Workers' Compensation Board of the Department of Justice Crime Victim Compensation Fund ("Fund") Findings of Fact, Conclusions and Order on Reconsideration dated January 17, 1986. The Fund denied claimant's claim for compensation as the victim of a crime under ORS 147.005 to 147.365. The Fund based its denial on: (1) claimant's failure to file a claim for benefits within one year from the date of the criminal injury; and (2) a lack of evidence that claimant was mentally or physically incapable of filing her claim within one year of her injury as a direct result of her injury.

We review pursuant to ORS 147.155. At claimant's request, an evidentiary hearing was conducted on July 30, 1986 by Roger C. Pearson, special hearings officer appointed by the Board. On August 14, 1986 the special hearings officer entered Findings of Fact, Conclusions and a Proposed Order, which we set forth in relevant part.

"FINDINGS OF FACT

"Claimant was physically assaulted on September 29, 1984. As a result of this unprovoked attack, she sustained multiple stab wounds, primarily to her chest and thorax. Claimant's injuries required emergency treatment, including immediate blood transfusions and eventually, several surgeries. Her major problem has been diagnosed as a brachial plexus injury, which has culminated in a severe disabling nerve injury to her left upper extremity. Her assailant subsequently pled guilty to assault and is presently incarcerated.

"Soon after her attack claimant received a letter from Victims' Assistance which advised her to contact them if she had any questions concerning her rights. The letter did not suggest that she could apply for benefits under the Crime Victims' Compensation Program. Had claimant known of the Program she would have filed an application. At approximately this same time, claimant also visited the Victims' Assistance office regarding the procurement of a restraining order. Again, she was neither advised of the Program nor of her possible eligibility for benefits.

"Claimant continued to receive periodic medical treatment during 1985, primarily from Dr. Nye and Dr. Marble. Although she has returned to her family home, she is physically capable of caring for herself. She has not sought psychiatric treatment. Most of her medical bills have been paid by private insurance. However, as a result of her injuries she has been unable to return to her employment as a word processing specialist. Consequently, she has either received disability compensation or performed modified work duties.

"Claimant first learned of the Program from Ms. Martha L. Costy, an insurance and collections clerk for Dr. Marble. According to Ms. Costy, this notice occurred during a September 30, 1985 conversation. Ms. Costy reports that she advised claimant that it was her understanding that the time limit

was one year from the date of the injury, but if claimant hurried she might still qualify for benefits.

"Claimant testified that she returned to the Victims' Assistance office the day after her conversation with Ms. Costy. She recalled that she completed her application that same day. The claim, signed on October 3, 1985, indicates that claimant was unaware of the program until October 2, 1985. Claimant conceded that the dates on her application were likely more accurate than her recollection.

"Had claimant known of the Program she would have immediately filed an application for benefits. However, no one at the Victims' Assistance office advised her of the Program's existence and her potential eligibility. An unidentified individual at the Victims' Assistance office later told her that victims were generally told of the Program only if the victims did not have medical insurance.

"Ms. Costy has offered a letter in support of claimant's application for benefits. It is Ms. Costy's firm belief that had claimant been informed of the Program, she would have promptly filed for benefits. In Ms. Costy's opinion claimant was not advised of the Program solely because she had good health insurance coverage. While Ms. Costy recognizes that rules and regulations are necessary, she feels that claimant deserves some consideration beyond the normal time limitations for this "unjust situation." Ms. Costy concludes by stating that "[Claimant's] case fell through the cracks, and I can only hope no other victims of crimes go unaided due to mishaps of this type."

"Claimant testified in a candid and forthright manner. Furthermore, I am convinced that the minor discrepancy over the date she first learned of the Crime Victims' Compensation Program and the date she filed her claim is a function of a lapse in memory rather than an intentional attempt at deception. Consequently, based upon my personal observation, I find that she is an entirely credible witness.

"CONCLUSIONS

"Pursuant to ORS 147.015, claimant is entitled to an award of compensation under the Compensation of Crime Victims Act, if, among other requirements:

> "(6) The application for an award of compensation under ORS 147.005 to 147.365 is filed with the department:
> " (a) Within six months of the date of the injury to the victim; or
> " (b) Within such further extension of time as the department for good cause shown, allows."

"Lack of knowledge of the Fund or failure of an investigating officer to provide information as provided for in ORS 147.365 shall be deemed to be "good cause" for extension of the time in which a claim must be filed. OAR 137-76-030(1). The extension consists of an additional six months from the date of the injury. id. In the interest of orderly and consistent administration, no extension of time within which a claim must be filed will be granted beyond one year from the date of the

criminal injury for any cause except for mental or physical incapacity directly resulting from the criminal injury sustained. OAR 137-76-030(2).

"The standard of review for cases appealed to the Board under the Compensation of Crime Victims Act is de novo on the entire record. ORS 147.155(5); Jill M. Gabriel, 35 Van Natta 1224, 1226 (1983). Following my de novo review of the documentary and testimonial evidence, I find that the preponderance of the evidence establishes that claimant's application for benefits was filed more than one year after the date of injury. Therefore, the application was untimely. Furthermore, I am not persuaded that claimant's failure to file her claim within one year of her injury was attributable to mental or physical incapacity directly resulting from her injury. Consequently, I conclude that the Department's Order on Reconsideration should be affirmed.

"OAR 436-76-030 was apparently adopted in response to several Board decisions concerning the issue of good cause for late claim filings. A review of these decisions follows.

"In Ronald E. Bass, 35 Van Natta 1679 (1983), the claim was filed nearly two years after the injury. The claim had not been filed earlier as a result of incorrect information furnished by the local District Attorney's Office. The Justice Department denied the application relying on "administrative policy" as set forth in OAR 436-76-030 (formerly OAR 436-76-105), which at that time was merely a proposed rule. Finding that the Department had not shown that it was prejudiced in processing the claim by the late filing, the Board reversed the Department's denial of benefits. The Board relied on Jill M. Gabriel, supra., and Ivan Ouchinnikov, 34 Van Natta 579 (1982), which also involved claims filed in excess of one year from the date of injury. These late filings were both attributable to law enforcement officials' failures to provide information of potential benefits. In reversing the Department's denial, the Board stated in Gabriel:

> "We believe that the denial of a claim because of late filing (where good cause has been shown) without first making a showing that it was prejudiced by the late filing is an abuse of discretion. We hold, therefore, that the Department abused its discretion in denying this claim." 35 Van Natta 1228.

"The Board in Gabriel reasoned that by failing to adopt administrative rules, the Department had failed to provide notice that there was an absolute deadline of one year for filing claims. This reasoning was equally applicable to the Board's subsequent decision in Bass. However, the Board noted in Bass as follows:

> "Although we agree with the Department that it has the power to adopt such rules to define 'good cause,' in the absence of properly promulgated rules to that effect, we decline to limit our review on the basis of 'administrative policy' and proposed rules." 35 Van Natta 1681.

"Since these Board decisions, the Department has

properly promulgated rules defining "good cause." See OAR 137-76-030. These rules became effective on September 1, 1983. See ORS Chapter 147; JD 4-1983. Thus, these rules are directly applicable in determining whether good cause exists to allow claimant's late claim for benefits.

"I am persuaded that claimant was initially unaware of the Program, either at the time of her injury or during her convalescence. Therefore, pursuant to OAR 137-76-030(1), she has established "good cause" for a sixth month extension in which to file her claim. Since her injury occurred on September 29, 1984, this extension would lapse on September 29, 1985. Her claim was not filed until October 3, 1985. Consequently, according to OAR 137-76-030(2), she is entitled to a further extension of time to file her claim only if she was mentally or physically incapable of filing as a direct result of her injury. The preponderance of the evidence fails to support such a finding. Accordingly, the claim must fail as untimely.

"This is truly a distressing situation. Through miscommunications mainly beyond her control, claimant has been prevented from receiving benefits to which she would otherwise be entitled. Her prompt efforts to apply for benefits once she learned of the Program persuade me that the responsibility for this late filing primarily lies with individuals other than herself. However, OAR 137-76-030 is clear on its face. In anticipation of situations like this, the Department allows for an additional six month "grace period" to file for benefits. Then, "in the interest of orderly and consistent administration," further extensions can only be granted under specific circumstances. Unfortunately, the claim falls days outside of the six-month extension and does not satisfy the requirements for a further extension.

"To paraphrase Ms. Costy, this claim has "fallen through the cracks" of the system. Although claimant will not receive any monetary benefits as a result of her claim, I trust that she will take solace in knowing that her efforts may assist later crime victims. Hopefully, her determination in discussing her plight with Victim Assistance officials and in pressing this matter to its ultimate level of appeal has caused officials to place a greater degree of emphasis on fully informing victims of their rights under the Crime Victims' Compensation Program."

We adopt the above findings and conclusions and, in conformity therewith, order that the Department of Justice Crime Victim Compensation Fund's Findings of Fact, Conclusions and Order on Reconsideration dated January 17, 1986 be affirmed.

IT IS SO ORDERED.

SONIA L. BOWEN, Claimant
Welch, et al., Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 85-00324
September 10, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of Referee Podnar's order that set aside its denial of the claim for injury to claimant's neck and right shoulder. The employer argues that the request for a hearing was not timely filed and has submitted

additional evidence of the date of mailing of the denial. The issues on review are compensability, remand and jurisdiction.

The proffered evidence is largely cumulative of evidence already in the record. There was no showing why the affidavits and copies of the documents could not have been produced at the hearing with due diligence in preparation for 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 it must be shown the evidence was not obtainable with due diligence before the hearing. Delfina P. Lopez, 37 Van Natta 164, 170 (1985). In Kienow's Food Stores v. Lyster, 79 Or App 416, 420 (1986), the court held that a party's failure to request an opinion based upon information that was available before the hearing was not good cause or a "compelling reason" to remand. There is no significant difference between the facts of this case and those of Lyster. The request to remand is denied.

There is enough evidence in the record to conclude that the denial letter was probably mailed during the first week of November 1984. Claimant received actual notice of the denial on November 5, 1984 from the occupational health nurse who was involved in the case. Claimant was already represented by an attorney and she immediately contacted him. She talked directly to her attorney who assured her that he would appeal the denial. The hearing request was mailed on January 8 and received by the Board on January 9, 1985.

A formal denial letter was sent to and received by claimant. She immediately turned the matter over to her attorney. The referee found that claimant was a credible witness. No good cause was shown why the request for a hearing was not filed within 60 days of either the date of the formal denial letter or actual notice to claimant. The Board finds that the Referee was without jurisdiction to consider the merits of the claim because the request for a hearing was not timely filed and no good cause was shown for the delay. ORS 656.319; see EBI Companies v. Lorence, 72 Or App 75, rev. den., 299 Or 118 (1985).

ORDER

The Referee's order dated January 16, 1986 is reversed. The self-insured employer's denial is reinstated. The hearing request is dismissed.

IRENE A. HUFT, Claimant
Welch, Bruun & Green, Claimant's Attorneys
Kevin Mannix, Defense Attorney
Schwabe, et al., Defense Attorneys

WCB 85-04969 & 85-09066
September 10, 1986
Order on Review

Reviewed by Board Members Lewis and Ferris.

Argonaut Insurance Company requests review of Referee Leahy's order that: (1) affirmed the Determination Order dated April 1, 1985 which awarded 32 degrees for 10 percent unscheduled permanent partial disability for injury to claimant's low back; and (2) awarded 32 degrees for 10 percent unscheduled permanent partial disability in addition to the Determination Order dated July 10, 1985 which awarded no compensation for permanent disability for injury to claimant's upper, mid, and low back.

Argonaut argues that it is not responsible for claimant's low back disability. Claimant cross-requests review of the total award of compensation for permanent disability. EBI Companies objects to consideration of the issue of responsibility, which it argues is a new issue which was not raised before the Referee. The issues on review are extent of unscheduled permanent partial disability and responsibility for permanent disability compensation.

The Board affirms the order of the Referee with the following comment. Claimant worked for one employer who was covered at relevant times by two separate insurers. Claimant sustained one accepted back injury under each coverage. The first injury was to claimant's low back. The second injury was to claimant's cervical, thoracic, and lumbosacral spine. The second injury was a material contributing cause of claimant's worsened disability, therefore the second insurer is responsible for compensation for the increase in claimant's disability. Boise Cascade Corporation v. Starbuck, 296 Or 238 (1984). The Referee's award of compensation adequately compensates claimant for the permanent loss of earning capacity attributable to each accepted injury. Owen v. SAIF, 33 Or App 385 (1978); Earl H. Norby, 37 Van Natta 1003 (1984).

ORDER

The Referee's order dated January 10, 1986 is affirmed. Claimant's attorney is awarded $400 for services on Board review related to the issue of the amount of disability compensation awarded, to be paid by Argonaut Insurance Company in addition to compensation.

ELLIS E. WHISENHUNT, Claimant
Vick & Associates, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-06516
September 10, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Howell's order that: (1) upheld the SAIF Corporation's denial of aggravation of claimant's low back injury; and (2) affirmed the Determination Order dated May 20, 1985 which awarded compensation for temporary disability but no compensation for permanent disability. The issues on review are aggravation and extent of unscheduled permanent partial disability.

The Board affirms and adopts the well-reasoned order of the Referee. See Barrett v. D&H Drywall, 300 Or 553 (1986), on reconsideration on remand, 38 Van Natta 931 (WCB Case No. 81-02757, August 22, 1986); Sharon L. Novak, 38 Van Natta 601 (1986); Brian L. Hayes, 37 Van Natta 1219, 37 Van Natta 1447 (1985).

Claimant wrote a letter to the Board in which he stated disagreement with the Referee's order. It appears from the letter that claimant did not send copies of his letter to the other parties to the review. The letter restates the arguments claimant's attorney presented to the Board in the appeal and reply briefs. The letter is placed with the briefs in the record and notice to all interested parties is hereby provided pursuant to ORS 183.462.

ORDER

The Referee's order dated January 21, 1986 is affirmed.

DENNIS J. POKLIKUHA, Claimant
Coons & Cole, Claimant's Attorneys
Nelson, et al., Defense Attorneys

WCB 85-07551 & 85-07533
September 15, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The insurer requests review of that portion of Referee T. Lavere Johnson's order that awarded claimant 96 degrees for 30 percent unscheduled permanent partial disability for the mid and low back in lieu of a Determination Order award of 48 degrees for 15 percent unscheduled disability. The issue is extent of unscheduled disability.

Claimant is a former landscape laborer who compensably injured his left knee and low back in December 1983. Claimant received conservative treatment for both conditions and the claims were closed with no award of permanent disability for the low back. Claimant incurred a second compensable injury while employed by the same employer in August 1984. His resulting condition was diagnosed as a cervicodorsal and mid-thoracic myofacial strain. The claim was closed by way of Determination Order in May 1985 with a 15 percent unscheduled award.

We find from the medical evidence that claimant's physical impairment lies in the range of ten percent. He has restrictions as to bending, overhead lifting, push-pull movements, squatting, crawling and climbing. He also complains of chronic neck pain and muscle spasms. The medical consensus is that claimant cannot return to his prior occupation.

While claimant's physical impairment clearly exists and is permanent, it does not appear to be substantial. In addition, several of the non-physical factors pertaining to his earning capacity are favorable. Claimant was 34 years of age at the time of the hearing and had a high school diploma. In addition, he had completed two years of college course work and was enrolled in his third year. He was also employed part-time as a teacher's aide at the time of the hearing. The vocational record reveals that claimant was also capable of performing work as a physical therapy aide, but that efforts at placing him in employment ended when claimant decided to attend college.

After considering claimant's physical impairment and the various nonphysical earning capacity factors, we find that the Referee's award of 30 percent unscheduled disability is excessive. Based on our de novo review of the record, we find that claimant is adequately compensated by an award of 64 degrees for 20 percent unscheduled permanent partial disability.

ORDER

The Referee's order dated December 30, 1985 is modified in part and affirmed in part. That portion of the order that awarded claimant 30 percent unscheduled permanent partial disability in lieu of the Determination Order award is modified. In lieu of the Referee's award and all prior awards of unscheduled permanent partial disability, claimant is awarded 64 degrees for 20 percent unscheduled permanent partial disability. Claimant's attorney's fee is modified accordingly. The remainder of the Referee's order is affirmed.

MARSHALL A. RICHARDSON, Claimant
Keith Skelton, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-05405
September 15, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Pferdner's order that upheld the SAIF Corporation's denial of claimant's claim that his psychological condition is causally related to his compensable hearing loss and tinnitus conditions. The issues are the admissibility of an excluded exhibit and compensability.

Claimant filed a claim for hearing loss in April 1982 which was accepted by SAIF. In October 1984, claimant's treating otolaryngologist, Dr. Imbrie, referred claimant to Dr. Duncan, a psychiatrist, for a psychological evaluation. Dr. Duncan had treated claimant in March 1982 for a condition which had been diagnosed by consulting psychologist, Dr. Reiter, as schizotypal personality disorder. Dr. Reiter listed marital difficulties, alcohol abuse and attention deficit problems as complicating factors. In a report dated March 4, 1985, Dr. Duncan diagnosed claimant's condition as dysthymic disorder. He attributed this disorder to claimant's anger over having to leave his chosen line of work to avoid further hearing loss. He also thought that some of claimant's symptoms might relate to the use of marijuana.

Claimant was examined a second time by Dr. Reiter in December 1984. Dr. Reiter noted that claimant was extremely anxious, depressed and agitated about the loss of his job and his future employment status. On the issue of causation, Dr. Reiter attributed much of claimant's condition to preexisting personality disorders, but stated that "at the same time there is enough evidence to suggest that what is occurring now in all probability would not have occurred with such severity if it were not for his added physical problems."

Claimant was examined by another psychiatrist, Dr. Turco, in April 1985. Dr. Turco stated that claimant's problems were related to longstanding personality disorders as "accentuated because of his hearing loss and tinnitus."

SAIF denied claimant's psychological claim in April 1985. Claimant requested a hearing and the hearing was scheduled for January 3, 1986.

Eight days before the hearing, claimant's attorney received a report from Dr. Duncan which expressed the opinion that claimant's psychological condition was causally related to his compensable ear condtions. The attorney mailed a copy of the report to the Referee, but neglected to mail a copy to SAIF. SAIF objected to the receipt of the report at the hearing and the Referee excluded it.

The basis for the Referee's ruling was the second paragraph of OAR 438-07-005(3)(b), which states that when supplemental exhibits are submitted they must be "filed and provided to the other parties within seven (7) days of the submitting party's receipt of the exhibits." SAIF's attorney received a copy of the report on the day of the hearing, but this was the eighth day after claimant's attorney received the report.

Claimant's only argument on Board review is that SAIF was very impolite in insisting on compliance with the above-mentioned administrative rule. We find no error in the Referee's action. See OAR 438-07-005(4).

Although we do not consider Dr. Duncan's report, we nonetheless conclude that claimant has carried his burden of proving that his compensable hearing loss and tinnitus conditions were material contributing factors in causing or worsening his psychological condition. See Jeld-Wen, Inc. v. Page, 73 Or App 136, 139 (1985). All of the psychological professionals who expressed an opinion on the subject thought that claimant's psychological problems were related to his compensable ear conditions. We, therefore, reverse the Referee on the merits. We find that this is a case of ordinary difficulty and reasonable probability of success for claimant. A reasonable attorney fee is awarded accordingly.

ORDER

The Referee's order dated January 14, 1986 is reversed. Claimant's psychological claim is remanded to SAIF for acceptance and payment of compensation in accordance with law. Claimant's attorney is awarded $1,300 for services at the hearing and $600 for services on Board review, to be paid by the SAIF Corporation.

DENA M. SMITH, Claimant
Doblie & Associates, Claimant's Attorneys
Rankin, et al., Defense Attorneys

WCB 85-05567
September 16, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of those portions of Referee Howell's order which: (1) upheld the insurer's denial of aggravation of claimant's low back injury; and (2) denied penalties and attorney fees for a denial of medical services. Claimant objects to consideration of the testimony of two witnesses and requests penalties and attorney fees for: (1) unreasonable failure to close her claim and pay compensation for permanent disability; (2) unreasonable failure to notify claimant of closure; (3) unreasonable failure to pay temporary disability compensation on an aggravation claim; and (4) unreasonable backup denial of medical services. The insurer cross-requests review of those portions of the order which set aside its denial of medical services and awarded attorney fees. The issues on review are compensability, aggravation, claim closure, and penalties and attorney fees.

Claimant injured her low back on February 8, 1980. She went to a doctor two times and was off work for three days. She returned to work but restricted her heavy lifting. The next time she sought treatment for her low back was March 25, 1983. The chiropractor who treated claimant reported that no time loss was necessary and that the low back condition was caused by the original 1980 industrial injury. The chiropractor's bill was paid. The next time claimant sought treatment was January 18, 1985 from Dr. Bernson. Dr. Bernson believed that the back pain symptoms were related to the 1980 industrial injury and a virus. Claimant then sought treatment from Dr. Kovachevich, who also reported that claimant suffered from a chronic back strain related to the 1980 industrial injury.

Claimant was examined by Drs. Sulkosky and Duff. They believed that claimant's original industrial injury had resolved. They each opined that the lapse of time without treatment precluded a meaningful relationship between the 1980 industrial injury and the current condition.

The Referee found that claimant was a credible witness. He also found that claimant continued to suffer pain in her low back related to heavy lifting after the industrial injury and that she had not sought medical treatment because she did not know it would be paid for by the industrial insurer if related to the 1980 injury.

The Referee denied consideration of the aggravation claim because the claim was first made five years and three days after the original injury. The issue of subject matter jurisdiction was first raised at the hearing after claimant had made her opening statement. The issue of subject matter jurisdiction may be raised at any time in the course of litigation. Schlecht v. SAIF, 60 Or App 449 (1982). The Referee found that he was without jurisdiction to decide whether to reopen the claim for time loss because the claim was jurisdictionally an own motion claim under the Board's exclusive jurisdiction. ORS 656.273; 656.278. The Referee relied on Garland Combs, 37 Van Natta 756 (1985), among other cases. The Referee found by a preponderance of the evidence that the current medical services are causally related to claimant's 1980 industrial injury.

Since the Referee's decision, the Combs case was reversed by the Court of Appeals. Combs v. SAIF, 80 Or App 594 (per curiam, August 6, 1986) see also Davison v. SAIF, 80 Or App 541 (August 6, 1986). As a result of the Davison decision, claimant's 1980 industrial injury claim is still open because it was never closed by a Notice of Closure or Determination Order.

With this in mind, we have reviewed the evidence relevant to the issue of the compensability of the medical services in 1985. The Board affirms that portion of the Referee's order which set aside the insurer's denial of medical services benefits and awarded reasonable attorney fees pursuant to ORS 656.386(1).

The next issue is whether claimant has a disability claim and is entitled to compensation for temporary disability. This was an issue at the hearing because the partial denial was of temporary disability benefits. Claimant testified about her periods of work and her work activities through the date of the hearing. We find that the record is sufficiently and adequately developed to decide this issue.

Claimant originally left work for three days only and was therefore not entitled to compensation for that time loss. ORS 656.210. Claimant returned to her regular full-time work for about a year. Her job duties may have been modified slightly, but she suffered no reduction in wages and the modifications were not suggested by a doctor.

Considering the February 11, 1985 letter from Dr. Kovachevich as the initial claim for temporary disability compensation, we find that interim compensation was begun on February 21, 1985 and was therefore paid timely. The insurer denied compensation for temporary disability compensation on

May 1, 1985 but affirmed its duty to pay for reasonable and necessary medical services related to the 1980 injury. Having found that claimant was credible and that the opinions of Drs. Bernson and Kovachevich were more persuasive than the opinions of Drs. Duff and Sulkosky, we would also find that claimant would have been entitled to temporary disability compensation commencing February 6, 1985 had she left work. However, claimant's testimony did not establish that she left work or that she had sought work since September 1983, because her husband had obtained a new job at that time. We find that claimant removed herself from the workforce in September 1983. Therefore, we conclude that claimant is not entitled to temporary disability compensation. Cutright v. Weyerhaeuser Co., 299 Or 290 (1985); Bono v. SAIF, 298 Or 405 (1984); Karr v. SAIF, 79 Or App 250 (1986); Weyerhaeuser v. Bergstrom, 77 Or App 425 (1986). Consequently, that portion of the Referee's order which upheld the denial of temporary disability compensation is affirmed.

On the penalties and attorney fees issues, the Board finds that the unreasonable failure to close the claim, unreasonable failure to notify claimant of claim closure, and unreasonable failure to pay temporary disability compensation on an aggravation claim are rendered moot by the finding that the claim is still open. On the issue of penalties and attorney fees for unreasonable denial of the medical services in 1985 the Board affirms the order of the Referee.

ORDER

The Board affirms the Referee's order dated December 12, 1985. The claim is remanded to the insurer for processing in accordance with this opinion. Claimant's attorney is awarded $400 for services on Board review related to the issue of medical services, to be paid by the insurer.

RONALD G. HANSEN, Claimant
Hayner, et al., Claimant's Attorneys
Foss, et al., Defense Attorneys

WCB 83-03734 & 84-09893
September 19, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Tenenbaum's order that: (1) increased claimant's award of scheduled permanent partial disability for his right knee from the 25 percent (37.5 degrees) awarded by Determination Order to 35 percent (52.5 degrees); (2) declined to award any permanent partial disability for claimant's right hip; (3) found claimant's low back claim was not prematurely closed; (4) upheld the self-insured employer's denial of claimant's alcohol treatment; (5) upheld the employer's denial of claimant's pain center treatment; and (6) increased claimant's award of unscheduled permanent partial disability for his low back from the 10 percent (32 degrees) awarded by Determination Order to 20 percent (64 degrees). The employer cross-requests review of that portion of the order that found claimant's right hip condition compensable. The issues are the compensability of claimant's right hip condition, premature closure, medical services and extent of disability.

The Board affirms the order of the Referee with the exception of that portion of the order that declined to award any

permanent partial disability for claimant's right hip condition. Claimant suffers from arthritis of the hip, which the medical record indicates is causally related to the altered gait necessitated by claimant's right knee condition. The hip condition involves the articular surfaces of the acetabulum and thus, ostensibly, an unscheduled award would be appropriate. See John Cameron, 34 Van Natta 211, 211-12 (1982); Don W. Emrich, 27 Van Natta 416, 418 (1979).

The Referee's decision to award no permanent partial disability for claimant's right hip was based upon the rule of Woodman v. Georgia-Pacific Corp., 289 Or 551 (1980). That case involved the issue of whether a claimant is entitled to separate scheduled and unscheduled awards when the unscheduled disability in some way arises from the scheduled injury. The claimant in that case lost his left arm as a result of an industrial accident and later developed pain, muscular atrophy and other problems in the left shoulder and upper back which were related to the absence of the arm. The question was whether the claimant was entitled to an unscheduled award for the shoulder and upper back in addition to the scheduled award for the arm. In discussing this question, the court announced the following rule:

> "[T]he consequential loss in the unscheduled area is included in the scheduled formula when the medical expectation that it will accompany the scheduled loss is so great that its failure to occur would be an exceptional case. So much we believe may be fairly attributed to the legislative purpose in providing a schedule of awards for certain losses of use or function in lieu of individual predictions of lost earning capacity. But we do not think that this legislative assumption extends to secondary consequences beyond the scheduled loss that are merely common or probable. They must be so intrinsic to the original injury (even if delayed) that their failure to follow it would be anomalous and surprising. If the secondary consequences are of this kind, they do not give rise to recovery for unscheduled disability under ORS 656.214(5); otherwise they do." 289 Or at 558.

In the present case, we cannot say that that arthritis of the hip is so intrinsic to an injured knee joint that an unscheduled award was inappropriate for claimant's hip condition. We conclude, therefore, that claimant is entitled to a separate unscheduled award for his hip.

In determining the extent of permanent disability to claimant's right hip, we consider his physical impairment as reflected in the medical record and the testimony at the hearing and all of the 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. See 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 an award of 32 degrees for 10 percent unscheduled

permanent partial disability adequately and appropriately compensates claimant for the permanent loss of earning capacity due to his compensable condition. We modify the Referee's order accordingly.

ORDER

The Referee's order dated September 6, 1985 as amended by the order dated September 17, 1985 is modified in part. Claimant is awarded 32 degrees for 10 percent unscheduled permanent partial disability for his right hip. The remainder of the Referee's order is affirmed. The fee agreement signed by claimant and submitted by his attorney is approved. In accordance with the forms of the agreement, claimant's attorney is awarded 20 percent of the additional compensation granted by this order, not to exceed $3,000.

GARY L. MANOUS, Claimant
Olson Law Firm, Claimant's Attorney
Lindsay, et al., Defense Attorneys

WCB 83-07482
September 19, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Manous v. Argonaut Ins., 79 Or App 645 (1986). In accordance with the mandate of the court, the insurer's denial of benefits dated September 16, 1983 is set aside and the claim is remanded to the insurer for acceptance and processing according to law. The Determination Order dated August 5, 1982 is affirmed.

IT IS SO ORDERED.

KENNETH PRIVATSKY, Claimant
Olson Law Firm, Claimant's Attorney
Kevin Mannix, Defense Attorney

WCB 84-12662
September 19, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of that portion of Referee McCullough's order which increased his unscheduled permanent disability award for a low back injury from 45 percent (144 degrees), as awarded by prior Determination Orders and Stipulation, to 90 percent (288 degrees). On review, claimant contends that he is entitled to an award of permanent total disability.

In its respondent's brief, the insurer argues that claimant's permanent disability should be reduced and that the Referee was not justified in assessing a penalty and accompanying attorney fees for the insurer's allegedly unreasonable conduct. We have authority to consider the insurer's contentions notwithstanding its failure to cross-request review. Miller v. SAIF, 78 Or App 158 (1986); Jimmie Parkerson, 35 Van Natta 1247, 1249-50 (1983).

We affirm those portions of the Referee's order that declined to grant an award of permanent total disability and that assessed a penalty and accompanying attorney fees for unreasonable processing. However, we agree with the insurer that claimant's award of unscheduled permanent disability should be reduced. Accordingly, we modify that portion of the Referee's order.

Claimant was 58 years of age at the time of hearing. In December 1977, while working as a forklift operator, he

compensably injured his low back. As a result of this injury, claimant has undergone three surgeries: (1) a 1978 laminectomy at the L4-5 level; (2) a 1980 exploratory laminectomy at the L4-5 level; and (3) a 1983 wide decompressive laminectomy at the L4-5 and L5-S1 levels. The most recent surgery was performed by Dr. Berkeley, neurosurgeon.

Dr. Berkeley has recommended significant physical restrictions for claimant. In Dr. Berkeley's opinion, claimant can lift and carry up to 10 pounds frequently and up to 20 pounds occasionally. In an eight hour work day, he is capable of sitting three hours, standing one to two hours, and walking one hour. At any one time, claimant can sit and stand for 30 minutes, and walk up to one hour. Dr. Berkeley concluded that claimant could never bend, twist, or crawl, and could only occasionally crouch, kneel, or climb stairs. In view of these physical restrictions, Dr. Berkeley suggested that claimant limit his activities to part-time duties.

In March 1984 claimant was referred for vocational assistance. He has an eighth grade formal education, but has obtained his GED. In addition to his approximately 11 years as a lift truck driver, claimant served in the Navy for 22 years. While in the Navy he was a storekeeper, performing inventory and clerical work. Since the late 1940's claimant has held a private pilot's license. However, he presently cannot fly due to high blood pressure. He also served for 10 years as a volunteer fireman, receiving certification as an emergency medical technician. These duties ceased after his compensable injury.

Following his January 1980 surgery, claimant worked approximately 10 months as a supervisor and security guard. This employment was terminated for reasons not germane to this case. Claimant's vocational counselor opined that he possessed transferable skills in the supervisory, teaching, clerical, and security areas. Vocational services were terminated in October 1984, when claimant decided to retire.

Mr. McNaught, vocational consultant, interviewed claimant, reviewed the record, and testified at hearing. Mr. McNaught agreed that claimant possessed some transferable skills. However, considering claimant's age and significant physical limitations, Mr. McNaught questioned the marketability of these aptitudes.

In April 1985 the Orthopaedic Consultants performed an independent medical examination. The Consultants rated claimant's permanent low back impairment in the mid-portion of moderate. i.e., "40-60." In the Consultants' opinion, claimant was capable of performing light-sedentary work, provided he lifted no more than 15 to 20 pounds and could move about and change positions. The Consultants noted that claimant agreed that he probably could perform a job within these physical restrictions on a part time basis. Dr. Berkeley agreed with the Consultants' findings and recommendations.

Claimant experiences constant low back pain, which radiates into both of his legs. His legs also become numb, particularly the left leg which "drags" whenever he overexerts himself. These symptoms increase after prolonged walking, sitting, or standing. Claimant engages in these activities for no more than 15 to 20 minutes at a time. Furthermore, he avoids any

bending or lifting motions. These physical limitations prevent him from performing a full day's work. However, he would be willing to attempt certain part-time positions within his physical capabilities.

Claimant's back pain results in muscle spasms which evoke persistent headaches. He has "a hard time sleeping." To combat his pain, claimant takes codeine and Tylenol 3. Yet, he does not take pain medication daily because he fears becoming drug dependent. As a result of his compensable injury and subsequent surgeries, claimant has curtailed, if not eliminated, most of his recreational activities. These activities included golfing, dancing, camping, and fishing.

The Referee found that, due to the compensable injury and its sequelae, the range of claimant's vocational options was extremely narrow. After considering claimant's physical limitations and relevant social/vocational factors, the Referee concluded that he had suffered a significant loss of earning capacity. Consequently, claimant's unscheduled permanent disability award was increased from 45 percent to 90 percent.

We agree that claimant has sustained a significant permanent loss of earning capacity as a result of his compensable injury, surgeries, and physical limitations. 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 his testimony concerning disabling pain, 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).

Following our de novo review of the medical and lay evidence, and considering the aforementioned guidelines, we conclude that a 75 percent unscheduled permanent disability award adequately compensates claimant for his compensable injury.

ORDER

The Referee's order dated January 6, 1986 is affirmed in part and modified in part. In lieu of the Referee's award, and in addition to claimant's previous awards of unscheduled permanent disability, claimant is awarded 30 percent (96 degrees), which gives him a total award to date of 75 percent (208 degrees) unscheduled permanent disability for his compensable low back injury. Claimant's attorney's fee shall be adjusted accordingly. The remainder of the Referee's order is affirmed.

Beneficiaries of PAUL D. RASMUSSEN (Deceased)
Malagon & Moore, Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-09373
September 19, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Rasmussen v. SAIF, 79 Or App 527 (1986). In accordance with the mandate of the court, the Referee's order dated September 12, 1984 is reversed. The deceased claimant is awarded compensation for permanent total disability effective November 15, 1982. The SAIF Corporation's denial of survivor's

benefits pursuant to ORS 656.208 dated December 13, 1983 is set aside. The claim is remanded to the SAIF Corporation for processing and payment of benefits according to law.

IT IS SO ORDERED.

LAWRENCE H. HOITING, Claimant
Industrial Indemnity, Defense Attorney

Own Motion 85-0594M
September 23, 1986
Own Motion on Reconsideration

The Board issued an Own Motion Order on November 25, 1985 in which claimant's claim was to be reopened with temporary total disability to commence the date he was hospitalized for the recommended surgery. The insurer has recently requested the Board to reconsider its order, contending that it understood claimant had been drawing Social Security retirement benefits since May 1985 and, therefore, was not entitled to temporary total disability compensation. Claimant responded that he has been receiving retirement benefits since May 1986, shortly after he turned 62 years of age. He asks that temporary total disability benefits be allowed to continue.

Injured workers who are retired from the work force are not entitled to compensation for temporary total disability. Cutright v. Weyerhaeuser Company, 299 Or 290 (1985). We conclude claimant is entitled to compensation for temporary total disability from the date of hospitalization for the recommended surgery up to the specific date in May 1986 for which he began receiving retirement benefits only. Although temporary total disability benefits are no longer due claimant, his claim shall remain open until such time as he becomes medically stationary and the Board issues a closure order. Deduction of overpaid temporary disability from unpaid permanent disability is approved.

IT IS SO ORDERED.

JOSEPH A. LAMBERT, Claimant
Patrick K. Mackin, Claimant's Attorney
Roberts, et al., Defense Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-00940 & 85-01177
September 23, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of those portions of Referee Podnar's order that awarded claimant 10 percent (13.5 degrees) scheduled permanent partial disability for his left ankle and 10 percent (32 degrees) unscheduled permanent partial disability for his low back and set aside the employer's denial of medical treatment. Claimant cross-requests review of that portion of the order that upheld the SAIF Corporation's denial of claimant's aggravation claim for his neck. The issues are extent of scheduled and unscheduled disability and medical services, and aggravation.

The Board affirms and adopts the order of the Referee with the exception of that portion of the order that awarded claimant 10 percent (13.5 degrees) scheduled permanent partial disability for his left ankle. There is insufficient evidence to establish that claimant sustained any permanent impairment to his ankle as a result of his injuries during his employment with the self-insured employer.

Claimant's attorney is entitled to a fee under ORS 656.382(2) in connection with those portions of the Referee's order that awarded compensation which was not disallowed or reduced by the Board. Shoulders v. SAIF, 300 Or 606, 610 (1986).

ORDER

The Referee's order dated December 9, 1985 is reversed in part. That portion of the order that awarded claimant 10 percent (13.5 degrees) scheduled permanent partial disability for his left ankle is reversed. The remainder of the order is affirmed. Claimant's attorney is awarded $450 for services on Board review, to be paid by the self-insured employer.

MICHAEL J. BRUNO, Claimant
Peter O. Hansen, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 85-09634
September 24, 1986
Order on Review (Remanding)

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Menashe's order that affirmed the Determination Order dated July 25, 1985 which awarded compensation only for temporary disability. Claimant argues that the claim was prematurely closed and that he is entitled to an award of compensation for permanent disability.

Upon review of the evidence in this case, the Board discovered that two exhibits were offered at the deposition which followed the hearing. There were no exhibits attached to the copy of the deposition which was submitted to the Board for consideration on review. The Referee did not rule on the admissibility of the exhibits, although a timely objection was made on the record at the deposition. The Board finds that the record is incompletely developed and remands the case to the Referee for correction. Lawrence M. Sullivan, 37 Van Natta 1241 (1985).

ORDER

The case is remanded to the Referee for correction of the record consistent with this opinion.

ROGER W. CAROTHERS, Claimant
Steven C. Yates, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-09875
September 24, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of that portion of Referee Michael V. Johnson's order that awarded claimant 256 degrees for 80 percent unscheduled permanent partial disability in lieu of prior awards totalling 128 degrees for 40 percent unscheduled disability for the low back. Claimant has not cross-requested review, but asks in his brief that he be awarded compensation for permanent total disability. The issue is extent of unscheduled disability, including permanent total disability. We modify the Referee's order.

Claimant sustained a compensable low back injury in May 1982 while employed as a custodian. He ultimately underwent a decompression laminectomy and foraminotomy. All subsequent care was conservative. He was declared medically stationary in August 1984 by a panel of Orthopaedic Consultants, who found his physical impairment to be in the "mildly moderate" range. Claimant's treating physician concurred with the panel's assessment. A December 1984 Determination Order awarded claimant 64 degrees for 20 percent unscheduled disability which, combined with a prior award, brought claimant's unscheduled disability to 40 percent as of the time of the hearing.

Sometime after the compensable injury, claimant received vocational training in police dispatching and motel management. He successfully completed the latter program in early 1985. There is evidence that, although claimant's initial motel management placement was unsuccessful, other motel positions within his physical limitations were identified by his vocational counselors. For personal reasons, however, claimant did not pursue them. He was advised by his counselors to contact them when his personal affairs had resolved. At the time of the hearing, however, claimant had apparently not made contact and his motivation for employment appeared to have subsided.

Claimant is 53 years old and has completed the tenth grade. He has nearly completed his GED and has two years of community college training in auto mechanics. While claimant's prior employments were considered "heavy," he is now limited to light work. As previously noted, the medical consensus is that claimant is "mildly moderately" impaired. He has disabling pain, as well as a preexisting emotional disability.

The Referee found that due to claimant's "significant physical problem," "educational deficit," and limited job history, claimant had suffered an 80 percent loss of earning capacity as a result of the compensable injury. We find the Referee's award excessive. Although we agree that claimant has significant pain, we are not convinced that his physical impairment exceeds the "mildly moderate" findings of the physicians involved. Further, we disagree that claimant has an "educational deficit." On the contrary, it appears that his educational development exceeds the average, given his two years of successful community college preparation. Finally, it appears that of late, claimant has been less than cooperative with his vocational counselors, despite their identification of jobs within his capabilities.

Considering claimant's physical impairment, employment history, age, education and other relevant social and vocational factors, we find that he will be adequately compensated by an award of 176 degrees for 55 percent unscheduled permanent partial disability. The Referee's award shall be reduced accordingly.

ORDER

The Referee's order dated April 2, 1986 is modified in part and affirmed in part. That portion of the order that awarded claimant 256 degrees for 80 percent permanent partial disability is modified. In lieu of the Referee's award and all prior awards, claimant is awarded 176 degrees for 55 percent unscheduled permanent partial disability for the low back. Claimant's attorney fees are modified according to this order. The remainder of the Referee's order is affirmed.

GLENN R. DEES, Claimant
Doblie, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-07034
September 24, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Holtan's order that: (1) affirmed the May 10, 1985 Determination Order awarding 144 degrees for 45 percent unscheduled permanent partial disability for the low back; and (2) awarded 7.5 degrees for five percent scheduled permanent partial disability in addition to the 20 percent (30 degrees) awarded by the May 29, 1981 Determination Order for the left leg (knee). The issues are extent of unscheduled and scheduled permanent disability.

We agree with the Referee that claimant's unscheduled low back disability does not exceed 45 percent. We find, however, that claimant's left knee disability exceeds the 25 percent awarded by the Referee. We therefore modify the Referee's scheduled disability award.

Claimant compensably injured his left knee in August 1980 while employed as a roofer. The injury necessitated surgery involving an open reduction and internal fixation of the fracture at the tibial plateau. The fixation was accomplished with the introduction of bolts and screws, which were removed in a second surgical procedure in January 1983.

The physicians involved in this claim are of the opinion that claimant has lost 25 percent use of his left leg as a result of his compensable injury. The Referee apparently relied on these opinions in reaching his 25 percent award.

After reviewing the record, including claimant's testimony and the medical reports, we find claimant's residual left leg disability to exceed 25 percent. The medical record reveals that claimant's residual range of motion findings alone equal roughly 25 percent. See OAR 436-30-330. When this indicator of mechanical impairment is combined with claimant's testimony regarding disabling pain, the effects of the two surgeries and other use limitations, we find that claimant has a 35 percent loss of use of the left leg. The Referee's award of scheduled disability shall be modified accordingly.

ORDER

The Referee's order dated April 1, 1986 is modified in part and affirmed in part. That portion of the order that awarded claimant 7.5 degrees for 5 percent scheduled permanent partial disability in addition to the Determination Order award of 30 degrees for 20 percent disability for the left leg is modified. In lieu of the Referee's award and all prior awards of scheduled left leg disability, claimant is awarded 52.5 degree for 35 percent scheduled permanent partial disability for the left leg. Claimant's attorney is allowed a fee equal to 25 percent of the increased disability awarded by this order, not to exceed $3,000. The remainder of the Referee's order is affirmed.

CELIA GARCIA, Claimant
Olson Law Firm, Claimant's Attorney
Cummins, et al., Defense Attorneys

WCB 84-00892
September 24, 1986
Order on Reconsideration

Claimant has requested reconsideration of our Order on Review issued November 20, 1985. We withdrew the order for reconsideration. The issue on reconsideration is whether claimant is entitled to an employer-paid attorney fee on Board review. We conclude that claimant is not entitled to such a fee and republish our prior order.

The employer requested review of the Referee's order that directed it to pay for certain medical services. We found that only a part of the medical services were reasonably and necessarily related to claimant's compensable low back and knee conditions.

In Shoulders v. SAIF, 300 Or 606 (1986), the Supreme Court held that when medical services result from a finding of compensability, compensation is awarded. See ORS 656.005(9). We interpret Shoulders in the light of the facts of this case to conclude that the Referee awarded compensation when he ordered payment of medical services. At that point this case diverges from Shoulders. In Shoulders, at issue was the compensability of four distinct medical conditions. The Referee found all four to be compensable. The Board and the Court of appeals found only two of the conditions compensable. The Court of Appeals, however, concluded that the claimant was entitled to an attorney fee for having overcome denials of two of the conditions, basing the fee on ORS 656.386(1). Shoulders v. SAIF, 73 Or App 811 (1985). On review, the Supreme Court held:

> "We conclude that ORS 656.386(1) does not allow an award of attorney fees where the insurer, rather than the claimant, initiates review by the Board from an order accepting the claim. Therefore, claimant is not entitled to an attorney fee under that statute. However, claimant is entitled to reasonable attorney fees under ORS 656.382(2) for successfully defending against reduction of compensation for two of his conditions." 300 Or at 616.

The Supreme Court thus concluded that the claimant had four claims and successfully preserved two of them. Compensation on those claims having not been disallowed or reduced after an insurer initiated review, claimant was entitled to attorney fees on those two claims. In this case there was a single claim for treatment provided by Dr. DeShaw. There was no finding at any level that claimant's conditions were not compensable. The Referee ordered payment of all treatment. We reduced the amount of treatment, therefore, the compensation awarded. Because claimant's award of compensation was reduced, no attorney fee may awarded under ORS 656.382(2). There is no other applicable authority for an award of employer-paid attorney fees in this case.

The request for reconsideration is allowed. After reconsideration, we adhere to and republish our Order on Review dated November 20, 1985, effective this date.

IT IS SO ORDERED.

JACK T. GRANBY, Claimant
Hayner, et al., Claimant's Attorneys
Brian L. Pocock, Defense Attorney

WCB 85-16108
September 24, 1986
Order Denying Motion to Dismiss

Claimant has moved for an order dismissing the self-insured employer's request for Board review on the ground that a copy of the employer's request was not mailed to claimant. The motion acknowledges that a copy of the request was mailed to claimant's attorney within the time prescribed by ORS 656.289(3). Claimant does not assert that he was prejudiced by mailing to his attorney rather than to him. In the absence of prejudice, service of a request for review on the attorney for a party rather than the party is sufficient. Nollen v. SAIF, 23 Or App 420, 423 (1975), rev den 1976. The motion to dismiss is denied.

IT IS SO ORDERED.

WANDA L. (REUST) HAMILTON, Claimant
Charles Maier, Claimant's Attorney
Beers, et al., Defense Attorneys

WCB 85-07779 & 85-09092
September 24, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of that portion of Referee Howell's order that awarded claimant 48 degrees for 15 percent unscheduled permanent partial disability for the low back in lieu of prior Determination Orders awarding no permanent disability. The issue is extent of disability.

The Board affirms and adopts the order of the Referee. Normally, as in the present case, where the insurer has initiated a request for Board review, an attorney fee would be awarded. In this case, however, we find no fee to be due. ORS 656.382(2) provides that when an insurer requests review and the Board finds that claimant's compensation should not be reduced, the insurer is required to pay claimant or the attorney a reasonable attorney fee in an amount set by the Board. Therefore, the present claimant is entitled to a reasonable attorney fee as a matter of law.

The question, however, is what amount is "reasonable." The insurer requested review and filed its appellant's brief before the Board. Claimant filed no brief or other response to the insurer's brief and, did not assist us on review. Therefore under these circumstances, he is not entitled to an attorney fee. Compare Betty J. McMullen, 38 Van Natta 21, on reconsideration, 38 Van Natta 117 (1986).

ORDER

The Referee's order dated April 1, 1986 is affirmed.

BRUCE A. HATLELI, Claimant
Bischoff & Strooband, Claimant's Attorneys
Malagon & Moore, Attorneys
SAIF Corp Legal, Defense Attorney
David Horne, Defense Attorney
Reviewed by the Board en banc.

WCB 85-02089, 85-04106, 85-07657 & 85-07658
September 24, 1986
Order on Review

Claimant requests review of that portion of Referee Brown's order which declined to award an attorney's fee for his attorney's services concerning the procurement of an order designating a paying agent pursuant to ORS 656.307. On review, claimant contends that he is entitled to an attorney's fee. We agree and reverse.

In April 1983 claimant sustained a low back injury while working as a grocery clerk. His employer was insured by the SAIF Corporation. An August 1983 Determination Order closed the claim, awarding claimant a few weeks of temporary disability compensation. No permanent disability compensation was awarded.

Claimant worked for SAIF's insured until October 1983. Thereafter, he began working as a grocery clerk for another employer. This employer was insured by Wausau Insurance Company. His back symptoms resurfaced periodically, but he was able to continue his work activities. Finally, in November 1984, while lifting a box over his head, claimant's back "went out" again. This episode eventually resulted in an April 1985 lumbar laminectomy.

On January 31, 1985 claimant's attorney advised Wausau's insured that claimant's work activities had caused his current low back condition. Consequently, Wausau's insured was asked to commence processing claimant's workers' compensation claim. Wausau placed the claim in deferred status, but promptly began paying "interim" compensation.

On February 14, 1985 SAIF denied claimant's aggravation claim. SAIF not only contested responsibility for claimant's current condition, but also contended that there was "insufficient evidence indicating that [claimant's] condition has worsened." Thereafter, claimant's attorney requested a hearing concerning this denial and filed an application to schedule the hearing date.

On April 4, 1985 claimant's attorney requested a hearing regarding Wausau's failure to accept or deny the claim within 60 days. On April 12, 1985 claimant's attorney asked that a hearing date be scheduled.

On April 22, 1985 Wausau issued its denial, contending that it was not responsible for claimant's current condition. However, it conceded that claimant's condition was compensable. Moreover, Wausau announced that SAIF had agreed to submit to the issuance of an order designating a paying agent pursuant to ORS 656.307. In June 1985 a ".307" order issued, designating SAIF as the responsible insurer pending the forthcoming hearing.

At the hearing, the issues were responsiblity and penalties/attorney fees for the insurers' allegedly unreasonable conduct in processing the claims. Following a hearing, the Referee declined to assess penalties, but found Wausau responsible

for claimant's low back condition. Since compensability was not at issue, the Referee did not award an attorney's fee.

In declining to award an attorney's fee, the Referee relied on Petshow v. Farm Bureau Ins. Co., 76 Or App 563 (1985). In Petshow the court stated that when insurers concede compensability and only deny the claim on the basis of responsibility, claimants are generally not entitled to an award of attorney fees for overcoming a denial. The court reasoned that when compensability is conceded the claimant will always prevail on one of the denied claims. Considering the claimant's participation at the hearing with respect to the responsibility issue as nominal, the Petshow court concluded that there was no entitlement to an additional award of attorney fees. The Board followed this rationale in Stanley C. Phipps, 38 Van Natta 13, 16 (1986), concluding that the phrase to "actively and meaningfully participate" as used in OAR 438-47-090(1) must be interpreted as taking a position and actively litigating a point bearing upon the claimant's entitlement to receive compensation or the amount thereof.

We agree with the Referee that claimant is not entitled to an attorney fee for services rendered at the hearing. However, we conclude that a fee is in order for his attorney's participation in procuring an order designating a paying agent pursuant to ORS 656.307.

In Mark L. Queener, 38 Van Natta 882 (August 1, 1986) we discussed a similar issue. In Queener, neither insurer denied compensability, but the insurers' ultimate denials of responsibility could have resulted in an indeterminate delay in claimant's compensation. Since the attorney had taken substantive and affirmative steps to have a paying agent named pursuant to ORS 656.307, we concluded that an attorney fee was appropriate. Since compensability was not at issue, we held that the attorney fee was payable out of claimant's compensation, rather than from the insurer under ORS 656.386(1).

The Queener analysis compares favorably with applicable statutes and administrative rules. ORS 656.386(1) provides that in an appeal of denied claims, where the claimant prevails finally in a hearing before the Referee or at the Board level, claimant is entitled to a reasonable insurer-paid attorney fee. The authority to set the fee is delegated to the Referee, Board, or court. ORS 656.388. Pursuant to this delegation of authority, the Board has promulgated rules concerning the payment of attorney fees in workers' compensation cases. See OAR 438-47-000 et seq.

The aforementioned rules also foresee the possibility of insurers conceding the compensability of an initially denied claim prior to the hearing. In the event of this pre-hearing concession, these rules provide for an award of attorney fees for services rendered prior to the hearing. OAR 438-47-010(1)(a), and (b) state that attorney fees will be allowed only when the attorney is instrumental, with or without proceedings before a Referee, the Board, or a court in obtaining acceptance of a denied claim or in obtaining compensation. If an attorney is instrumental in obtaining compensation for a claimant without a hearing before a Referee, a reasonable attorney fee may be allowed or approved. OAR 438-47-015. Attorney fees shall be paid out of the compensation award except as otherwise specifically provided. OAR 438-47-010(5).

Since each insurer will likely actively litigate the issue of responsibility, the efforts of claimant' attorney in an ORS 656.307 proceeding are generally superfluous. Moreover, determination of the rate of temporary total disability benefits and the setting of aggravation rights are a natural outcome of the responsibility finding.

Here, compensability was not an issue at the hearing. Yet, claimant's attorney has participated in the procurement of the ".307" order. Pursuant to the Queener holding, claimant is entitled to a fee for services rendered prior to the hearing. As we reasoned in Queener, rather than an insurer-paid attorney fee, this fee shall be payable out of claimant's compensation.

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. Barbara A. Wheeler, 37 Van Natta 122 (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).

The record establishes that claimant's attorney wrote several letters and filed a number of hearing requests before the insurers eventually conceded the compensability of claimant's condition and submitted to the issuance of a ".307" order. Accordingly, considering the nature of the practice in general and the circumstances of this case in particular, we conclude that $500 is a reasonable award for claimant's attorney's services rendered prior to the hearing. Claimant is not entitled to an attorney fee for services on Board review. See Dotson v. Bohemia, Inc., 80 Or App 233 (1986).

ORDER

The Referee's order dated January 10, 1986 is affirmed in part and reversed in part. Claimant's attorney is awarded 25 percent of claimant's compensation, not to excede $500, for services rendered prior to hearing in procuring an order designating a paying agent under ORS 656.307. The remainder of the Referee's order is affirmed.

RAYLE R. JANSEN, Claimant
Bloom, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 85-08055
September 24, 1986
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of that portion of Referee Tuhy's order that allowed attorney fees out of additional temporary disability compensation awarded to claimant. In addition claimant requests: (1) penalties and attorney fees for unreasonable reduction of temporary disability compensation; and (2) penalties and attorney fees for unreasonable denial and delay of vocational rehabilitation. The SAIF Corporation requests in its brief that we reverse that portion of the order which increased claimant's temporary disability compensation from a partial disability rate to the total disability rate. The issues on review are extent of temporary disability, whether attorney fees on an extent of temporary disability issue are awarded in addition to compensation or allowed out of compensation, and penalties and attorney fees.

On the issues of penalties and attorney fees for reduction of temporary disability compensation and unreasonable denial and delay of vocational rehabilitation the Board affirms the order of the Referee. On the issue of attorney fees awarded in addition to or allowed out of compensation the Board affirms the order of the Referee.

While claimant was recovering from the industrial injury to his low back suffered while working as a groundskeeper, he obtained a job as a security patrolman for a high technology computer manufacturer. The job was within claimant's lifting limits and claimant denied that he had a limitation on his ability to work. When the manufacturer laid off some employes due to market conditions, claimant was offered a position as a janitor. The janitorial job was beyond claimant's working capacity and claimant suffered a recurrence of his low back symptomatology but was not disabled. Claimant was then restored to the position as a security patrolman for reasons unrelated to his back condition and the symptoms resolved.

SAIF offset claimant's temporary disability compensation by the wages earned, according to ORS 656.212. SAIF's vocational assistance program was terminated upon claimant's completion of 60 days on the new job.

The manufacturer learned of claimant's industrial injury through a contact from SAIF regarding claimant's ability to perform satisfactorily at the new job. The manufacturer then confronted claimant with the information about the back injury and fired him for falsification of his physical limitations on the job application form.

SAIF restored claimant's temporary disability compensation to the total disability rate pending investigation. When it confirmed that claimant was terminated for falsification of the employment application, it reduced claimant's temporary disability compensation to that rate which it would have been paying if claimant had continued performing the security watchman job.

The issue is whether claimant left work for reasons not associated with his industrial injury. If claimant had been medically unable to continue working then the reason for the firing would be immaterial. Lyn A. Hulslander, 37 Van Natta 427 (1985). If claimant was fired because of a misunderstanding which did not rise to the threshhold of a "violation of a normal employment standard" then claimant is entitled to resumption of temporary total disability compensation. Gloria K. Bas, 36 Van Natta 175 (1984). If claimant was fired for a reason which was a "violation of a normal employment standard" then claimant is not entitled to resumption of temporary total disability compensation. Thomas C. Harrell, 34 Van Natta 589 (1982).

At the time of his application for work at the computer manufacturer claimant knew that he had some limits on his ability to lift and carry due to the back injury. Claimant was fired for checking the box marked "none" in reference to limitations on the kinds of work he might be able to perform. When claimant was fired he was not disabled by his back injury nor has he been disabled by it since then. The Board finds that claimant's misrepresentation on the employment application was a violation of a normal employment standard. Therefore claimant was not entitled to resumption of temporary total disability compensation upon termination of employment and SAIF's action to reduce the temporary disability compensation it paid was correct. SAIF is entitled to offset out of temporary disability compensation any earnings claimant did make or would have made if he had not been fired for violating a normal employment standard.

ORDER

The Referee's order dated October 31, 1985 is reversed in part and affirmed in part. That portion of the order which increased claimant's temporary disability compensation from a partial disability rate to the total disability rate effective March 22, 1985 is reversed. Claimant is entitled to temporary disability compensation at a partial disability rate effective March 22, 1985. The remainder of the order is affirmed.

LORI L. O'BRIEN, Claimant
Welch, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-02541
September 24, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of that portion of Referee St. Martin's order which awarded 64 degrees for 20 percent unscheduled permanent partial disability in addition to the temporary disability compensation awarded by Determination Orders dated February 17, 1984 and March 9, 1984. SAIF requests that the Determination Orders be affirmed. The issue on review is extent of unscheduled permanent partial disability.

Claimant strained her low back while working as a bartender on November 14, 1983. Her work involved fast paced lifting of 30-pound boxes. She received chiropractic treatment. She returned to modified work as a hostess with the employer, then obtained a bartending job with another employer. Claimant's symptoms returned and she stopped working as a bartender for a time. Claimant has returned to lighter work as a bartender at establishments where there are assistants for the lifting work.

Although a medical examiner opined that claimant had no impairment, her treating chiropractor felt that claimant should not lift over 20 pounds and that she should not twist or bend her low back. No other contributing cause of claimant's limitations has been identified. The Referee found that claimant was a credible witness.

At the time of the hearing claimant was 27 years old. She holds two college degrees. She has employment experience as an office secretary, as a disc jockey, and as a newscaster in addition to her bartending. Claimant has a strong desire to remain in the field of bartending because of the income opportunities and has no desire to change her occupation.

