

VAN NATTA'S WORKERS' COMPENSATION REPORTER

VOLUME 38

(Pages 1255-END)

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.

OCTOBER-DECEMBER 1986

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CITE AS

38 Van Natta \_\_\_\_ (1986)

RICHARD B. TATTOO, Claimant  
Cynthia Barrett, Claimant's Attorney  
Roberts, et al., Defense Attorneys

WCB 85-05487 & 85-10428  
October 1, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The insurer requests review of those portions of Referee Thye's order that set aside the Determination Order dated June 6, 1985 as premature and awarded interim compensation for a subsequent aggravation claim. The issues are premature closure, interim compensation, aggravation and extent of disability.

Claimant filed a claim in connection with his employment as a roofer after his right thigh went numb in August 1984. Two months later, claimant filed another claim after his leg gave out as he was carrying some roofing material and he fell, injuring his back. By stipulation at the time of hearing, these two claims have been merged into one.

Claimant was examined by Dr. Snodgrass, a neurologist, in October 1984. Dr. Snodgrass diagnosed a compression or entrapment of the lateral femoral cutaneous nerve and also suspected a herniated lumbar disc. He referred claimant for a CT scan which showed no abnormality with the exception of a slight spondylolisthesis at L5-S1. Claimant visited an internist, Dr. Kern, in November 1984. Dr. Kern referred claimant for an EMG which confirmed an abnormality in claimant's right lateral femoral cutaneous nerve.

Claimant was examined by Dr. Silver, a neurological surgeon, in January 1985 and underwent another CT scan and a myelogram. Neither procedure revealed any abnormality. In a chart note dated February 14, 1985, Dr. Silver stated that claimant had been adequately evaluated and that he did not know of any other treatment which would be helpful to him. Claimant requested a referral to Dr. Kiest, an orthopedic surgeon, and Dr. Silver authorized the referral.

Dr. Kiest examined claimant and attributed claimant's ongoing complaints to his spondylolisthesis condition. He told claimant that he had no treatment to offer "except general advice for better body conditioning and the absolute necessity for a job change."

Later in February, claimant began treating with a chiropractor, Dr. Fish. After three weeks of treatment, Dr. Fish reported a "more than 50 percent" improvement in claimant's condition and thought that a formal exercise program would further benefit him. She later recommended that claimant participate for a period of three weeks in the "work hardening" program at Providence Medical Center. She thought that claimant might be able to return to work as a roofer after completing this program.

Claimant was examined by a panel of the Western Medical Consultants on April 18, 1985. The panel found no objective evidence of impairment, stated that claimant could return to his regular employment (although they added that it might be a good idea for claimant to change occupations given his subjective view of his limitations) and stated that further chiropractic treatment would be palliative only. In early May 1985, Drs. Snodgrass and

Kiest reviewed the Western Medical Consultants report, expressed their agreement with the report and declared claimant medically stationary. Dr. Fish completed a physical capacities assessment at about the same time in which she listed various physical limitations for claimant including a 50 pound lifting restriction. She indicated that these limitations were permanent, but noted at the bottom of the form: "[Claimant] may improve slightly with time."

Claimant began participating in the work hardening program on April 30, 1985 and continued in the program until after his claim was closed by Determination Order on June 6, 1985. The Determination Order granted no award for permanent partial disability and terminated compensation for temporary disability as of April 18, 1985, the date of the report by the Western Medical Consultants. Three days before the issuance of the Determination Order, the physical therapist in charge of claimant's work hardening program wrote the insurer stating that claimant was continuing to make "gradual gains, especially in terms of upper extremity strength." He recommended that claimant continue in the program for another two to four weeks and then be referred to a health club for further conditioning. He also related that claimant had expressed a desire to return to work as a roofer. The physical therapist did not think this desire was realistic, but speculated that it might be attainable with further conditioning.

Claimant left the work hardening program on June 11, 1985 and attempted to return to work as a roofer. On July 16, 1