To prevail on the issue of unscheduled permanent partial disability, claimant must demonstrate by a preponderance of the evidence that as a result of the industrial injury or occupational disease there has been a permanent loss of earning capacity. "Earning capacity" is defined as a worker's "ability to obtain and hold gainful employment in the broad field of general occupations ...," and considers the medical assessment of impairment as well as social and vocational factors. ORS 656.214(5).

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. Howerton v. SAIF, 70 Or App 99 (1984).

There is no doubt that claimant has been precluded from a significant portion of the occupation of bartending. However, an award for loss of earning capacity must consider the broad field of occupations and not solely one especially lucrative category of employment. Considering claimant's limitations and the relevant social and vocational factors, the Board finds that claimant would be appropriately compensated by an award of 16 degrees for 5 percent unscheduled permanent partial disability related to her low back condition.

ORDER

The Referee's order dated October 28, 1985 is modified in part and affirmed in part. Claimant is awarded 16 degrees for 5 percent unscheduled permanent partial disability due to her low back condition in addition to temporary disability compensation awarded by Determination Order dated March 9, 1984. The remainder of the order is affirmed.

FRANCES M. ROY, Claimant
Vick & Associates, Claimant's Attorneys
Garrett, et al., Defense Attorneys

WCB 84-11142
September 24, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The self-insured employer requests review of Referee Nichols' order that: (1) set aside its denial of treatment by an out-of-state chiropractor; (2) found that claimant had shown good cause for filing her hearing request more than 60 days after denial; and (3) awarded penalties and attorney fees for an unreasonably broad denial of out-of-state medical treatment. The issues on review are compensability, whether good cause was shown for a late hearing request, and penalties and attorney fees.

Claimant injured her back on January 22, 1982. She sought chiropractic treatment and the claim was closed by Determination Order dated November 8, 1982 with no award of compensation for permanent disability. By stipulation claimant was awarded 16 degrees for five percent unscheduled permanent partial disability in October 1983. Claimant continued to obtain chiropractic treatment for her back injury.

In March 1984 claimant moved to another state. She was referred to a chiropractor who had treated her previously while she was on vacation trips during recovery from her industrial injury. The employer received a bill from the new treating chiropractor and requested chart notes and justification for services. The chiropractor replied on July 17, 1984. The employer denied all unauthorized out-of-state medical treatment by letter dated July 24, 1984. Claimant received the letter shortly after July 31, 1984 and notified her chiropractor and her lawyer of the denial.

Claimant testified that she sent a copy of the denial letter to her attorney and that she talked to her attorney and her attorney's secretary on the telephone about the denial.

Claimant was the only witness. The Board finds no evidence of inconsistency or misunderstanding by the witness based on the transcript of her testimony and therefore finds that she is worthy of belief. Based on claimant's testimony the Board finds that claimant notified her attorney in writing and by telephone that she had received a denial letter, that she wished to have a hearing, and that notice to the attorney was accomplished sufficiently before the passage of 60 days from the date of the denial to allow the attorney to file a timely hearing request for claimant.

The hearing request was filed on the 91st day after the denial. Because claimant's attorney had sufficient notice to file the hearing request before the passage of 60 days from the date of the denial and no reason was given for the additional delay, the Board finds that no good cause which would excuse a late hearing request has been shown. See EBI Companies v. Lorence, 72 Or App 75, rev. den., 299 Or 118 (1985); Vernon L. Wellington, 37 Van Natta 183 (1985), aff'd mem., 77 Or App 276 (1986). Consequently the hearing request is dismissed as untimely filed. ORS 656.319(1). All other relief granted by the Referee is consequently set aside.

ORDER

The Referee's order dated January 30, 1986 is reversed. The hearing request filed October 23, 1984 is dismissed. The self-insured employer's denial dated July 24, 1984 is reinstated.

JANELL M. SHERMAN, Claimant
Olson Law Firm, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 85-04086
September 24, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Myers's order that: (1) found claimant's low back injury claim to have been timely filed; and (2) found the claim compensable on the merits. The issues are whether the claim was timely filed and, if so, whether it is compensable.

We agree with the Referee that claim is not barred as untimely filed. We disagree, however, that the claim is compensable.

Claimant is a surgical nurse who alleges that she injured her low back in January 1985 while helping a hospital patient out of bed. In the process of helping the patient, claimant felt a searing pain below the beltline. She finished her work shift but had pain and stiffness thereafter.

Claimant first sought medical treatment on February 18, 1985, or approximately three weeks after the alleged incident. According to claimant, she informed the initial examining physician, Dr. Coleman, of the work injury on that day. Dr. Coleman's chartnotes make no mention of a work injury or traumatic event, but describe claimant's complaints as "trochantric bursitis."

Dr. Coleman referred claimant to Dr. Issacson, who first examined claimant on February 20, 1985. Dr. Issacson's reports reflect that claimant made no mention of a traumatic or work-related event during the initial visit. When a CT scan revealed the presence of a herniated lumbar disk on March 5, 1985, however, Dr. Issacson reported:

> "The patient has given me further history that about three or four days before the initial onset of right buttock pain that she did strain her back, and that is when the whole thing started."

Claimant filed a claim for compensation the day after the CT scan results were known. SAIF denied the claim three weeks later.

On June 21, 1985, Dr. Issacson reported that symptoms associated with a herniated disk generally appear within 12 to 24 hours after a traumatic incident. While it is possible that symptoms would occur two weeks after a back strain, Dr. Issacson stated that it would be more difficult to "link up the incident of injury to the subsequent pain when there has been such a long period without symptoms."

Claimant was also examined by neurosurgeon, Dr. Misko, in March 1985. In a later opinion, Dr. Misko opined that claimant's work incident was the major cause of her symptom complex. Dr. Misko did not address the apparent extended time period between the alleged incident and the onset of symptoms.

Claimant testified that on January 30, 1985 she was assisting a patient out of bed onto a bedside commode. The patient became unstable and claimant attempted to twist him around onto the commode. In doing so, she felt a severe pain in her low back. Claimant testified that she informed her immediate supervisor, Ms. Hodgkiss, of the incident on the day it occurred. She did not file a claim, however, because she felt that the pain would soon subside. According to claimant, she also informed a second supervisor, Ms. Macken, of the incident on the day after it allegedly occurred. Finally, claimant stated that she discussed the work incident with two fellow employes, Ms. Krajeck and Ms. Corder.

Claimant further testified that she informed Dr. Coleman and Dr. Issacson of the work incident upon her initial visits to those physicians. As previously noted, no mention of trauma or a work injury appears in the notes or reports of either doctor.

Claimant's mother and sister testified that claimant mentioned the work incident to them soon after it allegedly occurred, and that claimant appeared to be in physical discomfort around the time in question.

Ms. Macken testified by way of deposition that she worked with claimant the day after the alleged incident and that claimant made no mention of a work injury. Neither did she appear to be in pain. Claimant continued to work her regular job through February 4, 1985, after which she left work for two weeks on disciplinary suspension. After the suspension was lifted, claimant returned to her regular employment and worked through February 27, 1985. On that date she requested sick leave due to low back symptoms. According to Ms. Macken, claimant did not attribute her symptoms to a work incident on the day she requested sick leave. Ms. Macken also testified that Dr. Coleman suggested to her that claimant's symptoms were probably due to horseback riding.

Ms. Hodgkiss testified that although she worked with claimant off and on after the alleged work incident, claimant did not tell her of a work injury until March 6, 1985, when claimant filed her claim. Claimant apparently did mention back problems as early as February 1, but did not attribute them to a work incident. Ms. Hodgkiss testified that it is a general policy for nurses to make a notation of a patient's physical instability in the patient's chart. She noted that the chart of the patient claimant was caring for on the date of the alleged incident makes no mention of the patient's instability or near fall.

Ms. Corder testified that she worked with claimant subsequent to the alleged incident and that claimant neither mentioned a work injury nor appeared to be in discomfort.

The Referee found the report of Dr. Misko, indicating that claimant's work incident was the major cause of her back problem, to establish medical causation. With regard to legal causation, the Referee found the testimony of claimant and her witnesses credible and persuasive. However, he also found the testimony of all other witnesses to be credible. As noted, the testimony of those witnesses is in direct conflict with that of the claimant.

It is claimant's burden to prove the compensability of

her claim by a preponderance of the evidence. After our de novo review, we find that she has failed to carry her burden. Although claimant testified that she informed Dr. Coleman, Dr. Issacson, Ms. Macken, Ms. Hodgkiss, and Ms. Corder of her work injury immediately or soon after it occurred, all of those persons contradicted her testimony. Rather, all specifically indicated that claimant made no mention of a work injury until the time of her claim filing more than a month after the alleged incident. Thus, claimant's testimony is largely unsupported, and on this record we find it improbable that the event for which she seeks compensation occurred as she described. We are also mindful of Dr. Issacson's statement that it is unusual for back strain symptoms to occur two weeks after a traumatic incident. While Dr. Misko indicated that claimant's work injury was the major cause of her disk lesion, the doctor did not address the question of the extended time period between the alleged incident and the onset of symptoms. Dr. Misko's analysis is therefore incomplete and of reduced persuasive value.

ORDER

The Referee's order dated March 16, 1986 is reversed and the insurer's denial is reinstated.

FRED C. SPIVEY, Claimant
Galton, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 83-11519 & 83-07867
September 24, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Spivey v. SAIF, 79 Or App 568 (1986). The court has mandated: (1) that we order the SAIF Corporation to repay compensation unilaterally offset against "interim" compensation due between May 22, 1983 and July 26, 1983; (2) that we determine whether there were any "amounts then due" during a four-day delay in denial of claimant's claim; and (3) that we assess an insurer-paid attorney fee on account of the delay in denying the claim.

We must exercise our factfinding role in determining whether compensation was "due" during the delay in claim denial. The record contains an uncontroverted form 1502, "Insurer Report," that recites that temporary disability compensation was paid through the date of the denial. We find that all compensation was paid and that there were no "amounts then due" at the time relevant in assessing a penalty. See Harold A. Lester, 37 Van Natta 745 (1985). Therefore, no penalty is assessed.

We find that a reasonable attorney fee for claimant's attorney's services in connection with the late denial is $100.

ORDER

The SAIF Corporation shall repay to claimant all compensation for the period April 22, 1983 through May 18, 1983 that was previously offset by letter dated July 1, 1983. Claimant's attorney is awarded a reasonable attorney fee of $100 for services in connection with the late denial, to be paid by the SAIF Corporation in addition to compensation.

PAULINE L. TRAVIS, Claimant
Peter O. Hansen, Claimant's Attorney
Malagon & Moore, Attorneys
Schwabe, et al., Defense Attorneys

WCB 82-03177
September 24, 1986
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Travis v. Liberty Mutual Insurance, 79 Or App 126, rev den, 301 Or 445 (1986). We have been mandated to award an attorney fee for claimant's attorney's efforts on Board review in resisting the employer's cross-request for review in which the employer objected to the Referee's increased award of compensation for permanent partial disability.

Subsequent to the publication of the court's opinion in this case, but prior to receipt of the appellate judgment and mandate, we issued our Order on Reconsideration in Richard M. Deskins, 38 Van Natta 825 (1986). In Deskins, we considered a request by the claimant for an award of attorney fees in a procedural setting in which the employer had filed a cross-request for Board review and had not prevailed. The claimant argued that he was entitled to an insurer-paid attorney fee pursuant to the holding in Travis. We noted that the court's opinion in the Travis case did not address a relevant administrative rule, OAR 438-47-075. We stated:

> "Our interpretation of the aforementioned rule leads us to conclude that barring the subsequent withdrawal of a request for Board review, the cross-appellant is not considered the initiating party for purposes of awarding attorney fees pursuant to ORS 656.382(2). The court's recent holding in Travis certainly supports claimant's request for an additional award of attorney fees. However, we are bound to follow the clear and unambiguous dictates of our administrative rules. See Wattenbarger v. Boise Casecade Corp., 301 Or 12, 15 (1986); Bratt v. SIAC, 114 Or 644 (1925).
>
> "Therefore, since claimant did not withdraw his appeal, the employer, as cross-appellant, is deemed not to have initiated an appeal. OAR 438-47-075. Accordingly, claimant is not entitled to an insurer-paid attorney's fee for responding to the employer's cross appeal."

Deskins is now pending judicial review by the Court of Appeals.

We have carefully reviewed the briefs and both petitions for Supreme Court review and have concluded that in this case no mention of OAR 438-47-075 was made, at least in writing, before either court. We believe that the rule is consistent with court decisions that have held that, "The Board has de novo review and is free to make any disposition of the case it deems appropriate . . . ." Destael v. Nicolai Co., 80 Or App 596, 600-01 (1986). See also Russell v. A & D Terminals, 50 Or App 27, 31 (1981).

We nevertheless conclude that we are bound to follow the court's mandate in this case. Rexnord, Inc. v. Ferris, 69 Or App 146, 148 (1984). We are mandated to award an attorney fee.

Notwithstanding our rule to the contrary and our decision in Deskins, supra, we do so in accordance with the mandate.

We find that the matter raised by the employer's cross-request for review was of ordinary difficulty and reasonable probability of success for claimant. We conclude that a reasonable attorney fee for services on Board review in connection with that issue is $300.

ORDER

Claimant's attorney is awarded a reasonable attorney fee of $300 for services on Board review, to be paid by the insurer.

GAYLON DeGEER, Claimant
Peter O. Hansen, Claimant's Attorney
Roberts, et al., Defense Attorneys

WCB 85-05914
September 25, 1986
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee Quillinan's order that: (1) affirmed the Determination Order dated April 24, 1985 which awarded no compensation for permanent disability in addition to prior awards of 64 degrees for 20 percent unscheduled permanent partial disability for injury to claimant's low back and 30 degrees for 20 percent scheduled permanent partial disability for injury to claimant's left hip; and (2) denied claimant's request for reimbursement of travel expenses to attend an approved training program. The issues on review are extent of scheduled permanent partial disability, extent of unscheduled permanent partial disability, and reimbursement of travel expenses to attend an approved training program.

The Board affirms the order of the Referee.

ORDER

The Referee's order dated January 27, 1986 is affirmed.

Board Member Lewis, dissenting in part:

I respectfully dissent from that portion of the Board's order which affirms the Referee's approval of the insurer's denial of reimbursement of necessary travel expenses related to an authorized training program.

Claimant's low back and hip were injured in a sawmill accident. He was unable to return to manual labor and was offered rehabilitation in the field of microcomputer repairs. He did very well in his vocational rehabilitation program. When the program was near completion at a very basic level, claimant was offered an opportunity to extend his training by one week and improve his earning capacity by approximately 40 percent. The additional training was a once-in-a-lifetime opportunity offered by the largest manufacturer of microcomputers to people associated with only seven institutions in the country. Claimant was determined to be eligible for the program but approval of expenses had to be obtained within a short period of time. The vocational counselor refused to present the opportunity to the insurer for approval until claimant offered to pay for part of the necessary expenses himself. The counselor then presented the program to the insurer as a package deal in which claimant paid for part of the cost of

the authorized training program without mentioning that claimant had sought full payment for the program. The insurer provided telephonic authorization for the package deal. Claimant attended the program and then obtained a job which paid approximately 35 percent more than the usual range of pay for entry-level microcomputer repair work. The additional training was a prerequisite for the new job. Claimant's new job pays approximately 90 percent of his wages at the time of injury.

I believe that the legislature has made it clear that the guiding principle of the rehabilitation of injured workers is to restore them to employment at wages as near as possible to the wages at the time of injury. See ORS 656.012, 656.268, 656.340. In Frame v. Crown Zellerbach, 63 Or App 327, on reconsideration, 65 Or App 801 (1983), the court considered an injured worker's entitlement to a retraining program and concluded "that the workers' compensation statutes were not intended to force an injured worker to take a drastic cut in pay instead of being trained for a job paying a comparable wage to what the worker would have been making had he not been injured." Frame, on reconsideration, 65 Or App at 804. I believe that the policies of the Workers' Compensation Law require that all of the necessary costs of an authorized training program must be paid by the responsible employer or insurer. See OAR 436-120-150. I find no authorization in regulation or statute for an insurer or employer to require an injured worker to pay for a necessary portion of an authorized training program. Consequently, I would order reimbursement of the necessary travel expenses actually paid by claimant.

WILLIAM C. DILWORTH, Claimant
Peter O. Hansen, Claimant's Attorney
Schwabe, et al., Defense Attorneys
Roberts, et al., Defense Attorneys

WCB 85-05079 & 85-11948
September 25, 1986
Order on Review

Reviewed by the Board en banc.

Claimant requests and Weyerhaeuser Company cross-requests review of Referee Knapp's order that upheld EBI Companies' denial of responsibility for claimant's low back and psychiatric conditions and set aside Weyerhaeuser's denial of responsibility for medical services for claimant's psychiatric condition. The issue is responsibility. Claimant's aggravation rights, ORS 656.273, as to the Weyerhaeuser claim have expired. Claimant has requested claim reopening by the Board under the provisions of ORS 656.278 in the event Weyerhaeuser is found responsible for claimant's compensation.

The Board adopts the Referee's findings of fact and affirms the order of the Referee with the following comments.

In this responsibility case, the question is whether a specific incident that occurred while claimant was employed by EBI's insured independently contributed to the cause of claimant's psychiatric disability. Prior to claimant's employment with EBI's insured claimant's psychiatric condition, dysthymic disorder, was adjudged to be Weyerhaeuser's responsibility under its 1972 industrial injury claim. The preponderance of the expert medical evidence is that claimant's psychiatric condition is chronic and that flareups of that condition were and are to be expected. The specific incident at issue, which we find to be a telephone call

reasonably perceived by claimant to be threatening, resulted in increased psychiatric disability.

The Referee analyzed this case under the line of cases beginning with Smith v. Ed's Pancake House, 27 Or App 361 (1976). See also Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984). He concluded:

> "What happened in this case is similar to a person with a back injury with continuing symptoms suffering a recurrence on job number two following some lift or exertion. We have here a person with an impaired psychological condition who suffers a recurrence following exposure to job duties which did not of themselves independently contribute to the condition. . . . The threatening phone call was the culminating event, but it was not a causative factor. The evidence overwhelmingly demonstrates claimant's increased inability to cope was already in process and the worsening was inevitable. These facts do not warrant shifting responsibility from an injury that caused the problem to a second employment that did not."

We agree with and adopt the Referee's conclusion, which we believe to be consistent with cases decided by the courts subsequent to the Referee's order in this case. See Hensel Phelps Construction v. Mirich, 81 Or App 290 (CA A37006, filed September 10, 1986); Consolidated Freightways v. Foushee, 78 Or App 509, rev den, 301 Or 338 (1986).

We have also considered this case in light of the Court of Appeals' opinion in Adsitt v. Clairmont Water District, 79 Or App 1, rev den, 301 Or 338, 301 Or 666 (1986). In Adsitt, the court stated: "We can find no basis for a distinction between the symptoms of a mental disorder and the disorder itself; if the symptoms are worse, the disorder has necessarily worsened, at least until the symptoms abate. The exacerbation of claimant's condition therefore constituted a worsening of her disease." Id. at 7. We conclude that Adsitt is limited to the situation where the initial compensability of a stress-related occupational disease claim is in issue. To apply the quoted statement from Adsitt to the facts of this case would render Hensel Phelps, supra, and Foushee, supra, meaningless.

As the court stated in Hensel Phelps, "If worsened symptoms alone were enough to place responsibility on the second employer, the first employer would never be responsible." Slip Op. at 5. Conversely, if Adsitt is applied in responsibility cases, the second employer would always be responsible. Employers would be understandably reluctant to hire employes with previously accepted mental disorders. We find this inconsistent with the stated purposes of the Workers' Compensation Act. See ORS 656.012(2). The worsening of claimant's psychiatric condition in this case was a symptomatic worsening and not a worsening of the underlying condition. Compare ORS 656.273(1); Foushee v. Consolidated Freightways, supra, with Wheeler v. Boise Cascade Corp., 298 Or 452, 457 (1985); Weller v. Union Carbide, 288 Or 27, 35 (1979). As such, it is an aggravation of the 1972 injury for

which Weyerhaeuser remains responsible.

The Referee awarded claimant's attorney an employer-paid attorney fee for prevailing on the Weyerhaeuser denial of medical services. ORS 656.386(1). Claimant could only be entitled to an insurer or employer paid attorney fee on Board review if he was successful in having EBI's denial set aside, ORS 656.386(1), or if compensation awarded by the Referee was not disallowed or reduced after an appeal initiated by an employer or insurer, ORS 656.382(2). See Shoulders v. SAIF, 300 Or 606 (1986). Medical services are compensation. ORS 656.005(9); Shoulders v. SAIF, supra, 300 Or at 609.

Although Weyerhaeuser did cross-request review in this case, its goal on review was exactly the same as claimant's -- to have EBI's denial set aside. We acknowledge that in Travis v. Liberty Mutual Insurance, 79 Or App 126, 128, rev den, 301 Or 445 (1986), the court mandated an attorney fee under ORS 656.382(2) on the basis of an insurer's cross-request for Board review. Subsequent to Travis, we declined to award an attorney fee at this level in an identical procedural situation, holding that we were precluded from doing so by OAR 438-47-075 and court decisions admonishing us to follow our own administrative rules. Richard M. Deskins, 38 Van Natta 825 (1986). Since Travis, the court has yet again admonished us that we are bound by our own rules. Edward Hines Lumber Co. v. Kephart, 81 Or App 43, 47 (1986). See also ORS 183.400. We, therefore, decline to award an attorney fee for services on Board review on the basis of Weyerhaeuser's cross-request. The commonality of interest in this case between claimant and Weyerhaeuser underscores in part the reasoning behind OAR 438-47-075.

We have addressed claimant's request for claim reopening under the provisions of ORS 656.278 in our separate Own Motion Order issued this date.

ORDER

The Referee's order dated April 9, 1986 is affirmed.

DAVID D. GRIMES, Claimant
William H. Skalak, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-00302
September 25, 1986
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The SAIF Corporation requests review of Referee Pferdner's order that: (1) found claimant's industrial injury claim for the neck to have been timely filed; and (2) set aside SAIF's denial on the merits. The issues are whether the claim was timely filed and, if so, whether the claim is compensable.

Claimant alleges that he injured his neck sometime in August 1984 while working on a construction project. He underwent a cervical laminectomy on December 11, 1984. Although he testified to having immediate symptoms after the alleged incident, he did not file a claim until December 6, 1984, or approximately four months after the alleged industrial accident and five days before his surgery.

SAIF asserts that the claim was untimely filed and that

the Referee was without jurisdiction to entertain claimant's appeal from SAIF's denial. ORS 656.265(1) provides that a claim is to be filed with the employer no later than 30 days after an industrial accident. Failure to give the required notice bars the claim unless: (1) the employer had knowledge of the injury, or the insurer was not prejudiced by lack of notice; (2) the insurer has begun compensation payments; or (3) notice is given within one year of the accident and the worker establishes good cause for failure to give notice within 30 days. ORS 656.265(4).

In the present case, the employer had no notice of claimant's claim until the claim was formally filed four months after the alleged accident. Thus, the employer knowledge exception is not satisfied. Neither is the lack of prejudice exception satisfied, for we find that the insurer was prejudiced by claimant's failure to timely file. It was precluded from conducting a meaningful investigation. The construction site claimant was working on at the time of the allegedly injury had been altered by the time the claim was filed. In addition, claimant underwent surgery just five days after filing his claim, thereby precluding the insurer from arranging for an independent medical examination before surgery was performed.

Neither was the payment-of-compensation exception satisfied, because the employer made no payments before the filing of the claim. Claimant will be excused from failing to timely file, therefore, only if he establishes "good cause" for the late filing. ORS 656.265(4)(c). Whether claimant established good cause is a factual question that depends on the circumstances surrounding the filing. Wilson v. SAIF, 3 Or App 573 (1970).

Claimant testified that his experience with past employments led him to conclude that he would be fired or otherwise disciplined by the present employer if he filed a claim for compensation. He further testified that until it became apparent that he had incurred a serious injury, he chose not to file for fear of losing his job. He asserted at hearing that fear of discipline is "good cause" as that phrase is used in ORS 656.265(4)(c). The Referee agreed and found the claim compensable on the merits.

In Riddel v. Sears, Roebuck & Co., 8 Or App 438 (1972), the court recognized that under certain circumstances, a fear of discipline may excuse untimely filing. The claimant in Riddel injured his back in July 1969 but failed to file a claim until April 1970. He had incurred prior injuries during his employment with the same employer and had been warned that further back problems would not be tolerated. As a result, claimant feared that he would lose his job if he filed a claim, and he waited until he had otherwise terminated his employment before filing.

The employer in Riddel argued that the mere fact that a claimant believes that he will be disciplined for reporting an accident is insufficient as a matter of law unless the belief is induced by an "actual occurrence" susceptible to such an interpretation by the claimant. The court found that there had been an "actual occurrence" in that the claimant had been specifically warned by his employer against filing a claim. Consequently, the court found the late filing to be excused. It further found that it need not decide whether a mere subjective fear of discipline constitutes "good cause" where there was no factual basis for the belief. Riddel, 8 Or App at 441.

As noted, supra, the present claimant testified that he feared discipline from the present employer because of his experience with prior employers, who had apparently threatened disciplinary action if claims for compensation were filed. There is no persuasive evidence that the present employer ever threatened claimant or any other worker. In other words, there was no "actual occurrence," Riddel, supra, involving this worker and this employer that would have led claimant to a reasonable expectation of discipline.

Thus, the present case differs from Riddel, and we are left to decide what the Riddel court did not have occasion to determine, whether a claimant's subjective belief that he will be disciplined for filing a claim establishes good cause for late filing, when there is no objective evidence that his employer in fact threatened disciplinary action. We find that it does not. In reaching our conclusion we are mindful of the Court's pronouncement in McGarrah v. SAIF, 296 Or 145 (1983), that a purely subjective standard "is no standard at all in the reality of application." Id. at 165. While McGarrah involved the standard applied in mental stress claims, we believe that the Court's conclusion regarding a claimant's purely subjective beliefs is applicable to the determination of "good cause" as well.

We believe that if we were to find that a subjective fear of discipline constitutes "good cause" for failure to timely file a claim, the statute providing for good cause would be rendered meaningless. Any worker wishing to avoid the barring of his claim could merely assert his belief that discipline would follow claim filing. Whether the belief had a basis in fact would be irrelevant, and there would essentially be no standard at all for determining the existence of good cause. We believe that in providing for a "good cause" exception to the timely filing requirement, the legislature intended that there be some practical standard for determining whether good cause in fact exists. A pure subjective standard is not practical.

While claimant might assert that his experiences during past employments led to a reasonable expectation of incurring discipline from the current employer, we find the connection between the past and present employments to be too attenuated to be meaningful. We find that in the absence of some actual threat of discipline or other action by the present employer, claimant had no reasonable basis for concluding that discipline would follow the filing of his claim. An unreasonable belief does not represent good cause. Claimant's claim was untimely and is barred. ORS 656.265(4).

Because of our findings on the timeliness issue, we do not reach the merits of the claim.

ORDER

The Referee's order dated February 6, 1986 is reversed and SAIF's denial is reinstated.

G. DONALD MASSEY, Applicant
Ann Kelley, Ass't. Attorney General

WCB CV-86005
September 25, 1986
Findings of Fact, Conclusions and Proposed Order (Crime Victim Act) (After Reconsideratior

Findings of Fact, Conclusions and a Proposed Order were issued August 21, 1986. Because of the adoption of amended rules of procedure effective September 1, 1986, the order was withdrawn for reconsideration on September 9, 1986 after receipt of objections to the proposed order filed by the applicant. After reconsideration, I hereby republish the original order in its entirety, as follows.

Pursuant to notice, a hearing was conducted and concluded by James L. Emerson, special hearings officer, on August 15, 1986 at Salem, Oregon. The applicant ("claimant"), G. Donald Massey, was present and not represented by counsel. The Department of Justice was represented by Ann Kelley, Assistant Attorney General. The hearing recorder was Tammy Steinbock. The record was closed August 15, 1986.

ISSUES

1. Claimant objects to a one time lump sum deduction of $250 from his award of compensation.

2. Claimant objects to the deduction of $310 in benefits received from Adult and Family Services from his award of compensation.

3. Claimant objects to the finding of fact made and entered by the Department of Justice that his net monthly loss of earnings at the time of the compensable crime was $154.

FINDINGS OF FACT

Claimant was the innocent victim of an assault on September 26, 1985 when an assailant entered his home and shot him three times with a pistol. Claimant satisfied all of the statutory requirements for compensation under the Compensation Act for Victims of Crime (ORS Chapter 147) and his claim for compensation was accepted by the Department of Justice on January 3, 1986. The Department found that claimant's net lost earnings as a result of his injuries amounted to $154 per month beginning September 26, 1985. As of the date of the hearing, claimant had not been released to work by his physicians and his lost earnings are continuing. The Department deducted from claimant's lost earnings award a $462 emergency payment made December 26, 1985 and $310 in benefits claimant received from Adult and Family Services.

Claimant was self-employed at the time of the compensable crime. His income came from selling firewood and placer gold and some infrequent babysitting. Claimant has also performed services as a paralegal. Claimant's business records were destroyed when his home was burned to the ground in connection with the compensable crime. Copies of claimant's 1984 income tax records were not available because claimant did not file state or federal income tax returns for 1984. Claimant did

file income tax returns in 1982 or 1983. Claimant calculated his gross earnings as of the compensable crime as $522 per month, based upon affidavits submitted to the Department.

The Department arrived at the $154 per month figure by using the affidavits furnished by claimant that documented income totalling $2,610 over a 12 month period. The affidavits show actual income in five of the 12 months -- December 1984 and March, June, August and September 1985. The Department assumed that claimant had no income in the seven months in which no income was documented. The Department also assumed an allowable business expense of 20 percent and social security self-employment taxes of 11.3 percent, which were deducted from the gross income to arrive at the monthly net figure.

On or about September 30, 1985 claimant applied for assistance from the Department of Human Resources Adult and Family Services Division (AFS). Between October 8 and December 31, 1985 claimant received assistance from AFS in the form of $230 in cash and $80 in food stamps, totalling $310. In his application for compensation under the Compensation Act for Victims of Crime claimant or someone on claimant's behalf checked the "no" response to the inquiry whether claimant requested a waiver of the $250 statutory deductible. On or about February 13, 1986, in his request for reconsideration of the Department's Findings of Fact, Conclusions and Order, claimant specifically requested a waiver of the statutory $250 deductible. Claimant is separated from his spouse and has no dependent children.

Based upon my review of the entire record, the content and manner of claimant's testimony and my observation of claimant during the hearing, I find that claimant's assertions of the facts are suspect.

CONCLUSIONS

1. Waiver of the $250 Deductible. ORS 147.125(4) provides that for all awards under the Act the Department "[s]hall deduct the sum of $250, unless the department finds that the deduction will result in an extreme hardship to the applicant." OAR 137-76-035(4) provides: "In no instance will a waiver of the statutory $250 deductible be granted unless specifically requested by the victim or the dependents of a deceased victim."

OAR 137-76-035(1) provides that a single person with no dependents is eligible for waiver of the deductible if his or her net monthly income from all sources is $600 per month or less. As set forth below, I have concluded that claimant's net monthly income from all sources is less than $600.

The Department's decision to not allow waiver of the statutory deductible appears to be based upon the fact that claimant did not request the waiver in his original application. Although that observation is true, there is no statutory or regulatory requirement that he do so. Once the Department made the deduction in its initial order, claimant immediately and clearly requested waiver of the deductible in his request for reconsideration. Because claimant meets the Department's eligibility requirement for the waiver and because he requested the waiver prior to the final disposition of his claim, I conclude that the waiver should be allowed.

2. Deduction of $310 in Adult and Family Services Benefits. The Department deducted from claimant's compensation

the sum of $310 claimant received in benefits from Adult and Family Services, $230 in cash and $80 in food stamp assistance. ORS 147.125(5) provides that for all awards under the Act the Department "[s]hall deduct the amount of benefits, payments or awards, payable under the Workers' Compensation Law, from local government, state or federal funds or from any source, and which the victim or dependents of the victim are entitled as a result of the death or injury of the victim . . . ."

Claimant argues that this statute is limited to workers' compensation benefits. That argument is an unduly restrictive interpretation of the statute and I reject it. Claimant also argues that this deduction is contrary to ORS 147.315 and 147.325 which respectively prohibit the charging of fees to applicants for compensation under the Act and prior attachment by legal process or assignment of benefits under the Act. I conclude that this deduction is not a fee, assignment or prior attachment. Claimant received the $310 in benefits and is not required to pay them back to Adult and Family Services. The Act is a final resource, or "last resort" for victims of crime, who are required to exhaust all other benefits prior to receiving benefits under the Act. I conclude that the deduction was proper.

3. Calculation of Lost Earnings. OAR 137-76-025(3) provides that, "Lost earnings compensation shall be computed on the basis of the victim's actual net earnings at the time the criminal incident occurred." The Department's application form contains the following preprinted language: "If victim was self-employed: Submit most recent Income Tax Reports and other proof such as statements from those for whom victim worked showing amount(s) paid and date(s) for a period at least 60 days prior to injury." (Emphasis in original.) Although claimant established that he did not file state or federal income tax returns in 1984, he did not furnish any other income tax documents; therefore, claimant failed to provide his "most recent" income tax reports. Claimant did furnish statements from persons for whom he had done work. Those statement were accepted by the Department and used to reach the Department's figure of $154 per week net income.

Claimant objected to the inclusion of the Department's written computation in the record and moved that it be stricken. Although the motion was denied, claimant renewed the motion in his closing argument. Claimant bases his argument on ORS 147.125, which requires the Department to consider the facts stated on the application in arriving at its determination of benefits. Claimant asserts that the Department's written calculations, which were prepared by James Lamka, a certified public accountant employed by the Department of Justice and who testified at the hearing, are not a part of the application and cannot be considered. I conclude that Mr. Lamka's worksheet is nothing more than a recitation of how the Department determined claimant's loss of earnings based upon claimant's application. As such, it is properly a part of the record. See ORS 147.125(2); 147.155(5).

Claimant's application form recites that his net income at the time of the crime was $50 per week and $200 per month. When claimant was directly asked by the special hearings officer what his income was at the time of the crime, claimant's response was vague and evasive. He ultimately estimated that he was making from $600 to $700 per month. Claimant also argued that his net income was as much as $790 and as little as $522 per month.

Claimant testified that his application form was filled out by another person while he was in the hospital and heavily medicated and that the application is inaccurate. I find claimant's attempt to explain this inconsistency unpersuasive. Because of these marked inconsistencies and my overall suspicion of the accuracy of claimant's testimony on this issue, I give claimant's unsupported estimates of his net income no weight. I conclude that the preponderance of the persuasive evidence is that claimant's average gross income was was from seasonal employment and was approximately $200 per month over the long term. Based upon the entire record, I conclude that the Department's computation of claimant's net income was at least reasonable and probably was generous. I, therefore, conclude that the Department's computation of lost earnings was correct and should be affirmed.

PROPOSED ORDER

I recommend that the Findings of Fact, Conclusions and Order on Reconsideration of the Department of Justice Crime Victims' Compensation Program dated February 27, 1986 be modified to grant claimant a waiver of the statutory $250 deductible on the ground of extreme hardship. I recommend that said order be affirmed in all other respects.

GLADYS GROOCOCK, Applicant
Ann Kelley, Ass't. Attorney General

WCB CV-86006
September 26, 1986
Findings of Fact, Conclusions and Proposed Order (Crime Victim Act)

Pursuant to notice, a hearing was conducted and concluded by James L. Emerson, special hearings officer, on September 19, 1986 at Portland, Oregon. The applicant, Gladys Groocock, was present and not represented by counsel. The Department of Justice was represented by Ann Kelley, Assistant Attorney General. The court recorder was Jeannette Conn of Harris Reporting. The record was closed September 19, 1986.

The applicant has requested review by the Workers' Compensation Board of the Department of Justice's Special Compensation Program's Amended Findings of Fact, Conclusions and Order on Reconsideration dated June 6, 1986. By its order, the Department denied the applicant's claim for compensation as the victim of a crime.

FINDINGS OF FACT

The applicant ("claimant") was born May 6, 1902 and was age 84 at the time of the hearing. At approximately 4 p.m. on June 17, 1978 claimant was loading some groceries into her car in the parking lot of the Fred Meyer store at Union Avenue and N.E. Killingsworth Street in Portland. At that time and place, a person approached claimant and took a small picnic basket containing her purse and several other items, left the area on foot and eventually fled in a car driven by another person. Claimant's purse was recovered by police after having been thrown from the getaway car several blocks from the crime scene and was returned to her. One hundred dollars in bills and other items of value were missing from the purse, but identification and other papers were still in the purse.

Claimant immediately reported the incident to the police and cooperated in the investigation of the crime. Based upon the record and claimant's testimony I find that no arrest was made. Claimant made her claim for benefits on October 5, 1978, less than six months after the crime.

Claimant testified that the assailant physically assaulted her prior to stealing the basket. According to claimant's testimony, the assailant threw her down, then threw her back and forth between the car and a shopping cart, banging her knees into both the car and the cart. According to claimant, the assault lasted for about five minutes. There is no mention in the police report included in the record that claimant was assaulted or showed any signs of injury. After the incident, claimant rode in a police car for a time in search of the assailant. Claimant testified that she did so in extreme pain. She further testified that she was able to drive herself home, but collapsed after she arrived at home and remained in her home for several days thereafter. Claimant did not seek medical treatment beyond the care she was routinely receiving at the time. On at least two occasions prior to June 1978 claimant was the victim of assaults resulting in injuries including fractured thoracic vertebrae. These assaults and injuries predate the enactment of the Compensation Act for Victims of Crime.

Claimant suffers from osteoporosis and osteo-arthritis. In 1978 she was treated for these conditions by Dr. Gritzka, an orthopedist. Dr. Gritzka's May 10, 1978 chart note recites that the goal of treatment at the time was "to keep [claimant] free enough of symptoms for the next several months for her to settle her business affairs and then she will probably need to go into a nursing home." A marginal notation of diagnosis is "arthritis." The next substantive chart note is dated August 4, 1978. It recites that claimant had entered a nursing home and was obtaining some relief from her symptoms by using DMSO on her knees. It concludes, "Nothing else has worked for her degenerative arthritis." The marginal note of diagnosis is "same."

I find that claimant's testimony about the events of the criminal incident is entitled to little weight. The testimony is inconsistent with records, most notably the police report, made at the time of the incident. While I conclude that claimant honestly believes what she now describes, I find that her version of the incident has become embellished over time. I find that, if claimant was injured at all in the criminal incident, her injuries were slight. I find that claimant's medical condition was the same before and after the crime. Claimant's medical condition has worsened since 1978, however I find based upon the medical record that the worsening is due to the natural progression of her osteo-arthritis and osteoporosis.

CONCLUSIONS

The standard of review for cases appealed to the Board under the Compensation Act for Victims of Crime is de novo on the entire record. ORS 147.155(5); Jill M. Gabriel, 35 Van Natta 1224, 1226 (1983). Following my de novo review of the documentary and testimonial evidence, I conclude that the preponderance of the persuasive evidence does not establish that claimant is entitled to benefits.

ORS 147.015 establishes general criteria for eligibility for benefits under the Act. The threshhold criterion is that: "The person is a victim, or is a dependent of a deceased victim of a compensable crime that resulted in a compensable loss of more than $250 . . . ."

A "compensable crime" is one that results in death or "serious bodily injury." ORS 147.005(4). Although the term "compensable loss" is not defined in the Act, the reasonable interpretation is that the term means a loss proximately caused by a compensable crime. I conclude that a preponderance of the persuasive evidence does not establish that claimant's medical expenses since June 17, 1978 were or are proximately caused by the criminal incident of that date. I also conclude from my findings of fact that claimant did not sustain a "serious bodily injury" on June 17, 1978 and, thus, was not the victim of a compensable crime, although she certainly was the victim of a crime.

PROPOSED ORDER

I recommend that the Amended Findings of Fact, Conclusions and Order on Reconsideration of the Department of Justice Crime Victim Compensation Program dated June 6, 1986 be affirmed.

RANDY L. KLING, Claimant
Emmons, et al., Claimant's Attorneys
SAIF Corp Legal, Defense Attorney

WCB 84-08542
September 29, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of Referee Michael Johnson's order that set aside its denial of claimant's inguinal hernia. SAIF moves to strike exhibits twelve through fifteen and cites as error that the Referee allowed a continuance for claimant to obtain rebuttal to expert witness testimony. The issues on review are compensability and hearing procedure.

The Board finds that the record was not incompletely, improperly or insufficiently developed or heard by the Referee. The Referee acted within his discretion to allow the continuance and consider the exhibits offered after the hearing. ORS 656.283(7). SAIF's motion is denied.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's order dated February 10, 1986 is affirmed. Claimant's attorney is awarded $500 for services on Board review, to be paid by the SAIF Corporation.

BRETT W. BERTRAND, Claimant
Francesconi & Cash, Claimant's Attorneys
Roberts, et al., Defense Attorneys

WCB 85-15137
September 30, 1986
Order Denying Motion to Dismiss

Claimant has moved to dismiss to insurer's request for Board review on the ground that the request was untimely. The thirtieth day after the date of the Referee's order was August 23,

1986, a Saturday. The request was mailed Monday, August 25, 1986. The request was timely. See ORS 174.120. The motion to dismiss is denied.

IT IS SO ORDERED.

MARTIN W. GREENSLITT, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 82-00591
September 30, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee St. Martin's order that: (1) set aside SAIF's denial of claimant's occupational disease claim for a myocardial infarction; (2) set aside SAIF's denial of claimant's claim for a syncopal episode; and (3) awarded claimant's attorney a fee of $7,000 for services at hearing. The issues are the compensability of claimant's myocardial infarction and syncope claims and attorney fees.

We agree with the Referee that claimant's myocardial infarction and syncopal episode are compensable. We therefore affirm the Referee's order on the merits. We find the Referee's award of attorney fees to be excessive, however, and we modify that award.

The Referee awarded claimant's attorney a fee of $7,000 for services at hearing, noting his impression that the services rendered by claimant's attorney were "extraordinary." OAR 438-47-015 provides the Referee the discretion to award an attorney fee of up to $3,000 on a denied claim ordered accepted by the Referee. The Referee or Board may allow a fee in excess of the rule's maximum when claimant's attorney provides a sworn statement regarding the services rendered on claimant's behalf, and the services are deemed to have been extraordinary. OAR 438-047-010(2).

In the present case, no sworn statement was submitted to the Referee. No showing nor request was made at hearing for an extraordinary fee. See Roger A. Shoff, 38 Van Natta 163, 164 (1986). Although the Referee felt that the efforts expended by claimant's attorney were "extraordinary," he did not acknowledge the absence of a sworn statement regarding an extraordinary fee. Without benefit of the sworn statement, the Referee had no discretion to award a fee in excess of the $3,000 maximum allowed by administrative rule. Without the sworn statement, we, too, are constrained from awarding more than the maximum allowed by our rule. Claimant's attorney's fee for services at hearing shall therefore be reduced to $3,000. A separate fee shall be awarded for services rendered by claimant's attorney on Board review.

ORDER

The Referee's order dated September 5, 1985 is modified in part and affirmed in part. That portion of the order that awarded claimant's attorney a fee of $7,000 for services at hearing is modified. In lieu of the Referee's award of fees, claimant's attorney is awarded $3,000 for services at hearing. For successfully defending against the insurer's request for Board

review on the merits, claimant's attorney is awarded $800. Both attorney fees shall be paid by the SAIF Corporation. The remainder of the Referee's order is affirmed.

THOMAS W. MATTHEWS, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-00122
August 20, 1986
Order of Abatement

The Board has received the SAIF Corporation's request for reconsideration of our Order on Review dated July 25, 1986.

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

IT IS SO ORDERED.

THOMAS W. MATTHEWS, Claimant
Peter O. Hansen, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 84-00122
September 30, 1986
Amended Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Reconsideration dated September 10, 1986. The Board issued its original Order on Review on July 25, 1986. That order concerned an appeal by the SAIF Corporation in which SAIF raised the issues of remand and extent of disability. The Board denied SAIF's request for remand, affirmed the Referee on the extent issue and awarded claimant's attorney an employer-paid fee of $600 for services on Board review.

After we issued our Order on Review, SAIF requested reconsideration on the remand issue. We abated our order to allow claimant an opportunity to respond. Claimant's attorney submitted a three-page memorandum in opposition to SAIF's request for reconsideration. After considering the arguments submitted by the parties, the Board republished its original order, effective September 10, 1986, in an Order on Reconsideration. Claimant now requests reconsideration of the September 10, 1986 Order on Reconsideration alleging that his attorney is entitled to an increased fee for services rendered in connection with SAIF's request for reconsideration. We agree. See Daniel J. Sabol, 38 Van Natta 154 (1986).

We amend our Order on Reconsideration dated September 10, 1983 and award claimant's attonrey an additional fee of $150 to be paid by the SAIF Corporation. The Board adheres to the remainder of its order and, as amended above, republishes that order, effective this date.

IT IS SO ORDERED.

WALLACE W. MOCK, Claimant
Peter O. Hansen, Claimant's Attorney
Lindsay, et al., Defense Attorneys
Moscato & Byerly, Defense Attorneys

WCB 84-04915 & 84-06463
September 30, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Argonaut Insurance Company requests review of Referee Knapp's "Discovery Order" dated October 31, 1985, denying Argonaut's request for the dismissal of claimant's claim for his alleged failure to provide discovery. Argonaut also requests

review of those portions of the Referee's Opinion and Order dated November 7, 1985 that set aside its denial of claimant's claim for a new injury to the cervical spine on the basis of untimely filing and responsibility, and affirmed Fred Meyer's denial of claimant's aggravation claim.

Fred Meyer cross-requests review of that portion of Referee Knapp's order that found that even though claimant's injury at Argonaut's insured's constituted a new injury, claimant's initial injury at Fred Meyer remained a material contributing cause of claimant's ultimate need for cervical surgery.

Claimant cross-request's review of that portion of the order that found him to be entitled to temporary total disability through October 1, 1981 only. The issues are whether claimant's claim was timely filed with Argonaut and if so, whether Argonaut or Fred Meyer is responsible, the Referee's finding with regard to Fred Meyer's contribution to claimant's need for surgery, and temporary total disability.

The Board affirms and adopts the order of the Referee.

ORDER

The Referee's Discovery Order dated October 31, 1985 and the Opinion and Order dated November 7, 1985 are affirmed. Claimant's attorney is awarded a fee of $650 for services on Board review, to be paid by Argonaut Insurance Company.

WALLACE W. MOCK, Claimant
Peter O. Hansen, Claimant's Attorney
Lindsay, et al., Defense Attorneys
Moscato & Byerly, Defense Attorneys

WCB 85-14684
September 30, 1986
Order Denying Motion to Vacate Referee's Order

The insurer has moved the Board for an order vacating the Referee's order dated September 3, 1986. The underlying case is an "enforcement action," in which Referee Neal ordered the payment of temporary and permanent disability compensation previously ordered by another Referee and a Determination Order and assessed a penalty and attorney fee for failure to pay benefits as ordered. The insurer contends that the Referee lacked jurisdiction.

The insurer's argument is based upon its assertion that it was correct in offsetting the compensation previously ordered paid against sums it contends it was entitled to recover out of a settlement with a third person under the provisions of ORS 656.593. We conclude that the Referee correctly decided that she had no jurisdiction to rule on whether such an offset is permitted under ORS 656.576 to 656.595. Her decision was strictly limited to whether it was reasonable for the insurer to take the offset without prior authorization. We hold that it was at least within the scope of the Referee's jurisdiction to decide the question.

The motion to vacate the Referee's order dated September 3, 1986 is denied. The Board accepts the motion as a request for Board review, which will be processed accordingly.

IT IS SO ORDERED.

ROBERT PETERS, Claimant
Moscato & Byerly, Attorneys

WCB 82-09865
September 30, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Fink's order that upheld the self-insured employer's denial of claimant's myocardial infarction. The issue on review is compensability.

After review of the evidence presented to the Referee in this case, the Board finds that claimant has proven that it was possible that industrial exposure to degreasing chemicals, high temperatures, and physical exertion may have contributed to the causation of his heart attack. However, such proof that is not enough to cause the employer to be responsible for compensation. Claimant must prove that it is more likely than not that the industrial exposure was the major contributing cause of the worsening of his preexisting heart condition which led to the heart attack. Claimant failed to prove that the industrial exposures were more likely to be the cause of his heart attack than the other factors which were identified by the doctors to be not related to claimant's employment. Consequently, the Board affirms the well-reasoned order of the Referee.

ORDER

The Referee's order dated January 24, 1986 is affirmed.

ROBERT L. RAMSDELL, Claimant
Ann B. Witte, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 85-05274
September 30, 1986
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Presiding Referee Daughtry's order that dismissed his request for a hearing without prejudice. The issues on review are: (1) can claimant obtain a hearing to protest an insurer's Notice of Closure without requesting a Determination Order from the Evaluation Division of the Workers' Compensation Department; and (2) can claimant obtain a hearing on an aggravation claim which has not been denied.

The Board affirms the order of the Presiding Referee. Syphers v. K-M Logging, Inc., 51 Or App 769, rev. den., 291 Or 151 (1981); Barbara A. Gilbert, 36 Van Natta 1485 (1984).

The Board has received a letter from claimant in which he disagrees with the Referee's order. Apparently, claimant did not send copies of his letter to his attorney nor to the other parties to the review. The letter states facts which are contained in other correspondence in the record. Moreover, the letter addresses the legal issue of entitlement to a hearing which is also the substance of the brief from claimant's lawyer. The letter has been placed with the briefs in the record and notice to all interested parties is hereby provided pursuant to ORS 183.462.

ORDER

The Referee's order dated March 25, 1986 is affirmed.

RONALD R. THEALL, Claimant
JOYCE ADAMS dba Canyon Farms, Employer
James C. Lynch, Claimant's Attorney
SAIF Corp Legal, Defense Attorney
Carl M. Davis, Dept. of Justice

WCB 85-01223
September 30, 1986
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Canyon Farms, an alleged noncomplying employer, requests review of Referee Brown's order that: (1) found claimant's industrial injury claim for the neck to be compensable; (2) and approved the Workers' Compensation Department's proposed order finding Canyon Farms to be a noncomplying employer. The issues are compensability and the alleged noncomplying status of Canyon Farms.

The Board affirms the order of the Referee with the following comment. The Referee correctly announced in the initial portion of his opinion that it is claimant's burden to prove the compensability of his claim. That finding was proper. The Referee then weighed the evidence and found the claim compensable. In doing so, however, he concluded: "He [the employer] has failed to sustain his burden." This suggests that the employer, at sometime, assumed the burden of proving claimant's claim noncompensable. That finding was incorrect. It remained claimant's burden throughout the proceeding to affirmatively prove the compensability of his claim.

Because the employer requested review and we have affirmed the order of the Referee, claimant is entitled to a reasonable attorney fee. OAR 438-47-055. Claimant did not participate on Board review, however. Consequently, we find no fee to be due.

ORDER

The Referee's order dated November 5, 1985 is affirmed.

DANNIEL K. WILSON, Claimant
Evohl F. Malagon, Claimant's Attorney
SAIF Corp Legal, Defense Attorney

WCB 83-05965
September 30, 1986
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of those portions of Referee T. Lavere Johnson's order which: (1) awarded compensation for permanent total disability; and (2) denied authorization to offset compensation awarded in 1981 by the order of a Referee against the current award. SAIF requests remand to reconsider the extent of claimant's permanent disability and cites as error that the Referee refused to reopen the hearing to consider whether claimant's subsequent refusal of pain center treatment was reasonable. Claimant objected to those portions of SAIF's reply brief which refer to and rely on facts not in the record.

The issues on review are extent of permanent disability including permanent total disability, offset, remand, and whether portions of SAIF's reply brief should be considered on review.

The information contained in SAIF's reply brief which reaches beyond the record in this case was submitted along with a request to remand to the Referee. The Referee left the record open to obtain the opinion of the treating doctor in response to a

last-minute report from Orthopaedic Consultants. After the doctor responded to the report, he also recommended a referral to a pain center which had treated claimant previously. Other factors worked to delay closing the record and resolution of the issues between the parties. SAIF obtained further information about claimant's ability to work and sought to reopen the record. The Referee denied the request to reopen the record and decided the case based on the information developed at the hearing and the subsequent report from the treating doctor. The Referee concluded that claimant had proven that he was permanently and totally disabled.

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). 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). To merit remand it must be shown that material evidence was not obtainable with due diligence before the hearing. Kienow's Food Stores v. Lyster, 79 Or App 416 (1986); Delfina P. Lopez, 37 Van Natta 164, 170 (1985).

In this case, SAIF requests remand based on subsequent vocational developments. We find that the Referee acted correctly by deciding the issue based on the information as it had been developed by the parties at the time of the hearing. See Gettman v. SAIF 289 Or 609 (1980); Arthur L. Chatt, 38 Van Natta 612 The request for remand is denied.

The information submitted to support the remand request was not considered on review. Those portions of SAIF's brief were not considered which relied on evidence not part of the record.

On the issues of the extent of claimant's permanent disability and authorization of an offset, the Board affirms the order of the Referee with the following comment. The evidence is not persuasive that the Determination Order authorized recovery of the compensation previously awarded by a Referee's order. Rather, the record is persuasive that through perseverance and extraordinary effort claimant reduced his permanent disability over the course of years and that he had prior to the most recent injury regained a portion of the wage earning capacity that had been thought permanently lost.

ORDER

The Referee's order dated October 18, 1985 is affirmed. Claimant's attorney is awarded $500 for services related to the issue of permanent disability, $200 for services related to the issue of the offset, and $100 for services related to the issue of remand on Board review, to be paid by the SAIF Corporation.

PETER R. RIOS, Claimant
Pozzi, et al., Claimant's Attorneys
Brian L. Pocock, Defense Attorney

WCB 85-07944 & 84-08085
July 3, 1986
Order of Abatement

The Board has received the self-insured employer's request that we stay our Order on Review dated June 17, 1986 and reconsider the issue of penalties and attorney fees awarded for unreasonable delay of compensation awarded by a Determination Order.

In order to allow sufficient time to consider the motion, the above noted Board order is abated and claimant is requested to file a response to the motion within fourteen days.

IT IS SO ORDERED.

WORKERS' COMPENSATION CASES

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

ACCIDENT PREVENTION DIVISION,
Respondent,
v.
CASCADE FOREST PRODUCTS, INC.,
Petitioner.
(SH-79-276; CA A30658)

* In Banc

Judicial Review from Workers' Compensation Board.

Argued and submitted November 15, 1984; resubmitted in banc February 5, 1986.

Brian L. Pocock, Eugene, argued the cause and filed the brief for petitioner.

Jeff Bennett, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

BUTTLER, J.

Affirmed.

* Gillette, J., Pro Tempore, participating; Deits, J., not participating.

BUTTLER, J.

Petitioner seeks judicial review of a Workers' Compensation Board (Board) referee's order affirming, for the third time, the validity of two safety violation citations issued by the Accident Prevention Division (APD). The first citation (Citation 1) was issued April 11, 1979. It charged petitioner with four "serious violations" of the Oregon Occupational Health and Safety Code, assessed penalties of $450 and specified correction dates for each violation. The second citation (Citation 2), issued October 11, 1979, charged petitioner with failing to comply with the abatement order regarding the second violation cited by Citation 1 (Item 2) and assessed a penalty of $8,250. Petitioner challenges the validity of both citations. We affirm.

In 1979, petitioner operated a wood products plant near Bend. The plant's equipment included three inverted swing cut-off saws, which, at that time, had been in use for approximately 20 years. Item 2 of Citation 1 cited petitioner's failure to guard the blades of those saws in accordance with OAR 437-10-3-34,[1] adopted in 1974 by the Workers' Compensation Department under the Oregon Safe Employment Act (OSEA), ORS 654.001 to 654.295, which provides:

> "Inverted swing cutoff saws shall be provided with a hood that will cover the part of the saw that protrudes above the top of the table or above the material being cut. It shall automatically adjust itself to the thickness of and remain in contact with the material being cut."

[1] This rule has since been renumbered OAR 437-64-285(4).

Petitioner was fined $150 for that violation and was ordered to install the required hoods within 30 days.

On April 19, 1979, petitioner requested that the compliance date for Item 2 be delayed approximately four and one-half months, because it planned to shut down its existing plant and move to its new plant, then nearing completion, equipped with modern, complying equipment, on August 1, 1979.[2] After APD denied the request, petitioner sought a hearing before the Board to contest the reasonableness of the

denial. ORS 654.078(1).[3] The referee affirmed APD's decision, and petitioner sought judicial review. We affirmed without opinion. *Cascade Forest Products Inc. v. Accident Prevention Division,* 44 Or App 131, 605 P2d 759 (1980).

On April 23, 1979, petitioner filed a separate request for a hearing to challenge the lawfulness of Citation 1. It later indicated that it also intended to contest Citation 2. The hearing was held in August, 1980, following which the referee affirmed Citation 1 on its merits and found that petitioner's challenge to Citation 2 was time-barred. Petitioner sought judicial review, and we remanded for further consideration regarding Citation 1, Item 2. *Cascade Forest Products v. Accident Prev. Div.*, 60 Or App 255, 653 P2d 574 (1982). We did not address the validity of Citation 2, because it was conceded that it depended on the validity of Citation 1, which might be affected by the referee's findings on remand. We said that we would not address that issue unless a new final order made it necessary to do so.

Our remand directed the agency to address petitioner's contention that it should not be penalized for its failure to comply with OAR 437-10-3-34, because (1) it had no knowledge that the saws were not in compliance with the regulation, (2) compliance would increase the risk of serious injuries to its employes and (3) installing the hoods was not economically feasible. The referee on remand complied with that directive and reaffirmed his decision. Petitioner now seeks judicial review of that order. On review, petitioner does not make specific assignments of error but argues that the referee's findings regarding each of its three defenses are not supported by substantial evidence, that the economic feasibility of installing the required hoods was analyzed under the wrong standard and that it was error to deny petitioner's motion to disqualify the referee.

We are satisfied that the findings with respect to each of the defenses are supported by substantial evidence and that

[2] Petitioner closed the old plant in early September, 1979.

[3] ORS 654.078(1) provides:

"An employer may contest a citation, a proposed assessment of civil penalty and the period of time fixed for correction of a violation, or any of these, by filing with the department, within 20 days after receipt of the citation, notice or order, a written request for a hearing before the board. Such a request need not be in any particular form, but shall specify the alleged violation that is contested and the grounds upon which the employer considers the citation or proposed penalty or correction period unjust or unlawful."

there was no error in denying the motion to disqualify the referee. Respondent contends that the referee, in deciding that compliance with the order was economically feasible, erred in applying the "brink of bankruptcy" test. It argues that the economic feasibility of compliance should be determined by weighing the cost of compliance against the degree to which compliance would enhance the health and safety conditions of the work place. That test is the one most commonly used by the federal courts, *see Donovan v. Castle & Cooke Foods, etc.*, 692 F2d 641 (9th Cir 1982), although the brink of bankruptcy test has also been applied. *See Faultless Division v. Secretary of Labor*, 674 F2d 1177 (7th Cir 1982). As a true test of economic feasibility, the brink of bankruptcy standard does not make much sense, because it would excuse compliance with a safety regulation that would eliminate a clear and substantial hazard to employes if doing so would imperil the economic viability of the company. Here, however, there is no question but that plaintiff could have complied with the order without serious economic consequences, much less being pushed to the edge of bankruptcy.

If there is a problem with the referee's failure to consider the cost benefit analysis urged by petitioner, it would relate to the reasonableness[4] of the compliance order under all of the circumstances, particularly the short time that petitioner was to remain in its old plant. However, the reasonableness of that compliance order was affirmed by this court without opinion on the first petition for review in 1980; it is no longer an open question. We now affirm the referee's order with respect to the lawfulness of Citation 1.

We next consider the referee's ruling that petitioner's challenge to Citation 2 was time-barred. As noted above, Citation 2 was issued on October 11, 1979. Petitioner did not "request" a hearing on that citation, however, until July 16,

1980.[5] ORS 654.078(1) provides that an employer may contest a citation by filing a written request for a hearing before the board "within 20 days after receipt of the citation."[6] If it does not, ORS 654.078(3) provides that the citation and the assessment of penalty as proposed constitute a final order that is not subject to review by any agency or court.[7]

[4] ORS 654.035(2) authorizes the Workers' Compensation Department to:

"Fix reasonable standards and prescribe and enforce reasonable orders for the adoption, installation, use and maintenance of devices, safeguards and other means of protection, and of methods, processes and work practices, to be as nearly uniform as possible, as may be necessary to carry out all laws relative to the protection of the life, safety and health of employes."

[5] Petitioner did not "file" a separate request for a hearing regarding Citation 2. Rather, it notified the referee by letter that it intended to contest the citation.

[6] ORS 654.078(1) provides:

"An employer may contest a citation, a proposed assessment of civil penalty and the period of time fixed for correction of a violation, or any of these, by filing with the department, within 20 days after receipt of the citation, notice or order, a written request for a hearing before the board. Such a request need not be in any particular form, but shall specify the alleged violation that is contested and the grounds upon which the employer considers the citation or proposed penalty or correction period unjust or unlawful."

[7] ORS 654.078(3) provides:

"A hearing on any question relating to the validity of a citation or the proposed civil penalty to be assessed therefor shall not be granted unless a request for hearing is filed by the employer within the period specified in subsection (1) of this section. If a request for hearing is not so filed, the citation and the assessment of penalty as proposed shall be a final order of the department and shall not be subject to review by any agency or court."

On review, petitioner does not assert that its request for a hearing on Citation 2 was timely. It argues, rather, that its late request should be excused, because it was misled by Exhibit A appended to the citation, which states: "A request for hearing is presently pending on [Citation 1]. In the event the employer prevails on Item number 2 of [Citation 1], * * * this Citation will be withdrawn."

In our opinion, the quoted language does not suggest, as petitioner contends, that it was not required to file a separate request for a hearing, in accordance with ORS 654.078(1), if it desired to contest the merits of Citation 2. It states what appears to be the obvious: if the violations for which petitioner was fined in Citation 1 are reversed, the penalty imposed in Citation 2 for failing to comply would no longer be assessed. Furthermore, any potential confusion was offset by the specific information appearing on the back of the citation itself setting forth petitioner's appeal rights.[8]

Affirmed.

[8] The provision stated:

"If you wish to contest any violation, penalty, or correction date, you may appeal this citation. Your appeal must be in writing, be signed, include your name, address, telephone number, citation number, date received, and specify each item contested, and reason for appeal. The appeal must be *received* by the Department within 20 days of your receipt of the Citation. If you do not appeal, this Citation becomes a final order of the Workers' Compensation Department. * * *"

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Kenneth L. Roff, Claimant.

GEORGIA-PACIFIC CORPORATION,
Petitioner,

v.

ROFF et al,
Respondents.

(WCB 83-03697; 83-07319; 83-11827; CA A35088)

Judicial Review from Workers' Compensation Board.

Argued and submitted December 16, 1985.

George W. Goodman, McMinnville, argued the cause for petitioner. On the brief were Jerry K. Brown and Cummins, Cummins, Brown & Goodman, McMinnville.

J. Michael Starr, Eugene, waived appearance for respondent Kenneth L. Roff.

John E. Snarskis, Portland, argued the cause and filed the brief for respondent Industrial Indemnity Company.

Before Richardson, Presiding Judge, Joseph, Chief Judge, and Warden, J.

WARDEN, J.

Reversed.

WARDEN, J.

Georgia-Pacific seeks judicial review of an order of the Worker's Compensation Board that affirmed the referee's opinion and order. The referee had concluded that claimant suffered a compensable aggravation of an injury to his back, assigned responsibility to Georgia-Pacific and awarded claimant attorney's fees of approximately $1700, to be paid by Georgia-Pacific. On *de novo* review, we find the evidence insufficient to support the conclusion of the referee and the Board that claimant suffered a worsening of his condition and therefore conclude that he does not have a compensable aggravation.

Claimant suffered compensable back injuries in April and July, 1977, while working for Georgia-Pacific. Dr. Rockey, claimant's treating orthopedic surgeon, described his condition a few months after the injuries as chronic low back strain with lumbosacral facet asymmetry. After claimant unsuccessfully attempted to return to work in December, 1977, Rockey ordered a lumbar myelogram. It showed no abnormality. Claimant continued to complain of low back pain and did not return to work. Rockey declared him medically stationary and recommended that he be limited to sedentary work. A July 7, 1978, determination order awarded time loss benefits and 35 degrees for unscheduled permanent partial disability. ORS 656.214(5).

Claimant returned to Rockey in April 1979 complaining of increased pain. Rockey was unable to find evidence of a new injury and concluded that the back problems were aggravated by obesity and lack of conditioning. He advised claimant to lose weight and discharged him from his care in May 1979. By stipulation and order dated July 11, 1979, claimant's unscheduled permanent partial disability award was increased to 88 degrees.

In September, 1979, claimant consulted Dr. Robertson, another orthopedic surgeon, who indicated that claimant's problem was more psychiatric than orthopedic and noted "a huge amount of functional overlay." In August, 1980, while working as a bartender at an Eagles Lodge, claimant hurt his back again, when he lifted two cases of empty beer bottles. He consulted Dr. Stainsby, a neurosurgeon, who diagnosed his condition as a sprain of the lumbar back and

recommended that he lose weight. Industrial Indemnity, the lodge's insurer, accepted the claim. It was closed by a December 8, 1980, determination order awarding time loss benefits only.

Claimant resumed working at the lodge as a card dealer but began to suffer new pains. Dr. Phifer diagnosed deQuervain's Disease and carpal tunnel syndrome. Industrial Indemnity accepted claimant's occupational disease claim for those conditions. In January, 1983, it referred claimant to the Callahan Center for a vocational assessment and rehabilitation program for his wrist and hand conditions. Dr. Storino examined him on his entry into the Callahan Center and found "a normal lumbar curve with good range of motion, no

subjective complaints of pain and no low back tenderness." The Callahan Center placed him on a weight reduction program and prescribed daily one-mile walks for exercise. His back began to hurt. After three days, he left, because of intolerable back pain, which he attributed to the walks.

Claimant returned again to Rockey, who ordered a CT scan. It provided no evidence of the cause of pain. Rockey reported to Georgia-Pacific that claimant remained partly disabled but that his back condition had not deteriorated since May 15, 1979. Rockey did not recommend any further course of treatment.

On March 9, 1983, claimant began seeing Dr. Carlstrom, a chiropractor, for his back problems. Carlstrom wrote to Georgia-Pacific, relating the condition to the 1977 injuries, reporting that claimant considered his condition worse and authorizing time-loss payments. On April 15, 1983, Georgia-Pacific denied responsibility for claimant's back condition on the ground that his back problems were related to his 1980 injury, at the Eagles Lodge rather than to the 1977 injury at Georgia-Pacific. On July 28, 1983, Industrial Indemnity denied claimant's low back claim, contending that his condition had not worsened and that, if it had, the worsening was not related to the August, 1980, injury.

After the initial hearing in November, 1983, the referee issued an interim order finding that claimant had "suffered a worsening of his low back condition, beginning in early 1983." He based that finding primarily on the facts that

claimant had managed to get along without substantial treatment for his back after 1980 until the Callahan Center incident in 1983 and that, after that, he had required frequent chiropractic treatments. The referee left the record open for the purpose of deposing Dr. Raaf on the issue of responsibility. Raaf had examined claimant in September, 1983, and had found no objective evidence to substantiate his complaints. It was Raaf's opinion that he had experienced no actual worsening of his back condition in early 1983 and that his claims of increased pain were largely fabricated.

We conclude that claimant has not met his burden of proving that his condition worsened in 1983. *Van Horn v. Jerry Jerzel, Inc.*, 66 Or App 457, 674 P2d 617, *rev den* 297 Or 82 (1984). Three doctors provided opinions on the question. Rockey and Raaf both believed that there had been no worsening. Rockey was the only one of the three who had treated claimant both before and after the Callahan Center incident.

Only Carlstrom thought that claimant's condition worsened in 1983. However, he saw claimant for the first time only after the worsening supposedly took place and was never provided a complete history of claimant's problems. In his deposition, he admitted that he had not reviewed the medical reports relating to the closure of the 1980 claim and that he had not reviewed the records from claimant's stay at the Callahan Center.

We do not doubt that claimant suffered a flare-up of

symptomatic pain while at the Callahan Center. We also recognize that he is not required to prove a worsening of his underlying condition, as opposed to his symptoms. *Consolidated Freightways v. Foushee,* 78 Or App 509, ___ P2d ___, *rev pending* (1986). He is, however, required to to prove that his flare-up of symptomatic pain rendered him more disabled than he was at the time of the last arrangement of compensation. ORS 656.273; *Consolidated Freightways v. Foushee, supra; Smith v. SAIF,* 78 Or App 443, ___ P2d ___ (1986). He has not done that. A person suffering from significant disability as a result of back injuries may experience occasional flare-ups of symptomatic pain, but that does not necessarily demonstrate increased permanent disability. Claimant has

not shown that his unscheduled permanent partial disability now exceeds the 88 degrees previously awarded.

Reversed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of A. G. McCullough, Claimant.

WEYERHAEUSER COMPANY,
Petitioner,

v.

McCULLOUGH,
Respondent.

(WCB No. 83-04115; CA A36287)

Judicial Review from Workers' Compensation Board.

Argued and submitted February 26, 1986.

Paul L. Roess, Coos Bay, argued the cause for petitioner. With him on the brief was Foss, Whitty & Roess, Coos Bay.

Michael R. Stebbins, North Bend, argued the cause for respondent. With him on the brief was Hayner, Stebbins & Coffey, North Bend.

Before Richardson, Presiding Judge, and Warden and Warren, Judges.

WARREN, J.

Reversed.

WARREN, J.

Employer seeks review of a Worker's Compensation Board order which affirmed the referee's determination that claimant's myocardial infarction was compensable.

Claimant suffered a heart attack shortly after climbing stairs in the course of his employment duties as a maintenance millwright. He indicated that he climbs stairs regularly

on his job but that he had climbed them somewhat faster on this particular occasion. Claimant is a smoker and suffers from diffuse coronary disease and high cholesterol. Four medical opinions were provided concerning whether the physical stress of climbing the stairs materially contributed to the onset of the heart attack, which reflects a continuing medical debate that frequently appears in Worker's Compensation cases. *See Bales v. SAIF,* 294 Or 224, 656 P2d 300 (1982); *Clayton v. Compensation Department,* 253 Or 397, 454 P2d 628 (1969).

There are several theoretical explanations for the onset of heart attacks, but no doctor was prepared to say unequivocally what the actual cause of the attack was in this case. The doctors' opinions were stated in terms of medical probability. Doctors Keene and Kloster believe that physical exertion rarely, if ever, leads to a heart attack and then only in the case of severe exertion for an extended period of time. In their view, neither the nature nor the duration of the exertion claimant experienced on the job was sufficient to bring on an attack. Doctors Henke and Griswold believe that the exertion could have and probably did bring on the attack. They rely heavily on the temporal relationship between the attack and the exertion. The Board's ruling concluding that the attack was compensable is based on the same reasoning, in spite of the fact that the Board expressly concluded that the medical opinions were in equipoise.

Given the *de novo* choice between the conflicting medical evidence, we are more persuaded by Kloster's opinion that the extent of the exertion and the other circumstances do not indicate a relationship between claimant's employment and his myocardial infarction.

Reversed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
William Vaandering, Claimant.

PROGRESS QUARRIES et al,
Petitioners - Cross-Respondents,

v.

VAANDERING,
Respondent - Cross-Petitioner,

TODD BUILDING et al,
Respondents - Cross-Respondents.

(WCB 82-07420; WCB 82-09180; WCB 82-09204, WCB 82-10649; CA A33651)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 5, 1985.

Jerald P. Keene, Portland, argued the cause for petitioners - cross-respondents. With him on the brief were Craig A. Staples, and Roberts, Reinisch & Klor, P.C., Portland.

John Uffelman, Hillsboro, argued the cause for respondent - cross-petitioner William Vaandering. With him on the brief was Brink, Moore, Brink & Peterson, Hillsboro.

John A. Reuling, Jr., Assistant Attorney General, Salem, argued the cause for respondents - cross-respondents Todd Building and State Accident Insurance Fund Corporation. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

William H. Stockton, Hillsboro, filed the brief for respondent - cross-respondent Coast Marine Construction.

Catherine Riffe, Portland, argued the cause for respondents - cross-respondents J. C. Compton Company and Argonaut Insurance. With her on the brief was Lindsay, Hart, Neil & Weigler, Portland.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

RICHARDSON, P. J.

On petition, affirmed in part, reversed in part; cross-petition rendered moot; referee's decision reinstated.

RICHARDSON, P. J.

The issue in this workers' compensation case is which of several employers is responsible for claimant's occupational diseases of hearing loss and tinnitus. Claimant filed occupational disease claims against most of the employers for whom he had worked since 1975. It was conceded that both conditions were work related and that the issue was which employer was responsible for each condition. The referee concluded that petitioner Progress Quarries was responsible for the hearing loss and that respondent Todd Building, insured by SAIF, was responsible for the tinnitus. On review, the Workers' Compensation Board held that petitioner was responsible for both conditions.

Progress Quarries and its insurer, Western Employers Insurance, petition for review. Claimant cross-petitions for review regarding attorney fees and an issue of extent of disability.

As a result of years of exposure to loud noise resulting from his job as a heavy equipment operator, claimant has a substantial hearing loss. He also suffers from tinnitus, a condition characterized by a steady and annoying ringing in his ears which can become disabling. Although the noise induced hearing loss and the tinnitus are closely related, they are distinct occupational diseases that have distinct causes.

We address the hearing loss claim first. Most of claimant's employments were of a kind that could have contributed to his hearing loss. The Board correctly concluded

that, in such a case, liability is assigned to the claimant's employer at the time that the disease results in disability. *Boise Cascade Corp. v. Starbuck*, 296 Or 238, 675 P2d 1044 (1984). Although claimant experienced progressive hearing loss and discomfort from the tinnitus, he continued to work. When, as here, a claimant is not actually disabled from work, the "triggering event" for assignment of responsibility is the date when claimant first seeks medical treatment for the condition. *SAIF v. Carey*, 63 Or App 68, 662 P2d 781 (1983).

Claimant first sought medical treatment for his ear problems on January 19, 1982, during a period when he was unemployed. The Board found that petitioner was responsible

for the hearing loss, because it had provided the last potentially causal employment before claimant's medical treatment. Petitioner contends it is not responsible, because claimant in fact worked for two other employers after he quit work at Progress Quarries and before he sought medical treatment. The most recent employer before the medical treatment was not named in claimant's claim. He worked for that employer, Jean Zimmerly Construction Company, from December 15, 1981, to January 4, 1982. He worked for approximately 11 days during that period. The next previous employer after Progress Quarries was respondent Coast Marine Construction. The referee and the Board concluded that Coast Marine was not subject to the Oregon Workers' Compensation Act, and that finding is not challenged or addressed by any party other than respondent Coast Marine.

Petitioner argues that it is entitled to use the last injurious exposure rule defensively by showing that a subsequent employment environment was potentially the cause of the disease. As a general proposition, that is correct; however, it must be established, at least, that the subsequent employment involved the conditions that are the major medical contributing cause of the disease. *Runft v. SAIF*, 78 Or App 356, 710 P2d 159 (1986). There is scant evidence to establish what the working conditions were at the Jean Zimmerly Construction Company work site or whether that work environment was such that it could have caused claimant's hearing loss or tinnitus. Petitioner has not established a basis for shifting responsibility for either condition to Jean Zimmerly Construction Company.

Petitioner argues in the alternative that, if Jean Zimmerly is not responsible, then the next subsequent employer, Coast Marine, is liable. The Board held, without elaboration, that, because claimant's employment with Coast Marine was out of state and not covered under Oregon's Workers' Compensation Act, petitioner, as the next employer in line, was responsible.

Claimant and SAIF argue that an employment not covered under Oregon's Workers' Compensation Act cannot be proffered defensively as a potentially causal environment of the claimed occupational disease. Petitioner cites *Miville v. SAIF*, 76 Or App 603, 710 P2d 159 (1985), and argues that

claimant must prove that he sought out-of-state benefits from

Coast Marine and received a final order disallowing them before it, as an Oregon employer, can be deemed responsible under the last injurious exposure rule. *Miville* involved the question of whether the claimant's back condition was an aggravation of a prior compensable injury or a new injury, and if so, which employer was responsible. The relevant employment following the original injury was out of state and not covered by Oregon's workers' compensation law. The medical evidence showed that the subsequent out-of-state employment contributed independently to the condition and that the Oregon employment materially contributed to the present disability. Had all employers been Oregon employers, the second employer would have been liable under the analysis in *Smith v. Ed's Pancake House,* 27 Or App 361, 556 P2d 158 (1976). Because the second employer was out of state, a finding of liability under Oregon law would not have operated against that employer and the claimant would not have been compensated for an admittedly employment related condition. The claimant had argued that *Grable v. Weyerhaeuser Company,* 291 Or 387, 631 P2d 768 (1981), applied and because the out-of-state injury, although job related, was not covered by Oregon's workers' compensation system, it should be categorized as an off-the-job injury. In that instance, the Oregon employer would be liable for aggravation benefits. In order to provide benefits under the Oregon compensation system and also to prevent a double recovery by claimant, we said that the claimant could recover in Oregon if he had filed a claim in the state where the second employer was located and was denied recovery. If, however, he did not file a claim or having filed a claim was awarded compensation in the other state, the Oregon employer would not be liable.

That opinion reflects an accommodation between the seemingly conflicting holdings of *Grable v. Weyerhaeuser Company, supra,* and *Smith v. Ed's Pancake House, supra,* and met the underlying policy of providing compensation for work related injuries. Although some of the same policy considerations apply respecting administration of the last injurious exposure rule regarding occupational disease, the analysis is not readily transferable to the problems of responsibility for an occupational disease. *Grable, Smith* and *Miville* all involve an initial compensable injury and a subsequent increased

disability of the same part of the body. They do not involve the problems of proof and responsibility which produced the disease-oriented last injurious exposure rule, under which issues are whether there is compensability in the first instance and which of the successive employers or carriers is responsible.

As the Supreme Court noted in *Bracke v. Baza'r,* 293 Or 239, 646 P2d 1330 (1982), the rule, which is for claimants' benefit, can operate fairly for employers if applied consistently. The basic overall fairness can be achieved only if application of the rule remains under control of the Oregon workers' compensation system. If out-of-state employment is considered, the systematic application of the rule breaks down. By reason of the analysis required under the last injurious exposure rule, only if the Oregon employment environment is injurious and a potential cause of the disease

can the claimant be entitled to compensation under the rule of proof aspect of the doctrine. An individual employer escapes liability because Oregon has no apportionment provision and because of a policy to award compensation for occupational disability despite a lack of precision in the proof. The doctrine would not be served by requiring this claimant to file a claim in Washington to determine if that state would provide some measure of compensation.

Petitioner is responsible under the last injurious exposure rule for claimant's hearing loss.

Claimant's tinnitus is work-related. Claimant testified that he first noticed the tinnitus while employed by petitioner, Progress Quarries. Claimant also testified that the whistling in his ears worsened, becoming higher in frequency and steadier, during his employment with respondent Todd Building. Petitioner argues that, under the last injurious exposure rule as explained in *Boise Cascade Corp. v. Starbuck*, *supra*, 296 Or at 243, responsibility shifts to a subsequent employer whenever the later employment conditions contribute to the cause of, aggravate, or exacerbate the underlying disease, and Todd should be held responsible for claimant's tinnitus.

The Board found, however, that:

> "In the absence of objective testing, we are not convinced that the worsening was anything more than the natural progression of his underlying tinnitus condition."

We find the Board's conclusion flawed. All the evidence indicates that, other than for verifying the existence of the condition, there is no objective way of determining the progression of tinnitus. The examining physician must rely on the patient's subjective testimony as the only means of determining if the condition has worsened.

Claimant testified that his tinnitus definitely worsened while he was at Todd. He stated that the condition peaked during that employment. The evidence indicated that even low levels of noise can aggravate tinnitus and that noise levels at Todd could in fact have aggravated claimant's condition. The referee found claimant to be a credible witness. The Board did not make an express credibility finding and, indeed, its decision was not based on claimant's credibility but on the lack of objective test results which were not obtainable. In this case the result hinges on claimant's credibility, because his testimony is the only evidence available regarding the aggravation of his tinnitus. We find, as the referee did, that Todd Building is the responsible employer,[1] and reinstate the referee's finding of responsibility and award of attorney fees regarding tinnitus.

Claimant's cross-petition regarding attorney fees is

[1] The referee reached this result by a slightly different method. He found that claimant was disabled by his employment with Todd Building and that that disability was the triggering event for purposes of the last injurious exposure rule. Todd disputes any finding that claimant left its employ disabled. We need not reach the matter because we have concluded that claimant's medical treatment was the triggering event for purposes of the last injurious exposure rule and that, pursuant to *Boise Cascade Corp. v. Starbuck*, *supra*, responsibility shifts to Todd as a subsequent employer where employment conditions exacerbated claimant's underlying disease.

resolved by our decision which reinstates the referee's order. He also asks that we make a finding based on supplemental evidence we allowed him to file in this court that his tinnitus condition is disabling. The issue is which employer is responsible for the condition. The extent of disability is not yet involved. The cross-petition is moot.

On petition, affirmed in part, reversed in part; cross-petition rendered moot; referee's decision reinstated.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Harold L. Dotson, Claimant.

DOTSON,
Petitioner,

v.

BOHEMIA, INC. et al,
Respondents.

(WCB 83-06463; CA A37168)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 23, 1986.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief were Evohl F. Malagon and Malagon & Associates, Eugene.

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, Solicitor General, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

Affirmed.

WARREN, J.

Claimant seeks review of an order of the Worker's Compensation Board (Board) which denied his attorney a fee for defending the referee's order after SAIF initiated a review. Claimant filed a claim for a cervical spine condition. Before the hearing, the parties had resolved all issues on the claim except for the amount of the fee claimant's attorney was entitled to recover; that was the only issue presented to the referee. The referee found that $2,000 was a reasonable fee and ordered that SAIF pay that sum to claimant's attorney. SAIF requested that the Board review the order, arguing that the attorney's fee should be reduced. The Board affirmed the referee's order. Claimant's attorney also requested that the Board award him a fee for successfully defending the award of an attorney fee on review. The Board denied his request, and claimant appeals from this order.

Claimant bases his argument on ORS 656.382(2), which provides:

> "If a request for hearing, request for review, appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court is initiated by an employer or insurer, and the referee, board or court finds that the compensation awarded to a claimant should not be disallowed or reduced, the employer or insurer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney fee in an amount set by the referee, board or the court for legal representation by an attorney for the claimant at and prior to the hearing, review on appeal or cross-appeal."

Claimant argues that, because the Board did not disallow or reduce the attorney fee awarded by the referee, his attorney is entitled to recover a fee for his services from SAIF. The issue is whether an attorney fee ordered to be paid by the insurer is an element of "compensation" as the term is used in ORS 656.382(2).

ORS 656.005(9) sets forth the definition of compensation:

> " 'Compensation' includes all benefits, including medical services, provided for a compensable injury to a subject worker or the worker's beneficiaries by an insurer or self-insured employer pursuant to this chapter."

Claimant argues that "compensation" encompasses any benefit that he receives through the workers' compensation laws and that having SAIF pay his attorney a fee is such a benefit. SAIF responds that, although its paying claimant's attorney's fee is a benefit to claimant in the broad sense of the term, "benefits" in ORS 656.005(9) should have a narrower, more specific meaning.

We agree that the definition of compensation in 656.005(9) calls for a narrower interpretation of "benefit" than claimant's. Compensation is defined as "all benefits * * * provided *for a compensable injury to a subject worker* * * *." (Emphasis supplied.) We think that the legislature intended "benefits * * * provided for a compensable injury" to refer to those set forth in ORS 656.202 to ORS 656.258. These include payments for a worker's death, disability, medical services and vocational assistance. Attorney fees are provided for legal services, and not for a compensable injury, and are addressed in ORS 656.382 to ORS 656.388. We hold that the term "compensation" in ORS 656.382(2) does not include attorney fees and that the Board properly denied claimant's attorney a fee for the review in this case.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Loretta C. Loehr, Claimant.

LOEHR,
Petitioner,

v.

LIBERTY NORTHWEST INSURANCE
CORPORATION et al,
Respondents.

(WCB 83-10921; CA A35420)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 20, 1985.

W. D. Bates, Jr., Eugene, argued the cause and filed the brief for petitioner.

Craig A. Crispin, Portland, argued the cause for respondents. With him on the brief were Jonathan T. Harnish, and Bullard, Korshoj, Smith & Jernstedt, P.C., Portland.

Before Richardson, Presiding Judge, and Newman and Deits,* Judges.

DEITS, J.

Affirmed.

* Deits, J., *vice* Warden, J.

DEITS, J.

Claimant seeks review of a Workers' Compensation Board order denying her benefits for an allegedly work related condition of her left wrist. We affirm.

Claimant, who was 35 years old at the time of the hearing, began working as a billing clerk for McCracken Motor Freight on May 2, 1983. On October 20, 1983, while working at a computer terminal, she extended her little finger to touch a key and felt a sharp pain in her left wrist. She reported the pain to her supervisor and stopped the data entry work. The following day she sought treatment from her family physician, Dr. Williams, but in his absence was seen by Dr. Albright. He diagnosed "typical tendonitis" and noted that claimant had had a "similar problem" five months earlier, on May 1, 1983, when she had been seen in an emergency room for sharp left wrist pain. Williams saw claimant five days after the incident at work. He diagnosed flexor-ulnar tendonitis, prescribed medication and a splint and took claimant off work until the condition improved. She was referred to two orthopedic surgeons, neither of whom offered an opinion concerning causation of the condition.

The referee found claimant to be credible and concluded that there was no medical evidence to indicate that the

tendonitis was not related to her work. The referee ordered the insurer to accept the claim and awarded a 25 percent penalty and attorney fees for unreasonable denial.

The insurer appealed, and the Board reversed, finding that Williams' opinion was unpersuasive in the light of claimant's earlier problems with her left wrist. The Board concluded:

> "We do not find Dr. Williams' opinion persuasive. Considering claimant's medical history, we think it was incumbent upon her to submit an expert analysis of her prior left wrist problems, distinguishing them from her current complaints. Moreover, a discussion of the potential contribution, if any, from claimant's 'stroke' and import business duties would also have been enlightening. In the absence of a cogent analysis and conclusion from a medical expert on this complex and pivotal issue of causation, claimant's attempts at a distinction between her prior and current left wrist problems are unpersuasive."

The key issue is whether claimant proved by a preponderance of the evidence that her work activities were either a material contributing factor in producing the injury or the major contributing cause of a disease or worsening of a preexisting condition. We conclude that claimant did not sustain her burden of proof.

The evidence supporting the conclusion that her work activities caused the disability or condition consists primarily of testimony by claimant explaining how the condition occurred and what action she took following the incident. The medical evidence consists of bare conclusions and does not provide any explanation of how her work activities caused her condition. In his medical report Williams diagnosed claimant's condition as flexor-ulnar tendonitis and checked "yes" in response to the question on the form "Is condition work related?" However, Williams' explanation of his medical report in later correspondence with the employer indicates that his opinion regarding medical causation is not entitled to much weight.

On November, 7, 1983, the employer wrote Williams stating the reasons for the denial and asking him to explain why he believed claimant's condition was related to her work. The employer explained the denial:

> "Our main reasons for denying this claim are that she was treated May 1, 1983 for a similar, if not the same, type of complaint but denied this information when we asked her. She was not employed by McCracken Motor Freight at that time. Secondly, we are aware of her involvement with her own company and question the amount of exposure on that job that would contribute to her problem. Last, it seems that her condition would improve without use of her left wrist and although she has been off work since October 20, 1983 her condition apparently remains unchanged."

In his response Williams stated that he did not "quarrel with any of the points made" and explained that he based his opinion regarding the injury being work related "on the statements made by the patient, as she very clearly indicated to me that she felt her job as the biller was the reason for her distress."

Other evidence indicates that claimant had suffered from similar left wrist pain before this employment. Although

she testified, in response to a question as to whether she had had previous problems with her left wrist, that she had not had tendonitis before, she did have a history of similar problems with her left wrist. In October, 1979, she complained to her doctor of a sore left ulnar styloid. During her May 1, 1983, visit to the emergency room she complained of sharp left wrist pain and deformity of the ulna. The notes of the physician who treated her immediately following her October, 1983, injury indicate claimant "had similar problems in May this year."

We conclude that claimant has not sustained her burden of proof of establishing the required causal connection between her work activities and the condition. Although she refers to her complaint as an "injury," it does not appear to be the sort of injury the cause of which can be determined by a nonexpert. Her history of similar complaints calls for *some* explanation of the causal relation between her work activities and her tendonitis. Her physician's conclusory statement is simply not sufficient. Claimant has not proven that her work activities were either a material contributing factor in producing her injury or the major contributing cause of a disease or worsening of a preexisting condition. *See Moe v. Ceiling Systems,* 44 Or App 429, 606 P2d 644 (1980).

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Jeffrey L. Linday, Claimant

LINDAY,
Petitioner,

v.

SAIF CORPORATION et al,
Respondents.

(WCB 84-06636; CA A36920)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 10, 1986.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief were Christopher D. Moore 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 Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

WARDEN, P. J.

Affirmed.

WARDEN, P. J.

Claimant seeks judicial review of a Workers' Compensation Board order that upheld the closure of his claim by a determination order dated June 15, 1984, and made a permanent partial disability award for the loss of use of his right leg. Claimant asks that we set aside the determination order as premature or, alternatively, that we remand for reopening to consider claimant's lumbosacral sprain as an aggravation of his compensable industrial injury. We affirm.

Claimant broke his ankle in a logging accident on March 5, 1979. After several years, ankle fusion surgery was performed by claimant's treating physician, Dr. Van Olst. As a result of his injury, claimant's right leg is significantly shorter than his left, and he walks with a pronounced limp. In a May 15, 1984, letter to SAIF, Van Olst reported that claimant's medical condition was medically stationary and no further treatment was called for. He recommended that the claim be closed.[1] A neurological report from Dr. Brooks, who examined claimant on Van Olst's referral, was also submitted to SAIF. That report indicated that claimant had suffered increasing leg, hip and back pain ever since his compensable injury. Nothing in Brooks' report contradicts Van Olst's conclusion that claimant was medically stationary, and we find that the 1984 claim closure was justified.

Claimant was awarded 90 degrees scheduled permanent partial disability when the claim was closed in 1984. He was then referred to the Callahan Center for a vocational assessment. In a report dated July 16, 1984, Dr. Toon stated:

> "The main problem here will be weight bearing on the right leg and future employment should avoid prolonged standing or sitting, walking, stairs, ladders, uneven terrain, and heavy lifting. Within the above restrictions, this patient should be able to handle light to medium work."

In August, 1984, claimant sought treatment from Dr. Wichser, who reported that he had "severe muscle spasms in his right leg and back secondary to abnormal ambulation on

his operated ankle." The report was forwarded to SAIF and constituted a claim for aggravation. *Haret v. SAIF*, 72 Or App 668, 697 P2d 201, *rev den* 299 Or 313 (1985).

Van Olst examined claimant again for his lower back complaints on September 10, 1984. The examination revealed that he had a full range of motion in his back except for some loss in right and left rotation, with tightness but no pain. Use of a previously prescribed one-half inch shoe lift on the right leg leveled claimant's mild pelvic tilt and led to a marked decrease in lower back pain. Van Olst concluded that the ankle condition remained stable and that he was medically stationary. The low back pain was secondary to the shortening of his right leg and constituted a lumbosacral sprain, which was stabilized with the use of the shoe lift.

[1] ORS 656.005(17) reads:

" 'Medically stationary' means that no further material improvement would reasonably be expected from medical treatment, or the passage of time."

SAIF informed claimant on September 28, 1984, that it had concluded that his condition had not materially worsened and that his aggravation claim was denied. On October 14, 1984, Wichser reported that claimant's status had "markedly improved." He noted that the muscle spasm in the leg was no longer a "material problem" and made no mention of claimant's back spasm, although a reasonable inference would be that it too had been alleviated. Van Olst issued a follow-up report to the Board on December 11, 1984, stating:

> "[Claimant's] back complaints were never incapacitating and it is my impression that he would not require any additional limitations [to those prescribed for his ankle condition] other than wearing a previously prescribed heel lift in the right boot. The back problem was never disabling but was aggravating and is stabilized by the use of the heel lift."

A hearing was held on the denial of the aggravation claim. The referee found that the medical reports objectively demonstrated that claimant had no increased disability beyond the 1984 award. We note that the restrictions placed on claimant by Wichser when his muscle spasm problem was at its worst were no more severe than those recommended previously because of his ankle condition. The referee concluded:

> "Claimant's back problem, while arising from the right leg surgery, was temporary in nature and has been largely alleviated through use of a shoe lift and physical therapy."

We have previously explained that, in a claim for

aggravation, "a claimant must prove by a preponderance of the evidence a worsening of his condition since the last award or arrangement of compensation and a causal relation between the worsening and his compensable injury." *Hoke v. Libby, McNeil & Libby,* 73 Or App 44, 46, 697 P2d 993 (1985); *Brewer v. SAIF,* 59 Or App 87, 650 P2d 947 (1982). In this case, one result of claimant's compensable injury was a shortening of his leg which ultimately required the use of a shoe lift. Without the lift his condition became symptomatic with low back pain. The symptoms were alleviated after a brief period of therapy.

At the hearing, claimant was not using the lift and continued to complain of back pain while acknowledging that use of the lift alleviated the pain. We agree with the referee's finding that the medical evidence provides objective evidence that his condition had not materially worsened since the last award of compensation. As in *Hoke v. Libby, McNeil & Libby, supra,* claimant's complaints of pain fail to sustain his burden of proof in the light of objective medical evidence indicating that there was no worsening.[2] Moreover, the record also shows that, although claimant has some back pain, he is not further disabled by it. The workers' compensation law does not compensate for pain, but only for the disabling effects of pain. *Harwell v. Argonaut Insurance Co.,* 296 Or 505, 509, 678 P2d 1202 (1984).

Affirmed.

[2] A July, 1984, psychological evaluation by Dr. Norman indicated that claimant was likely to overstate his current level of physical discomfort and overevaluate minimal physical dysfunction.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Appellant,
v.
GERALD CLIFTON MOCK,
Respondent.
(CF 85-312; CA A37405)

Appeal from Circuit Court, Umatilla County.

Robert B. Abrams, Judge.

Argued and submitted April 9, 1986.

Kendall M. Barnes, Assistant Attorney General, Salem, argued the cause for appellant. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Dennis A. Hachler, Pendleton, argued the cause and filed the brief for respondent.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

WARDEN, P. J.

Reversed and remanded.

WARDEN, P. J.

The state appeals an order dismissing, with prejudice, a charge against defendant of felony driving while suspended. We hold that the trial judge abused his discretion and reverse.

The record indicates that the proceedings below were fraught with frustration and confusion, but it does not reveal grounds for dismissal of the charge. Trial commenced on August 27, 1985. During *voir dire* examination of potential jurors, a controversy arose over one of the state's questions. In a discussion with the prosecutor and defense counsel in chambers, the judge limited the issues which the state could pursue. Although the judge was apparently attempting to limit only the scope of the state's examination on *voir dire,* the prosecuting attorney understood the judge's comments to apply to the trial itself. Interpreting the court's ruling as a pretrial evidentiary order, the state requested a continuance to pursue an appeal. *See* ORS 138.060.

Defense counsel responded to the state's request for a continuance by asking for a mistrial, alleging improper conduct by the state. The trial judge orally granted a mistrial. Then the state asked that the grounds for the mistrial be based on an impermissible suggestion to the jury, to preserve the state's ground for appeal. The judge agreed to that request. For some unexplained reason, he subsequently signed an order granting a continuance, as originally requested by the state, instead of a mistrial, and set the trial for September 10, 1985.

Apparently the prosecutor realized that he had misunderstood the court's ruling limiting the scope of *voir dire* examination, and he requested a hearing, offering to withdraw the request for a continuance. This momentary lapse into reasonableness by the prosecutor quickly deteriorated into a verbal clash between him and the judge over the same issue that interrupted the earlier proceeding. The trial judge indicated at various points in the discussion that he was prepared to dismiss the case and ultimately did so, entering an order of dismissal dated September 5, 1985.[1]

There is some question as to the authority under which the judge proceeded. Defendant never moved to dismiss the case. ORS 135.755 authorizes a trial judge to dismiss a case on the court's own motion, "in the furtherance of justice." The statute requires that the reasons for the dismissal be set forth in the order. No reason is given for the dismissal in the order, nor can we glean one from the record before us. The court's frustration with the prosecutor's insistent arguments is apparent, but justice was not furthered by dismissal. *State v. Love,* 38 Or App 459, 462, 590 P2d 741, *rev den* 286 Or 303 (1979).

Defendant argues that the dismissal could have been based on ORS 136.120, which allows a dismissal when the prosecution is not prepared to go forward on the scheduled trial date. There is no indication that the prosecutor could not or would not proceed, if he had been directed to by the court. He asked for and received a continuance for the purpose of considering an appeal of what he thought was a pretrial order, but for reasons not adequately explained to us, the trial judge dismissed the case before the expiration of the period of continuance.[2]

It appears that the trial judge became annoyed with the confusion and the argumentativeness of the prosecutor and dismissed this case in frustration. That does not justify dismissal of the charge. *State v. Hansen,* 37 Or App 461, 587 P2d 508 (1978).

Reversed and remanded.

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[1] Defendant argues that this court lacks jurisdiction to hear this appeal because the order dismissing the case was entered after it had been called to trial. That issue was settled by *State v. Hattersley,* 294 Or 592, 660 P2d 674 (1983), which held that such orders were appealable after jury selection had begun but before the jury was impaneled and sworn.

[2] Furthermore, ORS 136.130 directs that dismissal of a felony charge under ORS 136.120 is not a bar to further proceedings unless so directed by the court. If the court so directs, ORS 136.130 requires that a judgment of acquittal be entered. No such judgment was entered in this case and thus the trial court did not properly proceed under ORS 136.120, if indeed that was the intended ground for the dismissal.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of N. M. Calkins, Claimant.
STATE ACCIDENT INSURANCE
FUND CORPORATION,
Petitioner,
v.
CALKINS,
Respondent.
(WCB 84-02109; CA A36977)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 18, 1986.

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.

James L. Edmunson, Eugene, argued the cause for respondent. With him on the brief was Malagon & Associates, Eugene.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

WARDEN, P. J.

Reversed.

WARDEN, P. J.

SAIF petitions for review of a Workers' Compensation Board order awarding claimant, who is permanently and totally disabled, $5 per week for two of his children who are over age 18 and are attending college. The issue is whether the statute in effect at the time of the injury defined "beneficiary" to include a child over age 18 who is attending college. We reverse.

Claimant was injured in 1976 and was awarded permanent total disability. The ages of his three children are 23, 21 and 19. Two of the children are attending school; the other is self-employed. SAIF reduced claimant's award by $5 per week when each child reached age 18. The Board and the referee construed ORS 656.206(2) as it existed in 1976 to have the same meaning as it does after a 1983 amendment, which provided benefits for children in college, and increased claimant's award by $5 per week for each child attending college.

Both parties agree that the law in effect at the time of the injury controls. ORS 656.202(2). When construing a statute, if the meaning is clear and unambiguous, it must be applied as written, without resort to extrinsic aids such as legislative history. Statutes are not read in isolation, but as parts of the act as a whole. *See Davis v. Wasco IED,* 286 Or 261, 593 P2d 1152 (1979).

At the time of the injury, ORS 656.206(2) provided:

> "When permanent total disability results from the injury, the workman shall receive during the period of that disability compensation benefits equal to 66-2/3 percent of wages not to exceed 100 percent of the average weekly wage nor less than the amount of 90 percent of wages a week or the amount of $50, whichever amount is lesser. In addition, the workman shall receive $5 per week for each additional beneficiary not to exceed five."

ORS 656.005(3) defined "beneficiary" as "an injured workman, and the husband, wife, child or dependent of a workman who is entitled to receive payments under this chapter * * *." ORS 656.005(6) defined "child" to include

> "a posthumous child, a child legally adopted prior to the injury, a child toward whom the workman stands in loco parentis, an illegitmate child and a stepchild, if such stepchild

> was, at the time of the injury, a member of the workman's family and substantially dependent upon him for support. An invalid dependent child is a child, for purposes of benefits, regardless of his age, so long as the child was an invalid at the time of the accident and thereafter remains an invalid substantially dependent on the workman for support. For purposes of this chapter, an invalid dependent child is considered to be a child under 18 years of age."

Although the statute did not specifically define "child" to be a person under age 18, reading the act as a whole, that is its clear and unambiguous meaning. We need not examine legislative history.

ORS 656.005(6) provided that an invalid dependent child of any age is to be considered to be a child under age 18. It clearly implied that benefits would ordinarily cease when a child other than an invalid dependent child reached age 18. If that was not the case, there would be no need for the language equating an invalid dependent child of any age with a child under age 18.[1]

Claimant is correct in pointing out that the act is remedial in nature and should be liberally construed in favor of the injured worker. However, we are not at liberty to do so by departing from its clear language. *Reynaga v. Northwest Farm Bureau,* 300 Or 255, 262, 709 P2d 1071 (1985). Workers' compensation law is purely statutory. *Nelson v. SAIF,* 43 Or App 155, 602 P2d 341, *rev den* 288 Or 173 (1979), *cert den* 446 US 980 (1980). At the time of the injury, the statute did not provide the benefit that the Board awarded.

Reversed.

[1] Other sections of the act illustrate that "child" meant only a person under age 18. ORS 656.005(11) defined "dependent" as certain relatives of a deceased workman, including a "child under the age of 18 years." *See* Or Laws 1975, ch 556, § 10. ORS 656.204 provided for compensation if the worker died from the injury. That statute awarded benefits for a child until age 18; however, it also specifically extended benefits, under certain circumstances, beyond age 18. From ORS 656.204 it is evident that the legislature knew how to extend benefits to children in college who are older than 18. It did so for children of deceased workers. Only in 1983 did the legislature extend these benefits to children of permanently and totally disabled workers as well. Or Laws 1983, ch 816, § 3.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Dennis L. Hankins, Claimant.

HANKINS,
Petitioner,

v.

UNITED PACIFIC INSURANCE et al,
Respondents.

(WCB No. 83-10401; CA A35948)

Judicial Review from Workers' Compensation Board.

Argued and submitted February 3, 1986.

David C. Force, Eugene, argued the cause and filed the brief for petitioner.

William H. Stockton, Hillsboro, argued the cause and filed the brief for respondents.

Before Joseph, Chief Judge, and Warren and Rossman, Judges.

ROSSMAN, J.

Reversed; referee's order reinstated.

ROSSMAN, J.

Claimant seeks review of a Workers' Compensation Board order which reversed the referee and held that his back surgery was not compensable as an aggravation of an earlier injury. On *de novo* review, we reverse.

In May, 1983, while working for employer as a vinyl applicator, claimant suffered the compensable back injury on which the present aggravation claim is based. Immediately after the injury, he saw Dr. Bachhuber, who diagnosed lumbar strain. The claim was closed on August 10, 1983, with no award of permanent partial disability.

Claimant was laid off in July, 1983, and went to Alaska with his nephew to seek employment in the construction industry. He and several witnesses testified that he did that in spite of weakness and numbness in his right leg. He worked as a framer until he began to experience pain in his mid-back which eventually spread to his right leg. After three weeks, he could not bear the pain, and he began working as a finishing carpenter. Even that was too much for him, and he returned to Oregon in October, 1983. He testified that, while in Alaska, he did not experience any incident or accident which precipitated the increased pain. The referee found him credible.

Claimant again consulted Bachhuber, who diagnosed a herniated disk and expressed the opinion that the herniation had occurred in Alaska. Bachhuber did not offer an opinion as

to whether the herniation was caused by claimant's work in Alaska or by other circumstances:

> "Q: Then you don't know, in fact, whether it occurred and developed while in Alaska?
>
> "A: Yes, it did occur in Alaska. But I have no idea whether it's from stepping out of the bath tub, from sitting on the toilet, from turning over in bed or from his work. * * *"

Bachhuber explained that, when he saw him before the Alaska trip, claimant did not display the right leg symptoms indicative of a disk herniation which he had when he returned from Alaska. That testimony contradicts the testimony of four other witnesses. Because he believed that there were no prior right leg symptoms, Bachhuber concluded that claimant's work with employer did not contribute to the herniation. On

the other hand, Dr. Smith, who operated on claimant's back in November, 1983, believed that the disk problem was directly related to the 1983 injury.

Claimant has the burden of proving that his injury is a material contributing cause of his worsened back condition and that no intervening incident contributed independently to the condition. *Smith v. Ed's Pancake House,* 27 Or App 361, 556 P2d 158 (1976). Bachhuber expressed no opinion as to whether the herniation was employment related. There is evidence that claimant was doing work which could have affected his back, but no direct evidence that the work gave rise to the herniation. If the herniation was brought on by nonemployment conditions in Alaska, it would be compensable as an aggravation, as long as the 1983 injury remained a material contributing cause. *Grable v. Weyerhaeuser Company,* 291 Or 387, 631 P2d 769 (1982). Smith's opinion that claimant's condition was brought on by the injury is consistent with the other evidence that the injury was a material contributing cause. The insurer's attempt to prove that the Alaskan employment contributed independently to the cause of his disk herniation is unpersuasive. The claim is compensable.

Reversed; referee's order reinstated.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Patrick K. Richards, Claimant,

RICHARDS,
Petitioner,

v.

ARGONAUT INSURANCE COMPANIES et al,
Respondents.

(82-11053; CA A34477)

Judicial Review from Workers' Compensation Board.

Argued and submitted November 20, 1985.

Robert M. Lusk, Portland, argued the cause for petitioner. With him on the brief was Duncan, Lusk & Strock, Portland.

Patric J. Doherty, Portland, argued the cause for respondents. With him on the brief were Karli L. Olson and Rankin, McMurry, VavRosky & Doherty, Portland.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

NEWMAN, J.

Reversed and remanded for acceptance of claim.

Warden, J., dissenting.

NEWMAN, J.

Claimant seeks review of an order of the Workers' Compensation Board which affirmed and adopted an order of the referee which had denied his aggravation claim.[1] We reverse.

Claimant sustained a compensable injury to his right knee on April 16, 1979. He was treated by Dr. Mandiberg, an orthopedic surgeon, who performed a medial meniscectomy on the knee on July 9, 1979. During the operation, he also removed a small fragment of the lateral meniscus. Postoperatively, claimant developed a foreign body infection that required drainage of the knee and two weeks of hospitalization. Thereafter he made a rapid recovery, and on October 3, Mandiberg reported that his "range of motion is excellent and he states that he feels 100 percent." Claimant did not return to Mandiberg for further treatment. His claim was closed by a June 4, 1980, determination order that awarded him 7.5 degrees permanent partial disability for the right knee.

[1] ORS 656.273(1) provides:

"(1) 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."

Claimant terminated his employment with employer in November, 1979. He was then employed intermittently in construction work and as a janitor. In August, 1980, while working on a construction project, he slipped and twisted his right knee. He went to an emergency room, from which he was released with these instructions:

> "(1) decrease [weight] bearing, ace bandage (2) off work for 5 days (3) follow up with assigned orthopedist (4) Tylenol II [every] 6 [hours] for pain."

There is no evidence that claimant visited an orthopedist for that injury. His claim was closed in December, 1980, with an award of three days' time loss.

In September, 1982, claimant experienced severe pain in his right knee while playing softball. He quit playing the game and, when the pain did not subside after four or five days, sought medical treatment through a referral service. He

testified that he did not return to Mandiberg initially, because he was dissatisfied with the care that he had received after his 1979 injury. He was referred to Dr. Sirounian, who took x-rays and diagnosed a knee strain. Sirounian, however, recommended that claimant contact Mandiberg so that the x-rays could be compared with the 1979 x-ray.

On September 16, 1982, Mandiberg saw claimant and recorded the following history:

> "Mr. Richards was seen by me about two or three years ago at Kaiser. At that time I did a right medial meniscectomy. I have no other records here as to the exact circumstances of the original injury, although it was a Workmans' Compensation injury. The patient tells me that since his surgery he hasn't been having a problem with his cartilage but he always has grating in his kneecap. That problem was one that he lived with.
>
> "About a year and a half ago he lost his job due to the general down turn in the economy and he hasn't worked since that time. He has gained about 15 or 20 pounds minimum according to him. He has been playing sports such as softball and racquetball without any difficulty until about a week ago when he heard a pop and his knee gave way on him. Since that time he has had swelling. He saw Dr. Sirounian who evaluated him and told him there was something wrong with his kneecap."

He diagnosed a "chondromalacic problem that [had] been existent for at least 2-3 years," but stated that the injury was unrelated to the 1979 injury. He prescribed medication and instructed claimant to do strengthening exercises and to return in three weeks.

Claimant did not return to Mandiberg but, instead, went to the Sports Medicine Clinic, where he was seen by Dr. Wells, another orthopedic surgeon. He told Wells that, since the 1979 injury, he had had ongoing problems with his knee, particularly after activity. He claimed that, because of that injury, he was no longer able to run without a definite limp and was limited in his ability to play softball.

After his initial consultation with claimant, Wells obtained and reviewed claimant's x-rays, which he found to be incomplete. Eventually, he performed surgery and removed a tear of the lateral meniscus. In a letter to claimant's counsel, he reported on the surgery:

"We eventually got hold of the operative reports, felt that further exploration was warranted and as a consequence, [claimant] underwent arthroscopy by myself on 1-4-83, where a rather complex horizontal cleavage tear of the lateral meniscus *which was obviously old,* extending clear back to the popliteus recess was found, with secondary chondromalacia of the lateral tibial plateau, and also evidence of the previous total medial meniscectomy.

"* * * * *

"Prognosis for recovery is fair, and is fair only because of the rather extensive degenerative damage to the articular cartilege [*sic*] as a result of this meniscal tear, indicating *it was old. The fact that a partial meniscal tear was found at the time of his original arthrotomy would tend to imply that the present knee condition dates back to his injury of April, 1979 and I feel that the evidence would indicate that the initiating factor for his present difficulties is indeed based on that injury."* (Emphasis supplied.)

The insurer solicited Mandiburg's opinion as to the relationship between claimant's 1979 and 1982 injuries. He stated:

"The question is whether the tear of the lateral tibial plateau and the articular cartilage was there as a result of the first injury in 1979, or the result of an injury in 1982. I did note in my 1979 operative report that I removed a tag of cartilage. At that time an arthroscopy revealed no significant tears through the lateral portal. I did not see any significant articular damage at that time. Within two months of his operation he had a full range of motion and was complaining of no significant difficulties. In his office visit to me in 1982, he again complained of no difficulties except for some minimal chondromalacia in the patella area until his injury of September, 1982. In light of that history, the chondromalacia he complained about to me is not of significant importance. *The tear of his lateral meniscus as seen by Dr. Wells may have resulted from his first injury, but there is no way I want to state this.* The interim three years was essentially negative for any meniscal pain, and it was only after his fall in September, 1982, that he began to have problems, according to the history given to me at that time." (Emphasis supplied.)

Wells responded:

"I continue to feel that considering the very tattered nature of the lateral meniscal tear, the secondary articular cartilege [*sic*] damage, that this spoke strongly of the presence of this lesion

over a prolonged period of time, though I am unable to state medically, how long. I would be able to state, however, that they had been there longer than three months.

"I personally did not find Mr. Richards' history to be implausible considering what I saw at arthroscopy and what I have been able to determine from further examinations of him serially.

"* * * * *

"As far as the significance of a symptomatic versus symptoms free interval between 1979 and 1982, since this is largely subjective, and from my viewpoint entirely historical, it will be almost impossible for me to draw very precise conclusions from the information I have available to me. I would only state

that if a tear has been initiated within a meniscus, that with time and re-injury, an extension tear tends to occur and this may not be catastrophic or tear all at one instance, but feeling that the initial tear represents a defect from which the lesion can continue, much as a crack or defect in a window of an automobile will tend to perpetuate itself unless stopped by drilling a hole in the end of it or otherwise relieving the stress at that particular point."

"* * * * *

Going back to Dr. Mandiberg's examination, *if this were a true torn meniscus or a tag of torn meniscus* [cartilage] *that was removed, I think it is very likely that there was a tendency for continuation to occur at the level of this defect and that this represents a probable explanation of the findings found in my arthroscopy of 1983.* If this were a synovial tag, having nothing to do with the substance of the meniscus, then my conclusions would have to be different. However, I would again state that it is my opinion that the change in the lateral meniscus was certainly of greater duration than three months." (Emphasis supplied.)

The laboratory report in 1979 indicated that the "tag" of lateral meniscus removed was cartilage, not synovia. Wells and Mandiberg are the only doctors giving opinions in this case. Neither knew of claimant's 1980 injury.

Insurer denied the aggravation claim, and claimant requested a hearing. Consistent with the history that he had given Wells, he testified that he had experienced knee problems intermittently since the 1979 injury. His wife and another witness corroborated his testimony.

The referee affirmed the denial. He did not consider claimant a credible witness and found that the history that he had given Mandiberg was probably accurate. He, therefore, credited Mandiberg's opinion over Wells'. As to Wells' assertion that the underlying injury was "certainly of greater duration than three months," he stated only: "There is no evidence that Dr. Wells was aware of the August, 1980, incident nor that he was aware of all of claimant's athletic and work activities." With one member dissenting, the Board affirmed and adopted the referee's order.

Claimant argues that, even if we accept the Board's finding that he was not a credible witness, he has still proven by objective medical evidence that his 1982 softball injury was an aggravation of his 1979 compensable injury.

In order to prevail on his aggravation claim, claimant must show by a preponderance of the evidence that his compensable injury was a material contributing cause of his worsened condition. ORS 656.273(1); *Grable v. Weyerhaeuser*, 291 Or 387, 401, 631 P2d 768 (1981). If the compensable injury was such a cause, the condition is compensable as an aggravation, even if something else precipitated it. *Taaffe v. SAIF*, 77 Or App 492, 713 P2d 680 (1986).

The preponderance of the medical evidence establishes a causal relationship between the 1979 injury and the 1982 softball injury. Wells stated that the tear in the lateral

meniscus clearly predated the softball injury and probably had its genesis in the 1979 injury.[2] He based his opinion primarily on his observations during surgery and on the nature of the previous injury. Although his initial opinion was based in part on claimant's report of his symptoms between 1979 and 1982, he reaffirmed that opinion after learning that claimant may have been "symptom free" during those years.

Mandiberg's opinion that the 1982 injury was unrelated to the 1979 injury, on the other hand, was based almost entirely on claimant's report to him that he had experienced

little knee discomfort in the interim between the injuries.[3] The validity of that, however, is severely undercut by Wells' observation, which the referee apparently accepted, that the tear was "old." If the tear predated the 1982 injury, it apparently did not cause claimant discomfort before that injury. Accordingly, claimant's lack of symptoms before the softball incident is not evidence that the 1982 injury was unrelated to the 1979 injury. The referee explains Wells' finding that the tear was "old" by citing the 1980 knee injury of which he was unaware. There is, however, *no* medical evidence to support the contention that the damage to claimant's lateral meniscus began with that injury, which, on this record, appears to have been minor.

Claimant had no knee problems before his 1979 injury. There was at least some damage to the lateral meniscus at that time. Dr. Wells indicated that the 1982 tear was old and probably related to the 1979 injury. There was no proof of a serious intervening injury between 1979 and 1982. We find that claimant proved by the preponderance of the evidence that the 1979 injury was a material contributing cause of his 1982 injury, and, accordingly, claimant's aggravation claim is compensable.

Reversed and remanded for acceptance of claim.

WARDEN, J., dissenting.

Because I would affirm the order of the Workers' Compensation Board, I respectfully dissent.

As the majority correctly points out, for claimant to prevail on his aggravation claim, he must prove by a preponderance of the evidence that his 1979 injury was a material contributing cause of the worsening of his knee's condition in 1982. ORS 656.273(1); *Grable v. Weyerhaeuser,* 291 Or 387, 631 P2d 768 (1981). He has not done so.

Both Dr. Mandiberg and Dr. Wells had to rely on histories given by claimant. Mandiberg had performed surgery on claimant's right knee after his 1979 compensable injury and found that the range of motion in the knee after treatment was excellent. At that time, claimant told Mandiberg that he felt "100 percent." When his knee "popped" while he was

[2] Specifically, Wells believed that the tag of lateral meniscus removed in 1979 was associated with the defect that resulted in the 1982 tear.

[3] In his letter to insurer's counsel, he stated:

"The reason why I felt the patient was most likely suffering from a new injury was because of the relative lack of symptoms between the time of his surgery and the time of his visit."

playing softball in September, 1982, he returned to Mandiberg and told him that the only problem he had had with his knee between 1979 and 1982 was "grating in his kneecap." (Apparently, the grating was caused by chondromalacia of the patella found by both Mandiberg and Wells in 1982.) He told Mandiberg that he had been playing softball and racquetball without difficulty until his knee "popped" and gave way about a week earlier. Mandiberg advised claimant that, in his opinion, that was a totally new situation and was not causally connected to his 1979 industrial injury. Claimant failed to keep his next appointment with Mandiberg but consulted with Wells in October.

He told Wells that he had experienced pain during activity ever since the 1979 injury, that he could not run without a limp and that he was not able to play softball. Wells had the impression that claimant had been coaching softball. He did not tell either Wells or Mandiberg of another injury to his knee in 1980.

Before the referee, claimant testified that his knee had given him pain and had swelled with activity ever since the 1979 injury. He never consulted a doctor for it, however, and did not explain why he had not. The referee found claimant not credible. In his opinion he states:

> "Claimant made no effort to explain the difference in the histories he gave Dr. Mandiberg and Dr. Wells. I consider those histories to be irreconcilable. One could argue that after Dr. Mandiberg advised claimant he didn't feel the September, 1982 episode was related to the industrial injury that claimant thereupon modified the history and consulted a different physician."

We give great weight to a referee's finding on the issue of credibility. *Bloomfield v. National Union Ins. Co.*, 72 Or App 126, 694 P2d 1015 (1985).

The referee affirmed the denial of the claim. The Board affirmed the referee. We should affirm the Board, because claimant is not credible and because Wells' opinion, on which the majority relies, is based on an altered, incomplete and partially false history given him by claimant.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Dick H. Wright, Claimant.
INTERNATIONAL PAPER COMPANY,
Petitioner,
v.
WRIGHT et al,
Respondents.

(WCB 83-11167 and WCB 83-11533; CA A34605)

Judicial Review from Workers' Compensation Board.

Argued and submitted October 14, 1985.

Brian L. Pocock, Eugene, argued the cause and filed the brief for petitioner.

David C. Force, Eugene, argued the cause and filed the brief for respondent Dick H. Wright.

Craig A. Staples, Portland, argued the cause for respondents EBI Companies and Oregon Temporary Services. With him on the brief was Roberts, Reinisch & Klor, Portland.

Before Gillette, Presiding Judge, Pro Tempore, and Van Hoomissen and Young, Judges.

GILLETTE, P. J., Pro Tempore

Petition for review dismissed.

GILLETTE, P. J., Pro Tempore

International Paper seeks review of four Workers' Compensation Board orders holding it responsible for claimant's disability. We dismiss the petition.

In October, 1977, claimant suffered a compensable knee injury while employed by International. He was awarded time loss and permanent disability of 25 percent for his right leg. The claim was closed in 1981. Claimant continued to work for International until he was laid off in 1982. He was subsequently employed by Oregon Temporary Services (OTS). After three months, however, he left his job with OTS because of pain and inflammation in his knee.

Both International and OTS denied responsibility for the disability. International asserted that claimant's aggravation rights for his 1977 knee injury had expired, ORS 656.273(4)(a), and that, in any event, his current problems were the result of a new injury suffered during his employment with OTS. OTS maintained that claimant's condition is an aggravation of the 1977 injury, for which International is responsible. Claimant sought a hearing on the denials. In the meantime, claimant also petitioned the Board to exercise its own motion jurisdiction and reopen his 1977 claim as an aggravation. The Board referred the petition to the referee

with instructions to make a recommendation with respect to the Board taking own motion jurisdiction. In particular, the referee was to determine whether claimant's knee condition had worsened and whether the condition was related to the 1977 injury.

On June 1, 1984, the referee issued an order sustaining OTS's denial of responsibility and finding that the knee condition was related to the 1977 injury at International. In the same order, the referee recommended that the Board exercise its own motion jurisdiction and reopen the claim against International as an aggravation. International requested Board review and, on November 30, 1984, the Board issued an order on review affirming the referee's finding regarding the relationship between the knee condition and claimant's employment at International. On the same day, it issued an own motion order, ordering International to reopen the claim as an aggravation.

On December 17, 1984, International moved that the Board stay and reconsider both of the November 30 orders. The Board issued an order on reconsideration on December 27, 1984, which adhered to and republished the order on review, but made no mention of the own motion order. On January 18, 1985, International filed a petition for judicial review of all three Board orders. Claimant and OTS moved to dismiss the petition as untimely and for the additional reason that the November 30 own motion order is not reviewable. International then sought clarification of the Board's action from the Board. The Board issued another order on reconsideration on February 5, 1985, declining to reconsider the November 30 own motion order. International filed an amended petition for review to include that order.

We conclude that we cannot review any of the Board's orders. Assuming that both November 30 orders were subject to review within 30 days, ORS 656.295(8), any petition for review should have been filed by December 31, 1984. The first petition was not filed until January 18, 1985. The Board's December 27, 1984, order merely adhered to and republished the November 30 order on review; it did not "stay" the order on review or extend the time for seeking review. *See Fischer v. SAIF*, 76 Or App 656, 659, 711 P2d 162 (1985). The February 5, 1985, order did not increase the award of compensation over the "award" made on November 30 and is not separately reviewable.[1] ORS 656.278(3).

Petition for review dismissed.

[1] We need not decide whether the November 30 own motion order did, in fact, "increase the award" of compensation within the meaning of ORS 656.278(3), so as to be subject to judicial review. *Cf. Shoulders v. SAIF*, 300 Or 606, ___ P2d ___ (1986) (when a claim is determined to be compensable, compensation is considered to have been awarded for the purpose of ORS 656.382(2)).

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Patrick J. Havice, Claimant.

HAVICE,
Petitioner,

v.

SAIF CORPORATION et al,
Respondents.

(WCB 83-08177 & WCB 83-08027; CA A36250)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 10, 1986.

David C. Force, Eugene, argued the cause and filed the brief 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.

GILLETTE, P. J., Pro Tempore

Reversed as to compensability; affirmed as to interim compensation, penalties and attorney fees; remanded for acceptance of aggravated claim.

GILLETTE, P. J., Pro Tempore

Claimant seeks review of a Workers' Compensation Board order which reversed the referee's decision that his low back condition was compensable as an aggravation. We reverse in part and affirm in part.

Claimant worked for employer for 18 months in 1977 and 1978. In early August, 1978, while operating a sanding machine, he suffered severe back pain which forced him to miss four days of work. Later that month, he again suffered low back pain, as well as pain and swelling in the joints of his hands. Claimant was examined by Dr. Jefferson on August 18, 1978, and again on August 29. According to Jefferson's initial report, claimant complained both of swelling of the joints in his hands and low back pain; Jefferson diagnosed the condition as traumatic arthritis. Claimant was released for work on August 19, but was forced by pain to leave his job on August 31. He did not return.

Employer submitted a claim form to SAIF dated September 14, 1978, describing an "injury" consisting of pain in the hands and back. On October 2, 1978, SAIF partially accepted the claim as a nondisabling injury. On November 8, 1978, SAIF denied responsibility "for the condition diagnosed by Jefferson as traumatic arthritis superimposed on preexisting arthritis."

Jefferson referred claimant to Dr. Cassell, a rheumatologist, for treatment of his hands. Cassell entered a chart note on November 14, 1978, referring to complaints of low back pain. In June, 1981, while undergoing treatment for arthritis at the Oregon Health Sciences University, claimant was diagnosed as suffering from mechanical (not arthritic) low back pain and degenerative disc disease.[1] In November, 1982, his low back pain increased after he pushed on a car wheel. He went to Dr. Buck in December, 1982, who saw symptoms of a herniated disc and referred him to Dr. Golden, a neurosurgeon. On June 9, 1983, Golden performed a laminectomy and removed a disc herniation. His report to SAIF

indicated that claimant's condition was related to his August, 1978, injury. On July 2, 1983, claimant filed a separate claim for an occupational back disease which allegedly resulted from his employment with employer. SAIF sent a letter denying compensation for the disc surgery on August 17, 1983.[2]

At the hearing, claimant testified that he had never suffered back pain before the August, 1978, incident, but that since that time the pain had been continuous. Golden's August 19, 1983, report states:

> "The history I obtained on Mr. Havice, and as a result of my evaluation, leads me to believe that there is a definite causal relationship between his work activities five years ago and the diagnosis of a herniated disc. He has had a constant flow of symptoms from that time and it became progressively worse. There may be some aggravation from other factors and his susceptibility to inflammatory response as a result of rheumatoid arthritis, may also be a factor. Nonetheless, the significant causal factor is the injury as described."

Golden acknowledged that it was not possible to tell from his surgical examination of the injury when the herniation actually occurred. He relied on the history given to him by claimant to reach his conclusion that the 1978 injury was a "significant causal factor." Dr. Brown, a neurologist, never examined claimant. He reviewed claimant's medical file and listened to his testimony. In his opinion, there was no connection between the original back injury and the surgery. He believed that none of the medical reports before Buck's stated findings consistent with a herniated disc and that the herniation was more likely attributable to gradual degenerative changes than to trauma.

The referee agreed with claimant and Golden. In his findings he stated:

> "The compensability of the aggravation claim rises or falls primarily on the level of this claimant's credibility. After hearing and observing claimant, I adjudge him to be extremely honest. He is worthy of belief, and I accept his testimony. I conclude, * * * that the August, 1978, work was a material

[1] The Board's and SAIF's version of the facts indicate that medical reports never noted back pain after August, 1978. Our review of the record reveals that that statement is incorrect; Cassell's November 14, 1978, chart note and a September, 1981, Oregon Health Sciences University medical report refer to back pain.

[2] Claimant filed the occupational disease claim as an alternative theory of recovery for the surgery. SAIF's letter of August 17, 1983, was sufficient to deny both the aggravation and occupational disease claims. Claimant does not argue here that the disc herniation is compensable as an occupational disease.

> factor in the condition resulting in the June, 1983 surgery. SAIF denied responsibility for arthritis on November 8, 1978, but since it was not the arthritis which necessitated the surgery, that denial is no bar to the instant aggravation claim."

On review, the Board acknowledged the referee's credibility finding; it purported to analyze the case strictly as a question of medical causation. It found that claimant had not met his burden of proving that the herniated disc was related to his occupational injury of August 18, 1978. The Board's opinion turned entirely on what it said were

> "serious discrepancies between the evolution of back and leg pain as described by claimant at the hearing (and relied upon by Dr. Golden), and the history reflected in the medical records from the time of petitioner's 1978 injury."

We think that the Board's analysis is really a rejection of the referee's credibility assessment. If the medical history were devoid of any reference to a low back disorder, the Board's conclusion might be acceptable. However, as we have already noted, there are several references to low back pain in the reports, although, as Brown stated, they may not be indicative of a disc herniation. We accept the referee's express findings of credibility. We find, additionally, that Golden's opinion of medical causation is more persuasive, and conclude that the back injury of 1978 was a material contributing cause of claimant's back condition requiring surgery. *See Grable v. Weyerhaeuser Company,* 291 Or 387, 631 P2d 769 (1982).

We affirm the Board's denial of interim compensation, attorney fees and penalties.

Reversed as to compensability; affirmed as to interim compensation, penalties and attorney fees; remanded for acceptance of aggravated claim.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ESCHLIMAN,
Appellant,
v.
GAB BUSINESS SERVICE, INC.,
Respondent.

(16-84-09300; CA A36457)

Appeal from Circuit Court, Lane County.

Gregory Foote, Judge.

Argued and submitted April 18, 1986.

Steven C. Yates, Eugene, argued the cause and filed the brief for appellant.

Barry Shanks, Portland, argued the cause for respondent. On the brief were James Jeffery Adams and Mitchell, Lang & Smith, Portland.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

PER CURIAM

Affirmed.

PER CURIAM

Plaintiff appeals a judgment dismissing his complaint for failure to state ultimate facts sufficient to constitute a claim. ORCP 21A(8). We affirm.

Plaintiff sustained an injury, compensable under the Workers' Compensation Act on September 21, 1982. Defendant is the agency paying benefits to plaintiff for his employer. After the Statute of Limitations had run, barring plaintiff's right to maintain an action against a third party for his injuries, plaintiff brought this action in counts alleging breach of a fiduciary duty and negligence for defendant's failure to inform him of the existence of his third party claim. The issue is whether a workers' compensation insurer has a duty to inform an injured worker of the existence of a potential third party claim under ORS 656.154.

Workers' compensation law is purely statutory, and the rights and remedies provided by the Workers' Compensation Act are exclusive. *Nelson v. SAIF,* 43 Or App 155, 602 P2d 341, *rev den* 288 Or 173 (1979), *cert den* 446 US 980 (1980). It imposes no duty on the insurer to inform an injured worker of the existence of a potential third party claim.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Darlene L. Stephens, now known as Darlene L. Youngblood, Claimant.

JAMES RIVER CORPORATION,
Petitioner,

v.

DARLENE L. YOUNGBLOOD et al,
Respondents.

(WCB 83-02302, 83-02414 & 83-05679; CA A36332)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 21, 1986.

Patric J. Doherty, Portland, argued the cause for petitioner. With him on the brief were Ronald W. Atwood, and Rankin, McMurry, VavRosky & Doherty, Portland.

Howard R. Nielsen, and Vick & Associates, Salem, filed the brief for respondent Youngblood.

Craig A. Staples, Portland, argued the cause for respondents American Can Company and Wausau Insurance Companies. On the brief were Gordon T. Clark, and Roberts, Reinisch & Klor, P.C., Portland.

Before Richardson, Presiding Judge, and Newman and Deits, Judges.

DEITS, J.

Affirmed.

DEITS, J.

The sole issue in this Workers' Compensation review is which employer is responsible for claimant's compensable occupational disease. Claimant has worked in different positions at the same paper mill since 1977. Until 1982, the mill was owned by respondent American Can Company, which was insured by respondent Wausau Insurance. In July, 1982, petitioner James River Corporation purchased the mill. Claimant filed claims in 1978, 1979, 1982 and 1983, all relating to pain in her neck and left shoulder diagnosed as thoracic outlet syndrome. Wausau accepted responsibility for the claims filed in 1978, 1979 and 1982, but denied responsibility for the 1983 claim. James River contends that the disabling onset of increased pain in 1983 was merely an increase of symptoms of the same underlying condition, and that Wausau remains responsible. Wausau argues that the underlying condition worsened as a result of plaintiff's work activities in March, 1983, and that James River is responsible.

A hearing was held pursuant to ORS 656.307. The referee found that claimant's occupational disease had worsened while she was employed by James River and that her work activities in 1983 caused that worsening. The Board affirmed, recognizing that the case presented a close question, but concluding that the preponderance of the evidence showed that claimant's underlying condition had worsened. We affirm.

During her first two years at the mill, claimant worked at a napkin wrapping machine, which required twisting and repetitive hand and arm movements as she bundled napkins and placed them on a conveyor belt. Her condition first manifested itself in April, 1978, when she complained of a pulled shoulder muscle. Her claim for medical treatment benefits was accepted as nondisabling. In November, 1978, she complained of back pain and pain in her neck and left shoulder, with tingling in her left arm and forearm. She was seen by Dr. Gerstener, a general surgeon who has acted as plant physician. He diagnosed thoracic outlet syndrome of a moderate degree and advised her to perform back and shoulder exercises. No claim for time loss was made.

Claimant continued to work at the napkin machine and suffered another onset of pain and numbness in

November, 1979. She filed a claim for time loss beginning in December, 1979, when her chiropractor advised that she was disabled due to her work activities. She was seen by Gerstener

in February, 1980, for evaluation. He again diagnosed thoracic outlet compression and recommended physical therapy and time off from work. Claimant testified that, after her initial time off in December, 1979, she returned to work briefly at the napkin machine but immediately suffered an increase in pain and again left work. She did not return to work until late February, 1980, when she was assigned to duties which did not require highly repetitive arm movements.

Claimant testified that she was not completely free of pain during the period from February, 1980, to September, 1982, but that she lost no time from work due to her thoracic outlet condition. In September, 1982, she was assigned to a new position involving relief duties at a tissue wrapping machine, which required twisting to left and right and repetitive arm movements at or above shoulder level as she removed packages from the machine and stacked them in carts. Within a few days, claimant suffered a significant increase in pain and sought treatment from her chiropractor. She was off work from September 11, 1982, until October 29, 1982.[1]

When claimant returned to work in late October, 1982, her duties did not involve repetitive arm movements. However, in March, 1983, she was reassigned to duties similar to those she had performed in September, 1982, including relief work at the tissue wrapping machine. She suffered an immediate increase in pain, and after five days she was unable to work. She filed this claim.

The dispositive issue is whether claimant's work activities in 1983 caused a worsening of her thoracic outlet syndrome or whether there was a recurrence of symptoms which did not reflect a progression of the underlying disease. *Bracke v. Baza'r,* 293 Or 239, 250, 646 P2d 1330 (1982). Responsibility for a claimant's disability does not shift to a

subsequent employer unless later work activities "contribute to the cause of, aggravate, or exacerbate the underlying disease." *Bracke v. Baza'r, supra,* 293 Or at 250. A mere increase in symptoms does not demonstrate that the underlying disease has worsened. *Fred Meyer v. Benjamin Franklin Savings & Loan,* 73 Or App 795, 700 P2d 257 (1985).

Gerstener provided the only expert opinion specifically addressing the relationship between claimant's complaints and her underlying thoracic outlet compression condition. In his reports and deposition, he described the increased pain in March, 1983 as a "worsening," "aggravation," "exacerbation" and "progression" of the underlying disease. He indicated that thoracic outlet syndrome typically does not worsen in the absence of certain activities and that the work activities claimant performed in September, 1982, and in March, 1983, involved the sort of movement which would cause a worsening of her condition. He also testified that claimant's work activities were the major contributing cause of a worsening of her syndrome and stated that the compression, which caused the pain and tingling, was itself greater as a result of the work activities.

[1] Although claimant was then employed by James River Corporation, her claim for medical treatment and time loss benefits was accepted by Wausau, which concedes that, under the rule in *Bauman v. SAIF,* 295 Or 788, 670 P2d 1027 (1983), it could not later deny its responsibility for the September, 1982, claim. That period of disability is not at issue here.

Petitioner contends that Gerstener's testimony is not persuasive evidence, because it is inconsistent. He did state that claimant's underlying condition was the same in 1978 as it was in 1983, even though there have been aggravations and increased symptoms since 1978. Further, he indicated that the only manifest change was an increase in the frequency and duration of pain and discomfort. However, he also testified that there would have had to be a change in the underlying condition for there to be an increase in symptoms.

We conclude, on the basis of Gerstener's statements as a whole, that his testimony is convincing that claimant's work activities caused increased compression and the worsening of her underlying condition, which resulted in increased pain and discomfort. Although this case presents a close question, the preponderance of the evidence proves that claimant's occupational disease worsened while she was employed by James River Corporation, which is therefore responsible for her claim for time loss and medical benefits subsequent to March 11, 1983.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Michael E. Davison, Claimant.

DAVISON,
Petitioner,

v.

SAIF CORPORATION,
Respondent.

(WCB 83-09422; CA A36882)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 7, 1986.

W. D. Bates, Jr., Eugene, argued the cause and filed the brief for petitioner.

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 Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

Reversed in part and remanded to the Board for claim closure; affirmed as to penalty and attorney fees.

WARREN, J.

Claimant seeks review of a Workers' Compensation Board order which reversed the referee and held that he was not entitled to have his injury claim closed and reclassified as disabling. We reverse in part.

Claimant lost a small portion of his little finger in an industrial accident. SAIF accepted the claim as a nondisabling injury. Claimant now believes that the injury was disabling from the outset and asserts that the claim is still viable, because it was never closed, as required by ORS 656.268(3).[1] He did not seek a reclassification of the injury from nondisabling to one that has become disabling, as allowed by ORS 656.262(12).[2]

The Board reasoned that, although the claim may always have been disabling and, therefore, may not strictly fall under ORS 656.262(12), that statute provides the only procedure for challenging an insurer's decision to characterize a claim as nondisabling. We do not agree. ORS 656.262(12) applies to a claim that was initially nondisabling and became disabling. It does not apply to a claim that was disabling from the outset but was misclassified as nondisabling, as alleged here. ORS 656.262(12) has no application to the facts of this case.

The Board held that ORS 656.268(3) does not require a formal closure of a nondisabling claim and that it was

[1] ORS 656.268(3) provides:

"When the medical reports indicate to the insurer or self-insured employer that the worker's condition has become medically stationary and the insurer or self-insured employer decides that the claim is disabling but without permanant disability, the claim may be closed, without the issuance of a determination order by the Evaluation Division. The insurer or self-insured employer shall issue a notice of closure of such a claim to the worker and to the Workers' Compensation Department. The notice must inform the worker of the decision that no permanent disability results from the injury; of the amount and duration of temporary total disability compensation; of the right of the worker to request a determination order from the Evaluation Division within one year of the date of the notice of claim closure; of the aggravation rights; and of such other information as the director may require. Within one year of the date of the notice of such a claim closure, a determination order subsequently shall be issued on the claim at the request of the claimant or may be issued by the Evaluation Division upon review of the claim if the division finds that the claim was closed improperly. If an insurer or self-insured employer has closed a claim pursuant to this subsection and thereafter decides that the claim has permanency, the insurer or self-insured employer shall request a determination order as provided in subsection (2) of this section. If the reasonableness of that closure decision is at issue in a hearing on the claim and if a finding is made at the hearing that the closure decision was not supported by substantial evidence, a penalty shall be assessed against the insurer or self-insured employer and paid to the worker in an amount equal to 25 percent of all compensation determined to be owing between the date of original closure and the date upon which the claim is closed by determination order. The penalty shall not be less than $500."

[2] ORS 656.262(12) provides:

"Insurers and self-insured employers shall report every claim for disabling injury to the director within 21 days after the date the employer has notice or knowledge of such injury. If within one year after the injury, a worker claims a nondisabling injury has become disabling, the insurer or self-insured employer shall report the claim to the director immediately after receiving notice or knowledge of such claim. A claim that a nondisabling injury has become disabling, if made more than one year after the date of injury, shall be made pursuant to ORS 656.273 as for a claim for aggravation."

sufficient that the notice of acceptance contain all the information required by ORS 656.268(3) to be included in a notice of closure. SAIF concedes that the Board's reasoning is not completely correct and that an insurer is required to close a nondisabling claim. It asserts, however, that the notice of acceptance met that requirement. We agree with SAIF that it was required to close the claim and that the "Notice of Acceptance" contained each bit of information required to be provided by ORS 656.268(3)—save one. It did not inform claimant that it was a notice of closure. It, therefore, did not trigger his right to seek a determination order under ORS 656.268(3). Because his claim is not closed, claimant's right to seek a determination order has not yet expired.

Claimant also seeks a penalty and attorney fees for SAIF's failure to close the claim. He never left work because of his injury, and we know of no basis for the award of a penalty or insurer paid attorney fee. *Bono v. SAIF,* 298 Or 405, 692 P2d 606 (1984).

Reversed in part and remanded to the Board for claim closure; affirmed as to penalty and attorney fees.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Liz A. Destael, Claimant.

DESTAEL,
Petitioner,

v.

NICOLAI COMPANY et al,
Respondents.

(83-04946, 83-04947; CA A35807)

Judicial Review from Workers' Compensation Board.

Argued and submitted February 7, 1986.

Kathryn H. Clarke, Portland, argued the cause and filed the brief for petitioner.

Kenneth L. Kleinsmith, Portland, argued the cause for respondents. On the brief were Daniel L. Meyers and Meyers & Terrall, Portland.

Before Joseph, Chief Judge, and Van Hoomissen and Young, Judges.

JOSEPH, C. J.

Affirmed.

JOSEPH, C. J.

Claimant seeks review of a Workers' Compensation Board order which denied her an award of permanent partial

disability (PPD) for the impairment resulting from her low back condition. The referee had found that her back condition was causally related to an industrial injury of October, 1981, and had reversed employer's denial of responsibility for that condition. On review, the Board reversed the referee and found that the back condition was not related to the industrial injury. On *de novo* review, we affirm.

Claimant is a 32-year-old woman who has been employed by employer since 1975. In 1980, she was operating a ripsaw when she stooped to raise a heavy board from the floor and injured her upper back. Dr. Mayer, a chiropractor, has treated her for pain from that injury, but she has had no time loss. Employer accepted the claim for the upper back injury. In October, 1981, she was feeding a piece of wood into a ripsaw when it suddenly reversed and ejected two pieces of wood. One of them struck claimant with sufficient force that it penetrated her clothing and was imbedded 4-1/2 inches in her abdomen. She was hospitalized for approximately one week and did not return to work until January, 1982. Employer accepted the claim for the injury on November 2, 1981.[1] Claimant testified that she began feeling low back pain while still in the hospital recuperating from the wound. However, the doctor who performed the surgery and did the follow-up examinations, at least through December, 1981, did not make note of any low back pain in his medical reports.

In April, 1982, Mayer reported that claimant had chronic left side lumbar pain. He had been treating her since January, 1982, but that was the first mention of low back pain. He attributed that pain to deteriorating spinal stability as a result of the impact in the 1981 accident. In July, 1982, Mayer reported that claimant would have permanent spinal impairment as a result of the accident. Employer then referred her to

Dr. Gatterman, another chiropractor, for evaluation of disability and an opinion on the advisability of continuing chiropractic treatment. Gatterman recommended against further chiropractic treatment and did not note any rateable spinal impairment. Claimant was then referred to Dr. Howell, an osteopathic physician, who recommended treatment for the upper back and neck only and found minimal lumbar dysfunction "perhaps related to the October, 1981, incident."

In October, 1982, claimant began treatments with Dr. Gritzka, an orthopedist, who diagnosed a chronic lumbosacral sprain superimposed on unilateral spondylolysis and a congenital "batwing" anomaly. He explained that many people who have that anomaly are asymptomatic. He indicated that trauma can stretch the ligament which gives stability to the anomaly, rendering it unstable and causing pain. Symptoms can also be caused by simple degeneration. He treated her by prescribing medication and a back brace. The medication was not beneficial and was discontinued. He then administered injections into the area of the anomaly. That initially was very beneficial, but each succeeding treatment had less effect.

[1] Claimant does not assert that her low back injury is attributable to the 1980 accident. In addition, the parties stipulated, wrongly or rightly, that the 1984 Determination Order that closed the 1980 claim and awarded claimant low back disability was really meant to close the 1981 claim, even though a 1983 determination order had specifically already closed the latter claim.

After Gritzka's diagnosis of the anomaly, Howell again examined claimant to determine if her current treatment was necessitated by the effects of the anomaly or by the effects of the October, 1981, injury. He reported that he had difficulty in understanding how the abdominal injuries could have resulted in the batwing area becoming symptomatic; however, on the basis of the fact that claimant had had no low back symptoms until after the 1981 injury, he concluded that the incident did contribute to her current disability.

Employer also had claimant examined by Dr. Robinson, who diagnosed a lumbar strain and contusions superimposed on congenital anomalies of the lower back. He concluded that she does have a permanent mild low back impairment related to the underlying anomaly and a minimal low back impairment related to the injury. He stated that the underlying anomaly played a major part in her present problem, even though the symptoms followed the 1981 injury. Gritzka expressly agreed with those conclusions in 1983. In March, 1984, he apparently changed his mind and concluded that 75 percent of her present symptoms are attributable to the October, 1981, injury. Shortly before the hearing, which

she had requested on the extent of PPD, employer wrote her a letter denying further compensation for treatment of or disability for the low back condition.

Claimant argues that the Board erred in finding that the low back symptoms were not causally related to the 1981 injury. The Board found that she did not carry her burden of persuasion, and we agree. The question is whether the on-the-job injury was a material contributing cause of the complained of condition. *Jeld-Wen, Inc. v. Page,* 73 Or App 136, 698 P2d 61 (1985); *see also Grace v. SAIF,* 76 Or App 511, 709 P2d 1146 (1985).[2] The medical evidence in this case generally reflects a belief that the 1981 injury is related to the low back pain, but it does not establish that the abdominal injury was a material contributing cause of the low back pain. Mayer and Gritzka concluded that the 1981 injury caused the low back condition but based that on nothing more than the fact that the pain did not begin until after the 1981 injury. Neither doctor offered an explanation for why the low back pain remained unreported for six months after the alleged causal incident. We give no special credit to the testimony of the treating doctors in this case. *See Hammons v. Perini Corp.,* 43 Or App 299, 602 P2d 1094 (1979). Gatterman found no rateable spinal impairment. Howell found minimal lumbar dysfunction and thought that it was "possible" that it could have been related to the 1981 injury. Robinson found permanent, mild impairment of the low back due to the congenital anomaly and minimal, nonpermanent impairment related to the injury. That evidence does not persuade us that the abdominal injury was a material contributing cause of the low back symptoms.

Claimant also argues that the Board did not have

[2] It may well be that the test of "a material contributing cause" is of little or no practical utility in a case like this. The only contested issue is whether the abdominal injury is causally related to the back condition. That ought to be only a matter of medical testimony to be tested by the preponderance of the evidence standard. The language of the cases, however, dictates the other test.

authority to set aside the permanent partial disability award in the 1984 determination order, because employer did not contest it. The Board reviewed the referee's order, which had adopted the determination order award. The Board has *de novo* review and is free to make any disposition of the case it

deems appropriate. ORS 656.295(6); *Russell v. A & D Terminals,* 50 Or App 27, 31, 621 P2d 1221 (1981). The Board's decision was within its authority.

She next argues that employer is foreclosed from denying responsibility for her low back condition on the basis of *Bauman v. SAIF,* 295 Or 788, 794, 670 P2d 1027 (1983), in which the court held that, once an employer has accepted a claim, it may not later deny it after 60 days have elapsed since notice of the claim, unless there is a showing of fraud, misrepresentation or illegal activity. In this case, employer accepted the abdominal injury claim on November 2, 1981. The scope of the acceptance is governed by the notice or knowledge that the employer has of the nature of claimant's condition at the time of its acceptance. ORS 656.262(6);[3] *Johnson v. Spectra Physics,* 77 Or App 1, 5, 712 P2d 125 (1985), *rev allowed,* 301 Or 165 (1986). In *Spectra Physics,* the employer had notice, from a doctor's report, that the claimant had a carpal tunnel syndrome relating to her back injury. The employer accepted the claim after receiving that report. We held that the scope of the acceptance of the back injury claim included the carpal tunnel syndrome, because employer had notice and knowledge that it related to the back injury. In this case, when employer accepted the abdominal injury claim, it had neither notice nor knowledge that claimant was suffering from low back pain as a result of that injury. There is no report of low back pain until Mayer's 1982 letter to employer. The scope of employer's acceptance in November, 1981, therefore, did not include the low back.

The remaining assignment of error relates to the extent of permanent disability, and on the basis of our conclusion of noncompensability it does not require discussion.

Affirmed.

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[3] ORS 656.262(6) provides, in part:

"Written notice of acceptance or denial of the claim shall be furnished to the claimant by the insurer or self-insured employer within 60 days after the employer has *notice or knowledge* of the claim. Pending acceptance or denial of a claim, compensation payable to a claimant does not include the costs of medical benefits or burial expenses. The insurer shall also furnish the employer a copy of the notice of acceptance." (Emphasis supplied.)

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Laurence E. Saxton, Claimant.

SAXTON,
Petitioner,

v.

SAIF CORPORATION et al,
Respondents.

(WCB 83-10671; CA A36554)

Judicial Review from Workers' Compensation Board.

Argued and submitted February 19, 1986.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief was Malagon & Associates, Eugene.

Jeff Bennett, 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, Joseph, Chief Judge, and Warden, Judge.

RICHARDSON, P. J.

Affirmed.

RICHARDSON, P. J.

The issue in this workers' compensation case is whether claimant, who successfully defended a referee's award of penalties and attorney fees in an insurer's appeal to the Workers' Compensation Board, is entitled to attorney fees under ORS 656.382(2), even though the insurer was successful in persuading the Board to overturn the referee's award of additional temporary total disability and to reduce the award of permanent partial disability.

ORS 656.382(2) provides:

> "If a request for hearing, request for review, appeal or cross-appeal to the Court of Appeals or petition for review to the Supreme Court is initiated by an employer or insurer, and the referee, board or court finds that the compensation awarded to a claimant should not be disallowed or reduced, the employer or insurer shall be required to pay to the claimant or the attorney of the claimant a reasonable attorney fee in an amount set by the referee, board or the court for legal representation by an attorney for the claimant at and prior to the hearing, review on appeal or cross-appeal."

The Board denied claimant's request for attorney fees, because he had "prevailed only on the penalty/attorney fee issue and lost on the 'compensation' issues." Claimant argues that attorney fees and penalties are "compensation" within the meaning of ORS 656.382(2) and that, because the Board

did not reduce or disallow either of those awards, he is entitled to attorney fees for his defense of those awards.

In *Bahler v. Mail-Well Envelope Co.*, 60 Or App 90, 652 P2d 875 (1982), we held that, after the insurer's appeal to the Board, the claimant was entitled to attorney fees under ORS 656.382(2) when the Board found that the compensation that the referee awarded should not be reduced but that the penalties awarded should be. We stated: "The term 'compensation,' as used in ORS 656.382(2), excludes penalties." 60 Or App at 93. *Accord, Mt. Mazama Plywood Co. v. Beattie*, 62 Or App 355, 661 P2d 109 (1983). Similarly, in *Mobley v. SAIF*, 58 Or App 394, 648 P2d 1357 (1982), we held that the claimant was entitled to attorney fees under the statute when the Board affirmed the referee's decision that the claim was compensable but reduced the referee's award of attorney fees. We said that "[t]he reduction in the fee ordered by the Board had no

effect on the entitlement to an award of attorney fees under ORS 656.382(2)." 58 Or App at 397. In *Dodson v. Bohemia, Inc.*, 80 Or App 233, ___ P2d ___ (1986), we expressly held that the term "compensation" in ORS 656.382(2) does not include attorney fees. Claimant is not entitled to attorney fees under that statute.

The Board in this case reduced the amount of benefits that the referee had awarded. It relied on our decision in *Barrett v. D & H Drywall*, 73 Or App 184, 698 P2d 498 (1985), in not considering claimant's preexisting condition in calculating the extent of permanent partial disability. Claimant did not assign error to the Board's reduction of the award. After the briefs in this case were filed, but before oral argument, the Supreme Court reversed our decision in *Barrett* and held that a worker's preexisting condition must be considered in determining the extent of PPD if it is made disabling by the compensable injury. *Barrett v. D & H Drywall*, 300 Or 325, 709 P2d 1083 (1985), *clarified* 300 Or 553, 715 P2d 90 (1986). At oral argument, claimant's attorney requested that we review the award in the light of the Supreme Court's opinion in *Barrett*. We decline to do so.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Judy C. Stratton, Claimant.

STRATTON,
Petitioner,

v.

SAIF CORPORATION et al,
Respondents.

(WCB 83-12237; CA A36556)

Judicial Review from Workers' Compensation Board.

Argued and submitted February 19, 1986.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief were Evohl F. Malagon 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 Richardson, Presiding Judge, Joseph, Chief Judge, and Warden, Judge.

RICHARDSON, P. J.

Affirmed.

RICHARDSON, P. J.

Claimant seeks review of an order of the Workers' Compensation Board affirming an order of the referee which had upheld SAIF's denial of her aggravation claim. *See* ORS 656.273(1). We hold that she did not timely file a claim for aggravation benefits and affirm.

Claimant was injured at work on June 21, 1978. Her claim stated that the area of her body that had been injured was her right leg, and a "Physician's Initial Report of Work Injury or Occupational Disease," submitted by Dr. Woodworth and dated July 7, 1978, stated that she had a "[l]arge hematoma over right anterior tibia which is slightly tender," that is, a large bruise over her right shinbone. SAIF accepted that claim as a nondisabling injury.

Claimant testified in the hearing in this case that the precise location of the injury was approximately two inches below her kneecap and that the bruise extended into the lower part of her kneecap. She stated that Woodworth told her that the injury would heal in time and that he did not treat her. She also stated that over the years she had continued to experience problems with her right leg, particularly her knee, and that she mentioned those problems to the doctors who were treating her for carpal tunnel syndrome, a condition which she developed at work shortly before her leg injury and which SAIF had

also accepted. However, no mention of knee problems appears in the medical records until two chart notes by Dr. Davis in April and June of 1983. The first states:

> "[Claimant] is seen today because of pain in her right knee. She developed grinding in the patellar areas. She's had a previous direct contusion of the knee. She's examined today. She has no joint effusion. She has mild crepitus and snap over the superior medial pole of the patella. I cannot palpate a plica. Pressure on the patella does not increase her symptoms. Her facets are nontender.
>
> "Dx: Chondromalacia patella, mild.
>
> "Recommendations: She is presently enrolled in a jazzercise class. I have asked her to discontinue that until such time as her knee feels better. In the interim she may swim and ride a bike. If not improved, return, and she should have x-rays of her right knee including patellar skyline view."

The second states, as relevant to her knee problem:

> "[Claimant's] knee has improved. There is far less crepitus. Range of motion is normal. She has lateral facet tenderness but not severe.
>
> "I described to her the activities to avoid to prevent injuring her patella and instructed her in quad isometric and straight-leg raising exercises. I have asked her to return in the future if [she has] any persisting problems. * * *"

SAIF received those chart notes on June 8, 1983, within the five-year limitation period for filing an aggravation claim, *see* ORS 656.273(4)(b), but it did not treat them as an aggravation claim and did not respond by acceptance or denial. On December 1, 1983, Davis informed SAIF that claimant needed knee surgery. SAIF treated his report as an aggravation claim and denied it on February 7, 1984.

The referee upheld SAIF's denial on the ground that claimant's claim was time-barred. He stated that the chart notes received by SAIF in June, 1983, did not constitute a valid aggravation claim, because they did not relate claimant's knee problems to her 1978 injury. He also found that claimant was entitled to temporary total disability benefits from February 1 through 7, 1984, and penalties and attorney fees for SAIF's late denial of the December 1, 1983, claim. The Board affirmed, reasoning that, even if the claim was not time-barred, claimant had not proved that her knee problems were related to her 1978 compensable leg injury.

We agree with the referee that the chart notes received by SAIF in June, 1983, did not constitute an aggravation claim. A worker is entitled to additional compensation for "worsened conditions resulting from the original injury," and a physician's report indicating a need for further medical services or additional compensation is a claim for aggravation. ORS 656.273(1), (3). The chart notes here are insufficient, because they do not relate claimant's knee problems to her 1978 compensable injury. *Compare Trevino v. SAIF,* 66 Or App 410, 673 P2d 1389 (1984) (doctors' reports relating knee injury to prior compensable leg injury were aggravation claims). SAIF had accepted a condition that was described as a bruised shinbone. Almost five years later it received two chart notes indicating that claimant was experiencing knee problems. There is no evidence that SAIF knew or should have known that, as she claims, she had been experiencing knee

problems in the interim. Under those circumstances, it would be unreasonable to expect SAIF to infer from the chart notes that her knee problems were related to her earlier compensable injury.

Davis' statement in the first chart note that claimant had had a previous direct contusion of the knee would not have put SAIF on notice that the 1978 compensable injury was claimed to be involved, because defendant's 1978 claim and Woodworth's initial report did not state that the knee was injured. It would not be reasonable to expect SAIF to infer that Davis' reference to a prior contusion to the knee implicated the 1978 compensable injury. Furthermore, Davis apparently sent the chart notes to SAIF in connection with the carpal tunnel syndrome claim. That would make it even less likely that SAIF would connect the knee problem to the compensable leg injury, because its focus in reading the chart notes would have been on the carpal tunnel syndrome. Claimant failed to submit a valid aggravation claim before the limitations period had expired. Her claim is time-barred.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Marvin L. Noffsinger, Claimant.
STATE ACCIDENT INSURANCE
FUND CORPORATION,
Petitioner,
v.
NOFFSINGER,
Respondent.

(WCB 84-05413, 84-05412; CA A36545)

Judicial Review from Workers' Compensation Board.

Argued and submitted February 19, 1986.

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.

James L. Edmunson, Eugene, argued the cause for respondent. With him on the brief were Robert J. Guarrasi and Malagon & Associates, Eugene.

Before Richardson, Presiding Judge, Joseph, Chief Judge, and Warden, Judge.

RICHARDSON, P. J.

Affirmed.

RICHARDSON, P. J.

The issue in this workers' compensation case is whether claimant, who contends that he suffers from severe depression as a result of job pressures and harassment and horseplay by his co-workers, is entitled to compensation for an occupational disease. The referee and the Workers' Compensation Board held that he is. SAIF seeks review, and we affirm.

Claimant was 44 at the time of the hearing in this matter. He has a college degree in physical education. Although he taught physical education for one year after graduation, most of his work experience has been in lumber mills. In early 1980, he began working in employer's lumber mill, and he worked there until he was discharged in April, 1984. He initially worked on the green chain, but in October, 1981, he began working as a clipper operator.

The "clipper" is a machine which cuts out defective portions of veneer that has been produced on a lathe. It is operated either manually or by computer control and at either high or low speed. Its effective operation depends on the quantity and quality of veneer ribbon produced by the lathe. After the veneer passes through the clipper, it is transported to the green chain. The operation of the green chain depends on the quality and quantity of the veneer which has been clipped. Claimant was responsible for maximizing the efficient use of veneer, thereby increasing earnings from veneer production. Operation of the clipper is a critical phase in the production of plywood.

In January, 1982, the mill was purchased by a corporation whose president began actively to oversee the operation of the mill and to seek ways to increase production. He compared the output of the day shift with that of claimant's shift, the swing shift, and noted that the day shift produced more veneer. In mid-1982, employer transferred claimant to the day shift to determine whether he was the source of the problem. Claimant had his own ideas concerning the production discrepancy and, in late 1982, when he believed that he and the green chain crew were being blamed for the swing shift's lower production, he spoke with the president; in January, 1983, he submitted to the president a 45-page critique of the operation of the mill. Claimant believed that the president did not adequately understand the operation of the

mill and that he, claimant, understood it better. He believed that, for various reasons, the day shift had an advantage over the swing shift. He criticized a bonus plan initiated by the president, because he perceived that it was unfair to the swing shift. He also felt that the plan placed undue pressure on the swing shift. He disagreed with the manner in which production figures were calculated. On at least one occasion, he wrote his own production figures over those posted by the employer. He also felt pressured by his supervisor and the president to produce at maximum efficiency and, at times, maximum speed.

In addition to production pressures, claimant was also the victim of ongoing horseplay, harassment and criti-

cism by other employes. For the most part, he was the only employe subjected to such abuse. One employe on the green chain periodically yelled at claimant, criticized his operation of the clipper and suggested that he either quit or be fired. The lathe operator occasionally threw food at him. Other workers occasionally threw wood chips at him. They also threw firecrackers or placed them under his seat; his supervisor and two other employes once placed firecrackers in the space heater in his work station, causing it to blow apart while he was warming his hands. After the heater was repaired, some employes placed crab parts in it, creating an obnoxious odor in the work area. Claimant was quite upset by these events. When he asked his supervisor to put a stop to them, the supervisor denied that they had even occurred.

In early 1984, the employer made a further push to increase production. Claimant operated the clipper on high speed, which he claimed caused eye strain and tension and, consequently, decreased efficiency. Claimant wrote a letter to the president complaining about the demands being placed on him. The president replied that claimant had a negative attitude, to which claimant responded with another letter. In April, 1984, the president spent several hours observing claimant operate the clipper. He asked claimant why he was allowing the clipper to be operated automatically by the computer rather than manually, and claimant replied that it was too difficult to operate manually. Claimant was discharged the next evening. The employer's stated reason was that he would not follow instructions without considerable argument.

Claimant was quite upset following his discharge and had difficulty sleeping for the next night or two. On April 24, 1984, he visited a doctor, who noted elevated blood pressure and general agitation, prescribed medication and referred him for psychiatric evaluation. Dr. Carter, a psychiatrist, began treating claimant in June, 1984, and concluded that claimant was suffering from "[m]ajor depression, single episode, with melancholia," which was "substantially and significantly derived from job stress as perceived & experienced by patient." Carter reported to SAIF in August, 1984, that claimant's condition had improved through intensive psychotherapy and that "the major depression that he presented with was, indeed, derived from the vocational vector." Dr. Holland, also a psychiatrist, examined claimant at the request of SAIF. On August 20, 1984, he submitted a report in which he diagnosed the same illness as had Carter and stated that claimant had substantially improved. He concluded that the principal contributing factor to that illness was the job termination. He stated:

> "It is my opinion Mr. Noffsinger had a significant psychiatric illness which surfaced in the context of him [*sic*] being terminated. I believe the most proximate cause of his psychiatric illness was his termination from work while there were, to his accounting, significant vocationally related pyschosocial [sic] stressors ongoing in the latter days of his employment."

On September 10, 1984, Carter reported:

> "It is my opinion, within the realm of reasonable medical probability, that Mr. Noffsinger's presenting major depres-

sion, arose primarily from stress related to his most recent job with Yoncalla Timber Products. It is my impression that Mr. Noffsinger presents with pre-morbid psychopathology in the form of the atypical personality disorder, which renders him vulnerable to abrasive interaction with his fellow employees and management personnel. This, in part, derives from the fact that Mr. Noffsinger is a highly intelligent man, educated generally beyond the level of that of his co-workers, and probably many of his supervisors. Consequently, within the millwork setting, it is my impression that, he attempts to deal with stress encountered on the job by an over-ideational approach relative to his particular job and the expectations of function that go along with it, that this, in turn, contributes to an increase in distress experienced by Mr. Noffsinger, and

probably by other people around him. As he attempts to reduce the stress by intellectualization, and as this resort to anxiety relief is overwhelmed, there is increased reliance upon compulsive and obsessive mechanisms to decrease stress. As these fail, somatization, hostility, and paranoia emerge. In view of this impression, it is my opinion that the Axis II disorder, atypical personality disorder, was aggravated by the stress experienced by Mr. Noffsinger in the pursuit of his job."

SAIF, the employer's insurer, denied claimant's occupational disease claim.[1] The referee found that claimant had proven that work conditions were the major contributing cause of his depression and ordered SAIF to accept the claim. The Board affirmed without elaboration.

An "occupational disease" is "[a]ny disease or infection which arises out of and in the scope of employment, and to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment therein." ORS 656.802(1)(a). In comparison, a "compensable injury" is an "accidental injury * * * arising out of and in the course of employment." ORS 656.005(8)(a). Although the latter definition appears to contemplate a two-part test, in *Rogers v. SAIF,* 289 Or 633, 642, 616 P2d 485 (1980), the court rejected the mechanical application of that test and adopted a unitary "work-connection" approach to determine whether a given injury is compensable: *i.e.,* "[I]s the relationship between the injury and the employment sufficient that the injury should be compensable?" The "arising out of employment" and "course of employment" criteria are two parts of that unitary work-connection analysis. *Phil A. Livesly Co. v. Russ,* 296 Or 25, 29, 672 P2d 337 (1983). We see no reason not to apply the unitary work-connection analysis to the "arising out of and in the scope of employment" language of the occupational disease statute, despite some difference in the wording of the two statutes. *See Elwood v. SAIF,* 298 Or 429, 433, 693 P2d 641 (1985) (dictum using *Rogers* analysis in occupational disease context). If the relationship between the disease and the employment is sufficient, then the disease arises out of and in the scope of employment. Of course, because ORS 656.802(1)(a) requires that the disease be one

[1] Claimant also filed a claim for hearing loss. That claim is not involved in this appeal.

"to which an employe is not ordinarily subjected or exposed other than during a period of regular actual employment therein," the claimant must also prove that work conditions, when compared with non-work conditions, were the major contributing cause of the disease. *Dethlefs v. Hyster Co.*, 295 Or 298, 667 P2d 487 (1983); *SAIF v. Gygi*, 55 Or App 570, 639 P2d 655, *rev den* 292 Or 825 (1982).

There were four factors which contributed to claimant's psychiatric condition: (1) the pressure of operating the clipper at maximum efficiency; (2) the conflict between claimant and the president concerning the efficient operation of the mill; (3) horseplay and harassment from his fellow employes; and (4) the loss of his job. SAIF does not challenge the first, and it does not dispute that psychiatric problems which result from the pressure to produce that employers place on employes are compensable. SAIF challenges only the last three factors. Concerning the last, it argues that, under *Elwood v. SAIF, supra,* claimant is not entitled to compensation for illness resulting from the mere act of his discharge and the loss of his job. We agree. There is no evidence that there were any particularly stressful events accompanying the discharge itself, and he does not claim that there were. Under those circumstances we do not consider the stress attendant on his discharge in determining whether he suffered an occupational disease.

The focus of SAIF's appeal is on the second and third factors. It argues that they were outside the "scope of employment" as that phrase is used in ORS 656.802(1)(a) and that they therefore may not be considered as job-related conditions contributing to his psychiatric condition. It makes the same argument that we sidestepped in *Adsitt v. Clairmont Water District*, 79 Or App 1, 717 P2d 1231, *rev den* ___ Or ___ (1986), where the claimant alleged that criticism and related actions by a co-worker were the major contributing cause of the worsening of her underlying psychiatric problems. We stated:

> "SAIF argues, nonetheless, that the claim should not be compensable, because what happened to claimant was not in the scope of her employment. It points out that ORS 656.802(1)(a) defines an occupational disease as one 'which arises out of and *in the scope* of the employment * * *,' but a compensable injury is one which arises 'out of and *in the course* of employment * * *.' ORS 656.005(8)(a). (Emphasis

> supplied.) It asserts that the scope of employment is a narrower concept than the course of employment and that what claimant experienced was not in the scope of her employment. We need not decide what distinctions may exist between these definitions, for what happened to claimant was in the scope of her employment. Criticism of an employe's job performance is a normal part of employment and is within its scope. Browning's other actions which contributed to claimant's condition related to the criticism she gave and were thus also within the scope of claimant's employment. The exacerbation of claimant's underlying depression and alcoholism was a compensable occupational disease." 79 Or App at 7-8.

SAIF again urges us to define "scope of employment" very narrowly. It argues that only those conditions that are

directly related to the performance of the task claimant was hired to perform may be considered in determining whether he suffers an occupational disease. It concludes that the horseplay and harassment by his fellow employes and his self-appointed mission to tell the president how to run the mill were not directly related to claimant's operation of the clipper and that those factors may not be considered in determining whether he suffered an occupational disease.

There is no legislative history concerning the Occupational Disease Law to assist us in determining whether, in choosing to define "occupational disease" by using the phrase "scope of employment" rather than "course of employment," the legislature intended to define more narrowly occupational diseases than it had compensable injuries. *See James v. SAIF,* 290 Or 343, 349, 624 P2d 565 (1981). However, we are guided by the maxim that the workers' compensation act must be liberally construed to ensure that workers disabled or injured as a result of their employment are compensated. *Rogers v. SAIF, supra,* 289 Or at 643. SAIF's narrow interpretation of ORS 656.802(1)(a) fails to consider the actual conditions under which workers perform their assigned tasks. They do not work in a vacuum; they are generally involved in interpersonal relationships with other workers. As this case demonstrates, those relationships can be less than idyllic. Yet, they are as much within the scope of their employment as is the performance of assigned tasks.

The horseplay and harassment by claimant's fellow employes were sufficiently work-connected that any illness

that arose therefrom could be considered to have arisen out of and in the scope of claimant's employment within the meaning of ORS 656.802(1)(a). In *Stark v. State Industrial Acc. Com.,* 103 Or 80, 204 P 151 (1922), the court held that a worker's death as a result of horseplay that he had initiated arose out of and in the course of employment and was therefore compensable. The evidence suggested that the horseplay that the worker had engaged in—shooting an air-hose at a co-worker—was commonplace where he worked. The court stated:

> "The injury in question was caused by an industrial accident. It was a peril of the service. Under the usual conditions there prevailing the employees were more or less subject to such peril. It was an unexpected accident, but nevertheless may reasonably be said to have arisen out of and in the course of the employment. It was an incident of such employment by reason of the appliance used in the work, and the custom which prevailed of the employees, without the infraction of any enforced rule of the establishment, diverting the use of the air hose to sport. * * *
>
> "* * * * *
>
> "* * * It might be remarked parenthetically, that it is not to be supposed that a crew of men could be obtained unless some of them during working hours would play practical jokes on their fellow-workmen, especially if such men were red-blooded Americans. It is not conceivable that it was the intention of the legislature to preclude an injured workman or his beneficiaries from the benefits of the Workmen's Compensation Act for the reason that at the time of, or immediately prior to, the accident causing the injury such workman had been engaged

in play, unless the injury or death results to such workman 'from the deliberate intention of the workman himself to produce such injury.' We think it may fairly be said under the facts in this case that the accident arose 'out of and in the course of his employment.' * * *" 103 Or at 98-101.

In the landmark decision of *Matter of Leonbruno v. Champlain Silk Mills*, 229 NY 470, 471-73, 128 NE 711 (1920), Judge Cardozo, in upholding an award of compensation for a worker who lost his eyesight when he was struck by an apple thrown by another worker, wrote:

> "That it arose 'in the course of employment' is unquestioned. That it arose 'out of' employment, we now hold. The claimant's presence in a factory in association with other

> workmen involved exposure to the risk of injury from the careless acts of those about him. He was brought by the conditions of his work 'within the zone of special danger' * * *. Whatever men and boys will do, when gathered together in such surroundings, at all events if it is something reasonably to be expected, was one of the perils of his service. We think * * * that it was 'but natural to expect them to deport themselves as young men and boys, replete with the activities of life and health. For workmen of that age or even of maturer years to indulge in a moment's diversion from work to joke with or play a prank upon a fellow workman, is a matter of common knowledge to every one who employs labor.' The claimant was injured, not merely while he was in a factory, but because he was in a factory, in touch with associations and conditions inseparable from factory life. The risks of such associations and conditions were risks of the employment * * *.
>
> "* * * The risks of injury incurred in the crowded contacts of the factory through the acts of fellow-workmen, are not measured by the tendency of such acts to serve the master's business. Many things that have no such tendency are done by workmen every day. The test of liability under the statute is not the master's dereliction, whether his own or that of his representatives acting within the scope of their authority. The test of liability is the relation of the service to the injury, of the employment to the risk." (Citations omitted.)

The majority rule in the United States is that a nonparticipating victim who suffers an injury at the hands of his fellow employes' horseplay is entitled to compensation. 1A Larson, Workmen's Compensation Law 5-159 - 5-163, § 23.10 (1985). The reasoning of many of those cases is that horseplay is a risk inherent in employment and injuries arising therefrom can be said to have arisen "out of and in the course of employment." We are persuaded that horseplay at the workplace is so commonplace that it is also within the "scope of employment" within the meaning of ORS 656.802(1)(a). The horseplay and harassment of claimant's fellow employes may properly be considered under that statute as causal factors of his emotional illness.

The same is true of claimant's conflict with the president of the mill. Like the co-worker's criticism in *Adsitt v. Clairmont Water District, supra*, 79 Or App at 8, that sort of conflict is "a normal part of employment and is within its scope."

In order for his claim to be compensable, claimant must prove by a preponderance of the evidence that the real events and conditions of his employment, when viewed objectively, were capable of producing stress and that they were in fact the major contributing cause of his psychiatric condition. *McGarrah v. SAIF,* 296 Or 145, 675 P2d 159 (1983). The pressure to produce placed on claimant, the harassment and horseplay of his fellow employes and the conflict with the president of the mill all actually occurred and, when viewed objectively, were capable of producing stress. Carter and Holland agree that claimant suffered from major depression. Holland apparently believed that the loss of claimant's job was the chief cause of that depression, although in his report he acknowledges that claimant was subject to stressful conditions at work before he was terminated; as we have stated, we may not consider the mere loss of employment as a causal factor in claimant's illness. Carter clearly placed the blame for claimant's illness on the actual conditions of his employment. Carter was claimant's treating psychologist, and we find his analysis and opinion more persuasive. Claimant's illness is compensable.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of James Nix, Claimant.

NIX,
Petitioner,
v.
STATE ACCIDENT INSURANCE FUND,
Respondent.

(WCB 84-05083; CA A37597)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 5, 1986.

Michael L. Spencer, Klamath Falls, argued the cause for petitioner. With him on the brief was Osborne & Spencer, Klamath Falls.

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 Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

WARDEN, P. J.

Award of temporary total disability affirmed; reversed as to penalty and attorney fees and referee's award reinstated.

WARDEN, P. J.

Claimant seeks judicial review of a Workers' Compensation Board order reducing the referee's award of compensation for temporary disability. He also objects to the Board's setting aside the referee's award of a penalty and attorney fees. The referee awarded them because of respondent's unreasonable delay in paying interim compensation. We affirm the Board's reduction of compensation for temporary disability and reverse its order setting aside the award of penalties and attorney fees.

On February 20, 1984, claimant was injured in an on-the-job accident while driving employer's truck. Employer was at the scene of the accident and urged claimant to seek immediate medical attention. Claimant was taken to a Bend hospital, where he was treated and released. He was unable to work for two weeks as a result of his injuries. Although employer knew that claimant was involved in an accident that might result in a compensable injury, he did not immediately report the accident to SAIF as required by ORS 656.262(3).[1] He terminated claimant's employment on the date of the accident.

Claimant signed a claim form on May 7; employer signed it on May 17 and forwarded it to SAIF. SAIF accepted the claim as non-disabling on May 30, 1984. Claimant requested a hearing, asserting that he was entitled to interim compensation[2] from the date of the accident through May 30, 1984. The referee awarded interim compensation for that period. ORS 656.262(4) requires that the first interim payment of compensation be made no later than 14 days after the employer has notice or knowledge of the claim. The referee found that employer had such notice on the day of the accident and, because SAIF had failed to make a payment

within 14 days, the referee also imposed a penalty and awarded attorney fees pursuant to ORS 656.262(10).[3] *See Jones v. Emanuel Hospital,* 280 Or 147, 570 P2d 70 (1977).

The Board found that claimant was away from work as a result of his injury for only two weeks. He had not returned to his job after that, because the only truck available for him to drive had been rendered inoperable in the accident and employer had terminated him. Relying on *Bono v. SAIF,* 298 Or 405, 692 P2d 606 (1984), the Board concluded that claimant was entitled to temporary total disability only for the

[1] ORS 656.262(3) provides in part:

"Employers shall, immediately and not later than five days after notice or knowledge of any claims or accident which may result in a compensable injury claim, report the same to their insurer."

[2] The term "interim compensation" was coined by the court in *Jones v. Emanuel Hospital,* 280 Or 147, 570 P2d 70 (1977); it refers to temporary disability payments which ORS 656.262 requires be made to a claimant who is off work as a result of an injury for the time between the employer's notice of the injury and acceptance or denial of the claim.

[3] ORS 656.262(10) provides in part:

"If the insurer * * * unreasonably delays or unreasonably refuses to pay compensation * * * the insurer * * * 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."

two week period during which he was unable to work because of his injury. In *Bono,* the court held that a workers' compensation claimant is not entitled to interim compensation for any period when he was on the job.

In *Jones v. Emanuel Hospital, supra,* the court reasoned that, when read together, subsections (2), (4), and (5) (now (6)) of ORS 656.262 require an employer or insurer to begin paying interim compensation within 14 days of having notice of a claim. The payments are due whether or not the claim is ultimately found compensable. The court noted that interim compensation would prevent delays in processing a claim and insure a worker's well being during the period in which acceptance or denial of the claim was being considered. 280 Or at 151-152.

In *Bono v. SAIF, supra,* the court limited the effect of *Jones,* stating:

> "The purpose of interim compensation is to compensate the injured worker for leaving work. This is true even where this results from a non-compensable injury, as in *Jones.* However, if the worker does not demonstrate that he or she left work, interim compensation is not required." 298 Or at 410.

Claimant in this case was away from work after recovering from his injuries for reasons that were unrelated to his injury: He had been fired. Therefore, after claimant's two weeks of

disability, he was not entitled to interim compensation. *See Weyerhaeuser Co. v. Bergstrom,* 77 Or App 425, 713 P2d 654 (1986).

We disagree, however, with the Board's decision to set aside the referee's award of a penalty and attorney fees for SAIF's delay in paying interim compensation for the two weeks when claimant was disabled. The Board ruled that the penalty and attorney fees were not justified, because SAIF's delay was not unreasonable, because the fact that claimant was unable to work due to his injury was not known to SAIF until the hearing. That result cannot be squared with the statutory scheme, which provides that processing claims and providing compensation for a worker is the responsibility of the insurer. ORS 656.262(1). The Board held that, once SAIF had notice of the claim, it had acted reasonably by promptly processing it. Although SAIF may have proceeded correctly after receiving notice of the claim, the fact remains that claimant was not served by the workers' compensation system as he had a right to be. Compensation was not paid within 14 days of the accident, because employer failed to report the accident within five days, as required by ORS 656.262(3). That conduct of the employer was unreasonable and is legally attributable to his insurer, SAIF. *See Anfilofieff v. SAIF,* 52 Or App 127, 627 P2d 1274 (1981).

In *Anfilofieff,* the employer did not truthfully report the cause of claimant's injury or his relationship with claimant to SAIF, leading to a denial of the claim. We held that penalties and attorney fees could be assessed against SAIF:

> "[W]e interpret the statute to authorize penalties to be paid by SAIF to the extent unreasonable conduct of a contributing or noncomplying employer causes or contributes to the delay or refusal of compensation." 52 Or App at 135.

Having found that interim compensation was due within 14 days of the accident, and finding that the compensation was unreasonably delayed by employer's failure to report to SAIF, we order the referee's award of a penalty and attorney fees to be reinstated.[4]

Award of temporary total disability affirmed; reversed as to penalty and attorney fees and referee's award reinstated.

[4] ORS 656.262(3), which requires prompt reporting of claims to its insurer by an employer, also states:

"Failure to so report subjects the offending employer to a charge for reimbursing the insurer for any penalty the insurer is required to pay under subsection (10) of this section because of such failure."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Marvin Tevepaugh, Deceased and Ruby Tevepaugh, Claimant.

TEVEPAUGH,
Petitioner,

v.

SAIF CORPORATION et al,
Respondent.

(WCB No. 84-05351; CA A35839)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 18, 1986.

David C. Force, Eugene, argued the cause and filed the brief for petitioner.

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 Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

VAN HOOMISSEN, J.

Affirmed.

VAN HOOMISSEN, J.

Petitioner, the surviving spouse of an injured worker, seeks judicial review of an order of the Workers' Compensation Board that she is not entitled to survivor's benefits because, at the time of decedent's *injury*, he was married to another woman. The dispositive issue is whether ORS 656.208 denies petitioner equality of privileges in violation of Article I,

section 20, of the Oregon Constitution[1] or denies her Equal Protection of the Laws in violation of the Fourteenth Amendment to the United States Constitution.[2] We affirm.

Decedent was injured in 1964. At that time he was married to Bertha Tevepaugh. In 1967, the Workers' Compensation Board determined that decedent was permanently and totally disabled. His marriage to Bertha was later terminated.[3] In July, 1968, he married petitioner and was married to her at the time of his death in 1984.[4] No children were born of that marriage.

At the time decedent when was injured,[5] ORS 656.208(1) provided:

> "(1) If the injured worker dies during the period of permanent total disability, whatever the cause of death, leaving:
>
> "(a) *A widow who was his wife either at the time of the injury causing the disability or within two years thereafter.*

> "* * * * *
>
> "* * * the surviving widow * * * shall receive $90 per month until death or remarriage." (Emphasis supplied.)[6]

That statute did not create a classification based on a suspect class and, therefore, is not subject to "strict" scrutiny.[7] We examine the statute to determine whether it "rationally furthers some legitimate, articulated state purpose." *Olsen v. State ex rel Johnson*, 276 Or 9, 17, 554 P2d 139 (1976). Although the statute may not provide benefits to every person who might suffer a pecuniary loss from the death of an injured worker, the statute cannot be described as arbitrary. *See Leech v. Georgia Pacific Corp.*, 259 Or 161, 167-70, 485 P2d 1195 (1971).

The legislature could have had a rational basis for distinguishing between surviving spouses who were married to a decedent at the time when an industrial injury occurred, or within two years thereafter, and surviving spouses who mar-

---

[1] Article I, section 20, of the Oregon Constitution provides:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which upon the same terms, shall not equally belong to all citizens."

[2] The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "No state shall * * * deny to any person within its jurisdiction the equal protection of the laws."

[3] The record does not disclose the nature of that termination, however, it does show the couple had no issue or dependents.

[4] Claimant does not contend that the death was causally related to the industrial injury. Therefore, ORS 656.204, governing a spouse's benefits for a death resulting from accidental injury, does not apply.

[5] A workers' compensation claim, including a claim for survivor's benefits, is governed by the law in force at the time of the injury. ORS 656.202(2); *Roselle v. State Industrial Accident Commission*, 164 Or 173, 176, 95 P2d 726 (1940); *Bradley v. SAIF*, 38 Or App 559, 562-64, 590 P2d 784 (1978), *rev den* 287 Or 123 (1979).

[6] ORS 656.208 was amended by Or Laws 1985, ch 108, § 2, to eliminate the requirement in issue here.

[7] Petitioner cites *Hewitt v. SAIF*, 54 Or App 398, 635 P2d 384 (1981), *aff'd* 294 Or 33, 653 P2d 970 (1982). That case involved a classification based on *gender*. This case does not.

ried an injured worker more than two years after the injury.[8] Based on this analysis, the result would be the same under the federal Constitution.

Affirmed.

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[8] SAIF argues that the legislature may have intended to provide survival benefits to those persons who had not married a permanently-disabled worker, while withholding those benefits from those who had married a permanently-disabled worker:

> "Thus, the surviving-spouse benefits would constitute a form of compensation to the survivor for damages accrued as a result of the industrial injury. The legislature could have concluded rationally that a person who knowingly marries a disabled worker does not suffer damages from the industrial injury and hence need not be compensated."

Petitioner's brief vitually concedes a legitimate legislative purpose.

> Petitioner herein does not contest the underlying concept of the statute, to make such beneficiaries identifiable and to set a two-year limit upon the insurer or employer's risk of paying benefits after the death of the injured worker."

Petitioner's brief then explains:

> "Petitioner does contest the discrimination between successive spouses implicit in the statute, and applied against her herein."

As indicated above, this discrimination is not *per se* impermissible. *See Leech v. Georgia Pacific Corp., supra.*

IN THE COURT OF APPEALS OF THE STATE OF OREGON

HERTEL,
Petitioner,
v.
EMPLOYMENT DIVISION et al,
Respondents.

(85-AB-1150; CA A37224)

Judicial Review from Employment Appeals Board.

Argued and submitted March 26, 1986.

Kathryn S. Augustson, Portland, argued the cause for petitioner. With her on the brief was Reynolds & Johnston, Portland.

Thomas W. Sondag, Portland, argued the cause for respondent Viking Industries. With him on the brief were Richard C. Hunt, Portland, and Spears, Lubersky, Campbell, Bledsoe, Anderson & Young, Portland.

No appearance for respondent Employment Division.

Before Buttler, Presiding Judge, and Warren and Van Hoomissen, Judges.

VAN HOOMISSEN, J.

Reversed and remanded for reconsideration.

VAN HOOMISSEN, J.

Claimant seeks review of an Employment Appeals Board (EAB) decision denying him unemployment compensation on the ground that he voluntarily left work without good

cause. ORS 657.176(2)(c).[1] EAB concluded that he had not met his burden of showing that he had "no reasonable alternative but to leave work." OAR 471-30-038(4).[2] We reverse and remand for reconsideration.[3]

On April 4, 1985, claimant voluntarily quit work. The Employment Division, the referee and EAB denied claimant unemployment compensation on the ground that he had voluntarily left work without good cause. EAB made these findings of fact:

> "(1) During his eleven years of work as a truck driver for this employer, claimant had been injured on three occasions. (2) As a result of these injuries, claimant was pla¼ced on a less physically demanding truck driving job. (3) This job, as did the other, required working overtime without much notice. (4) In June, 1984, claimant was awarded custody of his children who had previously resided with his ex-wife. (5) Providing care for the children was an inconvenience to the claimant when he was required to work overtime. (6) The light duty truck driving caused pain as the result of claimant's previous injuries. (7) Shortly before claimant left work he was offered lighter duty work which paid less than he was earning and still

> required overtime. (8) Claimant declined this position because of the overtime which would still be an inconvenience in caring for the children. (9) He left work April 5, 1985, because the only positions available with this employer required overtime which would not allow him to spend as much time with his children as he deemed necessary."

EAB concluded that claimant had voluntarily left work without good cause:

> "It is contended by the claimant that it was absolutely necessary for him to spend more time with his children because of serious emotional problems suffered by the children as a result of the custody battle. However, all that he has shown is that the overtime required made it inconvenient to arrange child care. All that he offers in support of his contention is that a therapist '* * * recommends the importance of regular and routine child care and not to be 24 hours a day at a babysitter's type of care.' By his own testimony, claimant has shown that he provided regular and routine child care. It was not even hinted that it was ever necessary to have a babysitter look after the children 24 hours a day. To establish good cause for leaving an individual must show by a preponderance of the

[1] ORS 657.176(2) provides, in part:

> "An individual shall be disqualified from the receipt of benefits * * * if the authorized representative designated by the assistant director finds that the individual:
>
> "* * * * *
>
> "(c) Voluntarily left work without good cause."

[2] OAR 471-30-038(4) provides:

> "Good cause for voluntarily leaving work under ORS 657.176(2)(c) is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work. The reason must be of such gravity that the individual has no reasonable alternative but to leave work."

[3] Our scope of review in unemployment compensation cases is provided in ORS 183.482(8)(c), which states in part:

> "The court shall set aside or remand the order if it finds that the order is not supported by substantial evidence in the record."

Substantial evidence is "such proof as a reasonable mind would employ to support a conclusion." *Henzel et al v. Cameron et al*, 228 Or 452, 464, 365 P2d 498 (1961).

evidence that 'The reason must be of such gravity that the individual has *no reasonable alternative but to leave work.*' [OAR 471-30-038(4)]. The claimant has not met this burden." (Emphasis in the original.)

One member dissented.[4]

Claimant has two children, ages 10 and 4 at the time of the hearing. He was divorced in February, 1982. The dissolution decree provided for joint custody of the children. In June, 1984, claimant was awarded sole custody. The dissolution was hard fought, involving claims that his wife was abusing alcohol and other drugs. Claimant's uncontested testimony was that the litigation and surrounding circumstances had a serious emotional impact on the children. Their pediatrician reported that "each of [the] children has had

unique issues regarding emotional adjustment which have required extra time and attention from [claimant]."

At the hearing, claimant contended that he could not reasonably continue working at his truck driving job. His uncontested testimony was that that job required him to work substantial overtime, a fact that prevented him from spending the amount of time that he believed was necessary with his children. Further, his physician recommended that he seek a more sedentary job due to the numerous injuries he had suffered at work. Claimant also contended that the other job offered to him by employer was not a reasonable alternative to quitting, because that job also would have required him to work substantial overtime. Further, it paid less than his driving job and had other reduced benefits and no pension or profit sharing.

Claimant contends that, due to the irregularity of his work schedule, he was unable personally to provide regular and responsive care for his children commensurate with their particular needs. That contention is based on the type of compelling personal reason that may constitute good cause for leaving work. *See Sothras v. Employment Division,* 48 Or App 69, 76, 616 P2d 524 (1980). EAB did not specifically address that contention. It had a duty to do that, ORS 183.470(2), and its failure renders its order incomplete and, therefore, insufficient. *Guerra v. Real Estate Division,* 78 Or App 122, 126-27, 714 P2d 1087 (1986); *Cascade Forest Products v. Accident Prev. Div.,* 60 Or App 255, 260, 653 P2d 574 (1982). Without specific findings responsive to claimant's contention, meaningful review is not possible in this case.

Reversed and remanded for reconsideration.[5]

[4] The dissent states:

"I dissent and find good cause for leaving work has been established. Claimant's testimony, which is uncontroverted, was that it was necessary for the emotional stability of his children that he spend time with them on a regular basis. There has been no finding he was not credible in this regard. Claimant has amply demonstrated that he acted as a reasonable, prudent person in dealing with a situation of such gravity that he had no reasonable alternative but to leave work to provide emotional stability for his children. A disqualification is not appropriate."

[5] OAR 471-30-038 does not require a worker to seek other employment before quitting in order to show good cause. *Blivens v. Employment Division,* 55 Or App 665, 669, 639 P2d 690 (1980).

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Kenneth L. Booras, Claimant.

BOORAS,
Petitioner,

v.

NORTH BEND GARBAGE et al,
Respondents.

(WCB 83-11009, 83-11008, 82-09693; CA A37029)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 5, 1986.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief was Malagon & Associates, Eugene.

Randy G. Rice, Portland, argued the cause and filed the brief for respondent EBI Companies.

Marcus Ward, Elmira, argued the cause and filed the brief for respondent William Cusack.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondents SAIF Corporation and North Bend Garbage. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

PER CURIAM

Reversed; referee's order reinstated.

PER CURIAM

Claimant seeks judicial review of an order of the Workers' Compensation Board that reversed the referee's order, in which the referee had concluded that claimant had suffered an aggravation of a previous compensable injury on the basis of claimant's testimony and the treating physician's opinion.[1] The Board concluded that claimant's condition and symptoms were unchanged since his last award of compensation. On *de novo* review, we find that claimant showed that he has suffered some worsening of his compensable condition and, therefore, we reverse the Board and reinstate the referee's opinion. *Consolidated Freightways v. Foushee,* 78 Or App 509, 717 P2d 633, *rev den* 301 Or 338 (1986).

Reversed; referee's order reinstated.

[1] The referee concluded that claimant's employer at the time of his original injur was responsible, on the basis of his finding no evidence that claimant's subsequen employment contributed in any way to his worsened condition. The issue of responsi bility was not raised before the Board on review and is not considered in this appeal

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Archie F. Kephart, Claimant.

EDWARD HINES LUMBER CO.,

Petitioner,

v.

KEPHART,

Respondent.

(WCB O/M 81-0173M; CA A36968)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 14, 1986.

Marshall C. Cheney, Portland, argued the cause and filed the brief for petitioner.

James L. Edmunson, Portland, argued the cause for respondent. With him on the brief was Malagon & Moore, Portland.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

WARDEN, P. J.

Reversed and remanded for reconsideration.

WARDEN, P. J.

Employer petitions for judicial review of an order of the Workers' Compensation Board, made on the Board's own motion under ORS 656.278,[1] which awarded claimant permanent total disability. Employer makes several arguments, including that ORS 656.278 unconstitutionally delegates legislative authority to the Board. We hold that the statute is constitutional. However, we reverse, because the Board, in contravention of its own rule, did not allow employer 20 days

[1] ORS 656.278 provides:

"(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 may be, made by the board on its own motion.

"(3) The claimant has no right to appeal any order or award made by the board on its own motion, except when the order diminishes or terminates a former award. The employer may appeal from an order which increases the award.

"(4) The insurer or self-insured employer may voluntarily reopen any claim to provide benefits or grant additional medical or hospital care to the claimant.

"(5) 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; or

"(b) Approving disposition of a claim under ORS 656.289(4)."

to state its position after claimant had requested own motion relief.

Claimant injured his back in the course of employment on December 5, 1969. Employer accepted the claim, and claimant received an award for unscheduled permanent partial disability. He filed an aggravation claim in 1972 and received an increased award. In 1978, the Board exercised own motion jurisdiction and again increased the award. By another own motion order on January 4, 1985, the Board increased the award to 240 degrees. On July 24, 1985, claimant submitted additional medical reports, and on the basis of those reports the Board awarded claimant permanent total disability in its "Second own motion determination on reconsideration," on August 6, 1985.

We must construe a statute to be constitutional, if possible. *State v. Collis*, 243 Or 222, 231, 413 P2d 53 (1966). We reject employer's contention that ORS 656.278 is an unconstitutional delegation of legislative authority and its argument that there is no rule or standard to guide the Board in the exercise of its discretion. The language of ORS 656.278 includes limits on its application. Subsection (1) requires that the Board believe that "such action is justified." The Supreme Court, in *Holmes v. State Ind. Acc. Com.*, 227 Or 562, 575-576, 362 P2d 371, 363 P2d 563 (1961), interpreted that phrase to mean that, if challenged, the Board "must support its modification, change or termination with reason." Subsection (5) prohibits the Board from modifying findings or orders regarding compensability.

Employer overlooks the fact that the other statutes pertaining to disability awards apply equally to own motion orders. The rules and standards contained in the statutes covering awards for temporary and permanent disability are not abrogated by ORS 656.278. Its only effect is to continue the jurisdiction of the Board over a claim on a discretionary basis.

Statutes are not read in isolation, but in the light of the entire statutory scheme. *See SAIF v. Calkins*, 80 Or App 369, ___ P2d ___ (1986). The purpose of the Workers' Compensation Act is to provide prompt compensation to injured workers. In addition,

> "[o]ne express purpose of [ORS 656.278] is to provide for the adjustment of compensation from time to time as the workman's disability increases or diminishes." *Buell v. S.I.A.C.*, 238 Or 492, 497, 395 P2d 442 (1964).

Own motion jurisdiction only provides the mechanism for adjustments. It is a part of the Workers' Compensation Act and with the other provisions of the act, provides rules and standards to guide the Board in the exercise of its discretion. The statute is constitutional.

We reverse, however, because the Board acted in contravention of its own rules. OAR 438-12-005 provides in part:

> "(1) In carrying out its continuing power and jurisdiction to modify, change or terminate orders or awards under ORS 656.278, the Board will proceed as follows:

"(a) An application to the Board to exercise its authority under ORS 656.278 may be filed without limitation in time. A request will not be acted on by the Board while other administrative or judicial remedy is available.

"(b) A request by a claimant or the insurer should contain a written statement of all relief sought and all reasons or grounds for such relief. Attached to the application should be appropriate medical reports, affidavits or other supporting evidence to assist the Board in determining whether or not to grant the relief applied for. A copy of the request and all supporting materials should be furnished to all parties, i.e., claimant or insurer.

"(c) If the request is by the claimant, the insurer shall acknowledge receipt and advise the Worker's [*sic*] Compensation Board within 20 days of its position."

The Board is, of course, bound by its own rules. *Burke v. Children's Services Division*, 288 Or 533, 538, 607 P2d 141 (1980); *Fulgham v. SAIF*, 63 Or App 731, 735, 666 P2d 850 (1983).

On July 24, 1985, claimant submitted additional medical reports to the Board and requested an increased permanent disability award. That constituted a request that the Board exercise its own motion authority. The Board's rules allowed employer 20 days after receipt of a copy of the request to advise the Board of its position. The Board was not at liberty to render its decision before employer had advised it of employer's position or the 20 days had expired. It rendered its decision on August 6, 1985, only 13 days after the request and before employer had advised it of its position, thereby depriving employer of the opportunity to do so.[2]

Reversed and remanded for reconsideration.

[2] Because of our disposition of this case, we need not consider the other errors assigned by employer.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Margaret Gallegos, A Beneficiary of Samuel Gallegos, Claimant (deceased).

GALLEGOS,
Petitioner,

v.

AMALGAMATED SUGAR COMPANY,
Respondent.

(WCB 83-02336; CA A36983)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 5, 1986.

Tim J. Helfrich, Ontario, argued the cause for petitioner. With him on the brief was Yturri, Rose, Burnham, Ebert & Bentz, Ontario.

Stephen B. Fonda, Nyssa, argued the cause for respondent. With him on the brief was Stunz, Fonda, Pratt, Nichols & Kiyuna, Nyssa.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

VAN HOOMISSEN, J.

Affirmed.

VAN HOOMISSEN, J.

Claimant seeks judicial review of an order of the Workers' Compensation Board that affirmed and adopted the referee's order denying her claim for dependent's benefits. *See* ORS 656.005(11);[1] ORS 656.204(5).[2] We review *de novo,* ORS 656.298, and affirm.

The referee found:

"Margaret Gallegos is the claimant in this case. Her son, the injured worker, Samuel Gallegos, Jr., is deceased. Claimant and Samuel Gallegos, Sr. had been married for some 36 years and had five children. The parents separated in the middle of 1979 but apparently remained friendly. Eventually all the children grew up and moved out of the mother's home except Samuel, Jr. who lived with her. To the knowledge of the witnesses he never married or had any children or any other dependents. His mother claims she is a surviving dependent.

"Claimant and decedent lived at 1004 Park Ave., Nyssa, Oregon since 1975. Claimant was purchasing the home at $146 per month. The claimant since 1972 has worked at headstart migrant day care institution with facilities at Nyssa and Ontario. She started as a cleanup woman. One and one-half years later she became a medical aide until 1979 and she then started as a health consultant.

"Samuel, Jr. was 30 years old at the time of his death while at work at the Amalgamated Sugar Co. He was not steadily employed and had other jobs. His primary job with Amalgamated was during 'campaigns' which apparently last from October to January, during the sugar beet run. He was killed there during November, 1982, loading sugar beets. Samuel, Jr. also worked for his mother's employer. The employees there

knew him and testified concerning his relationship to his mother. He also received a National Guard monthly salary and annual active duty pay.

"The testimony at the hearing was vague concerning

[1] ORS 656.005(11) provides in part:

" 'Dependent' means any of the following-named relatives of a worker whose death results from any injury and who leaves surviving no widow, widower or child under the age of 18 years: Father, mother, * * * who at the time of the accident, are dependent in whole or in part for their support upon the earnings of the worker."

[2] ORS 656.204(5) provides, in part:

"If the worker leaves neither widow, widower nor child for whom compensation may be paid, but leaves a dependent, a monthly payment shall be made to each dependent equal to 50 percent of the average monthly support actually received by such dependent from the worker during the 12 months next preceding the occurrence of the accidental injury, but the total payments to all dependents in any case shall not exceed $150 per month."

specific amounts. Claimant was even given a recess in which to attempt to provide figures concerning the amount of support she thought she received from her deceased son. Defendant's position is that claimant was not dependent on her son but they did commingle their monies.

"The undersigned has gleaned from the sum total of all the testimony that decedent had told his mother's co-workers that his mother was not getting help from her other children and he intended to look after her permanently, but that he was getting on in years and he wanted to get married, but he would have to find a wife who would understand that he intended to support his mother. It was uncontradicted that decedent was intending to get married and it was his understanding that his fiancee acquiesced that they would have to live in the mother's home at least until claimant was (in his opinion) financially on her feet, which apparently she had not been (in his opinion) since before her husband left in 1969. It was not explained how claimant would accomplish this.

"The gist of all the witnesses' testimony was that decedent was generous with his mother and that sometimes he would turn over his entire pay to her. Sometimes he would keep out $30 or $40. Sometimes she would lend him money back when he had underestimated his needs for the month, but it was understood he would always reimburse her on his payday.

"It was also believably testified to that decedent had given little thought to the possibility that his mother, who he considered sickly, would outlive him, and in fact left his life insurance proceeds to his younger brother who lived close by in Idaho.

"The deceased's only large expense seems to be a used car he was buying. Apparently claimant needed collateral for a loan, so made the last two payments on the car in order for her son to obtain a free and clear title which she then used as collateral towards her loan. Claimant has her own car which the deceased maintained for her, but he did not make major repairs.

"According to the witnesses, the deceased often bought groceries and although his mother often cooked dinner he not only cooked on occasion but also regularly washed the dishes and cleaned up the house."

Claimant first contends that the referee and the Board erred in concluding that

> "[i]n order to comply with the statute the decedent has to have contributed more than 50 percent of claimant's average monthly income."

She argues that there is no authority for that requirement. She relies on ORS 656.005(11), ORS 656.204(5), and *Paul et al v. Industrial Acc. Com.*, 127 Or 599, 272 P 267, 273 P 337 (1928). We agree with claimant.

ORS 656.005(11) defines "dependent" as one "who at the time of the accident, [is] dependent in whole or in part for their support on the earnings of the worker." ORS 656.204(5) provides that "a monthly payment shall be made to [a] dependent equal to 50 percent of the average monthly support actually received by such dependent from the worker." Thus, it would be sufficient for claimant to show that she was dependent in part for her support on the earnings of the decedent. Her benefit would then be 50 percent of the average

monthly support she had actually received from him. The Board erred in adopting the referee's conclusion. However, that does not end our inquiry.

Claimant next contends that the referee and the Board erred in adopting employer's calculations of the decedent's income and expenses. She argues that employer consistently miscalculated decedent's income and expenses. The referee stated:

> "The undersigned accepts [employer's] brief with its citations and calculations, and finds against claimant's position."

Employer provided most of the evidence on the issue of the decedent's expenses. Claimant's evidence did not show the decedent's maintenance costs. Her evidence of his contributions was uncertain at best. The referee stated:

> "One consideration in this case is the credibility of the claimant. Although she appeared to believe in what she was testifying to, it is not very convincing that she knew enough to testify. She assembled easily assailable figures, and in the undersigned's opinion, does not have the data necessary. The undersigned feels there is a great deal of hopeful guesswork on her part. It is just as convincing that many of the things that decedent gave were gifts, not support.

> "Even if dependency had been established, the manipulation of the arithmetic does not allow an even remote calculation of benefits that might arise." *See* ORS 656.204(5).

We conclude that claimant failed to sustain her burden to show that the decedent contributed any more than his own maintenance cost. *See Paul et al v. Industrial Acc. Com., supra,* 127 Or at 608-609.

Claimant finally contends that the Board erred in concluding that she was not partially dependent on the decedent's earnings. She argues that, during the twelve months immediately preceding the decedent's death, her living expenses totalled $15,902 and that her net income during that same period was insufficient by more than $3,600 to pay that amount. She argues further that the decedent had contributed more than $300 monthly toward her support. The referee concluded in part:

> "Although the evidence does establish that the decedent made some contribution, the record fails to establish, as the statute requires, that claimant was in fact dependent on the contributions in whole or in part. ORS 656.005(11)."

We find no reason to disturb that conclusion.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Sharon L. James, Claimant.

JAMES,
Petitioner,

v.

KEMPER INSURANCE COMPANY et al,
Respondents.

(WCB 83-07472, 83-08033; CA A36959)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 14, 1986.

Steven C. Yates, Eugene, argued the cause and filed the brief for petitioner.

Noreen K. Saltveit, Portland, argued the cause for respondents. With her on the brief was N. K. Saltveit & Associates, Portland.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

VAN HOOMISSEN, J.

Affirmed.

VAN HOOMISSEN, J.

Claimant petitions for judicial review of a Workers' Compensation Board order that affirmed a referee's order upholding the insurer's denial of payment for chiropractic services in excess of those provided for by OAR 436-69-201(2)(a).[1] On *de novo* review, ORS 656.298, we affirm.

In July, 1982, claimant was injured while employed by General Foods. She was treated by Dr. Buttler, a chiropractor. In March, 1983, a determination order found that she was medically stationary and awarded her temporary total disability. Nevertheless, her physician felt that she would benefit from ongoing chiropractic treatment.

In June, 1983, claimant began working for J. M. Smucker, which was insured by Kemper. She had more problems. Buttler thought that her work had exacerbated her previous condition. In October, she was examined by Dr. Fry

[1] OAR 436-69-201(2)(a) provides:

"Frequency and extent of treatment shall not be more than the nature of the injury and the process of a recovery requires. Insurers have the right to require evidence of the efficacy of treatment. The usual range of the utilization of medical services does not exceed 15 office visits by any and all attending physicians in the first 60 days from first date of treatment, and 2 visits a month thereafter. This statement of fact does not constitute authority for an arbitrary limitation of services, but is a guideline to be used concerning requirements of accountability for the services being provided. Physicians requesting reimbursement for visits in excess of this amount must submit upon request a report documenting the need for such services."

at the request of Smucker's insurer. He thought that chiropractic treatment was only palliative. Dr. Pasquesi, an orthopedic surgeon, also examined her. He thought that she had a permanent impairment and needed chiropractic treatment, although he agreed that it was palliative. Two chiropractors also examined claimant. They thought that chiropractic treatment was only palliative and unnecessary.

In December, 1983, a determination order awarded claimant 10 percent unscheduled permanent partial disability. Kemper was ordered to pay the claim. After claimant began working for a different employer, Buttler increased the frequency of her chiropractic treatments. Kemper denied responsibility for treatments in excess of the guideline set out in

OAR 436-69-201(2)(a), claiming that additional treatments were unnecessary and, therefore, unreasonable.

In December, 1984, a referee issued an opinion and order which stated, in part:

> "With respect to the unreasonable treatment issue, I find that I place more credence on the opinions of both of the medical doctors, and two of the chiropractic physicians, that the continued chiropractic treatment of this claimant is unreasonable in its scope, and that the carrier should be responsible only for such continued palliative treatment as may be given in accordance with the guidelines set forth in the Oregon Administrative Rules (OAR 436-69-201(2)(a))."

Claimant requested reconsideration and clarification as to the applicable guideline, pointing out that the guideline in effect at the time of her injury provided for four treatments monthly. That guideline was amended in 1984 to provide for only two treatments monthly. The referee declined to reconsider and stated that he had evaluated the case under the administrative rule as effective in 1984. Claimant appealed to the Board for review, but did not file a brief. The Board affirmed, stating:

> "On the issue of the frequency of chiropractic treatments, in the absence of an indication as to what error the referee may have committed, we have searched the record and have found none."

The workers' compensation statutes do not authorize any limitation on the number of treatments a claimant may receive, and OAR 436-69-201(2) does not create a limit. *Kemp v. Worker's Comp. Dept.*, 65 Or App 659, 663, 672 P2d 1343 (1983), *modified on other grounds*, 67 Or App 270, 677 P2d 725, *rev den* 297 Or 227 (1984). ORS 656.245[2] "mandates provision of medical services, regardless of frequency, so long as they are reasonable and necessary." *West v. SAIF*, 74 Or App 317, 321,

[2] ORS 656.245(1) provides:

> "For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions resulting from the injury for such period as the nature of the injury or the process of the recovery requires, including such medical services as may be required after a determination of permanent disability. Such medical services shall include medical, surgical, hospital, nursing, ambulances and other related services, and drugs, medicine, crutches and prosthetic appliances, braces and supports and where necessary, physical restorative services. The duty to provide such medical services continues for the life of the worker."

702 P2d 1148 (1985). Claimant argues that the referee and the Board could not consider frequency in determining what is reasonable and necessary. She argues further that, because the referee and Board did not find chiropractic treatment to be unreasonable and unnecessary, the determination of the frequency of the treatments should be left to the treating physician. We disagree.

Palliative medical expenses are compensable only to the extent that they are reasonable and necessary. *Wetzel v. Goodwin Brothers*, 50 Or App 101, 108, 622 P2d 750 (1981). In determining what is reasonable and necessary, the insurer, the referee and the Board may consider the frequency of the treatments. Simply because the Board determines that it is reasonable and necessary for an injured worker to receive some chiropractic treatments does not mean that she may expect to be compensated for any number of treatments without showing that the treatments are reasonable and necessary.

Claimant has the burden of proving that the treatments are reasonable and necessary. *McGray v. SAIF*, 24 Or App 1083, 547 P2d 654 (1976). The referee concluded that she did not present sufficient evidence to show that treatments in excess of the guideline were reasonable and necessary. Although a referee may not arbitrarily limit the number of treatments to two, the number stated in the guidelines, *see West v. SAIF, supra*, the number of treatments may be limited to what is shown to be reasonable and necessary. We conclude that claimant has not met her burden of proving that more than two treatments monthly are reasonable and necessary.[3]

Affirmed.

[3] Because we conclude that the issue in this case is the reasonableness and necessity of the treatments, and because we have previously held that OAR 436-69-201(2)(a) does not establish a substantive rule, but merely a guideline, it is unnecessary to address the question whether the present guideline, allowing for two treatments monthly, or the former guideline, allowing for four treatments monthly, is applicable.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Carolle J. Tucker, Claimant,
EBBTIDE ENTERPRISES et al,
Petitioners,
v.
TUCKER et al,
Respondents.

(WCB 83-00889, WCB 83-03022, WCB 83-03550; CA A33743)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 20, 1985.

Jerald P. Keene, Portland, argued the cause for petitioners. With him on the brief was Roberts, Reinisch & Klor, P.C., Portland.

W. T. Westmoreland, Tillamook, waived appearance for respondent Carolle J. Tucker.

J. P. Toby Graff, Portland, waived appearance for respondents New England Fish Co., and INA.

No appearance for respondent American Care Center.

Robert M. Atkinson, 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.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

RICHARDSON, P. J.

Reversed and remanded for further proceedings on the aggravation claim; otherwise affirmed.

Newman, J., specially concurring.

RICHARDSON, P. J.

The issues in this workers' compensation case are whether petitioner EBI properly denied a previously accepted new injury claim and whether EBI, SAIF or INA is responsible for a subsequent aggravation. The aggravation claim was filed in March, 1983. Claimant had previously suffered three compensable low back injuries during three different employments. The first injury occurred in 1977 and resulted in a disability award payable by INA. She suffered her second back injury in February, 1982, while employed as a nurses' aide by American Care Center. That employer's insurer, SAIF, accepted the claim, and claimant received an additional disability award. The third injury occurred in July, 1982, while claimant was an employe of Ebbtide Enterprises, whose insurer, EBI, accepted the claim in September. However, in January, 1983, EBI issued a "backup denial" of that claim. It asserts that the denial is permissible under *Bauman v. SAIF,*

295 Or 788, 670 P2d 1027 (1983), because claimant told EBI about the earlier 1982 injury but did not inform it about the 1977 injury. That omission, according to EBI, brings the claim within the exception for "fraud, misrepresentation or other illegal activity" to the *Bauman* rule foreclosing insurers and employers from denying previously accepted claims. 295 Or at 794.

The referee agreed with EBI on that issue. He also concluded, as an independent basis for his decision, that the July, 1982, incident did not "in any way [contribute] to [claimant's] underlying condition" or to the aggravation. The referee therefore assigned responsibility to SAIF. The Board reversed. It concluded:

> "Our review of the record fails to persuade us that, had claimant informed EBI that her back problems originated with her 1977 industrial injury, rather than her more recent February 1982 injury, EBI's decision to accept the claim would have been any different. What claimant did consistently say to everyone, including the insurer's investigator and her doctors, rather graphically suggests at least the possibility that claimant's late 1982 problems originated with her early 1982 SAIF injury. If EBI did not follow this up with additional investigation, what basis is there for thinking it would have done anything differently had it known of the much older 1977 injury?

> "* * * * *
>
> "In short, claimant's nondisclosure was immaterial and, therefore, EBI's retroactive denial is precluded by *Bauman*. It necessarily follows that EBI, rather than the SAIF Corporation, is responsible for payment of claimant's compensation."

EBI and Ebbtide seek review. We agree with the Board's finding that the purported misrepresentation was not material. EBI knew of claimant's February, 1982, injury and that she ascribed most of her July back problems to that injury at the time when it accepted her claim in September. She had already been awarded additional permanent partial disability for the February injury. EBI's contention that its acceptance was due to a material misrepresentation is untenable, and its backup denial was impermissible.

However, as we understand the Board's order, it resolves only the issue of whether EBI's denial of the 1982 claim was proper. It does not address the question of responsibility for the 1983 aggravation claim. In its appeal to the Board, SAIF sought review of the referee's conclusion on the backup denial and did not specifically ask the Board to decide whether the referee also erred in assigning responsibility for the aggravation to SAIF. The responsibility question was nevertheless subject to the Board's *de novo* review. *See Destael v. Nicolai Co.*, 80 Or App 596, ___ P2d ___ (1986). Although it is plainly within our authority to decide the responsibility issue on *de novo* review without the Board first having considered it, it is also plainly within our discretion to remand for a determination by the Board. ORS 656.298(6). The referee described the medical evidence regarding which injury or injuries contributed to the March, 1983, "flare-up" as being "unfortunately scant." Given the Board's holding and ours that EBI is bound by its acceptance of claimant's most recent

injury, EBI has the burden of rebutting the presumption that it is responsible for the aggravation. *Industrial Indemnity Co. v. Kearns*, 70 Or App 583, 690 P2d 1068 (1984); *see also Boise Cascade Corp. v. Starbuck*, 296 Or 238, 675 P2d 1044 (1984). We conclude that the parties should have the benefit of the Board's evaluation of the evidence.[1]

Reversed and remanded for further proceedings on the aggravation claim; otherwise affirmed.

NEWMAN, J., specially concurring.

I believe that EBI's backup denial was proper. The majority states that claimant's failure to disclose a prior injury to the same body part was not a *material* misrepresentation. The majority reasons that, because EBI knew of one prior injury, it would have necessarily accepted the claim had it known of two. Because the misrepresentation did not change EBI's decision, the reasoning continues, it was not material. I disagree. Claimant's nondisclosure concerned the same body part involved in the claim. Moreover, the medical evidence indicates that her 1977 injury was a significant factor in her subsequent disabilities, including the disability involved in the 1982 claim against Ebbtide. Under these circumstances, I would hold that claimant's failure to disclose her 1977 injury to EBI was material and a misrepresentation within the meaning of *Bauman v. SAIF*, 295 Or 788, 794, 670 P2d 1027 (1983). *See Parker v. North Pacific Ins. Co.*, 73 Or App 790, 794, 700 P2d 255 (1985); *Skinner v. SAIF*, 66 OR App 467, 470, 674 P2d 72 (1984).

The majority's approach to the materiality issue is based on speculation. I can see little advantage to encouraging such speculation by requiring the insurer to prove that it would have acted differently if it had known of facts that claimant did not disclose, when the record shows that the non-disclosed injury was to the same body part as was involved in the accepted injury and materially contributed to it. Any increase in "fairness" that such a rule might promote would be outweighed by the increase in uncertainty that it would create, particularly because the insurer is only seeking an opportunity to litigate the claim. I would hold that claimant's misrepresentation is material and would reverse the Board on this issue.

As the majority notes, the referee found that claimant's work for Ebbtide did not in any way contribute to her subsequent injury. 81 Or App ___ (slip opinion at 2.) Even if the back-up denial is allowed under *Bauman*, EBI may still be responsible for the aggravation claim if the evidence shows that the denial should not be affirmed. The majority concludes that the parties should have the benefit of the Board's evaluation, not yet made, of the evidence on this point and remands for further proceedings on the aggravation claim. Because that disposition is reasonable under the circumstances, I concur.

[1] It is not clear from the referee's opinion whether he placed the burden of rebutting the presumption of responsibility on EBI, notwithstanding his conclusion that EBI's backup denial of the most recent injury claim was permissible.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CORVALLIS AERO SERVICE, INC. et al,
Appellants,
v.
VILLALOBOS et al,
Respondents.
(85-0136; CA A37299)

Appeal from Circuit Court, Marion County.

Val D. Sloper, Judge.

Argued and submitted June 6, 1986.

John L. Langslet, Portland, argued the cause for appellants. With him on the briefs was Martin, Bischoff, Templeton, Biggs & Ericsson, Portland.

No appearance for respondent Francisco Villalobos.

Richard D. Wasserman, Assistant Attorney General, Salem, argued the cause for respondent State Accident Insurance Fund Corporation. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Richardson, Presiding Judge, and Newman and Deits, Judges.

RICHARDSON, P. J.

Reversed and remanded with instructions to enter declaratory judgment for plaintiffs.

RICHARDSON, P. J.

In 1979, while employed by Jose Martinez, Francisco Villalobos suffered an on-the-job injury caused by the negligence of employes of Corvallis Aero Service (Corvallis).[1] Villalobos received workers' compensation benefits from SAIF, and he brought a third-party negligence action against Corvallis. Corvallis' liability insurer was insolvent. Consequently, the Oregon Insurance Guaranty Association (OIGA) assumed the responsibilities of Corvallis' insurer pursuant to ORS 734.510 to 734.710, for Villalobos' action. Villalobos and Corvallis entered into a settlement agreement, under which Corvallis agreed to pay Villalobos $35,000 plus interest, contingent on a final determination in this declaratory judgment action brought by Corvallis and OIGA that SAIF has no right to share in the settlement proceeds and has no monetary claim against Villalobos by virtue of the settlement.[2] The trial court ruled in favor of SAIF, OIGA appeals and we reverse.

[1] Villalobos subsequently died in an unrelated accident, and his personal representative has been substituted as a party to this action. We will nevertheless refer to Villalobos as a party to this action and to the underlying action against Corvallis.

[2] OIGA, of course, represented Corvallis in connection with the settlement. They appeared jointly in the declaratory judgment action. In the balance of this opinion, when we refer to the two collectively as parties to the action, we use "OIGA."

The issues in this appeal involve two statutory schemes: ORS 656.576 to 656.595, relating to third-party actions and allocation of third-party recoveries between workers' compensation insurers and recipients; and ORS 734.510 to 734.710, relating to the payment of "covered claims" against insolvent insurers. Under the ORS chapter 656 provisions, a worker who suffers an injury which is compensable for workers' compensation purposes, and which is caused by the negligence or wrong of a third party who is not exempt from tort actions under the Workers' Compensation Law, may elect to bring an action against the third party. If the worker so elects, the "paying agency" responsible for the payment of workers' compensation benefits has a lien on the worker's cause of action and is entitled to share in the proceeds in accordance with the formula of ORS 656.593. If the worker elects not to bring the action, the paying agency may bring an action in the worker's name against the third party, with any recovery to be allocated between the paying agency and the worker in accordance with ORS 656.591.

As relevant here, ORS 734.510 to 734.710 provide that all insurers authorized to transact business in this state ("member insurers"[3]). pay assessments to OIGA to fund the latter's duties under the statutes. Those duties include the defense, processing and payment of "covered claims" against insolvent insurers and their insureds. There is no dispute but that Villalobos' claim against Corvallis is a "covered claim" as defined by ORS 734.510(4). The issue is whether SAIF is entitled to share in Villalobos' recovery from Corvallis pursuant to ORS 656.593 or whether its lien under that statute is excluded by ORS 734.510(4)(b)(B), which provides:

> "(b) 'Covered claim' does not include:
>
> "* * * * *
>
> "(B) Any amount due any reinsurer, insurer, insurance pool or underwriting association as subrogated recoveries or otherwise."

Also germane is ORS 734.695, which provides:

> "The insured of an insolvent insurer shall not be personally liable for amounts due any reinsurer, insurer, insurance pool or underwriting association as subrogation recoveries or otherwise up to the applicable limits of liability provided by the insurance policy issued by the insolvent insurer."

SAIF makes four basic arguments for the proposition that the quoted statutes do not preclude it from imposing its lien on the proceeds of the Villalobos-OIGA settlement. It contends, first, that its lien does not pertain to any amounts due SAIF or owed by Corvallis, but attaches only to the amounts to be paid by OIGA to Villalobos. According to SAIF, those amounts

> "* * * are due to the injured worker (now his estate), not to an 'insurer * * * as subrogated recoveries or otherwise.' * * *
>
> "* * * * *
>
> "Because the damages payable by OIGA (in place of the insolvent insurer) to the Villalobos estate are not amounts payable to SAIF, those amounts do not fall within the ORS

[3] We assume for argument that, because SAIF does not require a certificate of authority from the Insurance Commissioner and because of certain statutory provisions which pertain specifically to it, SAIF is not a "member insurer," although it is an "insurer." *See* ORS 656.752; 734.010. As SAIF appears to agree, the anti-subrogation provisions of ORS 734.510 to 734.710 do apply to payments to insurers other than member insurers, albeit, in SAIF's view, not to the particular payments at issue here.

734.510(4)(b)(B) exclusion from the definition of 'covered claim.'

"Nor does ORS 734.695 aid plaintiffs. That statute merely deals with the personal liability of the 'insured of an insolvent insurer,' in this case, Corvallis Aero Service. Allowing SAIF to enforce its statutory lien against the proceeds of the settlement will not render Corvallis Aero Service personally liable to anyone * * *."

We think that SAIF's argument is based on too narrow a reading of both statutory schemes. If Villalobos had elected not to sue Corvallis, SAIF would have been entitled to proceed against Corvallis in his name and would have been entitled to an allocation of any recovery under ORS 656.591, rather than under ORS 656.593; that would have essentially been a subrogation action. We do not think that the legislative preclusion of OIGA's subrogation to insurers was meant to turn on the coincidence of whether the worker or the insurer brings the action in which the amounts payable to the insurer are recovered. More saliently, SAIF's argument is inconsistent with the language of ORS 734.510(4)(b)(B), which says that covered claims do not include any amounts "due any * * * insurer * * * as subrogated recoveries or otherwise." Our understanding of that language is that an amount which, for any reason, finds its way to an insurer rather than a claimant or an insured, is beyond the scope of what OIGA is authorized or required to pay. Given our understanding, we do not agree with SAIF that it is material whether it brings the action as the worker's subrogee or shares in the damages recovered in an action instituted by the worker. In either instance, ORS 734.510(4)(b)(B) prohibits payments to the insurer.

SAIF's second and third arguments are based on its view of the policy and purposes of ORS 734.510 to 734.710. SAIF understands the purposes of the statutes to be the protection of claimants and policyholders and the establishment of an assessment system to fund those protective objectives. *See* ORS 734.520. SAIF argues that those purposes are not furthered by applying ORS 734.510(4)(b)(B) here, because

"* * * ORS 734.510 to 734.710 protect claimants and policyholders against financial loss because of an insurer's insolvency and, through the creation of an association of insurers, distribute the cost of that protection proportionately among the association's members. At the same time, through

ORS 734.510(4)(b)(B), the 'anti-subrogation' provision, the statutes prevent the ultimately meaningless shuffling of money back and forth between the OIGA and individual members on account of subrogated claims. * * *

"The policy behind ORS 734.510(4)(b)(B) does not apply here. As already noted, the claim involved here is not *SAIF's* claim against Corvallis Aero Service, being handled by OIGA pursuant to ORS 734.570. Rather, the claim is by the Villalobos estate; SAIF merely has a statutory lien against a portion of the proceeds. Thus, the claim is not merely a battle between OIGA and one of its member insurers on a subrogation matter, which ORS 734.510(4)(b)(B) resolves by forcing the member insurer to take the loss." (Footnotes omitted; emphasis SAIF's.)

The problem with SAIF's analysis of the logic and

policy underlying ORS 734.510(4)(b)(B) is that, whatever *purpose* the legislature may have had for doing so, the prohibition it imposed *in clear terms* was on payments to insurers of amounts "as subrogated recoveries or otherwise." The end result of SAIF's theory would be that money OIGA pays under its settlement with Villalobos will be transmitted to SAIF, because SAIF has made insurance payments on Villalobos' workers' compensation claim. The language of the statute does not allow that result.[4]

SAIF argues next that, if it is not able to enforce its lien, Villalobos will have a double recovery: the workers' compensation benefits plus the full amount of the tort damages, unadjusted in accordance with ORS 656.593. Assuming that to be correct, *but see* note 4, *supra*, the answer is: "So what?" The effect and purpose of ORS 734.510(4)(b)(B) and 734.695 are to prevent insurers from seeking or recovering what they *otherwise* could. In some instances, the corollary will be that someone will not have to pay what he would otherwise not be entitled to keep. The elimination of a remedy often carries with it the creation of a windfall. That fact of life does not have any bearing on the meaning of the statutes.

SAIF's remaining argument is that ORS 734.510 to 734.710 do not apply to it, because ORS 731.028 enumerates the provisions of the Insurance Code to which SAIF is subject "as a domestic insurer" and does not mention the ORS chapter 734 provisions. We do not agree that an insurer's being subject to the affirmative regulations and requirements of ORS chapter 734 is relevant to whether the insurer is entitled to payments that are prohibited by ORS 734.510(4)(b)(B) and 734.695.[5] Those provisions pertain, respectively, to what OIGA and the insureds of insolvent insurers may or must *pay*; the inability of SAIF to *receive* payments is ancillary to the fact that the statutes excuse OIGA and Corvallis from making those payments, and the fact that ORS 731.028 makes no reference to ORS 734.510(4)(b)(B) and 734.695 does not give SAIF a unique right to receive amounts which the unmentioned statutes unqualifiedly provide that OIGA and the insureds need not pay to *any* insurer.

Underlying some of SAIF's arguments is the suggestion that, because it enjoys a *lien* under ORS 656.593, its rights are not defeated by the anti-*subrogation* provisions of ORS chapter 734. That suggestion is incorrect for two reasons. The first is that the statutes preclude payment of amounts due insurers "as subrogation recoveries *or otherwise.*" (Emphasis supplied.) The second is, as OIGA states in its reply brief, that "SAIF's lien claim basically is nothing more than a subrogation claim for which the legislature has granted lien rights as a

[4] Given our conclusion, we need not discuss SAIF's policy argument at length. As it posits, the objective of ORS 734.510 to 734.710 is to protect claimants and insureds, not insurers. The role of the anti-subrogation provisions in carrying out that objective is clear. SAIF's policy argument disregards the fact that an insurer's indirect recovery from amounts OIGA pays to a claimant can affect the total amount paid to settle a claim as much as the insurer's direct recovery from OIGA can.

[5] We note that SAIF is not the only insurer which is apparently not subject to the affirmative requirements of ORS chapter 734. *See, e.g.*, ORS 731.042(4).

mechanism of enforcement." ORS 734.510(4)(b)(B) and 734.695 preclude recoveries based on subrogation rights; ORS 656.593 creates a lien that is wholly derivative from the fact that the third-party statutes also make the paying agent the subrogee of the worker's action.

Reversed and remanded with instructions to enter a declaratory judgment for plaintiffs.

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144 September 10, 1986 No. 517

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Pauline V. Bohnke, Claimant.

UNITED MEDICAL LABORATORIES et al,
Petitioners,

v.

BOHNKE,
Respondent.

(WCB 82-06426; CA A35141)

Judicial Review from Workers' Compensation Board.

On petitioners' petition for reconsideration filed June 13, 1986. Former opinion filed April 16, 1986, 78 Or App 671, 717 P2d 251.

Jerald P. Keene and Roberts, Reinisch & Klor, P.C., Portland, for petition.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

RICHARDSON, P. J.

Petition for reconsideration allowed; affirmed.

RICHARDSON, P. J.

United Medical Laboratories and its insurance carrier, Employee Benefits Insurance Company, filed a petition for review of our decision, 78 Or App 671, 717 P2d 251 (1986). We treat it as a petition for reconsideration, ORAP 10.10, allow the petition, modify our opinion and affirm the decision of the Workers' Compensation Board.

In our original decision, we affirmed the Board's order *per curiam,* citing *SAIF v. Casteel,* 74 Or App 566, 703 P2d 1039 (1985). After our decision in this case, the Supreme Court vacated our decision in *Casteel* and remanded that case to the Board for reconsideration. *SAIF v. Casteel,* 301 Or 151, 719 P2d 853 (1986).

In *Casteel,*

> "[c]laimant compensably injured her back and hip. A referee awarded permanent total disability. SAIF requested Board review, and the Board reduced the award to 10 percent unscheduled permanent partial disability. Claimant requested review by this court, and we modified the Board's order and

granted claimant an award of 50 percent unscheduled permanent partial disability. * * *" 74 Or app at 568.

We held that by virtue of ORS 656.313, SAIF's payments preceding the ultimate award of 50 percent permanent partial disability benefits did not count toward that award. The Supreme Court concluded that we had misperceived the facts of the case and that therefore, the issue we posed and decided was not "cleanly" presented by the facts. The court concluded that our decision should be vacated because it was arguably an incorrect precedent.

We adhere to our reasoning in *Casteel,* which was based on our perception of the facts, however incorrect that perception may have been, and we use that reasoning to decide the identical issue in this case.

Petition for reconsideration allowed; affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Delbert Hutchinson, Claimant.

HUTCHINSON,
Petitioner - Cross-Respondent,

v.

LOUISIANA-PACIFIC CORPORATION,
Respondent - Cross-Petitioner,

and

TIMBERLAND LOGGING COMPANY et al,
Respondents - Cross-Respondents.

(WCB 83-09115 & 84-00654; CA A36379)

Judicial Review from Workers' Compensation Board.

On Petitioner - cross-respondent's petition for reconsideration filed July 25, 1986. Former opinion filed July 9, 1986, 80 Or App 276, 720 P2d 1350.

James S. Coon and Aitchison, Imperati, Barnett & Sherwood, P.C., Portland, for petition.

Before Richardson, Presiding Judge, and Newman and Deits, Judges.

RICHARDSON, P. J.

Reconsideration allowed; reversed and remanded for determination of attorney fees; otherwise affirmed.

RICHARDSON, P. J.

Petitioner - cross-respondent requests reconsideration of our decision in this case, 80 Or App 276, 720 P2d 1350 (1986), pursuant to ORAP 10.10. We allow the petition, modify our decision and affirm it as modified.

On review, petitioner contended that the Workers' Compensation Board erred in denying penalties and attorney

fees which he requested because of SAIF's late denial of his workers' compensation claim. ORS 656.262(10). We affirmed the Board's decision without opinion. Petitioner points out that, under *Spivey v. SAIF,* 79 Or App 568, 720 P2d 755 (1986), he is entitled to attorney fees. He is not entitled to a penalty for the tardy denial, because there was no compensation then due on which to base a penalty. He is, however, entitled to attorney fees. *Spivey v. SAIF, supra.*

Reconsideration allowed; reversed and remanded for determination of attorney fees; otherwise affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Karen Nicholson, Claimant.

NICHOLSON,
Petitioner,

v.

LIBERTY MUTUAL INSURANCE,
Respondent.

(WCB 82-0285M; CA A37288)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 23, 1986.

Don Dickerson, Eugene, argued the cause for petitioner. On the brief was Steven C. Yates, P.C., Eugene.

Keith D. Skelton, Portland, argued the cause and filed the brief for respondent.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Petition dismissed.

BUTTLER, P. J.

Claimant seeks review of an order of the Workers' Compensation Board issued on its own motion after claimant's aggravation rights had expired. ORS 656.273. Insurer had reopened the claim and voluntarily paid benefits for temporary total disability from April 26, 1982, through May 7, 1982, and from November 28, 1983, through December 13, 1983. The Board, on its own motion, by an order dated August 23, 1984, closed the claim and granted claimant temporary total disability from April 26, 1982, to April 11, 1984.

Both parties protested. Claimant objected to the Board's failure to increase her permanent disability award, and insurer contended that claimant had retired before April 26, 1982, or, in the alternative, that claimant was medically stationary for a portion of the time for which benefits had been granted.

On September 21, 1984, the Board abated its order of August 23, 1984, and on August 28, 1985, it rescinded that order, having concluded that claimant was medically stationary from September 2, 1982, to November 27, 1983, and was not entitled to temporary total disability during that period. It awarded temporary total disability benefits from April 26, 1982, through September 1, 1982, and from November 28, 1983, through April 11, 1984. Claimant seeks review of the August 28, 1985, order.

The August 23, 1984, order clearly was not reviewable.[1] When the Board rescinded that order, it became a nullity. The order of August 28, 1985, is the only own motion order resulting from this proceeding, and it actually *increased* claimant's benefits over those paid by the insurer. It is not reviewable at claimant's request.

Petition dismissed.

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[1] ORS 656.278(3) provides:

"The claimant has no right to appeal any order or award made by the board on its own motion, except when the order diminishes or terminates a former award. The employer may appeal from an order which increases the award."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Betty McGill, a Beneficiary of Clinton S. McGill (Deceased), Claimant.

McGILL,
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Respondent.

(82-01436; CA A34480)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 5, 1985.

J. Gary McClain, Milwaukie, argued the cause and filed the brief for petitioner.

Donna Parton Garaventa, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Richardson, Presiding Judge, and Warden and Newman, Judges.

WARDEN, J.

Reversed and remanded with instructions to accept claim for death benefits.

WARDEN, J.

Petitioner seeks review of a Workers' Compensation Board order which denied her benefits for her husband's death by suicide, because the decedent had "deliberately intended" his death. ORS 656.156(1). We reverse.

The facts are undisputed and are set out in the Board's order:

> "The decedent was a respected physician in the Portland medical community. In the course of his specialty as a diagnostic internist he developed an expertise at testifying as an expert for defendants in personal injury cases. In May 1980 a malpractice action was filed against the decedent by someone upon whom the decedent had performed an independent medical examination. Shortly thereafter, in June 1980, the decedent experienced several short episodes of confused speech and numbness in his left side. The treating physicians diagnosed transient ischemic attacks, but were unable to find objective signs to support that diagnosis. In September 1980 the decedent began treating with Dr. Bloch, a psychiatrist. In October 1980 a second malpractice action was filed against the decedent.
>
> "In April 1981 the decedent suffered a manic episode during which his wife brought him before the Board of Medical Examiners. The Board temporarily suspended his right to practice medicine pending treatment at the Oregon Health Sciences University. The decedent was treated for bipolar disorder at OHSU by Dr. Kinzie, a psychiatrist, from April 9, 1981 through April 26, 1981. Thereafter, Dr. Kinzie continued to treat the decedent when Dr. Bloch was unavailable.
>
> "In August 1981 Dr. Bloch hospitalized the decedent with a diagnosis of depressive disorder. The decedent remained hospitalized continuously until his death. During the course of the hospitalization, Dr. Bloch became convinced that the major cause of the decedent's depressive disorder was the two malpractice actions. He opined that the episodes in June 1980 which had been diagnosed as transient ischemic attacks were actually manifestations of claimant's depressive disorder. In November 1981, following consultation with Dr. Kinzie, Dr. Bloch determined that the best course of treatment for the decedent included an effort to gradually return him to his normal life, including the practice of medicine. As part of that return, Dr. Bloch issued day passes from the hospital for the

> weekend of November 7 and 8, 1981. On November 8, 1981 decedent committed suicide."

Both the referee and the Board found that the two malpractice actions were the major cause of decedent's depressive disorder and set aside SAIF's denial of petitioner's occupational disease claim.

There is no dispute but that decedent's suicide arose from his depressive disorder. The question remains whether ORS 656.156(1) precludes his widow from receiving benefits. The statute provides:

> "If injury or death results to a worker from the deliberate intention of the worker to produce such injury or death, neither the worker nor the widow, widower, child or depen-

dent of the worker shall receive any payment whatsoever under ORS 656.001 to 656.794."

Jones v. Cascade Wood Products, 21 Or App 86, 533 P2d 1399, *rev den* (1975), is the only Oregon case to discuss the application of ORS 656.156(1) to a suicide. In that case we concluded that the statute is not an absolute bar to recovery of benefits for death due to suicide. In determining the meaning of the statutory phrase "deliberate intention," we considered the various approaches used in state and federal compensation proceedings. 21 Or App at 87-88. We described the standards that had emerged to determine compensability and rejected the most liberal "but for" test, which holds a suicide compensable if "but for" the injury or disease the suicide would not have occurred. 21 Or App at 88. Because the facts of that case could not satisfy a more stringent standard, it was unnecessary to decide the issue that is before us now. That issue is whether, because decedent acted, at minimum, under an uncontrollable compulsion, the suicide is compensable.

Larson summarizes the current interpretation of the law:

> "Suicide under the majority rule is compensable if the injury produces mental derangement and the mental derangement produces suicide. The minority rule, which is steadily losing ground, is that suicide is not compensable unless there has followed as the direct result of a work-connected injury an insanity of such severity as to cause the victim to take his own life through an uncontrollable impulse or in a delirium of frenzy without conscious volition to produce death." 1A Larson, *The Law of Workmen's Compensation* 6-140, § 36.00 (1985).

The majority rule is also known as the chain-of-causation rule and exists in different forms because of modifications made in different jurisdictions. The Supreme Court of Texas in *Saunders v. Texas Employers' Ins. Ass'n,* 526 SW2d 515, 517 (Tex 1975), stated:

> "A number of jurisdictions, upon recognizing the advances made by medical science and psychiatry relating to the study of human reasoning and behavior have concluded that a suicide cannot be considered to have been intentionally self-inflicted if, in spite of the fact that the act is a conscious one, the suicide can be shown to have resulted from the deceased's inability to control the impulse to kill himself. * * * [I]f the effects of an injury or its treatment so acts upon the will of the injured workman so that it is not operating independently at the time of the suicide, then the chain of causation would appear to be unbroken and the fact that the decedent knew of the physical consequences of his act would be irrelevant."

The court rejected the "delirium or frenzy" requirement and summarized the applicable rule as follows:

> "Although there is some controversy among the jurisdictions as to the kind or degree of mental disorder which will prohibit suicide from being viewed as an independent intervening cause, *see* Larson § 36.10 at 6-40, we believe that in cases where the effects of injuries suffered by the deceased result in his becoming dominated by a derangement of the mind which impairs the ability to resist the impulse to take his own life to the extent that the decedent was in fact unable to control it, the suicide cannot be termed as willful under article 8306, section 1."

We agree with that reasoning; however, we decline to adopt its use of the word "impulse."[1] We hold that a worker's

suicide resulting from work-related stress which produced a mental derangement that impaired his ability to resist the compulsion to take his own life cannot be said to have arisen from a "deliberate intention"[2] under ORS 656.156(1).

The facts in this case support an award of benefits. Decedent was suffering from a compensable occupational depressive disorder. It caused a mental derangement which rendered him incapable of forming a deliberate intent to commit suicide. No stronger nonemployment influences intervened to break the chain of causation. Therefore, his widow is to receive benefits under ORS 656.156(1).

Reversed and remanded with instructions to accept the claim for death benefits.

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[1] "Impulse" and "irresistable impulse" are terms rooted in the M'Naughten insanity rule of criminal law and are associated with a delirium or frenzy requirement. *Annot.*, 15 ALR3d 616, 622 (1967). That requirement is inappropriate to the determination of a decedent's ability to form a "deliberate intention" under ORS 656.156(1). We agree with the Texas court that

> "the test should not be concerned with whether the compulsion could be characterized as being abrupt, unpremeditated or violent, but whether an uncontrollable impulse resulted from an impairment of the workman's reasoning facilities which would cause the suicidal act to be an involuntary one." *Saunders v. Texas Employers' Ins. Ass'n, supra*, 526 SW2d at 517.

Therefore, we need not speculate as to when decedent decided to kill himself, because the uncontrollable compulsion to commit suicide need not be abrupt or unpremeditated.

[2] We find inapposite *Jenkins v. Carmen MFG., Co.*, 79 Or 448, 155 P 703 (1916), cited by respondent. Although the court discussed the phrase "deliberate intention," it did not discuss it in the context of mental derangement.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Edward J. Reel, Claimant.

STATE ACCIDENT INSURANCE FUND CORPORATION,
Petitioner,

v.

REEL,
Respondent.

(WCB 84-00293; CA A36984)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 9, 1986.

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.

Thaddeus J. Hettle, Salem, argued the cause for respondent. With him on the brief was Rolf Olson, P.C., Salem.

Before Buttler, Presiding Judge, and Joseph, Chief Judge, and Warren, Judge.

WARREN, J.

Reversed.

WARREN, J.

SAIF petitions for review of an order of the Worker's Compensation Board which held that claimant was entitled to benefits for injuries he sustained in an explosion caused by a defective propane tank in his camper. We conclude that claimant was not entitled to compensation and reverse.

Claimant was a dump truck driver for a paving contractor which had its principal place of business in McMinnville, Oregon. His permanent home is in Salem, but his job took him all over the state to various construction sites. At the time of the injury, he was working on a job in Cascade Locks, a distance of 89 miles from Salem. He had decided to drive his pickup and camper to the job site and live there for the duration of the job, four to eight weeks. The night before the injury, claimant discovered that he was out of coffee. He drove to the local store to buy some, but he found it closed. He parked his camper on the other side of the road and spent the night there. The following morning, while claimant was in his camper and was attempting to light a cigarette, fumes from the camper's defective propane tank caused an explosion, and he was badly burned. The Board affirmed the referee's holding that claimant was acting within the course of his employment when he was injured and is entitled to compensation under the rule stated in *Rogers v. SAIF*, 289 Or 633, 616 P2d 485 (1980).

Claimant argues that he was either a "resident" or "traveling" employe. Under either theory he claims that he is entitled to broader than ordinary coverage for injuries sustained during periods of personal activity. *See* 1A Larson, Workmen's Compensation Law 5-212, §§ 24 and 25 (1985). Claimant would be considered a resident employe if he were required by his employer or by practical necessity to live on his employer's premises. He would be covered for injuries occurring on the premises associated with the conditions under which he was required to live. *See Wallace v. Green Thumb, Inc.*, 296 Or 79, 672 P2d 344 (1983). Claimant was not required to live on employer's premises, and his injury did not occur there. He was not a resident employe.

We would treat claimant as a traveling employe if he were required by the nature of his work to travel "away from the employer's premises." 1A Larson, *supra*, at 5-525; *see Slaughter v. SAIF*, 60 Or App 610, 654 P2d 1123 (1982). He

would be compensated for injuries arising out of the necessity of traveling, except if a distinct departure on a personal errand were shown. *Beneficiaries of McBroom v. Chamber of Commerce*, 77 Or App 700, 713 P2d 1095 (1986); *Simons v. SWF*

Plywood Co., 26 Or App 137, 552 P2d 268 (1976). His travel brought him *to* and not away from his employer's job site. We conclude that he was not a traveling employe in the sense that the term is used for workers' compensation purposes.

The ultimate test of compensability is whether the relationship between claimant's injury and his employment was sufficient to make the injury compensable. *Rogers v. SAIF, supra,* 289 Or at 638. Claimant was injured while engaging in a purely personal activity which bore no relationship to his employment. In no sense was the injury the result of a risk associated with his employment. It is not compensable.

Reversed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Rodger Blank, Claimant.

LOUISIANA-PACIFIC CORP.,
Petitioner,

v.

RODGER K. BLANK et al,
Respondents.

(84-07206 and 84-06182; CA A36289)

Judicial Review from Workers' Compensation Board.

Argued and submitted February 7, 1986.

Patric J. Doherty, Portland, argued the cause for petitioner. With him on the brief were Ronald W. Atwood and Rankin, McMurry, VavRosky & Doherty, Portland.

James F. Larson, Prineville, waived appearance for respondent Blank.

Craig Alan Staples, Portland, argued the cause for respondents Hudspeth Sawmill and EBI Companies. With him on the brief was Roberts, Reinisch & Klor, P.C., Portland.

Before Joseph, Chief Judge, and Van Hoomissen and Young, Judges.

YOUNG, J.

Reversed and remanded with instructions to enter order holding Hudspeth Sawmill and EBI responsible.

YOUNG, J.

Louisiana-Pacific Corporation seeks review of a Workers' Compensation Board order which affirmed the referee's order holding it responsible for claimant's back condition after April, 1984. The issue is whether claimant suffered an aggravation (the responsibility of Hudspeth Sawmill and EBI) or a new injury (the responsibility of Louisiana-Pacific). We hold that Hudspeth Sawmill and EBI are responsible and reverse.

In early 1981, claimant hurt his back while working for Hudspeth Sawmill. Over the next few weeks, he made several attempts to return to work. However, each time he experienced such extreme pain that he could not continue. In May, 1981, a myelogram was performed, revealing an L5-S1 herniated disc. Claimant declined Dr. Newby's initial recommendation of surgery and instead opted for conservative treatment. Between June and August, 1981, two orthopedic surgeons concluded that claimant was medically stationary, that he was unable to return to his previous job and that he should avoid repetitive bending. On August 19, 1981, Newby, a neurosurgeon, stated:

> "[Claimant] is a good example of a person who has a herniated disc that causes symptoms primarily with strenuous activity but is otherwise relatively asymptomatic in the interim * * *."

On October 19, 1981, a determination order issued, awarding claimant no permanent disability.

Over the next two years, claimant received no medical treatment for his back. He did, however, experience some constant back pain, which increased during exertion. He had numbness in his leg about once every six months. During that time, he held several jobs, including relief cook, disc jockey, fire fighter and surveyor.

In August, 1983, claimant started working full time for Louisiana-Pacific, flipping slabs as they passed on a conveyor belt. Those slabs were 16 feet long and varied from five to 100 pounds in weight. During the first few months, claimant had occasional "bad days" with increased back pain. However, by early 1984, his "bad days" became more frequent, and interfered with his work. He also began to experience

numbness in his left leg on a daily basis. At that point, claimant returned to Newby for treatment. A CT scan in May, 1984, revealed a moderate left-sided disc protrusion at L5-S1. Because of persistent and increasing pain, claimant agreed to undergo surgery. On July 18, 1984, Newby performed a microsurgical lumbar discectomy.

After receiving Newby's reports regarding the need for surgery, EBI denied the aggravation claim and requested an order under ORS 656.307. Thereafter, claimant filed a new injury claim against Louisiana-Pacific, which denied responsibility. On July 18, 1984, the .307 order issued, designating Louisiana-Pacific as the paying agent pending a hearing on responsibility.

Dr. Duff, an orthopedic surgeon, examined claimant on September 7, 1984, at the request of Louisiana-Pacific. Duff stated that claimant's deterioration was what one would expect in the normal course of his condition and that he doubted that claimant's work activity at Louisiana-Pacific had any bearing on the course of the back problem. Newby disagreed. He testified that non-surgical disc herniations spontaneously improve with time more often than they deteriorate and that claimant's fairly constant use of his back at Louisiana-Pacific could have caused additional injury to his back and thereby have contributed to his need for surgery. He

also testified, however, that claimant's underlying back condition had not worsened.

After a hearing, the referee found that claimant had suffered a new injury and held that it was the responsibility of Louisiana-Pacific:

> "[The Supreme Court has implied] that if conditions at a subsequent employment *do contribute to disability* then responsibility will shift to the employer whose work contributed. The Supreme Court made no mention of the requirement that a 'traumatic incident' occur before responsibility could be shifted.
>
> "* * * * *
>
> "Although it is a close case, I find the preponderance of evidence, consisting of Dr. Newby's opinion, the nature of the work and the chronology, to be that claimant's work activity with Louisiana Pacific did independently contribute to his disability and the need for medical treatment." (Emphasis in the original.)

The Board affirmed.

Like *Hensel Phelps Construction v. Mirich,* 81 Or App 290, ___ P2d ___ (decided this date), this case falls squarely within Larson's back injury example. 81 Or App at ___. (Slip opinion at 4.) Claimant testified that he was not pain-free during the two or three years before going to work for Louisiana-Pacific. That period of continuing symptoms culminated in a second period of disability after claimant began working for Louisiana-Pacific. There is no evidence that claimant's work at Louisiana-Pacific contibuted independently to a worsening of his underlying back condition.

Newby testified:

> "Q. [Louisiana-Pacific's attorney] When you operated upon him in * * * 1984, did you find — was the disc that you worked on, was that a new disc herniation? Had something new happened to the disc?
>
> "A. I can't find a report of him having a second myelogram, but I am almost certain I did two myelograms, but, the defect both on the CT scan in May of '84 and the defect in '81, there was not any appreciable change in the way they looked on those studies.
>
> "Q. Is it then true that the defect that you surgically repaired in 1984, the defect that had occurred in 1981?
>
> "A. That's correct.
>
> "Q. Then we can say that the cause of the defect is the injury that occurred in 1981 at Hudspeth?
>
> "A. Yes.
>
> "Q. Is that the direct cause of the injury at Hudspeth in 1981, is that the direct cause of the myelographic defect first identified in 1981, and then surgically repaired in 1984?
>
> "A. Correct.
>
> "Q. And, had anything happened to the defect in the intervening two to three years, in terms of an increase in the size of the defect?
>
> "A. On the x-ray studies — are you referring to the x-ray studies?
>
> "Q. Had anything changed in the nature of the defect?

"A. I couldn't tell any change."

Thus, even claimant's doctor agrees that claimant's work at Louisiana-Pacific did not independently contribute to the causation of the disabling condition. Hudspeth Sawmill and EBI are responsible. *Hensel Phelps Construction v. Mirich*, *supra*.

Reversed and remanded with instructions to enter an order holding Hudspeth Sawmill and EBI responsible.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Michael D. Mirich, Claimant.

HENSEL PHELPS CONSTRUCTION et al,
Petitioners,

v.

MIRICH et al,
Respondents.

(84-00644 & 83-08999; CA A37006)

Judicial Review from Workers' Compensation Board.

Argued and submitted February 7, 1986.

Allan M. Muir, Portland, argued the cause for appellant. With him on the brief were Ronald C. Holloway and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Cynthia L. Barrett, Portland, argued the cause for respondent Mirich. With her on the brief was Fellows, McCarthy, Friedman, Odman & Barrett, Portland.

Jas. Adams, Portland, argued the cause for respondents Kalt Manufacturing and Western Employers. With him on the brief was Mitchell, Lang & Smith, Portland.

Before Joseph, Chief Judge, and Van Hoomissen and Young, Judges.

YOUNG, J.

Affirmed.

YOUNG, J.

Hensel Phelps Construction (Phelps) seeks review of a Workers' Compensation Board order which affirmed the referee's order holding it responsible for claimant's back condition. The issue is whether claimant suffered an aggravation (the responsibility of Phelps) or a new injury (the responsibility of Kalt Manufacturing Company (Kalt)). We affirm.

On April 4, 1980, claimant suffered a dorsal lumbar strain while working for Phelps. He was awarded temporary but not permanent disability compensation. In the interval between recuperating from the Phelps injury and beginning at Kalt, claimant worked as a landscaper, did construction work and painted parking lots. Reports from his treating physician, Dr. Ho, reflect that on occasion he experienced back discomfort during those activities. In February, 1983, he began working at Kalt. The job required the handling of floors for walk-in freezers. Claimant and another employer placed floors ranging in weight from approximately 80 to 200 pounds in and out of a press. It was repetitive work. On July 25, 1983, claimant saw Dr. Cockburn for back pain. Cockburn diagnosed musculoligamentous thoracic and lumbar strain. Claimant was off work one week. No single event precipitated the back problems in July. Both Phelps and Kalt denied compensation for that episode.

Cockburn believed that claimant's underlying back condition had not worsened, but that his symptoms had. In March, 1984, Ho stated that claimant's back symptoms in 1983 "in all probability arose from his [1980] injury." Ho later reported that claimant's work activity at Kalt independently contributed to claimant's need for treatment in the summer of 1983.

The referee held that claimant suffered an aggravation that was Phelps' responsibility:

> "In June, 1981, Dr. Ho reported that claimant could not return to work requiring repetitive or strenuous use of the back. That was precisely the kind of work he did at Kalt. No injury occurred at Kalt. The repetitive work did, however, over a period of time cause increased pain that finally compelled claimant to see a doctor.

> "No new or different findings were noted in July 1983 and the diagnosis remained the same. In September 1983 Dr. Ho observed that the reason for claimant's symptoms was basically because he was reaching the limits of his tolerance for heavy work.
>
> "The conclusion from all this evidence is that the effect of the original injury continued and no injury occurred at the second period of employment that contributed independently; but rather that the disability was caused by the persistence of the original condition precipitated by exertion on the second job."

The Board affirmed.

As a preliminary matter, we reject Kalt's contention that the Board's decision was correct because there was no new "incident" at Kalt. In *Boise Cascade v. Starbuck*, 296 Or 238, 240, 675 P2d 1044 (1984), the first employer argued that, even though there was no "definable accident or event" at the later employment, the later employer nonetheless was liable under the last injury rule, because the working conditions at the later employment were capable of causing the disability. The court held the first employer liable, stating:

> "True, there is evidence in this case that straining and lifting at the later employment concurred with the first injury to cause the disability. Had the trier of fact made that finding,

the second employer would be liable. But the trier of fact (in this case, the Court of Appeals) concluded otherwise, and we are bound by that finding." 296 Or at 245. (Footnote omitted.)

Because the court indicated that the second employer would be liable if there had been an independent contribution, even though there was no "definable accident or event," there is no requirement that there be a "definable accident or event" to hold that later employer liable. *Accord, Home Ins. v. EBI Companies*, 76 Or App 112, 118, 708 P2d 1157 (1985). However, the Board's decision was correct for another reason.

In successive injury cases, we apply Larson's last injury rule:

> "The 'last injurious exposure' rule in successive injury cases places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability.
>
> "If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the *causation* of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. *In this class would fall * * * the kind of case in which a man has suffered 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.*
>
> "On the other hand, 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. This is consistent with the general principle of the compensability of the aggravation of a pre-existing condition." *Smith v. Ed's Pancake House*, 27 Or App 361, 364-65, 556 P2d 158 (1976) (emphasis supplied) (*quoting* 4 Larson, *Workmen's Compensation Law* § 95.12 (1976)); *see also Home Ins. Co. v. EBI Companies, supra*, 76 Or App at 117.

The facts of this case fit squarely within Larson's back injury example. The weight of the medical evidence is that claimant's work activities at Kalt did not independently contribute to the *causation* of the disabling condition, *i.e.*, to a worsening of the underlying condition. Claimant continued to have back pain after closure of the first claim. That period of continuing symptoms culminated in a second period of disability precipitated by his work at Kalt.

Phelps argues that the issue is not whether claimant's work activity at Kalt contributed to a worsening of claimant's underlying condition but, instead, whether that work activity contributed to the disability. We understand employer to argue that a worsening of symptoms alone is enough to shift responsibility, if the symptoms cause disability. We disagree. If worsened symptoms alone were enough to place responsibility on the second employer, then the first employer would never be responsible. That is contrary to our holding in *Consolidated Freightways v. Foushee*, 78 Or App 509, 717 P2d 633, *rev den* 301 Or 338 (1986). There must be a worsening of the underlying condition. *See Crowe v. Jeld-Wen*, 77 Or App 81, 87, 712 P2d 145 (1985), *rev den* 301 Or 76 (1986); *SAIF v. Brewer*, 62 Or App 124, 128-29, 659 P2d 988 (1983). The Board and the referee did not err.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation
of William E. Carr, Claimant.

CARR,
Petitioner,

v.

ALLIED PLATING COMPANY, INC. et al,
Respondents - Cross-petitioners,

and

WADE'S TIRE CENTER, INC. et al,
Respondents - Cross-respondents.

(83-05764 & 83-07625; CA A37118)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 2, 1986.

Frank A. Moscato, Portland, argued the cause for petitioner. On the brief were Willard E. Merkel and Galton, Popick & Scott, Portland.

Cynthia S. C. Shanahan, Portland, argued the cause for respondents - cross-petitioners. With her on the brief were William H. Replogle and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Craig Staples, Portland, argued the cause for respondents - cross-respondents. With him on the brief was Roberts, Reinisch & Klor, P.C., Portland.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

YOUNG, J.

Reversed and remanded on the petition; affirmed on the cross-petition.

YOUNG, J.

Claimant seeks review of a Workers' Compensation Board order affirming the referee's order holding that, although claimant proved his aggravation claim against Allied Plating Company, Inc. (Allied), the claim is barred by *res judicata.* Allied cross-petitions and seeks review of the portion of the Board's order which affirmed the referee's finding that claimant had suffered only worsened symptoms of an existing occupational disease, rather than a worsening of the disease, at Wade's Tire Center, Inc. (Wade's).

Our *de novo* review of the facts does not correspond in every detail to either the referee's or the parties' versions. Claimant has had elbow pain in his left arm since 1977. In 1978, he left work and saw an orthopedist, who diagnosed epicondylitis related to his job at Allied. On December 2, 1980, claimant was awarded 15 percent scheduled permanent partial

disability. In the spring of 1981, claimant obtained a job as a janitor at Mary Jane's Wheat Factory. He had difficulty with his arm at Mary Jane's and was laid off in May because he could not do the work. In June, 1981, he filed a claim against Mary Jane's. SAIF, the insurer, denied responsibility. He then filed an aggravation claim against Allied, which also was denied. (We refer to the claims against Mary Jane's and Allied collectively as "the 1981 claim".) In December, 1982, a hearing was held on the 1981 claim. Mary Jane's was dismissed as a party, because claimant had failed to request a hearing within 180 days after the denial. The referee found that claimant had not proved his aggravation claim against Allied. Claimant did not seek Board review.

Meanwhile, in March, 1982, he went to work for Wade's, separating metals. At first he was able to do the work, but he began to have problems with his arm when the job required the use of a sledgehammer. He left Wade's in October, 1982, and returned to work for Allied. Claimant left Allied in November, 1982, because he was unable to do the work. As a result, in April, 1983, claimant filed another aggravation claim against Allied. Allied denied responsibility and suggested that claimant file a claim with Wade's. He did so, but Wade's denied responsibility on the ground that the claim was not timely filed. Although these claims were filed in 1983, we refer to them for clarity collectively as "the 1982

claim," because the work activity precipitating the claims occurred in 1982. Claimant requested a hearing.

As to the claim against Wade's, the referee held that the claim was timely, but that claimant had failed to prove that there was a worsening of the underlying disease, and upheld the denial. As to the aggravation claim against Allied, the referee held that, although claimant proved that he had suffered an aggravation, claimant was barred by *res judicata* from pursuing that claim:

> "The present * * * 1982 aggravation claim is based on Dr. Eckhard's chart notes that were available prior to the * * * hearing [on the 1981 claim]. Even if Dr. Eckhardt did not interpret the chart notes in a manner to support an aggravation claim until after the * * * hearing, his interpretation could have been obtained before the hearing.
>
> "By failing to raise the issue of [a] 1982 aggravation at the December 1982 hearing, I find claimant is now barred from pursuing his * * * 1982 aggravation claim."

The referee concluded that Allied was responsible only for medical services. ORS 656.245.[1] The Board affirmed.

Res judicata bars claims which were or could have been litigated in a prior proceeding. *Million v. SAIF*, 45 Or App 1097, 1102, 610 P2d 285, *rev den* 289 Or 337 (1980). Collateral estoppel precludes relitigation of issues actually litigated and determined if their determination was essential to the prior judgment. *See State Farm Fire and Cas. v. Reuter*, 299 Or 155, 158, 700 P2d 236 (1985); *Million v. SAIF, supra*, 45

[1] At least the Board thought that the referee held Allied responsible for medical services. It is not clear to us that the referee held Allied responsible for anything, because her order simply "dismissed Allied as a party." In any event, this apparent discrepancy does not matter, given our disposition of the case.

Or App at 1102. Collateral estoppel does not apply here, because the 1982 claim was neither actually litigated in, nor essential to, resolution of the 1981 claim. *Million v. SAIF, supra.* Employer argues, however, that *res judicata* bars the 1982 claim, because it could have been litigated with the 1981 claim. We disagree.

In applying *res judicata,* the first issue is whether the second action is on the "same cause of action" as the first. *Dean v. Exotic Veneers, Inc.,* 271 Or 188, 191-92, 531 P2d 266

(1975). A cause of action is an aggregate of operative facts which compose a single occasion for judicial relief; the number of operative facts that should be viewed as included within a single cause of action must be determined pragmatically, on the basis primarily of practical trial convenience considerations. *Dean v. Exotic Veneers, Inc., supra,* 271 Or at 193; *Stowell v. R.L.K. and Company,* 66 Or App 567, 572, 675 P2d 1074 (1984).

As a practical matter, an attempt to litigate the 1982 claim at the hearing on the 1981 claim would have caused further delay in resolution of the 1981 claim. The 1982 claim could not be resolved without joining a new party (Wade's). Wade's would have been entitled to a 60-day period either to accept or to deny the claim before claimant requested a hearing. *See* ORS 656.262(6); *Syphers v. K-W Logging, Inc.,* 51 Or App 769, 771, 627 P2d 24, *rev den* 291 Or 151 (1981). The parties would have needed extra time to gather medical evidence on causation, because the 1982 claim arose from events occurring up until a month or two before the December 22 hearing. For those reasons, we hold that the 1981 and 1982 claims do not involve the same set of operative facts and, thus, are not the "same cause of action" for res judicata purposes. The Board erred in holding that the 1982 aggravation claim against Allied was barred by *res judicata.*

We turn to the cross-petition. We agree with the Board and the referee that claimant failed to prove a worsening of the underlying condition. Claimant's orthopedist's testimony establishes only that the symptoms of the disease worsened. The Board and the referee did not err in holding that Allied is the responsible employer. *See Fred Meyer v. Benjamin Franklin Savings & Loan,* 73 Or App 795, 799, 700 P2d 257, *rev den* 300 Or 162 (1985).

Reversed and remanded on the petition; affirmed on the cross-petition.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of James A. Poelwijk, Claimant.

CONSOLIDATED FREIGHTWAYS et al,
Petitioners,

v.

POELWIJK,
Respondent.

(84-00300; CA A37467 [control] 84-0340M; CA A37614)
(Cases consolidated.)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 2, 1986.

Allan M. Muir, Portland, argued the cause for petitioners. With him on the brief were Ridgway K. Foley, Jr., P.C., Roger A. Luedtke and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Richard E. Fowlks, Portland, argued the cause and filed the brief for respondent.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

YOUNG, J.

Affirmed.

YOUNG, J.

Employer seeks review of a Workers' Compensation Board order which affirmed a referee's order setting aside employer's denial of a claim for medical services relating to claimant's compensable low back injury. In addition, employer seeks review of the Board's "own motion" order reopening the low back claim. The issues are whether the claim for medical services (surgery in 1982 and 1984) is barred by *res judicata,* and whether the Board erred in reopening the low back claim on its own motion. We affirm.

In 1973, claimant sustained a compensable low back injury. In 1974, Dr. Fagan performed a spinal fusion. In 1978, claimant was awarded 35 percent unscheduled permanent partial disability. He was apparently free from back problems until April 1980, when he fell in a hole in a parking lot at his apartment. Because Fagan had died sometime before 1980, claimant saw Dr. Gritzka, who remains the treating physician.

Soon after his fall, claimant filed an aggravation claim. In July, 1980, employer denied the claim on the ground that the back complaints were the result of the noncompensable fall. Claimant requested a hearing. Employer responded that claimant's compensable condition was not aggravated, that the present back condition was due to the fall and that, in any event, the five-year aggravation period had expired. ORS 656.273(4). In September, 1980, claimant had a refusion. In

October, 1980, the Board rejected his request that it exercise its own motion jurisdiction. In January, 1981, the aggravation claim was denied, because claimant's aggravation rights had expired. His claim for medical services remained pending before the hearings division. In July, 1981, a laminectomy was performed with an extension of the fusion.

Claimant withdrew his opposition to employer's motion to dismiss the claim for medical services, because the medical evidence on causation was equivocal.[1] On August 11, 1981, claimant's request for a hearing was dismissed, and employer's denial of July, 1980, became final as a matter of law.

Claimant's back problems persisted, and in February, 1982, he had another laminectomy and a refusion. He requested the Board to reopen the claim on its own motion. On December 2, 1983, employer objected to the Board's exercising its own motion jurisdiction and again denied responsibility for medical services. Claimant requested several forms of relief, including the medical services which are the subject of this appeal. In February, 1984, a fifth back surgery was performed.

After the 1981 surgery but before the 1984 surgery, claimant had sought Fagan's medical records in order to pursue vocational rehabilitation. The records included x-rays taken in 1977. On the basis of the x-rays, Gritzka determined that, after the 1974 surgery, claimant had developed an asymptomatic nonunion of the fusion. Fagan's records reflect that in March, 1976, he thought that the fusion appeared solid but that in November, 1976, he suspected a pseudarthrosis. A January, 1978, chart note also indicates the possibility of a pseudarthrosis.

Gritzka testified that claimant's back was weakened because of the nonunion and that the fall caused it to be disrupted. He indicated that, because of the pseudarthrosis, claimant was at risk of reinjury. Although Gritzka acknowledged that some independent event could have occurred between March and November, 1976, to cause a nonunion, there was no evidence that that had occurred. He explained that all of the surgeries were medically related and that the need for each new surgery flowed from the last. Factors relevant to claimant's need for the surgeries include the failure of the first fusion to unite, stress placed on other structures after surgery and perhaps a genetic predisposition to have problems with fusions. Gritzka's testimony was uncontradicted.

The referee held that, although the August, 1981, dismissal order precludes relitigation of the compensability of the 1980 and 1981 surgeries, claimant is not barred from claiming that the 1982 and 1984 surgeries were related to his original 1973 injury. The referee concluded that "claimant has shown that his low back condition is related to the original injury and he is entitled to medical services commencing with the February 1982 surgery." The Board affirmed and issued its own motion order, holding that claimant had proven that his

[1] X-rays taken in May, 1980, revealed a lucent line through the 1974 fusion. Gritzka was unable to determine whether that defect was due to a nonunion of the 1974 fusion or to an acute fracture caused by the fall.

need for medical services in 1982 and 1984 was causally related to the 1973 injury and reopened the claim as of February, 1982.

We agree with the Board that claimant proved that the 1973 injury materially contributed to his need for surgery in 1982 and 1984. Indeed, employer does not argue to the contrary. Its argument is that *res judicata* bars the medical services claim, because claimant cannot prove that the 1973 injury materially contributed to his need for the 1982 and 1984 surgeries without "going behind" the 1981 order and proving that the 1980 and 1981 surgeries were compensable.

Res judicata bars claims which were or could have been litigated in the prior proceeding. *See Million v. SAIF*, 45 Or App 1097, 1102, 610 P2d 285, *rev den* 289 Or 337 (1980). It does not apply here, because claimant could not have litigated a claim for surgeries that had not yet occurred at the time of the prior order. Employer's argument, although characterized as *res judicata*, can better be viewed as seeking to apply collateral estoppel, which precludes relitigation of issues actually litigated and determined, if their determination was essential to the prior order. *See State Farm Fire & Cas. v. Reuter*, 299 Or 155, 158, 700 P2d 236 (1985); *Million v. SAIF*, *supra*, 45 Or App at 1102.

Assuming that collateral estoppel would ever prevent a claimant from proving that his current need for medical services relates to a prior compensable injury, it does not have that effect here. Although we agree with employer that it was essential to the prior order that the surgeries were not related to the 1973 injury, the "actual litigation of the issue" requirement is missing, because the hearing on the medical services claim was dismissed. Thus, collateral estoppel does not preclude litigation of any issue here. The Board did not err.

One matter remains. Employer also seeks review of the Board's own motion order, *see* ORS 656.278, which reopened the claim as of the date of the 1982 surgery. Claimant proved that the 1973 injury materially contributed to his need for surgery in 1982 and 1984. The Board did not err.

Affirmed.

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation
of Robert L. Trump, Claimant.
HALLMARK FURNITURE,
Petitioner,
v.
SAIF CORPORATION et al,
Respondents.
(84-11082 & 84-11081; CA A37198)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 5, 1986.

Jas. Adams, Portland, argued the cause for petitioner. With him on the brief was Mitchell, Lang & Smith, Portland.

Douglas F. Zier, 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.

Wade P. Bettis, Jr., La Grande, waived appearance for respondent Trump.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

YOUNG, J.

Reversed and remanded with instructions to reinstate referee's order.

YOUNG, J.

This case requires the application of the last injury rule to determine which of two employers is responsible for a claim for medical services. The referee found that SAIF, the insurer for the last employer, was responsible. The Workers' Compensation Board reversed and assigned responsibility to Hallmark Furniture (Hallmark), the first employer. Hallmark petitions for review, and we reverse.

In April, 1969, claimant injured his back while working as a delivery man for Hallmark. His condition was diagnosed as a low back strain with symptoms radiating into the right leg. Following conservative treatment, the claim was closed. He was eventually awarded 15 percent unscheduled permanent partial disability. Between 1970 and 1975, he attended a business college, worked as a truck driver, performed part-time bookkeeping duties and worked for several construction companies. His symptoms continued, periodically necessitating a return for medical treatment.

In July, 1975, claimant reinjured his low back while working for SAIF's insured. Dr. Stephens, claimant's treating orthopedist, diagnosed a low back strain with underlying

degenerative disc disease. Following his conservative treatment and vocational rehabilitation, the claim against SAIF was closed in March, 1978, and claimant was awarded 10 percent permanent partial disability. For approximately the next six years, he worked as a deputy sheriff and on his small farm. He continued to seek medical treatment when his back pain became intolerable. Those treatments occurred approximately once a year and consisted of pain medication and rest.

In March, 1984, while working on his farm, claimant experienced "very bad back pain." The pain was in the same area as before, but the tingling sensations in his right leg had become a pain radiating down the back of his leg. He returned to Stephens, who recommended surgery. In August, 1984, Stephens performed a laminectomy, a nerve root decompression and a fusion at L5-S1. Claimant filed a claim for medical services.[1] Hallmark denied the claim:

> "Available evidence indicates you sustained an intervening injury on July 2, 1975 while * * * insured with State Accident Insurance Fund and suggest your claim be directed to their office."

SAIF denied the claim on the ground that claimant's current problems arose from the 1969, and not the 1975, injury. Claimant requested a hearing.

The referee found that SAIF, the insurer on the risk at the time of the most recent injury, was responsible for claimant's surgery. He relied on *Industrial Indemnity Co. v. Kearns*, 70 Or App 583, 690 P2d 1068 (1984), and concluded that SAIF had failed to prove that there was no causal connection between the worsening of claimant's back and his 1975 injury that resulted in permanent impairment. The Board agreed that *Kearns* controls but decided that SAIF had proved that there was no such causal connection.

We agree with the Board and the referee that *Kearns* controls this case. There, we approved this rule:

> " 'Where there are multiple accepted injuries involving the same body part, we will assume that the last injury contributed independently to the condition now requiring further medical services or resulting in additional disability, and the employer/insurer on the risk at the time of the most recent injury has the burden of proving that some other accepted injury last contributed independently to the condition which presently gives rise to the claim for compensation; e.g., that its accepted injury caused only symptoms of the condition or involved a different condition affecting the same body part.' " 70 Or App at 585.

There is no direct medical evidence on whether there is a causal connection between the 1975 injury and the worsening of claimant's condition in 1984. The Board and the referee disagree over whether the lack of such a causal link can be inferred from Stephens' reports. On May 12, 1981, Stephens reported that

> "x-rays taken [in 1969] show no signs of degenerative disc disease. There is partial lumbarization of S1. The disc level

[1] Claimant also sought temporary and permanent disability compensation. The claim for compensation is not at issue here.

above this is normal. On subsequent films dating 1971, 1974, and 1976 begin to show degenerative changes with spur formation on both the superior and inferior end plates at the level above this lumbarized S1. In 1976 there is a small

anterior and posterior spur foundation about the superior and inferior end plates.

"It is my best medical judgment that this man's low back problems all resulted from his injury in 1969. I do not feel that his back problems are just normal degenerative changes."

On July 18, 1984, Stephens reported advanced degenerative changes at the L5-S1 level with significant spinal stenosis. He stated:

"I feel this man's present back condition is directly related to his injury of 1969. I previously have reviewed his x-rays from that time. He has had steadily advancing degenerative changes at the L5-S1 ever since the injury of 1969. The initial x-rays in 1969 did not show degenerative changes. Therefore, I feel that the damage in the L5-S1 level was done at the time of his injury in 1969 and he has had progressive degenerative changes from that time."

We agree with the referee that Stephens' statements are not sufficient, in themselves, to relieve SAIF from responsibility. Those reports discuss only the contribution of the 1969 injury. They do not address the possibility, likely on this record, that the 1969 and 1975 injuries *concurred* to cause the current disability.

SAIF suggests that we held in *Kearns* that the last injury rule requires proof that the later employment *actually* contributed to the disability and that it is not sufficient for claimant to show that the last injury *could have* contributed to claimant's disability. *See* 70 Or App at 587. Assuming that *Kearns* so held, that holding arguably is inconsistent with *Boise Cascade v. Starbuck*, 296 Or 238, 675 P2d 1044 (1984). In any event, SAIF misses the point of the *Kearns* presumption of *actual* contribution by the last injury in cases involving multiple accepted injuries to the same body part. 70 Or App at 587. SAIF failed to rebut that presumption, and the Board erred in finding Hallmark responsible.

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 Peter G. Voorhies, Claimant.

VOORHIES,
Petitioner,

v.

WOOD, TATUM, MOSSER, BROOKE & HOLDEN et al,
Respondents.

(82-04559; CA A35591)

Judicial Review from Workers' Compensation Board.

Argued December 18, 1985.

Robert K. Udziela, Portland, argued the cause for petitioner. With him on the brief was Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland.

Deborah L. Sather, Portland, argued the cause for respondents. With her on the brief was Moscato & Byerly, Portland.

Before Richardson, Presiding Judge, and Warden and Newman,* Judges.

NEWMAN, J.

Reversed and remanded with instructions to grant claimant hearing on denied claim.

* Newman, J., *vice* Joseph, C. J.

NEWMAN, J.

Claimant seeks reversal of a Workers' Compensation Board order which affirmed the referee's dismissal of claimant's request for a hearing on the ground that it was untimely filed. His only assignment of error that merits discussion is that the referee erred in not excusing his late filing on the basis of "good cause."[1]

Claimant, a partner in respondent law firm, was seriously injured in a car accident while driving to see a client about a legal matter. He filed a workers' compensation claim, which respondent insurer denied. He remained hospitalized for five weeks after the denial letter was received at his home, but he was made aware of the denial during that time. After his release from the hospital, he spent several more weeks undergoing intensive physical therapy. He was barely ambulatory and had to be transported in the back of a station wagon, because he could not sit upright.

Realizing that the 60-day period for requesting a

[1] The referee found that claimant had proved that the claim was compensable, but the order dismissed the claim. Our reversal of the dismissal compels a remand for hearing.

hearing was about to end, he prepared to have his wife drive him to Salem to file his hearing request personally. After one of his daily physical therapy sessions, he and his wife stopped at the office of insurer's agent to deal with matters pertaining to the damaged car. While there, he talked with insurer's claims supervisor, who believed that the 60-day period had already ended. Claimant disagreed. He was given to understand by the claims supervisor that, if the period had not already expired, it would be sufficient to protect his rights if he mailed the request on the 60th day. Claimant and his wife were relieved that they would not have to drive to Salem. After leaving the agent's office, claimant drafted a letter requesting a hearing and immediately mailed it by certified mail. The Board received the letter the next day—61 days after claimant had been notified of the denial.

A claimant has 60 days to request a hearing, or 180 days if good cause for the failure to request within the 60 days

is shown. ORS 656.319(1).[2] The referee reasoned that neither claimant's medical condition nor his reliance on the claims supervisor's advice constituted good cause for failure to file a timely request. On review, the Board adopted that portion of the referee's opinion. We disagree.

The test for determining if good cause exists has been equated to the standard of "mistake, inadvertance, surprise or excusable neglect" recognized under *former* ORS 18.160 and present ORCP 71B(1). *Anderson v. Publishers Paper Co.*, 78 Or App 513, 517, 717 P2d 635, *rev den* 301 Or 666 (1986); *see also Brown v. EBI Companies*, 289 Or 455, 616 P2d 457 (1980).

> "[T]he courts are liberal in granting relief [under ORS 18.160], for the policy of the law is to afford a trial upon the merits when it can be done without doing violence to the statute." *Wagar v. Prudential Ins. Co.*, 276 Or 827, 833, 556 P2d 658 (1976).

The referee's opinion stated that this case is

> "[n]ot unlike the cases of *Wamsher v. Brooks Products*, 26 Or App 835, 554 P2d 573 (1976), and *Fulop v. Oregonian Publishing Co.*, 10 Or App 1, 498 P2d 801 (1972), in which the claimants read and understood the appeal clauses, but neglected to keep track of the appeal time, until it was too late."

Those late filings were not excused. In this case, however, claimant did not neglect to keep track of the appeal time. He knew that he had 60 days and he knew that, although he had reached the end of that period, it had not yet expired. He was prepared to deliver his hearing request personally to the Board's office on time. He accepted the claims supervisor's statement that mailing on the 60th day would be sufficient to

[2] ORS 656.319(1) provides:

> "(1) With respect to objection by a claimant to denial of a claim for compensation under ORS 656.262, a hearing thereon shall not be granted and the claim shall not be enforceable unless:
>
> "(a) A request for hearing is filed not later than the 60th day after the claimant was notified of the denial; or
>
> "(b) The request is filed not later than the 180th day after notification of denial and the claimant establishes at a hearing that there was good cause for failure to file the request by the 60th day after notification of denial."

protect his rights.[3] It was reasonable to do that and be relieved of the physical burden of having to drive to Salem. Unlike the claimants in *Fulop* and *Wamsher,* this claimant did not lose track of the appeal time. His untimely filing occurred only as a result of the method of delivery. *Wamsher* and *Fulop* are not controlling.

Respondents also argue that claimant offers no good excuse for not mailing the hearing request earlier in the 60-day period. He was entitled to 60 days in which to file, and that right is no less valid on the 60th day than on any of the previous 59 days. The question is whether the failure to file on the 60th day is excused by good cause. Had the claims supervisor not given him the erroneous information that mailing was sufficient, it is unchallenged that he would have hand-delivered the request within the 60-day period. When the failure to meet a filing deadline is not accompanied by a lack of diligence or prejudice to the other party, then the spirit of the Workers' Compensation Law demands that a claimant have a hearing on the merits. *See* ORS 656.012(2)(b). His failure to file on the 60th day is excused by good cause.

Reversed and remanded with instructions to grant claimant a hearing on the denied claim.

[3] The referee's opinion stated:

"The parties dispute the substance of this conversation, but I find the discrepancies were due to faulty memories, especially on the part of the supervisor, Mr. Robinson. I therefore find that claimant's wife was present during part of the conversation and that Mr. Robinson, in discussing the appeal of the denial, gave claimant the impression that mailing a request for hearing, as opposed to personally delivering the request for hearing to the Salem office of the Workers' Compensation Board, would be sufficient to protect claimant's appeal rights. I also find that, during the discussion, the timeliness of the appeal rights was discussed and the claims representative informed the claimant that there may be a problem with the timeliness of the appeal. Based on his interpretation of the claims representative's statements, claimant and his wife were relieved they did not have to drive to Salem to file their appeal."

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Roy M. Hoke, Claimant.

HOKE,
Petitioner,

v.

LIBBY, MCNEIL & LIBBY et al,
Respondents.

(WCB 83-07945; CA A35730)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 7, 1986.

J. Michael Alexander, Salem, argued the cause for petitioner. With him on the brief was Burt, Swanson, Lathen, Alexander & McCann, Salem.

Deborah L. Sather, Portland, argued the cause for respondents. With her on the brief was Moscato & Byerly, Portland.

Before Richardson, Presiding Judge, and Newman and Deits, Judges.

NEWMAN, J.

Affirmed.

NEWMAN, J.

Claimant petitions for review of an order of the Worker's Compensation Board that reversed the referee and affirmed employer's termination of permanent total disability payments. We refer to our review, and the underlying proceedings before the referee and Board, as "Hoke III." We affirm.

Claimant suffered a compensable injury in 1979 and received an award of 50 percent permanent partial disability in April, 1982. In July and December of 1982, he filed aggravation claims, which employer denied. Claimant requested a hearing ("Hoke I"). On March 28, 1983, the referee issued an order in Hoke I, overturning the denial of the aggravation claims. Employer sought review by the Board. On December 18, 1983, the Board issued an order that reversed the referee in Hoke I and reinstated employer's denials. We affirmed. *Hoke v. Libby, McNeil & Libby,* 73 Or App 44, 697 P2d 993 (1985).

On February 18, 1983, just before the hearing in Hoke I, Dr. Raaf examined claimant; on March 3, 1983, he wrote a report, which employer treated as another aggravation claim and denied on March 22, 1983.[1] Claimant requested a hearing ("Hoke II"). It was held on May 18, 1983, before a different referee from the one who heard Hoke I. On May 28, 1983, while Hoke I was pending before the Board, the referee decided Hoke II. The issues were the propriety of the denial of March 22, 1983 and penalties and attorney's fees.

The referee refused to treat Raaf's report of March 3, 1983, as a separate aggravation claim. The opinion stated:

> "At the time of the denial [by employer on March 22, 1983], the referee [in Hoke I] had jurisdiction of the case. It was his responsibility to determine whether claimant's condition had worsened and whether an aggravation had occurred. Except for the reports of Dr. Raaf and Dr. Buza, no new medical evidence had been developed. Dr. Raaf suggested additional surgery and Dr. Buza agreed with him, but adhered to his opinion that, clinically, claimant's condition had not worsened. At the time of its denial, the claims administrator had no information which fortified its position presented at

> the prior hearing. If anything, Dr. Raaf's report strengthened the claimant's request for claim reopening.
>
> "After the hearing and before the issuance of the referee's Opinion and Order [in Hoke I], the employer through its insurer had at least two options. It could have waited receipt

[1] At oral argument, respondents moved to supplement the record with the transcript of the proceedings in Hoke II. We deny the motion.

of the order and, if dissatisfied, then requested a review. It could have requested the referee to admit into evidence any newly developed or discovered evidence and to reconvene the hearing. It is obvious that it chose to not await [*sic*] the order before taking some type of action. No attempt was made to submit new evidence and to reconvene the hearing. The documents received in this interim would have added nothing to its case, even if admitted at a reconvened hearing.

"The Opinion and Order issued on March 28, 1983 [in Hoke I] is presently the law of the case and will remain so until altered by a review or appeal. There is no authority under our law for another referee [in Hoke II] to be interposed into the appeal process or to impose himself in reevaluating and rejudging the same evidence in the posture of this matter.

"The option of issuing a denial [on March 22, 1983] was ill-advised. There was nothing to deny at this point. Claimant had not requested reopening of his claim after the hearing. He had done so before; a hearing was convened and evidence was taken and the issue under consideration by the referee [in Hoke I] was identically the same as that which was attempted to be raised by the denial issued after the [Hoke I] hearing.

"No precedent can be found for the action of the insurer. The Oregon Workers' Compensation Law establishes a procedure for the orderly processing and management of claims. In the case of denied aggravation claims, no benefits are payable until a referee orders otherwise after hearing. Benefits ordered paid by a referee must be paid until ordered otherwise, either on review, by a court on appeal, or by an evaluation order. This established system cannot be circumvented or altered by the issuance of a denial during the time the matter is before a referee. If permitted, the proliferation of hearings and litigations would be even a greater problem.

"It is obvious that this carrier used the device of this denial in an effort to avoid additional claim costs. On the date of the denial, however, it did not know whether the referee would order payment of additional claim costs. It chose to take the matter into its own hands by issuing the denial and terminating benefits.

"The action was improper and constituted an unreasonable resistance to the payment of compensation. The benefits

ordered paid by the referee in his order [in Hoke I] should have been paid but were not, in a misguided reliance upon a denial improperly issued."

The referee in Hoke II ordered employer to pay all sums that the referee ordered it to pay in Hoke I, plus penalties and attorney's fees. Neither party sought Board review of the referee's order in Hoke II.[2]

On September 2, 1983, after the referee's order in Hoke II and before the Board's order in Hoke I, the Evaluation Division issued a determination order awarding claimant permanent total disability, and employer began to pay it. When the Board reversed the referee in Hoke I in December, 1983, employer stopped paying. Claimant then requested another hearing; the referee ruled in Hoke III that employer could not lawfully stop paying. Employer appealed to the Board, which reversed the referee. Claimant then sought this

[2] After the referee's decision in Hoke II, claimant asked the Board in reviewing of Hoke I to add Raaf's report to the record in Hoke I. Employer successfully resisted the inclusion.

review. The issue before us is whether employer could discontinue permanent total disability payments after the Board, on December 18, 1983, reversed the referee in Hoke I and reinstated employer's denials.

Claimant asserts that the determination order of September, 1983, was based on the referee's order in Hoke II and, because that order was not appealed, employer had no right to stop permanent total disability payments. The referee in Hoke III agreed with claimant. He reasoned that, because the determination order in Hoke III ordered temporary total disability payments through July 18, 1983, "per opinion and order of March 28, 1983" (Hoke I) and permanent total disability thereafter, the Evaluation Division must have found that a worsening took place after the employer's denials which had been contested in Hoke I. The referee in Hoke III, therefore, decided that the determination order must have been based on the Hoke II proceeding. As a result, he ruled that employer could not terminate permanent total disability payments on the basis of the Board's reversal of the referee in Hoke I.

The Board correctly reversed the referee in Hoke III.

The referee in Hoke II had refused to consider whether or not Raaf's report constituted an aggravation claim. He ruled he was without authority to do so. Neither party appealed that determination. Thus the *only* claims upon which the determination order could be based were the claims involved in Hoke I. When the Board reinstated employer's denials in Hoke I, employer was not obligated to continue permanent total disability payments, because there was no compensable claim to support the payments.

Affirmed.

IN THE SUPREME COURT OF THE
STATE OF OREGON

In the Matter of the Compensation of
Herschel R. Pitts, (Deceased), Claimant.
FARMERS INSURANCE GROUP,
Petitioner on Review,
v.
SAIF CORPORATION,
Respondent on Review.
KAISER CEMENT AND GYPSUM et al,
Respondents.

(WCB 80-03994, 82-05466, 82-00902; CA A34131; SC S32512)

On review from the Court of Appeals.*

Argued and submitted on June 4, 1986.

Jerald P. Keene, Portland, argued the cause for petitioner on review. With him on the briefs was Roberts, Reinisch & Klor, Portland.

Darrell E. Bewley, Salem, argued the cause for respondent on review.

Before Peterson, Chief Justice, and Lent, Linde, Campbell, Carson and Jones, Justices.

PETERSON, C. J.

The decision of the Court of Appeals is reversed. Remanded to the Workers' Compensation Board for entry of an order consistent with this opinion.

Jones, J., filed a dissenting opinion in which Linde, J., joined.

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* Judicial review from the Workers' Compensation Board. 76 Or App 494, 709 P2d 757 (1985).

PETERSON, C. J.

The claimant is a widow who filed a workers' compensation claim with the State Accident Insurance Fund (SAIF) and petitioner, Farmers Insurance Group (Farmers) in late 1981, following her husband's death from a condition later determined to be asbestos-related and attributable to his work. Farmers and SAIF had workers' compensation policies covering her husband's employer for different periods of time during which he could have been exposed to asbestos. Both Farmers and SAIF denied the claim.

One issue at the hearing was which insurer was responsible to pay benefits. On March 14, 1983, the referee issued an Opinion and Order holding that SAIF was "liable". The Opinion and Order made no provision for attorney fees but did contain the following notice:

> "NOTICE TO ALL PARTIES: If you are dissatisfied with this Order, you may, not later than thirty (30) days after the mailing date on this Order, request a review by the Workers'

Compensation Board, 480 Church Street, S.E., Salem, Oregon 97310. Any such request for review shall be mailed to the Board at the above address with copies of such request mailed to all other parties to this proceeding. Failure to mail such a request for review within thirty (30) days after the mailing date of this Order will result in LOSS OF RIGHT TO APPEAL FROM THIS ORDER.

"Entered at Portland, Oregon on March 14, 1983."

Accompanying the Opinion and Order was a letter dated March 14, 1983, from the referee to the attorneys for the parties, explaining:

"The enclosed Opinion and Order does not make an award for attorneys' fees. The failure was intentional. I was unable to determine what the fee should be.

"* * * * *

"I desired to publish the Opinion and Order on the merits within the statutory time[1] which would be by the end of

March 14, 1983.

"This letter is to advise both of you that I desire a conference regarding the fees.

"I assured [SAIF's attorney] on March 11 by phone, and by this letter confirm that SAIF's right of appeal time shall run from the publication of the supplemental attorney fee Order, which will be after the proposed conference.

"I request, therefore, that no appeal be taken from the Order of today.

" I represent that the Supplemental Order shall issue prior to the expiration of 30 days from today."[2]

On April 5, 1983, the referee issued a Supplemental Order reciting the issuance of the March 14 order and that "[t]he matter of attorneys' fees was deferred," and ordered SAIF to pay attorney fees of $5,800.

The April 5, 1983, Supplemental Order provided:

"An Opinion and Order was issued in the above matter on March 14, 1983. The matter of attorneys' fees was deferred and, following a conference call with attorneys Murphy and Sawyer, and correspondence from both attorneys, dated, respectively, March 30, 1983, and March 29, 1983, the hearing was again closed, this time on March 31, 1983 upon receipt of the last of the two letters."

The Supplemental Order concerned only the award of attorney fees. It did not purport to republish, incorporate or reconsider the March 14 opinion and order that decided the other issues in the case. It contained a notice identical to the notice contained in the March 14 order.

[1]ORS 656.289(1) provides:

"Upon the conclusion of any hearing, or prior thereto with concurrence of the parties, the referee shall promptly and not later than 30 days after the hearing determine the matter and make an order in accordance with the referee's determination."

[2]The only reference to attorney fees in the March 14, 1983 order was as follows: "Claimant's attorney presented data regarding attorneys' fees." The order itself gives no indication that it is not a final order.

One or more of the parties either were not sent or did not receive a copy of the April 5 supplemental order. A third order was issued on June 1, 1983, purporting to make that date the effective date for review rights. The June 1 order read in full as follows (omitting only the "NOTICE TO ALL PARTIES" language that was identical to the notices contained in the two earlier orders):

"It appearing that one or more parties and/or attorneys

either were not sent or did not receive copies of the Supplamental (*sic*) Order of April 5, 1983 in the above matter, and it further appearing that review rights were thus prejudiced:

"IT IS HEREBY ORDERED that review rights are effective the date of this Order."

SAIF filed a request for review with the Workers' Compensation Board (Board) on June 3, 1983. Farmers moved to dismiss the request for review insofar as untimely. The Board denied the motion to dismiss.

The Board ruled:

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

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

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

The Board ordered:

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

counsel shall receive $300 for services on Board review to be paid by Farmers Insurance."

Farmers sought judicial review in the Court of

Appeals. It affirmed the Board on the jurisdiction issue and the effect of the March 14, April 5 and June 1 orders as affecting timely review and affirmed on the merits. Farmers petitioned for review.

ORS 656.289(1) (set forth in footnote 1) requires the referee to make an order "not later than 30 days after the hearing." ORS 656.289(3) states that the 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 review by the board under ORS 656.295."

We previously have addressed timeliness of review under ORS 656.289(3). *Chisholm v. SAIF*, 277 Or 51, 559 P2d 511 (1977) (*per curiam*), involved the following facts:

> "An order determining a Workmen's Compensation claim was mailed by the referee to the parties on August 27, 1975. On September 3, 1975, an amended order was mailed which made no change in the disposition of the case and was identical with the original order except that it corrected only the recitation of the date on which the hearing was held before the referee. ORS 656.289(3) provides that an order is final unless review is requested within thirty days of the time the referee's order determining the case is mailed to the parties. Claimant did not request review within thirty days of the day the original order determining the case was mailed but did request review within thirty days of the date that the correction was mailed. The issue is whether the request for review was timely. * * *." 277 Or at 53. (Footnote omitted.)

We held that the request for review was not timely, reversed the Court of Appeals and adopted the dissenting opinion of Chief Judge Schwab. 277 Or at 53. In his opinion (now ours), Chief Judge Schwab stated:

> "It is patent * * * that the order referred to in ORS 656.289(3) *means an order on the merits, i.e., that a claim is denied,* and does not mean an order correcting some minor clerical mistake in reciting a fact that never need have been recited in the first place and that all parties must have recognized as an obvious immaterial error." *Chisholm v. SAIF*, 26 Or App 627, 631, 553 P2d 1083 (1976) (Schwab, C.J., dissenting). (Emphasis supplied.)

Farmers asserts that the rule of *Chisholm* governs the present case. *Chisholm,* however, concerned a correction of a mere clerical error that had no effect on any issue raised in that case. Here, the amount of attorney fees to be awarded affected the parties and was not a "correction" at all. The supplemental order here was intended to and did determine the amount of the attorney fee award, a substantial matter intentionally not addressed in the March 14 order and opinion.

The Board relied on *former* OAR 436-83-480(1).[3] That rule allows a referee to reconsider an order on her or his own motion. The Board and Court of Appeals decided that the referee's letter that accompanied the March 14 opinion was actually (1) a self-made motion for reconsideration, and (2) an order abating the March 14 opinion. Both bodies concluded that the April 5 supplemental order was intended to incorporate the March 14 order and to make April 5 the effective date for both.

We do not agree. Assuming that the letter is an "order"[4], there is nothing in either document suggesting that the referee intended to reconsider any issue determined in his March 14 opinion and order. The purpose of the letter simply was to notify the parties that determination of the amount of attorney fees to be paid by SAIF had been deferred and to provide for the resolution of that matter. This is borne out by

the fact that the referee's letter contemplated only a "supplemental *attorney fee* Order." (Emphasis supplied.) A referee cannot by letter or order extend the appeal period beyond the time permitted by statute. *Compare Far West Landscaping v. Modern Merchandising,* 287 Or 653, 601 P2d 1237 (1979) (trial court had no authority to set aside one judgment and enter another for sole purpose of extending time for appeal). At the very least, for an order to abate and allow reconsideration of an order issued under ORS 656.289(1), the language of the second order must so state. The April 5 and June 1 orders affected only the review rights as to the amount of attorney fees. Neither purported to or did affect the matters decided in the March 14 order.

Under ORS 656.289(3), the matters determined by the March 14 order became 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 review by the board under ORS 656.295." The time runs not from the close of the hearing, but from the date of mailing the order. No timely request for review was made; the March 14 order became final 30 days from mailing.

Of prime interest to the legislature when dealing with the area of workers' compensation has been the celerity with which claims are to be decided. The legislative history of HB 1001 in 1965 as well as more recent pronouncements of legislative intent, *see* ORS 656.012, stress the prompt, fair and effective resolution of all claims. *Compare former* ORS 656.004 *with* ORS 656.012. We construe the requirement in ORS 656.289(1) that the referee's order determining the matter be issued no later than 30 days following the hearing to mean the determination of those issues directly affecting a worker's right to compensation. *See* ORS 656.704 (3). Determination of the amount of attorney fees payable by an employer or insurer is not necessary to the initial claim determination by the

[3] *Former* OAR 436-83-480 (repealed by WCB Admin. Order 2-1986) provided:

"*WHEN REFEREE MAY REQUIRE ADDITIONAL EVIDENCE*

"(1) The referee may reopen the record and reconsider his [or her] decision before a notice of appeal is filed or, if none is filed, before the appeal period expires. Reconsideration may be upon the referee's own motion or upon a motion by a partyshowing error, omission, misconstruction of an applicable statute or the discovery of new material evidence.

"(2) A motion to reconsider shall be served on the opposite parties by the movant and, if based on newly discovered evidence, shall state:

(a) The nature of the new evidence; and

(b) An explanation why the evidence could not reasonably have been discovered and produced at the hearing."

The bracketed language was added to the language of *former* OAR 436-83-480 and the entire provision set forth above is found presently at OAR 438-07-025.

[4] On this question, *see* ORS 656.704(1), ORS 656.726(4), ORS 183.310(5)(a) and ORS 183.310(5)(b).

referee, as it does not affect the right to, or amount of, compensation due. Further, any disagreement regarding the amount of attorney fees awarded by a referee is not subject to the ordinary board review procedures of ORS 656.295, but is to be resolved under the unique provisions of ORS 656.388(2).[5]

The March 14 opinion and order met the ORS 656.289(1) and (3) requirements for an order and became final 30 days from mailing. There never was any reconsideration of the order. We therefore reverse the Court of Appeals and the Board and remand to the Board for entry of an order consistent with this opinion.

JONES, J., dissenting.

The majority opinion tells lawyers that even though a referee specifically informs counsel that an opinion is not final, that further hearings will be conducted before the case is closed and that the appeal time does not commence until the referee has made the final order, they should ignore the words of the administrative officer and file an appeal. The message is that if an appellate court can dissect the issues in an administrative case so that one issue can be appealed at an earlier date, we merely call everything the referee said about a temporary order and non-appealability "King's X." Under these circumstances counsel is mandated to disregard the plain words of the referee (and I suppose by analogy similar words by any trial judge), bifurcate the case and immediately file an appeal to protect the client and himself or herself from a future malpractice claim.

In this case the referee issued his opinion on the merits of the claim, finding SAIF responsible, and did so on March 14, 1983, but expressly did not rule on claimant's attorney fee claim at that time. Instead, the referee wrote the lawyers that he would issue a supplemental order on the attorney fee question and that SAIF's appeal time would run from the date of the supplemental order, which he issued on April 5, 1983. However, because that order was not mailed to all the parties and their attorneys, the referee on June 1, 1983, issued another order stating that review would run from that date. That order completed the disposition of all issues in this case that were before the referee, namely, the decision on the merits and the award of attorney fees.

SAIF sought Board review on June 3, 1983, and the Board held that the referee's letter of March 14 was not final and that no final order was entered until the referee completed work on the case, namely, a decision on the merits and attorney fees, which was made final on June 1. The Court of

Appeals agreed with the Board that SAIF timely requested Board review of the referee's decision.

Even though the referee made the mistake of stating, "I desired to publish the Opinion and Order on the merits

[5] *See* ORS 656.388 (1983), ORS 656.386 (1983) and OAR 438-47-000 to 430-47-095.

within the statutory time which would be by the end of March 14, 1983," in the same letter he stated that he "desire[d] a conference regarding the fees" and "that no appeal be taken from the Order of today." There was nothing in the letter stating that his opinion on the merits was absolutely final or that he did not feel free to reconsider his original decision on the merits at any time prior to mailing the final order. Although he did not articulate anything one way or the other, certainly a reasonable interpretation of his actions should be that "while things are fresh in my mind these are my findings on the merits. My findings will not be final until I determine the attorney fee issue, so don't appeal anything until we get this whole matter wound up."

The majority opinion states that there is nothing in either document suggesting that the referee intended to reconsider any issue decided in his March 14 opinion, but by the same token there is nothing in either document suggesting that he did not intend to reconsider any issue, and he definitely left the door open so that he could do so. The majority opinion is not only an unrealistic interpretation of the intention of the referee, it is exquisitely unfair to counsel, who in good faith relied upon the statements of the administrative officer. Worse, the majority opinion is legally unsound and needlessly creates a confusing precedent for the profession.

Linde, J., joins in this dissenting opinion.

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation
of Ralph W. Compton, Claimant.

COMPTON,
Petitioner on review,

v.

WEYERHAEUSER COMPANY,
Respondent on review.

(WCB 83-10404; CA A34686; SC S32596)

In Banc

On review from the Court of Appeals.*

Argued and submitted July 2, 1986.

James L. Edmunson, Eugene, argued the cause for petitioner on review. With him on the petition were Christopher D. Moore and Malagon & Moore, Eugene.

Allan M. Muir, of Schwabe, Williamson, Wyatt, Moore & Roberts, Portland argued the cause for respondent on review and filed a response to the petition for review.

JONES, J.

The Court of Appeals is affirmed.

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* Judicial review from the Workers' Compensation Board. 77 Or App 194, 712 P2d ____ (1986).

JONES, J.

Claimant seeks workers' compensation benefits for an increased loss of hearing allegedly caused by on-the-job exposure to loud noise. Claimant prevailed before the referee, the employer appealed to the Workers' Compensation Board (Board), and the Board reversed the referee. The Court of Appeals affirmed the Board without opinion. We allowed review in this case and in *Cain v. Woolley Enterprises,* 301 Or 650, ___ P2d ___ (1986), to interpret the workers' compensation appellate review statutes concerning what evidence the Court of Appeals should consider that may not have been obtainable at the time of the hearing before the referee.

The facts presented to the referee and reviewed by the Board are as follows: Claimant, age 40, began working for Weyerhaeuser in 1966. He had a pre-existing hearing loss from working without hearing protection for two and one-half years at a previous, noisy lumber company job. Claimant worked around loud machinery at Weyerhaeuser for 17 and one-half years. During his first six months at Weyerhaeuser he wore no ear protection; he later used cigarette filters and, eventually, earplugs as ear protection. However, he removed his ear protection 10 to 15 times a day for 5- to 10-minute periods to converse with other workers. Claimant's other exposure to loud noise was minimal, which included occasional use of power tools at home and some hunting and target shooting at a rifle range that required the use of ear protection. Claimant presently works in Weyerhaeuser's office, which is considerably less noisy, but he finds using the telephone difficult and, at times, cannot accurately hear someone speak.

Claimant filed a claim for occupational hearing loss on April 27, 1983. The audiologist, Dr. Ediger, to whom Weyerhaeuser referred claimant, found a seven decibel loss of hearing since 1966 after deducting the loss attributable to aging. Ediger also noted that claimant's speech discrimination ability was poor. Although he characterized claimant's hearing change as slight, Ediger's initial report would not rule out the possibility that work at Weyerhaeuser might have caused the change in hearing.

Claimant was then referred to an ear, nose and throat

specialist, Dr. Hiatt, for evaluation. Hiatt's otological evaluation found no evidence of ear disease and concluded that the cause of additional hearing loss was "undetermined" and not related to noise exposure at Weyerhaeuser, *assuming* adequate ear protection. After reading the otological report, the audiologist, Dr. Ediger, amended his opinion, stating that he did not consider it likely that claimant's hearing loss was due to employment at Weyerhaeuser.

The referee found the claim compensable, in an opinion emphasizing that the experts' conclusions about lack of causation were "based on the *assumption* that claimant wore adequate hearing protection," that claimant had testified

that at times he wore no ear protection, and that there was no indication that either expert was aware of "this fact which might conceivably change their opinions." (Emphasis in original.)

The employer requested Board review. The employer also requested a "closing report" from Ediger. For that purpose, Ediger conducted another evaluation after the hearing. After this evaluation, Ediger reported evidence of a further reduction in hearing, albeit slight. The report from this evaluation also stated that after "reviewing and rethinking" the case in light of newly obtained information that claimant had gone without hearing protection when he needed to communicate with co-workers, Ediger felt that:

> "* * * it would be impossible to say that change in hearing from 1966 to 1984, though relatively slight, could absolutely not have resulted from excessive noise exposure as [a] result of employment at Weyerhaeuser. The absence of evidence of medical disease (as indicated in the medical report) would seem to leave the most probable cause of hearing loss to be noise exposure at work, probably during occasions when hearing protection was removed for verbal communication and not immediately replaced."

When the employer requested Board review of the referee's order, claimant moved for remand pursuant to ORS 656.295(5) because the case was "improperly, incompletely or otherwise insufficiently developed or heard by the referee" in the absence of this report. ORS 656.295(5) provides:

> "The review by the board shall be based upon the record submitted to it * * * and such oral or written argument as it

> may receive. However, if the board determines that a case has been improperly, incompletely or otherwise insufficiently developed or heard by the referee, it may remand the case to the referee for further evidence taking, correction or other necessary action."

A 2-to-1 majority of the Board denied remand for consideration of the new report, concluding that a report "explaining the [audiologist's] rethinking of his earlier position" was not evidence "which could not reasonably have been produced and discovered before the hearing." The Board was concerned that allowing remand in cases such as this would open the door for remand every time a claimant obtains a new medical opinion.

On the merits, the majority reversed the referee because claimant had not established that his work was "the major cause of the slight worsening" of his hearing loss. The dissent argued that the audiologist's re-analysis "is based to a substantial degree on new evidence" and that "this is not a case where, when faced with an adverse professional explanation of medical causation, the claimant has shopped around the medical community and ultimately found professional support for his theory of causation. In this case medical causation was heretofore without professional explanation."

On appeal, claimant moved pursuant to ORS 656.298(6) to have the Court of Appeals consider the report as "additional evidence concerning disability that was not obtainable at the time of the hearing." ORS 656.298(6) provides:

> "The review by the Court of Appeals shall be on the entire record forwarded by the board. The court may remand the case to the referee for further evidence taking, correction or other necessary action. However, the court may hear additional evidence concerning disability that was not obtainable at the time of the hearing. The court may affirm, reverse, modify or supplement the order appealed from, and make such disposition of the case as the court determines to be appropriate."

The Court of Appeals denied the motion and affirmed the Board.

The issue at hand is: Should the Court of Appeals consider an expert's re-evaluation of causation made after

receiving previously available but unobtained information about a worker's exposure to on-the-job hazards as evidence "not obtainable at the time of the hearing"?

The statutory scheme provides three methods for requesting the decisionmaker to consider evidence obtained after the referee's hearing. A party may (1) ask the Board to remand to the referee on grounds that the "case has been improperly or otherwise insufficiently developed or heard by the referee for further evidence taking," ORS 656.295(5); (2) ask the Court of Appeals to remand to the referee "for further evidence taking," ORS 656.298(6); or (3) ask the Court of Appeals to hear the additional evidence, *id.*

ORS 656.295(5), *ante* at 4, provides that the Board may remand a case to the referee for further evidence taking or correction if it determines that "a case has been improperly, incompletely or otherwise insufficiently developed or heard by the referee." ORS 656.298(6), *ante* at 5, provides that the Court of Appeals may grant a motion to hear additional evidence concerning disability if: (1) the additional evidence concerns disability, and (2) the evidence was unobtainable before hearing.

The Court of Appeals has construed ORS 656.298(6) to require that before the Court of Appeals will remand to the referee "for further evidence taking, correction or other necessary action," there must be a "compelling reason" to do so, such as to clear up an inconsistency or fill in a void in the record. *See Tanner v. P & C Tool Co.*, 9 Or App 463, 497 P2d 1230 (1972); *accord Brenner v. Industrial Indemnity Co.*, 30 Or App 69, 73, 566 P2d 530 (1977).

But did the legislature intend to restrict the Court of Appeals itself from taking additional, unobtainable evidence (as opposed to remanding to the referee) only if there was a "compelling reason" to do so? We believe it did. Given the total scheme of the workers' compensation statutes, which favors prompt and final resolution of claims that have been fully developed, any additional evidence should not be admitted at the Court of Appeals unless there is compelling reason to do so, and a compelling reason exists when the evidence (1) "concerns disability," (2) was "not obtainable at the time of hearing," and (3) it is reasonably likely to affect the outcome of the case.

Claimant asserts that Ediger's last opinion on causation was not available at the time of the hearing and thus was not obtainable. Claimant points out that he prevailed before the referee without Ediger's support on that issue and that the new evidence surfaced, unsolicited by him, when he was reexamined at the request of the employer for "closing purposes."

In *Mansfield v. Caplener Bros.*, 3 Or App 448, 452, 474 P2d 785 (1970), the first of a series of cases, the Court of Appeals wrote:

> "If the system contemplated by the statute—*de novo* review on the record—is to have any meaning, it is essential that there be a specific time as of which issues are to be determined. The Workmen's Compensation Law contemplates that it be the time of hearing. ORS 656.295(3) and (5). If the circuit court is permitted to consider evidence of events subsequent to the hearing, it no longer conducts a review, but itself becomes a hearing officer, without having the benefit of either the hearing officer's or the Workmen's Compensation Board's assessment of the new evidence. The circuit court found that the new testimony 'concerning disability was not obtainable at the time of the first hearing.' The court was correct in its finding in the sense that the evidence was not *available* at the time of the hearing because none of these tests and evaluations had then been conducted. However, this evidence could have been developed by the hearing officer upon his own initiative or upon the order of the reviewing authority (board or judge). Therefore, the evidence was, in fact, 'obtainable' within the meaning of ORS 656.298(6) at the time of hearing." (Emphasis in original.)

The Court of Appeals continued to make the distinction between unobtainable and unavailable evidence. In *Maumary v. Mayfair Markets*, 14 Or App 180, 184, 512 P2d 1370 (1973), the court wrote:

> "* * * Here, as in *Mansfield*, the evidence was not available at the time of hearing since all the vocational rehabilitation efforts had not then occurred. However, as in *Mansfield*, the evidence was still 'obtainable' at that time. In this case the claimant, at the time of hearing, knew that further rehabilitation efforts were to occur. The claimant could have requested a continuance from the hearing officer but did not. Thus the evidence could have been obtained at the time of that hearing, and it would have been error for the court to hear it."

In *Logue v. SAIF*, 43 Or App 991, 996 n 6, 607 P2d 750 (1979), the Court of Appeals stated: "We may have erred in admitting these additional medical reports. They may have been 'obtainable,' although not available at the time of hearing."

As recently as *Kienow's Food Stores v. Lyster*, 79 Or App 416, 420 n 2, 719 P2d 890 (1986), the Court of Appeals refused to consider a doctor's medical report: "[Dr.] Long's report was not *available* at that time because it was not in existence, but it was *obtainable*. It only needed to have been requested at the appropriate time." (Emphasis in original.)

This court previously has not distinguished between unobtainable and unavailable evidence in workers' compensation cases. We agree with the long line of Court of Appeals decisions that there is a distinction and we essentially agree with the distinction as drawn by that court.

But in the present case we still must determine the status of Dr. Ediger's report rendered after the hearing. That report was not requested by the worker, but was requested by the employer for closing the claim. This was not a case of a claimant disappointed with the referee's decision who engaged in opinion shopping in the medical community to seek additional benefits.

But does the erroneous factual foundation or the change of opinion create unobtainable evidence? The answer to that inquiry is in the negative. All claimant had to do upon receiving Ediger's first report to the referee was to produce the doctor to testify at the hearing and merely ask the doctor to assume the disputed fact of unprotected exposure at work and then ask the doctor if this would change his opinion. In the alternative, the worker could have supplied this information to the doctor and asked for a revised opinion. All this information existed long before the hearing and, in that sense, was obtainable. The fact is that claimant had three hearing interviews with the doctor in which he related his noise exposure at work. If he failed to advise the doctor correctly, he can scarcely complain now. If he did advise the doctor and the doctor neglected to consider the correct history, that erroneous assumption should have been corrected by his attorney at or before the hearing. The evidence may not have

been made available at the hearing, but it certainly was obtainable.

As we mentioned previously, the workers' compensation scheme requires not only promptness but also finality in the decisionmaking process, and to hold otherwise would allow virtually every case to be reopened when a belated discrepancy in the evidence is called to the attention of the claimant.

The Court of Appeals is affirmed.

IN THE SUPREME COURT OF THE
STATE OF OREGON

In the Matter of the Compensation
of John E. Cain, Claimant.

CAIN,
Petitioner on review,

v.

WOOLLEY ENTERPRISES
Respondent (below),

and

SAIF CORPORATION,
Respondent on review.

(WCB 82-10108; CA A34771; SC S32717)

In Banc

On review from the Court of Appeals.*

Argued and submitted July 2, 1986.

James L. Edmunson, Eugene, argued the cause for petitioner on review. With him on the petition were Christopher D. Moore and Malagon & Moore, Eugene.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondent on review. With him was Dave Frohnmayer, Attorney General, Salem.

JONES, J.

Remanded to the Court of Appeals with instructions.

* Judicial review from the Workers' Compensation Board. 77 Or App 726, 713 P2d ___ (1986).

JONES, J.

Claimant seeks workers' compensation benefits for aggravation of a low back injury. The referee set aside the State Accident Insurance Fund's (SAIF) denial of claimant's aggravation claim and ordered reopening for treatment recommended by claimant's doctor. The Workers' Compensation Board (Board) reversed the referee and on reconsideration declined to remand to the referee for taking additional evidence obtained during surgery authorized that was at SAIF's expense pursuant to the referee's order. The Court of Appeals denied claimant's motion to have the court either hear the evidence or remand to the referee and affirmed the Board without opinion. We allowed review in this case and in *Compton v. Weyerhaeuser Co.*, 301 Or 641, ___ P2d ___ (1986), to interpret the workers' compensation appellate

[1] ORS 656.298(6) provides:

"The review by the Court of Appeals shall be on the entire record forwarded by the board. The court may remand the case to the referee for further evidence taking, correction or other necessary action. However, the court may hear additional evidence concerning disability that was not obtainable at the time of the hearing. The court may affirm, reverse, modify or supplement the order appealed from, and make such disposition of the case as the court determines to be appropriate."

review statutes concerning what evidence the Court of Appeals should consider that may not have been obtainable at the time of the hearing before the referee. ORS 656.298(6).[1]

The facts presented to the referee and reviewed by the Board are as follows: Claimant suffered a compensable injury to his lower back in 1977 in a logging truck accident for which he received a temporary total disability award. No permanent disability was awarded. Claimant's symptoms worsened following his return to the job. A lumbar myelogram revealed a herniated disc at the L4-5 level for which doctors performed surgery in 1979. After his second return to work he again suffered increasing symptoms, causing him to quit work. Claimant underwent another lumbar myelogram in March 1981, which revealed an extradural defect at the L4-5 level on the right side for which claimant received conservative treatment. Claimant was again awarded temporary total disability and 40 percent unscheduled permanent partial disability for the low back. In May 1982, by stipulation, claimant was

awarded an additional 20 percent permanent partial disability for the low back.

In October 1982, claimant consulted a new doctor, Dr. Donald Smith, because claimant was experiencing continued low back and lower extremity pain. Smith recommended a CT scan and lumbar myelogram, and claimant filed an aggravation claim. Smith found increased sciatic tenderness and poorer results on the straight-leg raising test. He reported that the myelogram indicated a defect at the L4-5 level of the right side of claimant's spine consistent with a protruded disc. It was his opinion that claimant "should be offered surgical exploration and discectomy at the L4-5 level for persistent discal protrusion at L4-5 on the right, associated with sciatic nerve root compression symptoms."

In March 1983, the referee ordered the case reopened and found the aggravation claim compensable, emphasizing the "slight worsening" of claimant's condition as evidenced by new sciatic tenderness, claimant's poorer performance on a leg-raising test and the doctor's "unopposed recommendation for further surgery."

SAIF requested review by the Board, which reversed 2-to-1. The Board stated that claimant's testimony before the referee "was remarkably similar" to what claimant had said before the most recent closing of the case and that claimant's assertion that the pain was worse was "without any supporting elaboration or detail" and had "little support" from medical evidence. The majority found that the evidence of decreased straight-leg raising was not sufficiently precise to be reliable. As to the recommended surgery, the majority added:

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

Board Member Lewis dissented, agreeing with the referee that the new sciatic tenderness and leg-raising test established that claimant's condition had worsened.

Claimant moved for the Board to reconsider its order and to admit five medical reports, including two from surgeries performed in April 1983 and February 1984, as "newly created evidence." Claimant urged the Board either to consider this evidence itself or to remand to the referee. On February 1, 1985, the Board declined to reconsider the evidence because it believed that it had no statutory authority to do so. It also refused to remand because the proffered evidence concerned post-hearing surgery: the earlier order had considered only "whether claimant had proven an aggravation at the time of hearing." The Board noted its earlier conclusion that claimant had not so proven, quoted its earlier comments as to the request for surgery and concluded that the reports were "properly the subject of another claim for aggravation." (The claimant's five-year deadline for filing an aggravation claim had run as of April 18, 1983.)

Claimant appealed and moved the Court of Appeals to either consider the post-hearing reports or to remand to the referee. The court denied claimant's motion and affirmed the Board without opinion.

As we said in *Compton v. Weyerhaeuser Co, supra,* any additional evidence should not be admitted at the Court of Appeals unless there is compelling reason to do so, and a compelling reason exists when the evidence (1) "concerns disability," (2) was "not obtainable at the time of hearing," and (3) it is reasonably likely to affect the outcome of the case. Unlike *Compton,* the parties in this case do not dispute that the additional evidence concerns disability and was not obtainable at the time of the hearing. The surgical reports were not discoverable or obtainable at hearing because surgery was not performed until after the referee ordered the aggravation claim accepted. The reports could not have been produced or discovered until after the initial order. The remaining consideration is whether it is reasonably likely that the evidence would affect the outcome of the case. The post-surgery reports probably are not cumulative and might contain relevant evidence not previously available to support claimant's aggravation claim. Consideration of the post-surgery evidence might well create a reasonable likelihood that the outcome of the case would be affected.

The case is remanded to the Court of Appeals for

consideration of this claim in accordance with the standard set forth in *Compton v. Weyerhaeuser Co., supra.*

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Compensation of Leslie Colvin, Claimant.

COLVIN,
Petitioner on Review,
v.
INDUSTRIAL INDEMNITY,
Respondent on Review

(WCB 81-03061; CA A31519; SC 32190)

In Banc

On review from the Court of Appeals.*

Argued and submitted March 11, 1986.

James L. Edmunson, Eugene, argued the cause for petitioner on review. With him on the petition was Malagon & Associates, Eugene.

John E. Snarskis, Portland, argued the cause and filed the brief for respondent on review.

GILLETTE, J.

The decision of the Court of Appeals is reversed. Remanded to the Court of Appeals for further proceedings consistent with this opinion.

* Judicial review from Worker's Compensation Board. 75 Or App 87, 705 P2d 231 (1985).

GILLETTE, J.

This is a workers' compensation case in which claimant seeks benefits for injuries that occurred at a picnic sponsored by the law firm for which she worked. Both the Workers' Compensation Board (Board) and the Court of Appeals denied her benefits on the ground that her notice of claim was untimely. She seeks both reversal of the Court of Appeals interpretation of the knowledge requirement stated in ORS 656.265(4)(a)[1] and remand to the Court of Appeals to determine whether respondent was prejudiced by her untimely notice. We agree that the Court of Appeals misinterpreted ORS 656.265(4)(a) and, therefore, reverse and remand this case for further proceedings.

Claimant was hired as a paralegal for a law firm of approximately fifty lawyers after having interviewed with a partner and Ms. Kreft, a paralegal. On August 11, 1978, claimant injured her lower back while attending a firm picnic

[1] ORS 656.265(4)(a) states:

"Failure to give notice as required by this section bars a claim under ORS 656.001 to 656.794 unless:

"(a) The employer had knowledge of the injury or death, or the insurer or self-insured employer has not been prejudiced by failure to receive the notice;

"* * *"

at a partner's home. The injury occurred when she slipped and fell on some wet stairs. No one witnessed the fall, but claimant later informed Kreft and Mr. Lilly, an associate of the law firm.

Kreft was the senior paralegal. In addition, she was claimant's mentor and had assumed an informal leadership role among the paralegals. She was also a person to whom new paralegals went with questions. Lilly was a senior associate for whom claimant frequently worked.

Although claimant missed two days of work following her fall, she did not file a workers' compensation claim because she thought the pain would go away. In addition, she maintained that she was hesitant to file a claim because of her perception of the philosophical orientation of the firm. Over the next two years, she periodically suffered low back pain. On October 1, 1980, she finally filed a claim after experiencing a

severe recurrence of pain. The law firm's insurer denied the claim on the ground that it was not timely filed and claimant's employer had no knowledge of the injury.

The referee reversed the insurer's denial. He found that both Kreft and Lilly knew of the injury at or near the time of the accident, that claimant's relationship with each was that of employe and supervisor and, therefore, that Lilly's and Kreft's knowledge was sufficient to impute knowledge of the accident to the firm. The referee also found that the injury was sufficiently work related to be compensable.

The Board reversed the referee. It found that the claim was not timely filed because notice of the accident was not given. The Board also found that the employer had been prejudiced by the untimely claim. In addition, the Board found that, even if the claim was not time barred, the accident was not sufficiently work related to be compensable. Claimant sought judicial review.

The Court of Appeals affirmed the Board, finding that the employer had neither notice nor knowledge of claimant's injury. The court stated its rationale for finding the employer did not have knowledge of the injury this way:

> "[T]he relevant question in determining whether the employer had knowledge of the injury within the meaning of ORS 656.265(4)(a) is whether the individuals who were aware of the injury also had the apparent authority or a duty to do something about it. In the setting presented here, it would not only have been sufficient if any partner of the firm had known of claimant's injury, but it would also have been sufficient if an employe handling workers' compensation matters had known of it. *Whether that employe was or was not claimant's supervisor would have been irrelevant.*" 75 Or App 87, 91, 705 P2d 231 (1985). (Emphasis added.)

The court went on to find that neither Kreft nor Lilly had a duty or apparent duty to do anything about claimant's injury.

Claimant petitions for review by this court on two grounds. First, she argues that the Court of Appeals erred in its narrow definition of employer for the purpose of imputed knowledge under ORS 656.265(4)(a). Second, she argues that the Court of Appeals, in finding the claim was not timely filed, erred in not going on to consider the further question of whether the insurer was prejudiced by the late filing.

Timely notice "facilitates prompt investigation and diagnosis of the injury. It assures the opportunity to make an accurate record of the occurrence, and decreases the chance for confusion due to intervening or nonemployment-related causes." *Vandre v. Weyerhaeuser Co.*, 42 Or App 705, 709, 601 P2d 1265 (1979); *see also* 3 Larson's Workman's Compensation Law § 78.30. These opportunities are deemed assured where the employer has knowledge of the injury. *Frasure v. Agripac*, 290 Or 99, 619 P2d 274 (1980), *on remand*, 50 Or App 71, 622 P2d 321 (1981).

The question of whose knowledge of an injury may be imputed to the employer has not been addressed previously by this court. The Court of Appeals discounted supervisory authority in favor of a standard where the person who had knowledge also had a duty or apparent duty to do something about the injury. Professor Larson's approach, however, does recognize supervisory authority as being important for determining whether to impute knowledge to the employer:

> "Generally, in order that knowledge be imputed to the employer, the person receiving it must be in some supervisory or representative capacity, such as foreman, supervisor, insurance adjuster, personnel worker, corporate officer, physician or nurse. Knowledge of or notice to a mere co employee is not sufficient. *But any degree of authority that places a man in charge of even a small group of workers is enough to confer this representative status.*" 3 Larson's; *supra*, § 78.31(b), 15-116 through 15-129. (Emphasis supplied.)

We agree with Larson. The Court of Appeals holding in this case unnecessarily restricts imputable knowledge to those individuals in official representative capacities and runs counter to what is implied in prior Oregon caselaw. Oregon has impliedly followed Larson's suggestion that the knowledge of individuals in supervisory positions may be imputed to the employer. In both *Frasure v. Agripac, supra,* and *Vandre v. Weyerhaeuser Co., supra,* the employer was found to have knowledge where the claimant had informed a foreman. In neither of those cases did the court state that it was the ability of the foreman to do something about the accident, rather than the foreman's supervisory position, that caused knowledge of the injury to be imputed to the employer.

The Court of Appeals opinion identified individuals

within a company whose knowledge may obviously be imputed to the employer, including partners and those in charge of processing workers' compensation claims. The Court of Appeals, however, does not define those who have apparent authority. We believe individuals with supervisory authority belong in this category.

Where supervisory authority is not formalized within an employer's organization — as it apparently was not in the present case — a number of factors should be addressed so as to preserve the integrity of the notice process while ensuring a liberal interpretation of the workers' compensation scheme. These factors include, but are not limited to: whether the person who was aware of the accident exercised supervisory

authority over the claimant or others, whether the supervisory authority was of a kind as to lead a reasonable injured employe to conclude that this was a person to whom a report of injury should be made, whether there were established procedures for reporting accidents and whether and to what extent the injured employe had any knowledge concerning the employer's supervisory structure and handling of workers' compensation matters.

The purpose of these factors is to aid in assessing the fairness of attributing knowledge of the accident to the employer. No single factor is necessarily dispositive. A company may not avoid knowledge of an injury because it is poorly organized or fails to educate its employes about their rights and obligations under the workers' compensation laws. By the same token, a claimant may not avoid the notice requirements if the company has clear procedures for reporting accidents and injuries and the employe knows or should know of and is able to follow the procedures, but does not.

In the case at bar, facts apparently uncontroverted are that the law firm had little internal organization with respect to paralegals and claimant was not provided with a formal orientation or instructed how to report accidents or injuries, nor was she instructed on her rights and obligations as an employe under Oregon's workers' compensation laws. The evidence, however, is not clear on whether Kreft or Lilly had any supervisory authority over claimant. The referee and the Board disagreed, and the Court of Appeals disregarded supervisory authority in reaching its decision. We reverse the

Court of Appeals holding that supervisory authority is unimportant for determining whether knowledge will be imputed to an employer and remand this case for determination of whether Kreft or Lilly had supervisory authority over claimant.

On remand, if the Court of Appeals finds that Kreft or Lilly had supervisory authority over claimant, knowledge of claimant's injury will be imputed to the employer. If no supervisory authority is found, ORS 656.265(4)(a) requires a determination of whether respondent/insurer was prejudiced by the late notice. Finally, even if the employer had knowledge or respondent was not prejudiced, the Court of Appeals must determine whether claimant's injury is one "arising out of, and in the course of employment." ORS 656.005(8)(a).

Reversed. Remanded to the Court of Appeals for further proceedings consistent with this opinion.

INDEX CONTENTS

OCCUPATIONAL DISEASE, CONDITION, OR INJURY

OFFSETS/OVERPAYMENTS

ORDER TO SHOW CAUSE
See REQUEST FOR HEARING

OVERPAYMENT See OFFSETS

OWN MOTION RELIEF

PAYMENT

PENALTIES

PPD (GENERAL)

PPD (SCHEDULED)

PPD (UNSCHEDULED)

PERMANENT TOTAL DISABILITY

PREMATURE CLAIM CLOSURE
See MEDICALLY STATIONARY

PSYCHOLOGICAL CONDITIONS & FACTORS

RECONSIDERATION
See APPEAL & REVIEW

REMAND

REQUEST FOR HEARING

REQUEST FOR REVIEW--BOARD

REQUEST FOR REVIEW--COURTS

RES JUDICATA

RESPONSIBILITY CASES
See SUCCESSIVE EMPLOYMENT EXPOSURES

SAFETY VIOLATIONS

SETTLEMENTS & STIPULATIONS

SUBJECT WORKERS
See COVERAGE QUESTIONS

SUCCESSIVE (OR MULTIPLE) EMPLOYMENT EXPOSURES

TEMPORARY TOTAL DISABILITY

THIRD PARTY CLAIMS

TIME LIMITATIONS See AGGRAVATION CLAIM; CLAIMS, FILING; REQUEST FOR HEARING; REQUEST FOR REVIEW--BOARD; REQUEST FOR REVIEW--COURTS

TORT ACTION

VOCATIONAL REHABILITATION

COURT CITATIONS 1986

Court Case, Citation-----Page(s)

Court Case, Citation-----Page(s)

Court Case, Citation-----Page(s)

Court Case, Citation-----Page(s)

Court Case, Citation-----Page(s)

COURT CITATIONS 1986

Court Case, Citation-----Page(s)

Court Case, Citation-----Page(s)

Court Case, Citation-----Page(s)

Court Case, Citation-----Page(s)

Court Case, Citation-----Page(s)

VAN NATTA CITATIONS 1986

Name	Citation	Page(s)
Ernest A. Annette	35 Van Natta 35 (1983)	491
Anita Bade	36 Van Natta 1093 (1984)	515,869
Zelda M. Bahler	33 Van Natta 478 (1981)	231
Catherine C. Bailey	36 Van Natta 280 (1984)	266
Faye L. Ballweber	36 Van Natta 303 (1984)	70,104
Jeffrey Barnett	36 Van Natta 1636 (1984)	7,609
Robert A. Barnett	31 Van Natta 172 (1981)	20,164,266
David F. Barrett	38 Van Natta 931 (1986)	1008
Merle Barry	37 Van Natta 1492 (1985)	39,95,439,450
Gloria J. Bas	36 Van Natta 174 (1984)	500,1027
Ronald E. Bass	35 Van Natta 1679 (1983)	972,1003
Thomas A. Beasley	37 Van Natta 1514 (1985)	519
George Bedsaul	35 Van Natta 695 (1983)	119
Lori Beghtol	38 Van Natta 1003 (1986)	972
Dewey R. Begley	36 Van Natta 868 (1984)	996
Susan K. Bell	38 Van Natta 252 (1986)	889,901
Keith Berke	30 Van Natta 185 (1980)	623
David A. Berkey	38 Van Natta 155 (1986)	157
Roy L. Bier	35 Van Natta 1825 (1983)	104,601,824
Mark G. Blanchard	34 Van Natta 1660 (1982)	459
Derry D. Blouin	35 Van Natta 570 (1983)	117,118
Teresa L. Bogle	37 Van Natta 615 (1985)	453
Annie L. Bounds	36 Van Natta 775 (1984)	549
Calvin C. Bourne	38 Van Natta 965 (1986)	1002
Cynthia K. Bowman	33 Van Natta 582 (1981)	621
Sharon L. Bracke	36 Van Natta 1245 (1984)	235,494,809,954
Sharon L. Bracke	29 Van Natta 947 (1980)	809
Sharon L. Bracke	38 Van Natta 809 (1986)	910
David F. Brainerd	37 Van Natta 276 (1985)	601,824
Judy A. Britton	37 Van Natta 1262 (1985)	213
Charlene K. Brothert	38 Van Natta 256 (1986)	432,494,603,939
Theodore P. Brown	36 Van Natta 51 (1984)	160
John B. Bruce	37 Van Natta 135 (1985)	208,613
Paul W. Bryan	37 Van Natta 1431 (1985)	26,628
Royce J. Burian	37 Van Natta 1602 (1985)	421
Connell R. Cambron	38 Van Natta 927 (1986)	929
John Cameron	34 Van Natta 211 (1982)	1013
Daniel J. Cannon	35 Van Natta 1181, 1623	836
Gracia A. Carter	36 Van Natta 1604 (1985)	817
Dwayne G. Cary	36 Van Natta 265 (1984)	639
Katherine Casteel	31 Van Natta 127 (1981)	873
Katherine E. Casteel	36 Van Natta 695 (1984)	873
Darrell Chastain	35 Van Natta 1781 (1983)	958
Arthur L. Chatt	38 Van Natta 612 (1986)	1051
David Cheney	35 Van Natta 21 (1983)	101
Kenneth E. Choquette	37 Van Natta 927 (1985)	8,74,117,118,163,1024
Gary L. Clark	35 Van Natta 117 (1983)	8
Mary Lou Claypool	34 Van Natta 943 (1982)	954
Theodore C. Collier	37 Van Natta 1205 (1985)	160
Garland Combs	37 Van Natta 756 (1985)	101,1011
Deborah M. Cook	37 Van Natta 542 (1985)	610
Ada K. Cooper	37 Van Natta 1279 (1985)	26

VAN NATTA CITATIONS 1986

Name	Citation	Page(s)
Wayne D. Cooper	38 Van Natta 913 (1986)	916
Richard N. Couturier	36 Van Natta 59 (1984)	21,117
Robert D. Craig	37 Van Natta 494 (1985)	171,869
Kathie L. Cross	34 Van Natta 1064 (1982)	954
Nancy Cudaback	37 Van Natta 1522, 1580	869
Nancy Cudaback	38 Van Natta 423 (1986)	869
Dennis S. Current	38 Van Natta 858 (1986)	965,1002
Ralph Cutright	35 Van Natta 1647 (1983)	934
Ralph R. Cutright	35 Van Natta 1142 (1983)	934
Shaun Cutsforth	35 Van Natta 515 (1983)	144
Sally K. Cutts	36 Van Natta 641 (1984)	886,894
Bonnie M. Danton	37 Van Natta 561 (1985)	196,491
Patricia Debates	38 Van Natta 894 (1986)	912
Patricia M. Dees	35 Van Natta 120 (1983)	76,885
Richard M. Deskins	38 Van Natta 494 (1986)	954
Richard M. Deskins	38 Van Natta 825 (1986)	1034,1036
Liz A. Destael	37 Van Natta 453 (1985)	439,909
Robert L. Diehr	38 Van Natta 813 (1986)	855
Lawrence W. Digby	37 Van Natta 992 (1985)	92
Helen L. Dodge	36 Van Natta 1283 (1984)	459
Clarice G. Dorn	34 Van Natta 506 (1982)	459
Vanessa Dortch	37 Van Natta 1207 (1985)	8,218,478,553,575,597,853
Harold Dotson	37 Van Natta 759 (1985)	858
Michael R. Douglas	37 Van Natta 65 (1985)	481
James R. Drew	37 Van Natta 570 (1985)	26
Oscar Drew	35 Van Natta 1067 (1982)	934
Tim R. Dugan	38 Van Natta 929 (1986)	927
Don W. Emrich	27 Van Natta 416 (1979)	1013
C.D. English	37 Van Natta 572 (1985)	256,494,934
Billy J. Eubanks	35 Van Natta 131 (1983)	235,488,507,830
Timothy W. Evans	38 Van Natta 48 (1986)	858
Bob L. Farris	37 Van Natta 252 (1985)	266
James W. Foushee	36 Van Natta 901 (1984)	57
Mary Fraley	35 Van Natta 1107 (1983)	913
James R. Frank	37 Van Natta 1555 (1985)	510,927,929
Adam J. Gabel	36 Van Natta 263 (1984)	10,270
Jill M. Gabriel	35 Van Natta 1224 (1983)	484,623,972,1003,1044
John Galanopoulos	35 Van Natta 548 (1983)	613,626
Celia Garcia	37 Van Natta 1567 (1985)	863
Jovita P. Garcia	37 Van Natta 1208 (1985)	252
Ronald J. Gazely	36 Van Natta 212 (1984)	855,923
Robert T. Gerlach	36 Van Natta 293 (1984)	423
Barbara A. Gilbert	36 Van Natta 1485 (1984)	1050
Larry J. Gildersleev	37 Van Natta 1671 (1985)	163
Frank R. Gonzales	34 Van Natta 551 (1982)	954
Irene M. Gonzalez	38 Van Natta 257 (1986)	954
Kathleen M. Gould	37 Van Natta 458 (1985)	207
Deborah L. Greene	37 Van Natta 575 (1985)	257,516
Brad T. Gribble	37 Van Natta 92 (1985)	8,185,527
Edith Grimshaw	36 Van Natta 63 (1984)	855,923
Ralph W. Gurwell	35 Van Natta 1310 (1983)	13
Phillip E. Hager	36 Van Natta 1877 (1984)	526
Glenn O. Hall	35 Van Natta 275 (1983)	873
Gerald I. Halle	37 Van Natta 515 (1985)	639
Winzell L. Hamilton	37 Van Natta 215 (1985)	213
Patrick M. Hannum	36 Van Natta 1680 (1984)	828

VAN NATTA CITATIONS 1986

Name	Citation	Page(s)
Quinten S. Hargreave	35 Van Natta 156 (1983)	139
Thomas E. Harlow	37 Van Natta 1209 (1985)	610
Thomas C. Harrell	34 Van Natta 589 (1982)	500,1027
Joel I. Harris	36 Van Natta 829 (1984)	101,235,821,886
James T. Harvey	37 Van Natta 960 (1985)	886
Brian L. Hayes	37 Van Natta 1447 (1985)	909,1008
Allen W. Hays, Jr.	37 Van Natta 1179 (1985)	828
Marjorie Hearn	36 Van Natta 1300 (1984)	238
Dan W. Hedrick	37 Van Natta 1200 (1985)	478
Dan W. Hedrick	38 Van Natta 208 (1986)	908
Robert Heilman	34 Van Natta 1487 (1982)	13
Nonda G. Henderson	37 Van Natta 425 (1985)	825
Francisco Hernandes	37 Van Natta 1455 (1985)	117,118,208
Jimmie B. Hill	37 Van Natta 728 (1985)	57
Bernie Hinzman	37 Van Natta 1059 (1985)	494
Richard L. Hoffee	37 Van Natta 248 (1985)	603
Dan L. Householder	37 Van Natta 1583 (1985)	101
Earl P. Houston	37 Van Natta 1210 (1985)	218
Howard E. Hughes	37 Van Natta 998 (1985)	434,579,613
David Hulbert	37 Van Natta 1256 (1985)	250
Lyn A. Hulslander	37 Van Natta 427 (1985)	1027
Terry L. Hunter	38 Van Natta 134 (1986)	207,434,579,613
Charles R. Jackson	37 Van Natta 1609 (1985)	421
Sharon L. James	37 Van Natta 1049 (1985)	193
Martin A. Janssens	4 Van Natta 30 (1969)	809
George E. Johnson	37 Van Natta 547 (1985)	196,491
George E. Johnson	37 Van Natta 673 (1985)	196
Billy Joe Jones	36 Van Natta 1230 (1984)	53,57
Deborah L. Jones	37 Van Natta 1573 (1985)	21,55,78,86,114,559,899
Eugene R. Jones	36 Van Natta 1517 (1984)	522
Betty L. Juneau	38 Van Natta 553 (1986)	597
William H. Kahl	38 Van Natta 93 (1986)	99,110,162,162,813
Richard G. Kennedy	37 Van Natta 1468 (1985)	455,848
David A. Kimberly	35 Van Natta 1607 (1983)	954
Leonard F. Kisor	35 Van Natta 282 (1983)	613
John P. Kleger	37 Van Natta 1183 (1985)	29,1051
Joseph R. Klinsky	35 Van Natta 332 (1983)	436,449,886
Robert D. Klum	37 Van Natta 720 (1985)	86
Joji Kobayashi	36 Van Natta 1558 (1984)	817
George J. Koronaios	37 Van Natta 263 (1985)	879
John D. Kreutzer	36 Van Natta 284 (1984)	21,55,78,86,265,899,984
Doris J. Lanham	2 Van Natta 15 (1968)	459
Ellen Lankford	37 Van Natta 1146 (1985)	152,204
Barbara A. Lawrence	37 Van Natta 1612 (1985)	549
Jimmy C. Lay	37 Van Natta 583 (1985)	961,997
Daniel J. Leaton	34 Van Natta 1481 (1982)	954
Jack D. Ledford	37 Van Natta 1152 (1985)	249
Leroy E. Leep	37 Van Natta 1614 (1985)	996
Robert A. Leppla	37 Van Natta 1698 (1985)	439,830
Harold A. Lester	37 Van Natta 745 (1985)	8,527,565,603,827,886,1033
Carol J. Levesque	38 Van Natta 230 (1986)	598
Harlan L. Long	37 Van Natta 671 (1985)	74
Delfina P. Lopez	37 Van Natta 164 (1985)	20,29,44,146,163,164,189,213,231,261,266,427,473,482,550,855,1006,1051
Fernando Lopez	38 Van Natta 95 (1986)	196
John Losinger	36 Van Natta 239 (1984)	427

VAN NATTA CITATIONS 1986

Name	Citation	Page(s)
Barbara A. Lusey	37 Van Natta 265 (1985)	895
Vivian MacDougall	15 Van Natta 117 (1975)	809
Clinton L. Maddock	37 Van Natta 984 (1985)	208
Neil D. Maloney	36 Van Natta 1071 (1984)	459
Richard L. Manley	37 Van Natta 1469 (1985)	146
Robert E. Martell	37 Van Natta 1074 (1985)	266,527,618
Melvin L. Martin	37 Van Natta 1119 (1985)	473
Patricia A. Martin	38 Van Natta 439 (1986)	830
Leonor S. Martinez	38 Van Natta 575 (1986)	982
Frank Mason	34 Van Natta 568 (1982)	21,55,78,86,265,899,984
William H. McCall	35 Van Natta 1200 (1983)	256
Michael M. McGarry	34 Van Natta 1520 (1982)	39,243
Clinton S. McGill	36 Van Natta 1692 (1984)	606
James A. McGougan	37 Van Natta 539 (1985)	26
Jerry W. McLarrin	37 Van Natta 1064 (1985)	231
Betty J. McMullen	38 Van Natta 117 (1986)	208,510,865,891,1023
William E. McNichols	38 Van Natta 261 (1986)	968
Darrell Messinger	35 Van Natta 161 (1983)	139
Vernon Michael	34 Van Natta 1212 (1982)	137
Mary G. Mischke	37 Van Natta 1155 (1985)	66,592,958
Alberto V. Monaco	38 Van Natta 32 (1986)	583
Debbie Monrean (Kahn	38 Van Natta 180 (1986)	182
Debbie Monrean (Kahn	38 Van Natta 97 (1986)	112,182
Ray Moore	37 Van Natta 466 (1985)	821
Erica E. Moreno	38 Van Natta 137 (1986)	827
Edward Morgan	34 Van Natta 1590 (1982)	903
Joyce A. Morgan	36 Van Natta 114 (1984)	456,544
Roy L. Morris	38 Van Natta 99 (1986)	93,110,162,162,579,813
Michael Mulcahy	38 Van Natta 266 (1986)	573
Victoria K. Napier	34 Van Natta 1042 (1982)	903
Jorge Navarro	37 Van Natta 1107 (1985)	95
Albert Nelson	34 Van Natta 1077 (1982)	954
James E. Nelson	37 Van Natta 645 (1985)	544
William A. Newell	35 Van Natta 629 (1983)	639
Edward J. Nicks	37 Van Natta 1012 (1985)	53
James D. Nix	37 Van Natta 1288 (1985)	862
Earl H. Norby	37 Van Natta 1003 (1984)	1007
Sharon L. Novak	38 Van Natta 601 (1986)	925,930,1008
Melvin L. O'Brien	37 Van Natta 1478 (1985)	101,500
John J. O'Halloran	36 Van Natta 611 (1984)	589
John J. O'Halloran	34 Van Natta 1101 (1982)	119
Bob G. O'Neal	37 Van Natta 255 (1985)	21,55,78,86,899,984
Jephtha Orriggio	38 Van Natta 559 (1986)	984
Bernard L. Osborn	37 Van Natta 1054 (1985)	95,550,853,860
Carl R. Osborn	37 Van Natta 55 (1985)	139
Donald O. Otnes	37 Van Natta 522 (1985)	8
Ivan Ouchinnikov	34 Van Natta 579 (1982)	972,1003
Benjamin G. Parker	36 Van Natta 69 (1984)	836
Jimmie Parkerson	35 Van Natta 1247 (1983)	50,462,510,550,1015
Jimmie Parkerson	36 Van Natta 1240,1263	602
Donald R. Patterson	36 Van Natta 777 (1984)	510
David R. Petshow	36 Van Natta 1323 (1984)	13
Ellis L. Pettyjohn	37 Van Natta 1224 (1985)	1000
Stanley C. Phipps	38 Van Natta 13 (1986)	39,41,48,59,66,86,108,184,189,243,270,479,570,571,585,832,858,893,947,1024
Dorothy M. Pitcher	37 Van Natta 1700 (1986)	854

VAN NATTA CITATIONS 1986

Name	Citation	Page(s)
Leokadia W. Piwowar	37 Van Natta 21 (1985)	603
Leokadia W. Piwowar	37 Van Natta 1597 (1985)	603
Leokadia W. Piwowar	37 Van Natta 1591 (1985)	817,828
Robert L. Poague	38 Van Natta 157 (1986)	155
Noble A. Price	36 Van Natta 1105 (1984)	449
Elfreda Puckett	8 Van Natta 158 (1972)	427
Mark L. Queener	38 Van Natta 882 (1986)	893,965,1002,1024
Nancy J. Rensing	37 Van Natta 3 (1985)	208
Cleve A. Retchless	36 Van Natta 1328 (1984)	958
Cleve A. Retchless	35 Van Natta 1788 (1983)	958
Martin J. Ridge	37 Van Natta 768 (1985)	139
Gleason W. Rippey	36 Van Natta 778 (1984)	462,550
Marlene Ritchie	37 Van Natta 1088 (1985)	257
Ramon Robledo	36 Van Natta 632 (1984)	101
Bettie L. Rogers	36 Van Natta 615 (1984)	996
Arthur D. Roppe	38 Van Natta 118 (1986)	510,865,891
Darrell R. Rountree	38 Van Natta 222 (1986)	981
Wilma H. Ruff	34 Van Natta 1048 (1982)	415
Joda M. Ruhl	34 Van Natta 2 (1982)	459
Herbert D. Rustrum	37 Van Natta 1291 (1985)	39,95
Daniel J. Sabol	38 Van Natta 154 (1986)	1048
George E. Salleng	37 Van Natta 1701 (1985)	230
Jerry W. Sargent	36 Van Natta 1717 (1984)	104,193
Jerry W. Sargent	37 Van Natta 1595 (1985)	104
Heinz J.U. Sauerbrey	37 Van Natta 1512 (1985)	252
Richard A. Scharback	37 Van Natta 598 (1985)	53,57,853,860
Richard Schoennoehl	31 Van Natta 25 (1981)	488
Ruby Schultze	36 Van Natta 1720 (1984)	987
Joseph C. Sells	13 Van Natta 170 (1975)	901
Shirley Severe	27 Van Natta 710 (1979)	459
Igene G. Shaw	37 Van Natta 239 (1985)	472
Jim D. Shipley	37 Van Natta 116 (1985)	613
Roger A. Shoff	38 Van Natta 163 (1986)	1047
Lee E. Short	37 Van Natta 137 (1985)	456
Steven D. Silva	37 Van Natta 1621 (1985)	421
Andrew Simer	37 Van Natta 118 (1985)	439
Harold J. Simonis	37 Van Natta 1649 (1985)	459
Alaene R. Smith	35 Van Natta 310 (1983)	954
David A. Smith	35 Van Natta 1400 (1983)	519
Karola Smith	38 Van Natta 76 (1986)	885,927
Gerald L. Sneed	38 Van Natta 17 (1986)	586
Gary O. Soderstrom	35 Van Natta 1710 (1983)	252
Gary O. Soderstrom	36 Van Natta 1366 (1984)	252
Donald F. Spears	37 Van Natta 1650 (1985)	97
James D. Stenberg	38 Van Natta 108 (1986)	981
Brett A. Stevens	38 Van Natta 110 (1986)	93,99,162,162,813
Thomas J. Stokes	37 Van Natta 134 (1985)	21,86
Rodney C. Strauss	37 Van Natta 1212 (1985)	25,162
Mark T. Sturgis	37 Van Natta 715 (1985)	504,838
Lawrence M. Sullivan	37 Van Natta 1552 (1985)	606
Lawrence M. Sullivan	37 Van Natta 1241 (1985)	1019
Daniel Tanory	19 Van Natta 209 (1976)	459
Raymond D. Taylor	37 Van Natta 1082 (1985)	144,504
Donald A. Teem	37 Van Natta 770 (1985)	231
Joseph N. Thomas	37 Van Natta 501 (1985)	515
Vernita V. Thompson	38 Van Natta 152 (1986)	876

VAN NATTA CITATIONS 1986

Name	Citation	Page(s)
Marvin Thornton	34 Van Natta 998 (1982)	423
Pauline L. Travis	37 Van Natta 194 (1985)	525
Robert Tucker	37 Van Natta 952 (1985)	86
George M. Turner	37 Van Natta 531 (1985)	5,21,86,152,533,899
Lewis Twist	34 Van Natta 290 (1982)	954
William Vaandering	36 Van Natta 1296 (1984)	270
Alvin L. Van Arnam	36 Van Natta 1641 (1984)	533
Victor Vanderschuere	35 Van Natta 1074 (1983)	913
Susan F. Vernon	37 Van Natta 1562 (1985)	39,95,450,921
David L. Waasdorp	38 Van Natta 81 (1986)	426
Susan Wageman	37 Van Natta 973 (1985)	894
W. Craig Walker	37 Van Natta 974 (1985)	39,243,274
Peter R. Warner	37 Van Natta 419 (1985)	423
Sylvia A. Weaver	37 Van Natta 656 (1985)	854
Vernon L. Wellington	37 Van Natta 183 (1985)	1029
Barbara A. Wheeler	37 Van Natta 122 (1985)	117,118,208,247,256,432,494,603,893,939,1024
Rufus G. Whitaker	36 Van Natta 1193 (1984)	510
James D. Whitney	37 Van Natta 1463 (1985)	814
Mickey Wilcox	36 Van Natta 1706 (1984)	7
Karl J. Wild	37 Van Natta 491 (1985)	26
Donald W. Wilkinson	37 Van Natta 937 (1985)	55,78,86,132
Mary E. Williams	38 Van Natta 115 (1986)	539
Robert B. Williams	38 Van Natta 119 (1986)	423,613
Suzanne E. Williams	36 Van Natta 1310 (1984)	436
Jerry W. Wine	38 Van Natta 470 (1986)	965
Donald Wischnofske	34 Van Natta 664 (1982)	886,894
Casimir Witkowski	35 Van Natta 1661 (1983)	20,129,612
Wanda M. Wood	38 Van Natta 471 (1986)	951
James M. Woodward	37 Van Natta 1662 (1985)	424
Clyde C. Wyant	36 Van Natta 1067 (1984)	215
Robert L. Youngblood	37 Van Natta 1710 (1985)	101
Giordano Zorich	36 Van Natta 1599 (1984)	139

ORS CITATIONS

page(s)

ADMINISTRATIVE RULE CITATIONS

LARSON CITATIONS

The following Memorandum Opinions are not published in this volume. These decisions may be ordered from the Workers' Compensation Board using the numbers provided.

MEMORANDUM OPINIONS 1986

Name, WCB Number (Month/Year)

Abbott, Jerome R., 82-04542 (4/86)
Abbott, John, 85-01132 (2/86)
Aber, Leo L., 85-02766 (3/86)
Abma, Art, 85-00800 (7/86)
Adams, Edith I., 84-09607 (1/86)
Adams, James A., 84-10811 (9/86)
Allison, Bruce C., 84-04894 (8/86)
Alvarez, Richard, 84-05129 etc. (8/86)
Alvin, Theo D., 84-12091 (3/86)
Ames, Florence J., 85-09633 (9/86)
Anderson, Sharon, 83-07816 etc. (6/86)
Andrist, Lawrence J., 84-08466 (7/86)
Andrist, Lawrence J., 85-05503 (7/86)
Anlauf, Norman Z., 84-11533 (1/86)
Aranda, Michael B., 85-07615 (9/86)
Armstrong, Randy, 85-02618 etc. (4/86)
Arrant, Lyle T., 85-03829 (4/86)
Asay, Craig, 83-04679 (9/86)
Ash, Cleryl B., 84-02528 (8/86)
Ashker, Keith E., 85-01536 (3/86)
Astell, Edward J., 85-05399 (4/86)
Audas, Troy M., 84-03668 (5/86)
Avalos, Antonio S., 84-04390 (4/86)
Babcock, Dick L., 85-00381 (3/86)
Backman, Marcel E., 85-04206 (1/86)
Bacon, Erwin L., 84-12840 (5/86)
Baird, Harry, Jr., 84-11729 (3/86)
Baker, Donald R., 84-12120 etc. (4/86)
Baldwin, Ronald K., 84-10907 (4/86)
Ballweber, Ardell S., 85-00706 (5/86)
Barnes, Pamela R., 85-03720 (8/86)
Barr, Billie J., 85-02023 (4/86)
Barr, Carolyn K., 84-04731 (5/86)
Barry, Kelli A., 84-02023 etc. (6/86)
Bartlett, Dora I., 83-05909 etc.(3/86)
Basham, Bruce A., 84-13073 etc. (2/86)
Bashaw, Dorla D., 84-12480 (7/86)
Batson, David, 85-04259 (6/86)
Batson, James L., 84-12479 (5/86)
Baumgarden, Patsy L., 85-00635 (8/86)
Bechtold, Douglas L., 85-03257 (8/86)
Bedingfield, Michael, 85-12314 (8/86)
Begay, Ned, 84-10721 (3/86)
Begley, Steven, 85-10187 (9/86)
Benson, Robert A., 85-00167 (8/86)
Berliner, Dennis E., 84-13706 (4/86)
Betts, Stella, 85-10296 (8/86)
Bigbee, Elmer J., 85-00416 (4/86)
Bilyeu, Bertha B., 84-13322 (3/86)
Birkbeck, Kenneth E., 84-02480 (8/86)
Blackburn, Wanda J., 85-02537 (3/86)
Blackmer, Carol J., 84-12035 (5/86)
Blair, Robert C., 85-06739 (9/86)
Blank, Beverly J., 84-04633 (3/86)
Blofsky, Bradford, 85-06688 (8/86)
Bogle, Alva D., 85-01682 (1/86)
Borowczak, Thomas, 84-07974 etc.(3/86)
Bos, Donald W., 84-13225 (4/86)
Bowen, Linda K., 85-01342 (3/86)
Bowler, Robert B., 85-13779 (9/86)
Box, Stancel J., 84-10432 etc.(6,7/86)
Boyce, Lloyd C., 84-07906 (5/86)
Boyd, Frances I., 84-07954 etc. (5/86)
Boyd, Richard L., 85-05338 (5/86)
Boydston, Johnny W., 84-11713 (1/86)
Boyle, Andrew R., 84-09672 (1/86)
Brace, Bonnie M., 84-09052 (2/86)
Bracke, Sharon L., 84-02612 (8/86)
Brewer, Jerry D., 84-05310 etc. (4/86)
Brisso, Robert A., 84-00282 (4/86)
Brown, Edith E., 84-03736 (3/86)
Brown, Gary, 84-10390 (3/86)
Brown, Ricky L., 84-06135 (4/86)
Buchanan, Lewis P., 85-02493 (4/86)
Burkhart, Clyde C., 83-03104 (8/86)
Burnett, Mary L., 85-03313 (6/86)
Burns, Anthony D., 85-04622 (3/86)
Butler, Curtis A., 85-05817 (6/86)
Butler, Jimmy C., 85-00807 (3/86)
Butler, Jimmy, 85-11536 (9/86)
Byerley, Michael D., 85-09087 (8/86)
Byers, April J., 85-00742 (7/86)
Cahall, Darleen, 84-05421 etc.(5,6/86)
Calawa, Glenn T., 85-10308 (10/86)
Canniff, Kiki, 85-01324 (7/86)
Capps, Douglas R., 85-04654 (1/86)
Carpenter, Joseph A., 84-12978 (1/86)
Carr, Joseph L., 84-10089 (2/86)
Carson, Terry R., 85-15631 (9,9/86)
Chatt, Arthur L., 84-01782 (5/86)
Childs, Robert F., 84-11785 (1/86)
Clark, Gerry, 84-13193 (1/86)
Clark, Margaret L., 84-08096 (3/86)
Clark, Phoebe M., 85-05601 (3/86)
Coffman, Debra A., 84-11088 (6/86)
Colegrove, Janet L., 85-02318 (3/86)
Collins, Danny H., 85-00760 (3/86)
Collins, Robert E.,84-13160 etc.(4/86)
Cook, Hiram D., 84-08067 (3/86)
Cook, Maureen E., 83-05372 (4/86)
Corbett, Bruce E., 85-00479 (3/86)
Corbett, Gary L., 84-11813 (9/86)
Cornutt, Loren T., 85-04407 (5/86)
Corona, Mary J., 85-05900 (7/86)
Corrado, Joseph D., 85-03457 (9/86)

Name, WCB Number (Month/Year)

Costalez, Leroy M., 85-01590 (3/86)
Coyle, Roseann M., 84-06448 (2/86)
Crace, Peggy R., 85-04578 (5/86)
Craddock, Charles K., 84-09156 (1/86)
Crandell, William A., 85-04100 (9/86)
Crase, Lawson, 83-06918 (4,5/86)
Crawford, Lloyd B., 85-01322 (6/86)
Creighton, Dorothy E., 85-01585 (2/86)
Cromwell, Gary L., 83-10664 etc.(7/86)
Crothers, Larry, 84-07708 (4/86)
Cruz, Juan, 84-05598 (1/86)
Culp, James A., 85-00378 etc. (4/86)
Cummings, William F., 85-01029 (3/86)
Cushman, Robert, 84-07367 etc. (3/86)
Dahl, Robert E., 84-01008 (3/86)
Dahlen, Orville D., 83-00821 (1/86)
Dalgliesh, Kenneth, 84-08363 (6/86)
Dalton, James C., 85-05591 (7/86)
Dalton, Kenneth L., 84-11963 (3/86)
Damewood, Ruth M., 85-04276 (5/86)
Daugherty, Eldred D., 85-04303 (8/86)
David, Diana L., 85-02875 (3/86)
Davis, Anna M., 84-13273 (3/86)
Davis, Benjamin K., 83-00096 (4/86)
Davis, Dorothy J., 84-12233 (8/86)
Dean, Howard, 84-04299 (2/86)
Deane, Maxwell W., 84-10318 etc.(2/86)
Deaver, Kevin S., 85-03718 (3/86)
Decouteau, Frank, 84-05809 (3/86)
Denicola, Maria G., 82-09277 (1/86)
Dennis, Rhett J., 85-04987 etc. (7/86)
Deroboam, Raymond E., 85-07419 (8/86)
Derr, Claude G., 85-10354 (9/86)
Dickson, Charlie B., 85-07709 (8/86)
Do, Yen V., 84-09129 etc. (8/86)
Dobranski, Michael, 85-01724 (3/86)
Dodge, Shirley M., 85-02716 (3/86)
Doran, Ron A., 85-03223 (3/86)
Drake, Marilyn K., 85-05504 (1/86)
Drummond, Daniel P., 84-10082 (7/86)
Duty, Patrick J., 84-09090 etc. (2/86)
Duval, Clifford J., 84-12417 (7/86)
Earing, James F., 84-12843 (4/86)
Easter, Guy T., 84-12590 (9/86)
Ebert, Dean D., 84-06030 (1/86)
Edwards, Robert L., 82-08413 (4/86)
Eikansas, Luella D., 84-00788 (8/86)
Ellis, Kathy L., 85-02613 etc. (4/86)
Else, Michael R., 85-04615 (6/86)
Encel, Theresa L., 85-15566 (9/86)
Endicott, Victor, 84-09372 etc. (3/86)
English, Jesse E., 84-09995 etc.(9/86)
Eno, Kenneth L., 84-05874 (3/86)
Erickson, Dennis R., 82-08452 (8/86)
Evans, Thomas T., 85-09174 (9/86)
Faas, Eugene G., 84-12811 (3/86)

Name, WCB Number (Month/Year)

Faist, Timothy W., 84-06302 etc.(8/86)
Fanno, William P., 85-13051 (9/86)
Farmer, Dolores R., 84-10942 (3/86)
Farrell, Kevin L., 84-08997 (1/86)
Flint, Elwyn A., 85-00831 (7/86)
Foster, Jerry F., 84-11283 (6,6/86)
Fox, Donna E., 85-06013 (8/86)
Frankie, Jill E., 85-01031 etc. (8/86)
Frasure, Lonnie E., 84-10241 (7/86)
French, Sharon A., 84-11523 (8/86)
Freshour, Harley, 85-03656 (9/86)
Frosty, Dannie W., 84-08343 (6/86)
Fuller, George S., 84-12983 etc.(5/86)
Galstaun, George R., 84-00558 (2/86)
Gandy, Isaac L., 85-02928 (3/86)
Garcia, Antonia T.,85-02734 etc.(7/86)
Garrett, Sheree D., 84-08185 (3/86)
Geistlinger, Phyllis, 84-11359 (3/86)
George, Larry D., 82-11200 (2/86)
Gerba, Martin P., 84-13538 etc. (7/86)
Getsinger, David A., 84-07884 (4/86)
Gibbons, Rebecca L., 85-01225 (4/86)
Gill, Karen K., 85-01316 (3/86)
Gill, William R., 84-13144 (1/86)
Goding, Jody D., 85-02495 (2/86)
Gordon, Ronald D., 85-01036 (1/86)
Gordy, Richard W., 84-13738 (3/86)
Graham, Russell L., 85-04937 (3/86)
Graves, Ray, 85-08627 (9/86)
Gray, George M., 84-12435 (3/86)
Grey, Vivian J., 85-05005 (9/86)
Guiden, Verdell, 85-02603 (9/86)
H.S.C. Logging (4/86)
Haas, Edward R., 84-13394 (9/86)
Hacker, Clinton J., 85-06220 (6/86)
Hailey, Larry L., 84-08391 etc. (9/86)
Hallett, William F., 84-06439 (1/86)
Haney, Rodney A., 83-06061 (1/86)
Harlan, Timothy E., 85-07431 (7/86)
Harris, Miner L., 84-10113 (3/86)
Harris, Sidney S., 83-08014 (4/86)
Harryman, Perry R., 85-11593 (9/86)
Hart, Vivian B., 85-02690 (5/86)
Hawkins, Harry D., 85-13926 (9/86)
Hayes, Linda K., 85-11124 etc. (5/86)
Hayes, Roger D., 84-13055 (9/86)
Haynes, David T., 84-07159 (3/86)
Heath, Raymond C., 83-09761 etc.(1/86)
Hernandez, Leovardo, 85-14534 (8/86)
Herron, William O., 85-02774 (2/86)
Hickman, Lynda L., 85-02966 etc.(9/86)
Hilburn, John E., 82-08773 (9/86)
Hill, Leo O., 85-08447 (8/86)
Hill, Leota J., 85-03896 etc. (9/86)
Hill, Terry F., 84-13007 (7/86)
Hilliker, Irene P.,82-04313 etc.(2/86)

Name, WCB Number (Month/Year)

Hillman, Eddie E., 84-11538 (8/86)
Hines, David G., 85-12059 (5/86)
Hoard, Michael J., 85-01157 (6/86)
Hobbs, Raymond E., 84-05576 (5/86)
Hobson, Perry W., 84-01772 (1/86)
Holcomb, David, 86-00300 (8/86)
Holden, Miles E., 85-04996 (7/86)
Holechek, Harry A., 84-04520 (1/86)
Holt, Ned, 85-08857 (8/86)
Holwegnar, Ottis (Employer) (4/86)
Hopson, William E.,78-06309 etc.(3/86)
Horner, Billy J., 85-04081 (8/86)
Houck, Lillie L., 85-02011 (8/86)
Houston, David C., 84-12220 etc.(9/86)
Howard, James W., Jr., 84-12395 (9/86)
Hughes, James A., 85-04199 (5/86)
Humphrey, Fay L., 85-05783 (9/86)
Hunt, Ted A., 84-11530 (9/86)
Hunter, Riley V., 83-09477 (1/86)
Hylla, Frank R., 85-00569 (4/86)
Iacolucci, Laura L., 84-03467 (2/86)
Jacob, Thomas A., 85-01311 (1/86)
Jahnke, Roxann L., 84-09480 (3/86)
Jakubiec, Donna M., 85-00206 (1/86)
James, Raymond W., 85-09432 etc.(8/86)
Jarrell, Joyce E., 85-09336 (7/86)
Jebens, Peter G., 85-07422 (5/86)
Jeffords, Wendell R., 84-00351 (4/86)
Jenkins, Leonard V., 85-07550 (5/86)
Johnson, Richard C. III,85-03900(1/86)
Jones, Alma E., 84-07904 (1/86)
Jones, Robert V., 84-10854 (9/86)
Jordan, Shelli S., 84-10417 (2/86)
Jordon, Imogene P., 81-03569 (4/86)
June, Cheryl L., 84-05206 etc. (2/86)
Jury, Ardel M., 85-04551 (8/86)
Justis, Anna C., 84-13359 (2/86)
Kading, Carol S., 84-09675 (4/86)
Kelly, Carl, 84-03620 (2/86)
Kendregan, James P., 85-03930 (4/86)
Kennedy, Charles F., 84-04493 (3/86)
Kennel, Jaynee R., 85-07763 (6/86)
Kerns, Franklin N., 85-12930 (8/86)
Khong, Phou, 85-03689 (8,9/86)
Kight, Gordon P., 84-08780 (8/86)
Kittel, Steven A., 85-07088 (8/86)
Knapp, Carol J., 84-10829 (1/86)
Kuhn, Ronald C., 84-03301 (6/86)
Kuskie, Rosalie, 85-05561 (9/86)
Labato, Andrew K., 85-03169 (8/86)
Lacey, David C., 84-13092 (4/86)
Lacy, Marilyn E., 85-03523 (4/86)
Ladd, Randy L., 85-00837 (1/86)
Lafond, Philip E., 85-03489 (6/86)
Lamb, Clinton M., 83-09956 (2/86)
Lambert, Dennis I., 83-09777 (5/86)

Name, WCB Number (Month/Year)

Land, Gary J., 84-05609 (4/86)
Lang, Terry L., 84-09181 (8/86)
Langley, Violet, 82-06532 (8/86)
Lanier, David J., 84-00221 (3/86)
Lapping, Alta L., 84-04869 etc. (4/86)
Larmore, Robert C., 84-13023 (9/86)
Larsen, Kenneth M., 85-03664 (7/86)
Laski, Charlene M., 84-13414 (8/86)
Lathrop, Elmer J., 84-05116 etc.(4/86)
Lavodie, Ray L., 84-12829 (4/86)
Lawrence, Michael E., 84-07354 (3/86)
Leachman, James W.,84-11761 (1,2,2/86)
Leavitt, Pamla D., 84-08138 (2/86)
Lehnherr, Karla M., 85-02783 (5/86)
Liacos, Leon V., 84-12603 etc. (5/86)
Lilly, James A., 85-02198 (1/86)
Lindstrom, Morris, 84-09715 (8/86)
Lockwood, Linnie L., 85-04870 (7/86)
Logan, William D., 85-04482 (1/86)
Lombardi, Linda L., 84-01110 (1/86)
Lowe, Richard A., 85-13836 (9/86)
Lux, Melvin J., 85-09970 (8/86)
Lynch, Christine M., 85-08640 (8/86)
Maben, Charles, 85-02436 (8/86)
Maine, Keith M., 85-06109 etc. (9/86)
Majewski, Donald, 85-12326 (9/86)
Makinson, Billie A., 85-03843 (8/86)
Makinson, Joseph P., 85-04564 (5/86)
Margules, Trudy, 84-00185 (7/86)
Marlatt, Terry R., 84-12033 (6/86)
Martin, Robert T., 84-13125 (5/86)
Martinez, Elizabeth M.,85-13245 (7/86)
Martinez, Gregorio M., 84-09317 (7/86)
Martinez, Leonor S., 85-05863 (9/86)
Marzano, Marsha R., 85-03353 (6/86)
Masters, Robin W., 85-01400 (8/86)
Mathis, Glenn H., 84-12083 (4/86)
Mathis, Jimmy, 83-10182 (6/86)
Matsen, Dale S., 85-06934 etc. (9/86)
Matveev, Nefodey, 84-12852 etc. (8/86)
May, Carole A., 85-14827 (9/86)
McBride, George F.,84-11084 etc.(2/86)
McCartney, Dennis C., 84-07543 (7/86)
McClanahan, Donald K., 85-07438 (7/86)
McCoy, Ernest E., 85-11917 (7/86)
McDowell, John W., 84-13559 (5/86)
McFarland, Mary, 83-06254 etc. (5/86)
McHargue, Juanita, 84-02733 (3/86)
McKinney, Patty A., 85-10461 (9/86)
McKinnis,Georgette,85-00975 etc.(9/30)
McKinnon, Randi A., 85-07927 (8/86)
McMullen, George, 84-10663 etc. (4/86)
McQuisten, Terry L., 84-11392 (3/86)
Mead, Cyrus S., 84-13620 (1/86)
Meddock, Patricia D., 84-07634 (4/86)
Mefford, James S., Jr.,85-13227 (8/86)

Name, WCB Number (Month/Year)

Mendoza, Esperanza, 85-04638 (9/86)
Merrill, Virginia M., 84-09408 (9/86)
Merritt, Terry L., 85-03374 (4/86)
Meyer, Harold L., 85-02615 (4/86)
Meyers, Chris G., 84-13113 (1/86)
Michelson, Howard C., 85-04333 (2/86)
Miebach, Robert G., 85-04961 (6/86)
Millan, Edwin R., 82-08779 (1/86)
Miller, Beverly A.,84-07729 etc.(7/86)
Mitchell, Ann E., 85-03178 (8/86)
Modderman, James, 85-06783 etc. (8/86)
Moffitt, Joseph C., 83-08916 (4/86)
Montgomery, Floyd D., 85-00564 (9/86)
Morey, Alvin C., 85-10255 (7/86)
Morris, Arthur R., 85-01913 (2/86)
Morris, Lonnie D., 84-01189 etc.(4/86)
Morrison, Edna M., 84-12038 (7/86)
Mosley, Donald P., 85-04542 (6/86)
Mullen, Thomas C., 85-06288 (8/86)
Murphy, Christine, 83-12204 etc.(2/86)
Myers, Donald L., 85-11590 (9/86)
Myers, Lee C., 83-07238 (7/86)
Myrland, Linda, 85-09492 (9/86)
Nelson, Ace, 85-04120 (5/86)
Neuman, Paul E., 85-04215 (8/86)
Nguyen, Le V., 85-00959 (4/86)
Nichols, Robert J., 84-13621 (4/86)
Nolan, Kenneth P., 85-02568 (2/86)
Nolan, William S., 85-12463 (9/86)
Nunez, Eduardo, 85-00862 (1/86)
O'Neill, Rickey A., 85-08221 (8/86)
Oelhafen, Barbara K., 84-13515 (8/86)
Offield, Michael, 85-07280 (8/86)
Olson, Melvin A., 84-01217 (4/86)
Olson, Robert O., 85-06786 (4/86)
Opheim, Lucille A., 85-10629 (5/86)
Owen, Margaret A., 85-02509 (5/86)
Parke, George W., 85-14195 (9/86)
Parker, Lorenzo J., 85-00286 (3/86)
Parrish, Arlene, 85-01272 (8/86)
Paul, Vickie, 83-09378 etc. (3/86)
Paulson, Wilton L., 83-04084 (8/86)
Peterson, Jack V., 85-01386 (2/86)
Peterson, Norma M., 85-02350 (9/86)
Phelan, Rodney D., 84-08850 (4/86)
Phelps, Betty L., 85-04914 etc. (7/86)
Philipsen, Elizabeth, 83-05187 (1/86)
Phillips, Joycelyn A., 85-07177 (7/86)
Pinson, Manuel R., 85-00854 (3/86)
Pope, Deborah A., 85-00333 (9/86)
Popham, Larry W., 84-07500 (6/86)
Puckett, Lawrence A., 85-02225 (8/86)
Pullen, Donald L., 84-08647 (1/86)
Putnam, Gregory S., 84-11823 (7,8/86)
Puttbrese, Genevieve, 82-09814 (1/86)
Quilter, Richard V., 85-02579 (9/86)

Name, WCB Number (Month/Year)

Quinn, Michael F., 84-10833 (8/86)
Rabern, Mark D., 84-04321 etc. (4/86)
Ray, Bobby L., 85-04061 (9/86)
Ray, Harold M., 85-08748 (6/86)
Ray, Sally A., 84-12965 (3/86)
Reed, Martha L., 84-11224 etc. (1/86)
Reynolds, Richard, 85-12313 etc.(8/86)
Rice, Howard, 85-02881 (7/86)
Richesin, Eddie D., 86-00394 (9/86)
Richmond, Lyle G., 84-07696 etc.(1/86)
Rider, Marion V., 85-02692 etc. (5/86)
Riemer, Kurt E., 84-13716 (8/86)
Ring, Abraham W., 85-03629 (9/86)
Roberts, James N., 84-12882 (1/86)
Rodgers, Claud B., 84-05031 (6/86)
Rogers, Floyd E., 85-07445 (9/86)
Rohde, Mark W., 82-09518 (1/86)
Roppe, Arthur D., 85-00227 (1/86)
Ros, Rav, 85-00385 (4/86)
Rose, Robert, 85-08323 (6/86)
Rose, Rocky L., 85-00387 (7/86)
Rozell, Gary A., 84-10715 (3/86)
Rust, Royce J., 84-00182 (1/86)
Saarheim, Robert J., 84-06726 (8/86)
Sampson, Fred T., 85-01300 (9/86)
Sampson, James L., 83-02349 (2/86)
Sanders, Jimmy D., 85-08965 (9/86)
Sanders, Reinhold, Jr.,84-07694 (2/86)
Satcher, Elmira K., 85-07300 (9/86)
Savage, Buddy L., 85-01107 (7/86)
Schiermeister, John H.,85-02029 (8/86)
Schneider, Earl L.,84-04854 etc.(7/86)
Schroeder, Carolyn,84-09200 etc.(7/86)
Schuening, John D., 85-00949 (6/86)
Scism, Donna L., 85-10484 (8/84)
Scofield, Robert, 85-03834 (8/86)
Seabeck, Nibby J., 84-12966 (1/86)
Senske, Susanne E., 85-03388 (7/86)
Severe, Jerald H., 84-02646 (3/86)
Shaw, William, 85-07286 (3/86)
Shehorn, Wilbur L., 85-01642 (5/86)
Sheldon, Rosalie A., 85-04217 (3/86)
Sheldon, Rosalie A., 85-14077 (7/86)
Shipman, Glenn E., 84-10449 (1/86)
Shippey, Dallas D., 85-00120 (4/86)
Shivley, Henry O., 84-03367 (4/86)
Shutt, Carmen D., 84-12752 (2/86)
Simon, Dallas J., 85-00550 (4/86)
Simonton, Steven,84-02067 etc.(6,7/86)
Simpson, Wesley L., 85-05267 (4/86)
Sloan, Jerry, 83-11221 etc. (6/86)
Smith, Ellen D., 84-11958 (8/86)
Smith, Gary J., 84-05174 (4/86)
Smith, Leonard W., 84-09472 etc.(8/86)
Smith, Sharon, 85-03486 etc. (9/86)
Snyder, Leland L., 84-06586 (4/86)

Name, WCB Number (Month/Year)

Snyder, Susan B., 84-11497 (2/86)
Sommers,Richard F.,84-02858 etc.(4/86)
Soo, Carl B., 84-06264 (5/86)
Sorenson, Walter P., 84-02069 (1/86)
Sparks, Alberta A., 85-06408 (8/86)
Spenard, Andre P., 85-05507 (9/86)
Spencer, Jack L., 82-06758 (4/86)
St. Onge, David B., 85-02078 (4/86)
Stamps, James R.,84-10279 etc.(4,5/86)
Stedman, Steven G., 85-07815 (4/86)
Steele, Margie A., 85-07594 (8/86)
Steenkolk, Robert, 85-04672 (8/86)
Stieg, Daniel J., 85-00609 (4/86)
Storkel, Donald L., 84-09077 (1/86)
Strickland, Nathaniel, 85-01359 (6/86)
Strunk, Linda L., 83-08218 (2/86)
Stubblefield, David A.,83-09046 (4/86)
Stucki, Ronald G., 84-11529 (3/86)
Stump, Gerald (Employer) (4/86)
Sumpter, Mary C., 84-11883 (4/86)
Suran, Gisela, 85-01182 (9/86)
Sweeden, Gloria G., 84-04875 (1/86)
Tadlock, Mary L., 85-04193 (9/86)
Tait, Jack, 85-06032 etc. (8/86)
Tankersley, Leslie E., 85-12347 (8/86)
TAskinen, Florence E., 84-13556 (8/86)
Taylor, J.O., 84-11484 (7/86)
Taylor, Jessie M., 84-00020 (4,5/86)
Taylor, Robert V., 85-02395 (8/86)
Taylor, Shirley L., 84-07824 (4/86)
Thias, Mike S., 84-13072 (4/86)
Thill, Richard W., 83-11988 etc.(8/86)
Thomas, Louise W., 83-08841 (2/86)
Thompson, Harold L., 84-04010 (3/86)
Thompson, William W., 85-04627 (7/86)
Thornsberry, Richard, 85-01260 (7/86)
Thornton, Michael, 85-06958 (9/86)
Thorud, Thomas L., 84-04823 (5/86)
Throw, Jessica L., 85-00455 (4/86)
Thurston, Connie L., 84-04138 (1/86)
Timpy, Charles D., 84-12155 (4/86)
Tingue, William C., 83-00812 (8/86)
Tolin, William A., 85-04849 (9/86)
Tollefson, Gary E., 85-03658 (8,8/86)
Toney, Richard J., 84-01267 (8/86)
Torres-Smith, Michele, 84-12769 (8/86)
Trask, Winston W., 82-10951 (1/86)
Turner, Harold, 83-09731 etc. (4/86)
Valdez, Karen, 84-12412 (1/86)
Valum, John L., 84-10185 (1/86)
Vanator, Nancy L., 85-10355 (9/86)
Vaughn, John R., 84-12339 (7/86)
Vaughn, Michael D., 84-01665 (1/86)
Vizcarra, Miguel C., 84-12813 (4/86)
Walker, Charles E., 84-11309 (5/86)
Wallace, John M., 85-02757 etc. (9/86)

Name, WCB Number (Month/Year)

Ward, Edward G., 85-07319 (9/86)
Ward, Kenneth A., 85-06143 (5,5/86)
Warner, Russell T., 83-08187 (1/86)
Watson, Lois G., 84-13017 etc. (9/86)
Webster, Sharon S., 84-11789 (9/86)
Weideman, George L., 85-03899 (9/86)
Weight, Joyce M., 82-08531 (6/86)
Weight, Thomas C., 85-04716 (8/86)
Welch, Gary N., 85-03937 (9/86)
Wells, Delmar M., 84-09093 etc. (9/86)
Wertz, Clement P., 84-13111 (1/86)
Westwood, Clarence P., 84-13489 (9/86)
Whelchel, Katherine L.,84-03557 (1/86)
White, David H., 84-09822 (2/86)
White, Dawn C., 85-02637 (9/86)
Whitted, Dennis R., 85-07400 (7/86)
Williams, Deloise, 84-02208 etc.(7/86)
Williams, Floyd, 85-11775 (9/86)
Willis, Jerry W., 84-07510 (3/86)
Wilson, Carlette L., 83-10650 (4/86)
Wilson, Charles A., 85-06971 (7/86)
Wilson, Esther, 85-03731 (1/86)
Wisely, Mildred M., 84-06320 (9/86)
Wojick, Jerry E., 84-02193 (9/86)
Wood, William E., 84-10010 etc. (1/86)
Woodcock, Arlene L., 84-07950 (1/86)
Woodhull, Douglas A., 84-09546 (2/86)
Woods, Marilyn P., 85-08891 (8/86)
Wootton, Gilbert, 83-08529 etc. (9/86)
Wroe, Pamela J., 85-02218 (4/86)
Yancey, Pauline R., 84-05047 (3,4/86)
Young, Robert A., 82-11592 etc. (3/86)
Zachary, Wilbur M., 85-04074 (7/86)
Zelmer, Eugene L., 85-01424 etc.(4/86)
Zurbrugg, Kim C., 85-07374 etc. (5/86)

The following decisions under Own Motion Jurisdiction are not published in this volume. They may be ordered from the Workers' Compensation Board using the numbers provided.

OWN MOTION JURISDICTION 1986

Name, WCB Number (Month/Year)

Aaron, Mike L., 86-0343M (6/86)
Aber, Leo L., 84-0436M (4/86)
Akin, Sally, 86-0232M (4/86)
Alderman, Herb L., 86-0199M (7/86)
Aldinger, Raymond E., 86-0026M (7/86)
Allen, Ricky D., 85-0631M (2,3/86)
Allen, Wendy S., 86-0451M (8/86)
Allquist, Violet D., 85-0625M (4,4,8/86)
Alvarez, Richard C., 85-0366M (8/86)
Ancell, James H., 86-0319M (6/86)
Anderson, David W., 86-0470M (9/86)
Anderson, Diane R., 86-0269M (7/86)
Anderson, Don L., 86-0330M (6,8/86)
Arms, William C., 86-0174M (3/86)
Arnett, Edward R., 86-0376M (8/86)
Baird, Michael E., 85-0679M (4/86)
Baker, B. Franklin, 86-0136M (3/86)
Baker, Clifford W., 85-0677M (4/86)
Baldock, Joann, 84-0069M (1,2/86)
Baldwin, Michael T., 84-0183M (5/86)
Balfour, Doug, 86-0080M (2/86)
Barnes, Timothy G., 86-0458M (9/86)
Barnes-Lenz, Mildred, 86-0071M (7/86)
Barnett, Matthew K., 86-0248M (8/86)
Barney, Frank H., 86-0192M (4/86)
Barr, Jerry, 84-0477M (3/86)
Bartlett, Alva J., 86-0231M (4/86)
Beaty, Robert J., 84-0198M (8/86)
Bechtold, Jacqueline, 85-0566M (7/86)
Beck, Donald A., 84-0162M (4/86)
Beck, Geraldine, 86-0205M (5/86)
Beedle, David H., 85-0369M etc. (6/86)
Belshee, David W., 86-0200M (4/86)
Benefield, Sam, 86-0031M (4/86)
Bennett, Joseph M., 85-0483M (6,7/86)
Benson, Kathy L., 84-0612M (2/86)
Bentley, Hubert P., 86-0414M (8/86)
Beranek, Marvin R., 86-0204M (5/86)
Bettin, Phillip L., 85-0546M (2/86)
Bidney, Donald J., 85-0563M (2,4,5,9/86)
Bigelow, Audrey J., 86-0490M (9/86)
Billups, Terry L., 85-0271M (2/86)
Blakeley, Randy L., 86-0455M (9/86)
Blakely, Bobbie J., 85-0177M (1/86)
Boehmer, Harold R., 86-0128M (3/86)
Bogle, John H., 86-0142M (5/86)
Bonnin, Raymond A., 84-0382M (2,3,5/86)
Boring, Olen V., 85-0699M (4/86)
Borisoff, Henry T., 84-0482M (9/86)
Brant, Hilda Brown, 85-0667M (7/86)
Bratton, John R., 85-0218M (7/86)
Breazeale, Jerry W., 86-0452M (9/86)
Briggs, Arthur L., 85-0381M (7/86)
Britten, Charles D., 86-0085M (2,2/86)
Britzius, Daryl M., 85-0540M (2/86)
Bronson, David, 86-0054M (1/86)
Brookshire, Joy J., 86-0157M (3/86)
Brosnahan, Mildred I., 86-0105M (6/86)
Brown, Charles E., 85-0545M (3/86)
Brown, James M., 86-0386M (8/86)
Brown, Margaret I., 85-0099M (4/86)
Brown, Virginia J., 86-0294M (6/86)
Browning, Keith M., 86-0296M (6/86)
Bruce, Walter J., 83-0137M (5/86)
Buchanan, Clark W., 86-0412M (8/86)
Buchanan, Patrick L., 86-0278M (7/86)
Buford, Stephen, 86-0036M (1/86)
Bugni, James J., 86-0308M (8/86)
Burleigh, Stephen A., 86-0184M (3/86)
Burris, Joann, 86-0382M (7/86)
Burton-Berg, Verna, 86-0137M (3,7,9/86)
Bybee, Kevin G., 85-0220M (2,3/86)
Caccamise, Chris D., 85-0487M (1,5/86)
Cady, Lester F., 85-0688M (4,9/86)
Candelaria, Gayle, 86-0420M (8/86)
Cantril, Ernest, 86-0313M (6/86)
Cardoza, Linda E., 85-0520M (9/86)
Cardoza, Myrtle, 85-0557M (4/86)
Carey, Jane A., 85-0681M (7/86)
Cargill, Virgil R., 85-0657M (3/86)
Carmien, James D., 84-0004M (2/86)
Carroll, Eldon L., 86-0078M (9/86)
Carvello, William B., 86-0310M (6/86)
Caywood, Charles N., 86-0160M (3/86)
Cerkoney, Patricia J., 86-0099M (6/86)
Chamberlin, Dennis C., 86-0342M (8/86)
Charles, Ronald W., 84-0472M (2/86)
Chase, Floyd V., 86-0023M (1/86)
Chytka, Richard J., 86-0347M (8/86)
Clark, Mark S., 86-0162M (3,3/86)
Clarno, George, Jr., 85-0605M (1/86)
Claussen, Karen L., 85-0529M (1,5/86)
Cole, Johnny D., 86-0179M (3/86)
Combs, Harold W., 83-0015M (9/86)
Compton, Diana L., 85-0411M (6/86)
Cooper, Charles E., 85-0593M (4/86)
Cowan, Ross E., 85-0550M (5/86)
Cox, Anna Rose Irby, 86-0378M (7/86)
Cox, Joseph L., 86-0141M (9/86)
Crawford, Hoyt W., 86-0068M (4/86)
Croker, Ronald L., 86-0516M (10/86)
Crouch, Michael J., 86-0502M (9/86)
Croy, Doyle L., 85-0608M (1/86)
Culley, Ronald D., 86-0364M (7/86)
Curtis, Zara M., 85-0603M (1/86)

OWN MOTION JURISDICTION 1986

Name, WCB Number (Month/Year)

Cutts, Stanley K., 85-0434M (4/86)
Daining, David C., 85-0122M (8/86)
Davenport, Jack A., 84-0226M (3/86)
Davidson, Richard C., 85-0612M (3/86)
Davidson, Richard C., 85-0612M (8/86)
Davis, Dan A., 85-0471M (4/86)
Davis, Wallace J., 86-0164M (5/86)
Dawson, Bliss S., 86-0271M (6/86)
DeGarlais, Kevin P., 86-0297M (7/86)
DeRobles, Edward, 85-0331M (6/86)
Derrick, Richard F., 86-0188M (3,5/86)
Detweiler, Janice K., 85-0443M (1/86)
Dilka, Richard E., 83-0141M (4,6/86)
Dillard, Dennis L., 86-0289M (5/86)
Dilworth, William C., 85-0050M (9/86)
Dimmick, Dennis A., 86-0234M (4,5,6/86)
Discant, Gladys J., 85-0521M (3/86)
Dodrill, Donald L., 85-0410M (1/86)
Doringer, Lorraine D., 86-0038M (1/86)
Dorrenbacher, Billy J., 85-0552M (1,5/86)
Dorsey, Terry E., 84-0372M (5/86)
Douglas, Frieda M., 85-0511M (6,10/86)
Downes, Eugene, 86-0093M (9/86)
Duffy, Patrick M., 86-0226M (5/86)
Dump, Robert L., 86-0115M (3/86)
Dunigan, Cecil R., 85-0430M (6/86)
Dunson, David, 86-0307M (7/86)
Durst, Leroy H., 85-0555M etc. (4/86)
Dvorak, Diane M., 84-0299M (1,7/86)
Dygart, Virgil E., 86-0396M (7/86)
Ehly, Ronald R., 86-0089M (5,6/86)
Ekelund, Richard A., 86-0098M (2/86)
Elkins, Garry C., 86-0426M (8,9/86)
Ells, Marion L., 86-0454M (9/86)
Ellwood, Timothy M., 84-0486M (1/86)
Emery, Dennis R., 86-0312M (6/86)
Endicott, Robert W., 85-0118M (3/86)
Engler, Rose L., 86-0453M (8/86)
English, Jesse E., 84-0503M (9/86)
Essary, Thomas E., 85-0580M (1/86)
Estep, Ricky, 86-0290M (5/86)
Evans, Arnold "Gene", 86-0385M (7/86)
Ewers, Gideon B., 86-0159M (3/86)
Ezell, Ruth M., 84-0521M (6/86)
Faas, Eugene G., 84-0500M (5/86)
Fain, Lylah E., 85-0698M (1/86)
Fairchild, Charles B., 86-0006M (3/86)
Fandrich, Frank S., 85-0153M (5/86)
Farrar, Marlene T., 86-0389M (7/86)
Feldt, Darold J., 85-0135M (1/86)
Felsinger, Esteal R., 85-0435M (1/86)
Fischer, Lora, 86-0191M (5/86)
Flowers, Carrol L., 86-0048M (7/86)
Flowers, Theresa M., 85-0535M (2/86)
Flynn, Ben A., 84-0526M (1/86)
Forrester, Billy H., 86-0258M (5,8/86)

Name, WCB Number (Month/Year)

Fountain, Stanley T., 85-0506M (6/86)
Foust, George W., 86-0117M (3/86)
Foust, George W., 86-0117M (9/86)
Fowler, Charles O., 86-0116M (2/86)
Fox, Gary E., 86-0316M (6/86)
Franke, Donald M., 86-0097M (4/86)
Franklin, Donna, 85-0639M (1,3/86)
Frear, James, 85-0675M (4,9/86)
Freeman, Carl A., 86-0276M (7/86)
Friend, Lonita D., 86-0101M (2,3/86)
Fritz, Leonard J., 83-0134M (2/86)
Frye, Lila J. (Cahill), 86-0293M (9/86)
Fus, Lynn R., 86-0151M (9/86)
Gage, John W., 86-0083M (4/86)
Gairson, Mark, 84-0019M (4/86)
Gale, Everett, 86-0217M (4/86)
Gallagher, Jerry W., 86-0215M (7/86)
Garcia, Jose A., 85-0340M (2,4,5/86)
Gardner, Eugene A., 86-0084M (3,5,8/86)
Gardner, Leland R., 86-0249M (5/86)
Garnett, William E., 86-0517M (10/86)
Gates, Robert L., 86-0197M (4/86)
Gearin, Neil A., 85-0640M (4/86)
Geenty, Richard T., 83-0313M (9/86)
George, Donald, 86-0256M (9/86)
Gibbs, Frank L., 86-0002M (3/86)
Gibson, Leonard K., 86-0034M (1/86)
Gifford, Elizabeth, 86-0353M (9/86)
Gilcrist, Sharon W., 85-0319M (8/86)
Gilman, Charles A., 86-0251M (6/86)
Goble, Vicki A., 85-0596M (1/86)
Gomez, Mario, 86-0438M (9/86)
Goodall, Thomas V., 86-0056M (3/86)
Gough, Peter, 84-0122M (1/86)
Gould, Keith D., 86-0029M (1/86)
Gower, Earl C., 86-0381M (8/86)
Graves, Peggy J., 85-0683M (4/86)
Greenlee, C.M., 86-0273M (7/86)
Greer, Lynda Hanneman, 86-0106M (10/86)
Gregory, Daniel G., 85-0407M (7/86)
Grimes, Robert G., 86-0335M (7/86)
Grossman, Jerome A., 86-0081M (2/86)
Guerrette, Patsy J., 85-0658M (1/86)
Gunn, Steven C., 86-0222M (4/86)
Haefer, Elvin, 86-0246M (5/86)
Hagen, James D., 85-0201M (2,6/86)
Hagen, Richard W., 85-0478M (1,4/86)
Hager, Roy M., 86-0030M (1/86)
Hagger, Danny G., 85-0515M (4,7/86)
Halle, Gerald I., 86-0196M (7/86)
Hamm, James E., 85-0394M (1,7/86)
Hansen, Knute, 85-0659M (3/86)
Hansen, Richard A., 85-0539M (1/86)
Hardison, Rick L., 86-0129M (3/86)
Harkins, Susan N., 86-0193M (4/86)
Harkleroad, Jim R., 85-0268M (1/86)

OWN MOTION JURISDICTION 1986

Name, WCB Number (Month/Year)

Harmon, Willard E., 84-0555M etc. (2/86)
Harrell, William B., 86-0163M (3/86)
Harris, Jack G., 86-0060M (1,5/86)
Harrison, Donald E., 85-0503M (6,9/86)
Hartill, Gene A., 86-0253M (5,9/86)
Hartzog, William E., 85-0533M (2,8/86)
Hawkins, John H., 86-0183M (5/86)
Hayes, Larry L., 85-0393M etc. (7/86)
Heald, Peggy L., 86-0121M (3,3/86)
Helm, Jacob M., 86-0112M (3/86)
Hendrix, Calvin K., 86-0050M (1/86)
Henshaw, Johnnie K., 84-0588M (5/86)
Henson, Ronald L., 86-0123M (4,5/86)
Hereford, Joseph L., 86-0171M (3/86)
Hickman, Donald, 86-0172M (9/86)
Hilderbrand, James R., 86-0012M (1/86)
Hines, David J., 86-0037M (1/86)
Hines, David J., 86-0037M (8/86)
Hinton, Larry L., Jr., 85-0439M (7/86)
Hinzman, Bernie, 83-0097M (2,7/86)
Hodson, Raymond W., 86-0441M (8/86)
Hoggarth, Ronald E., 86-0238M (7/86)
Hogue, Wanda M., 85-0674M (6/86)
Hoke, Harold L., 84-0476M (9/86)
Hollamon, Ezekial A., 86-0057M (1,5/86)
Holland, John R., 86-0221M (4/86)
Holland, Walter, 86-0354M (7/86)
Holman, David R., 86-0437M (9/86)
Holmes, Terry J., 86-0446M (8/86)
Holt, Danny S., 86-0210M (4/86)
Holub, Roy F., 86-0346M (6/86)
Hookland, Richard S., 85-0151M (2,9/86)
Howell, Michael L., 85-0469M (1/86)
Hoyle, Fred L., 86-0487M (9/86)
Huff, Kathryn M., 84-0432M (1,3,9/86)
Huff, Lonnie, 85-0568M (1/86)
Huffman, Milford W., 84-0461M (1/86)
Huffman, Robert D., 85-0388M (1/86)
Hunter, David O., 86-0218M (9/86)
Hurley, Garold L., 85-0547M (1/86)
Hurt, Louise M., 86-0384M (7/86)
Husfloen, Carol D., 86-0035M (1,4/86)
Hutcheson, Orvilla J., 85-0438M (5/86)
Hutchinson, Joseph O., 86-0440M (9/86)
Imdahl, Herbert M., 86-0014M (5/86)
Ismert, Arthur J., 85-0384M (1/86)
James, Clarence O., 85-0689M (4/86)
James, Wayne D., 86-0497M (9/86)
Jarrett, Bruce, 86-0111M (9/86)
Jimenez, Juan M., 86-0055M (4/86)
Johnson, Diane L., 86-0320M (6/86)
Johnson, Freeda Mae, 85-0668M (6/86)
Johnson, Leroy J., 86-0265M (5/86)
Johnson, Scott R., 86-0176M (3/86)
Johnson, Steven E., 86-0073M (2/86)
Johnson, William E., 85-0344M (7/86)

Name, WCB Number (Month/Year)

Jolivette, Ronald L., 86-0268M (6,7/86)
Jones, Murl E., 85-0602M (6/86)
Justin, Cathy J., 86-0062M (4,9/86)
Kaiser, Mike J., 86-0373M (7/86)
Karn, Ernest W., 85-0216M (5/86)
Karna, Linda J., 86-0306M (6,7/86)
Kashuba, Kenneth R., 86-0042M (1/86)
Kashuba, Kenneth, 86-0439M (9/86)
Katzberg, Ronald L., 86-0272M (6/86)
Keen, Gwendolyn, 86-0058M (1/86)
Keeton, John W., 85-0474M (5/86)
Ketchum, Donald R., 86-0513M (10/86)
Keyser, John P., Jr., 82-0191M (4/86)
King, Walter F., Jr., 84-0464M (6/86)
Kliever, Delbert D., 86-0004M (1/86)
Knapp, David A., 86-0311M (6/86)
Knight, Stirman M., 86-0250M (8/86)
Koch, M. Irene, 86-0450M (9/86)
Kral, Robert B., 86-0266M (5/86)
Kral, Robert B., 86-0266M (7/86)
Krasneski, Ronald A., 86-0477M (9/86)
Kretschmer, Patrick, 86-0284M (5/86)
Ladd, Clayton D., 86-0510M (9/86)
Lambert, Leroy L., 86-0100M (2/86)
Lancaster, William D., 86-0063M (5/86)
Lance, Larry E., 85-0133M (10/86)
Lanz, Ray J., 86-0028M (1/86)
Larson, Gerald L., 86-0323M (6/86)
Larson, Melvin L., 84-0364M (2,3,4/86)
Leas, Teresa L., 86-0107M (5,7/86)
Leckington, Charles E., 86-0298M (8/86)
Lee, Patricia, 86-0025M (2/86)
Lehr, Wayne B., 86-0139M (3/86)
Leslie, Fay, 85-0502M (7/86)
Lindsay, Mamie I., 85-0160M (4/86)
Little, Dean, 86-0087M (2/86)
Little, Robert W., 81-0176M (3/86)
Lockard, Earnestine I., 86-0076M (3/86)
Loftis, Charles J., 86-0203M (4/86)
Lofton, Calvin, 85-0663M (5/86)
Logan, Richard R., 85-0591M (2/86)
Londo, James B., 86-0079M (2/86)
Long, Larry W., 85-0536M (1,5/86)
Lovins, Lloyd, 83-0043M (3/86)
Lucas, Craig M., 85-0643M (2/86)
Lundeen, Elmer V. 86-0467M (9/86)
Lunsford, Paul O., 84-0570M (8/86)
Lynch, Christine, 85-0627M (1/86)
Lyons, Charles G., 86-0133M (5/86)
Maine, Keith M., 85-0304M (5/86)
Makin, Glenwood, 86-0126M (3/86)
Malarkey, Robert D., 85-0219M (3/86)
Manchester, Earl E., 85-0189M (4/86)
Marsh, Lonnie J., 86-0132M (8/86)
Martin, Billie J., 86-0514M (10/86)
Martin, David, 84-0207M (4,7,7/86)

OWN MOTION JURISDICTION 1986

Name, WCB Number (Month/Year)

Martin, Glenn P., 86-0043M (1/86)
Martin, Melvin L., 84-0531M (1,3,7/86)
Martinez, Armando, 86-0252M (9/86)
Martinez, Arthur, 86-0065M (4,5/86)
Marvin, David M., 85-0473M (5/86)
Matott, Donald E., 83-0279M (4/86)
Matthews, James H., 86-0103M (4/86)
Maul, Christopher D., 86-0113M (2/86)
May, Ronald L., 84-0258M (1/86)
McAllaster, John E., 85-0326M (3/86)
McBride, Dennis L., 86-0301M (6/86)
McCall, Cathy J., 85-0508M (4/86)
McCarroll, Jode, 86-0114M (3/86)
McClaurin, Jenevieve F., 86-0395M (7/86)
McClay, Taylor L., 82-0309M (2/86)
McCreery, Randall K., 86-0427M (8/86)
McGehee, Lawrence L., 85-0409M (2,3/86)
McGhee, Arthur, 85-0365M (1/86)
McLeod, Ronald P., 85-0510M (1/86)
McMahon, Daniel R., 86-0483M (9/86)
McTague, Michael O., 86-0315M (6/86)
Meade, Donna M., 85-0429M (8/86)
Meeuwsen, Christiana H., 86-0039M (5/86)
Melampy, Diane V., 85-0267M (4/86)
Melbye, Michael G., 85-0644M (7/86)
Melcher, Jim W., 86-0110M (2/86)
Menke, Carlos R., 84-0282M (2/86)
Mercier, Darrel L., 85-0181M (6/86)
Messer, George R., 85-0179M (5,9/86)
Mezyk, Stanley R., 86-0182M (8/86)
Milich, Forrest D., 85-0691M (5/86)
Miller, Bruce A., 86-0094M (3/86)
Miller, Hugh, 86-0509M (9/86)
Miller, John I., 85-0690M (8/86)
Miller, Raymond I., 86-0127M (3/86)
Mills, Randall L., 86-0001M (2/86)
Millsap, Lawrence D., 85-0461M (2/86)
Minster, Alice, 86-0465M (9/86)
Mitchell, Karl E., 86-0064M (3/86)
Modaff, George A., 86-0304M (7/86)
Monroe, Jack, 86-0327M (8/86)
Monteith, Norris C., 84-0287M (5/86)
Mooney, Clarence T., 85-0003M (3/86)
Moore, Gerald S., 81-0196M (1,5,9/86)
Moore, Gerald S., 83-0363M (1/86)
Moore, Jacqueline M., 86-0108M (8/86)
Moore, James E., 85-0611M (1/86)
Moore, LaDonna J., 86-0143M (3/86)
Moore, Robert L., 86-0148M (6/86)
Moore, Stephen H., 84-0532M (1/86)
Moreno, Allan J., 86-0072M (2/86)
Morris, Arthur R., 85-0073M (9/86)
Morris, Lonnie D., 84-0221M (4/86)
Mossman, Leslie W., 86-0326M (7/86)
Mowry, Robert L., 85-0131M (2/86)
Muchmore, Brian K., 86-0235M (5/86)

Name, WCB Number (Month/Year)

Mullen, Lois E., 86-0288M (6,9/86)
Mullins, Michael P., 85-0408M (5,5/86)
Murphy, Susan C., 85-0356M (7/86)
Nava, Kathie S., 85-0577M (4/86)
Needham, Floyd A., 86-0447M (9/86)
Nelson, Robert L., 85-0633M (5/86)
Newingham, Donald F., 85-0676M (1/86)
Newton, Jack A., 86-0061M (2/86)
Nicks, Edward J., 85-0630M (4,8/86)
Nugent, Carole P., 86-0074M (4/86)
O'Connor, Richard S., 86-0005M (7/86)
Odell, Kenneth, 85-0695M (2,4,5/86)
Oldfield, Danny S., 86-0291M (7/86)
Olson, Robert O., 85-0297M (7,9/86)
Orozco, Anastacio, 86-0015M (5/86)
Orr, Robin L., 86-0092M (2/86)
Osborn, Rachel B., 85-0465M (6/86)
Otero, Fred, 85-0530M (5,8/86)
Paganoni, Audrey R., 86-0149M (3/86)
Parcels-Kramer, Jacquetta, 85-0584M(4/86)
Parker, Lee Roy, 84-0074M (9/86)
Parrish, Percy, 86-0016M (4/86)
Patterson, John R., 85-0628M (3,6/86)
Patterson, Katherine I., 86-0397M (7/86)
Paul, Vickie, 84-0362M (3/86)
Payne, James L., 86-0166M (3,5/86)
Peach-Kennedy, Delaine A.,86-0225M (8/86)
Pedersen, Robert D., 86-0053M (2,5/86)
Pence, Rene L., 85-0110M (3/86)
Perkins, Bradley H., 85-0694M (1/86)
Peters, Fred, 86-0144M (7/86)
Peterson, Cheryl L., 86-0095M (2/86)
Peterson, Marlene E., 86-0024M (3/86)
Peterson, Patricia S., 85-0092M (1,1/86)
Petrie, Terry A., 86-0020M etc. (2,4/86)
Pettigrew, Virginia E., 86-0281M (8/86)
Phillips, James T., 86-0003M (1/86)
Phillips, Joseph K., 86-0415M (8/86)
Pierce, Richard J., 86-0393M (7/86)
Pike, Timothy M., 86-0500M (9/86)
Pinnell, Ruth E., 84-0454M (4/86)
Pittman, Beulah F., 85-0673M (1/86)
Poh, Ronald, 86-0090M (2/86)
Popescu, Harold, 86-0367M (7/86)
Poplin, James R., 86-0351M (8/86)
Porras, Consuelo A., 86-0066M (1/86)
Powell, Edgar A., 85-0656M etc. (2/86)
Price, David E., 86-0422M (8/86)
Price, Juanita P., 86-0338M (7/86)
Price, Noble A., 86-0017M (3,4/86)
Primiano, Michael J., 85-0288M (1/86)
Pritchard, Debra K., 86-0240M (5/86)
Proffitt, Helen L., 86-0213M (5/86)
Pryor, Benjamin E., 86-0187M (9/86)
Purifoy, Bordy, 84-0452M (1/86)
Quimby, David, 85-0565M (2/86)

OWN MOTION JURISDICTION 1986

Name, WCB Number (Month/Year)

Ragland, Johnny B., 86-0277M (5/86)
Raidiger, Edwin E., 86-0091M (2,4/86)
Ramirez, Edward F., 86-0044M (1/86)
Randall, Gerald A., 85-0685M (1,5/86)
Randall, Nathan S., 86-0010M (1/86)
Rattay, Bringfried, 86-0075M (6,7/86)
Rautenberg, Larry L., 85-0205M (7,9/86)
Ray, Donald W., 85-0497M (3/86)
Raynor, Danny L., 85-0129M (4/86)
Reeves, Theodore G., 86-0362M (7/86)
Reyes, Anselmo, 85-0358M (4/86)
Reynolds, Lance P., 86-0224M (5/86)
Richardson, Jay F., 86-0027M (4/86)
Rictor, Donald A., 86-0244M (9/86)
Riley, John B., 85-0696M (2,5/86)
Robeson, Janet G., 85-0606M (4/86)
Robinson, Everett E., 85-0298M (1,7,8/86)
Rodeski, Jerry L., 85-0560M (8/86)
Rodgers, James, 85-0467M (6/86)
Ropp, Ronald L., 86-0173M (5/86)
Roppe, Arthur D., 85-0106M (2/86)
Rosa, Audeliz, 85-0422M (2,4/86)
Rosin, Oscar, 85-0697M (3/86)
Ross, Patricia R., 86-0282M (5/86)
Ross, Wiley G., 85-0454M (5/86)
Rottacker, Natalie, 86-0223M (8/86)
Roush, Richard L., 84-0018M (6/86)
Rowan, John T., 86-0413M (8,8/86)
Royer, Peggy A., 86-0399M (9/86)
Rumsey, Kenneth M., 85-0598M (2/86)
Salathe, Robert N., 85-0323M (1/86)
Salinas, John E., 85-0442M (4,9/86)
Salzer, Sharon K., 86-0070M (2/86)
Sanders, Leonard L., 86-0220M (8/86)
Sanmann, Elaine R., 86-0180M (3/86)
Satalich, Rudolph S., 86-0059M (4/86)
Sause, Lealice L., 85-0272M (3/86)
Schabert, Robert N., 86-0336M (7/86)
Schram, Debra L., 86-0069M (6,7/86)
Schuessler, Billie E., 85-0159M (1,3/86)
Schulenburg, Charles C., 86-0021M (1/86)
Scott, David K., 86-0032M (4/86)
Scott, John L., 86-0175M (3/86)
Seaton, Richard L., 85-0029M (4/86)
Seeger, Ethel M., 86-0318M (7/86)
Seibel, Karin, 85-0517M (1/86)
Self, Ira D., 86-0242M (6/86)
Selfridge, Charles, 85-0097M (4/86)
Setness, Frank L., 86-0138M (3/86)
Severson, Carl E., 85-0604M (7,8/86)
Sevey, Gene A., 85-0060M (1/86)
Shaw, Elvin D., 86-0040M (1,7,8/86)
Sherbina, Steven P., 85-0642M (2/86)
Shine, Donn F., 85-0693M (1/86)
Shobe, John L., 86-0230M (7/86)
Shoemaker, Sammy J., 85-0641M (1/86)

Name, WCB Number (Month/Year)

Short, Erle R., 85-0197M (2,8/86)
Sierzega, Louis A., 86-0201M (6/86)
Simnitt, Nancy S., 86-0052M (1/86)
Simpson, John D., 86-0345M (8/86)
Singer, Donald R., 85-0045M (5/86)
Skolfield, William R., 85-0569M (2/86)
Sloan, Kenneth L., 85-0248M (2/86)
Smalley, Donald D., 86-0264M (5/86)
Smith, Arthur G., 85-0687M (1/86)
Smith, Edward G., 85-0352M (8/86)
Smith, Kirk G., 86-0377M (8/86)
Smith, Richard E., 85-0670M (3/86)
Smith, Thomas J., 86-0350M (8,9/86)
Sommers, Barbara A., 86-0443M (9/86)
Southard, Linda M., 86-0449M (8/86)
Sowell, Michael D., 86-0041M (1/86)
Spalla, Francis J., 86-0082M (7/86)
Spencer, Randy A., 86-0189M (3,6/86)
Spunaugle, Jeannie E., 85-0104M (5/86)
Squires, Donald J., 86-0152M (3/86)
St. John, Donald L., 85-0396M (5/86)
St. Onge, Jim D., 85-0139M (7/86)
Staggs, James R., 86-0416M (8/86)
Starr, Owen "Rudy", 85-0178M (1/86)
Stately, Kendall M., 86-0168M (3/86)
Stephens, John R., 86-0019M (1/86)
Stevens, Dennis, 85-0632M (3,5/86)
Storey, Jay E., 86-0009M (1/86)
Stratton, Anita J., 84-0537M (7,7/86)
Stratton, Anna B., 85-0505M (1/86)
Stratton, Anna B., 86-0322M (6/86)
Strickland, Lawrence M., 86-0357M (9/86)
Strong, Jerry E., 86-0424M (9/86)
Sullivan, Leslie M., 86-0077M (7/86)
Sunderland, Wayne G., 86-0478M (9/86)
Swank, Donald L., 86-0261M (8/86)
Swartz, Wilma M., 86-0118M (6,7/86)
Tarpley, Gary O., 85-0620M (4/86)
Taskinen, Toivo R., 85-0017M (1,3/86)
Tatum, Beverly J., 86-0202M (4/86)
Taylor, Oren W., 84-0479M (1/86)
Terranova, Otto, 86-0167M (3/86)
Thanem, James C., 86-0067M (1,5/86)
Thissell, John O., Jr., 86-0499M (9/86)
Thomas, Betty M., 86-0185M (10/86)
Thomas, Betty M., 86-0185M (5/86)
Thomas, David L., 86-0008M (1/86)
Thomas, John E., 85-0355M (3/86)
Thomas, Tom, 86-0341M (7/86)
Thomas, Wanda M., 86-0181M (4/86)
Thompson, Robert, 86-0275M (5/86)
Thomson, Warren G., 86-0245M (6/86)
Thornton, Darl L., 86-0214M (4/86)
Thrush, Barbara W., 86-0051M (4/86)
Thurston, Arden D., 83-0249M (1/86)
Tibbetts, John M., 85-0063M (5/86)

OWN MOTION JURISDICTION 1986

Name, WCB Number (Month/Year)

Tillman, Buddy E., 86-0147M (3/86)
Tillman, Buddy E., 86-0445M (9/86)
Tolleshaug, Neal, 86-0314M (6/86)
Tompkins, Allan D., 86-0339M (7/86)
Torres, Angelo C., 86-0285M (5,7/86)
Torres, Ramiro, 86-0033M (2/86)
Tribur, Harold P., 85-0493M (1/86)
Trout, James, Jr., 84-0535M (4,8/86)
Trump, Robert L., 84-0506M (5/86)
Trusty, Stonewall, Jr., 84-0168M (1/86)
Turnbull, Sylvia, 86-0239M (5/86)
Tyler, Thomas R., 85-0617M (2/86)
Van Cleave, Emmett, 86-0286M (9/86)
Vance, Robert E., 86-0260M (7/86)
Vanlandingham, Colburn, 86-0463M (9/86)
Varin, Arthur, 86-0241M (9/86)
Vatland, Milnor R., 86-0519M (10/86)
Vaughn, William F., 86-0337M (8/86)
Vincent, Claude L., 85-0275M (2/86)
Vogt, Blaine J., 86-0153M (4/86)
Wagner, Nicklos S., 85-0212M (1/86)
Walker, Donna M., 86-0352M (8/86)
Walker, Edward R., 85-0397M (1/86)
Walker, Virgil E., 85-0257M (1/86)
Wallace, Willard, 86-0211M (5/86)
Walsh, Marjorie R., 85-0680M (3/86)
Walters, Robert, 86-0208M (4/86)
Walton, Lee A., 86-0383M (7/86)
Warnock, Jack T., 85-0299M (1/86)
Warnock, Robert K., 86-0013M (1/86)
Washburn, Barr V., 86-0194M (4/86)
Watson, Lois G., 84-0485M (9,9/85)
Weathers, Andrew L., 85-0692M (3/86)
Weaver, John L., 86-0178M (4/86)
Weeks, D. Homer, 86-0324M (6/86)
Weis, Nancy S., 84-0358M (6/86)
West, Donald E., 86-0206M (6/86)
Wheatley, Roy T., 86-0349M (8/86)
Whitman, Cecil C., 85-0374M (7/86)
Whitman, Larry A., 85-0647M (1/86)
Whitney, Allen H., 86-0409M (8,9/86)
Wiebe, Wilma E., 86-0229M (4/86)
Wilbanks, Dan, 85-0661M (6/86)
Wilcox, Mickey M., 84-0396M (4,5,7/86)
Wilkerson, Robert E., 85-0335M (1/86)
Williams, Norman L., 85-0575M (2,3/86)
Williams, Richard N., 86-0419M (8/86)
Wilson, Kyong, 86-0146M (3/86)
Wincer, Donald S., 86-0406M (8/86)
Wine, Richard L., 85-0548M (3,9/86)
Wirges, Mark J., 85-0452M (1/86)
Wofford, Earl A., 86-0165M (3/86)
Wood, William E., 86-0047M (1/86)
Woods, Donald W., 86-0228M (7/86)
Woodward, Thomas E., 86-0007M (4/86)
Worth, Nancy A., 86-0119M (2/86)
Wright, Artice, 86-0011M (1/86)
Wright, Ronald C., 81-0174M (5/86)
Yarnell, Donald, 86-0207M (6/86)
Young, Rose Ann, 86-0479M (9/86)
Young, Thomas A., 86-0120M (3/86)
Younger, Allen D., 86-0161M (3/86)
Zander, John W., 85-0488M (2/86)
Zullo, Judy L., 85-0404M (1/86)
Zurbrugg, Kim C., 86-0135M (5/86)

CLAIMANT INDEX 1986

CLAIMANT INDEX 1986

CLAIMANT INDEX 1986

CLAIMANT INDEX 1986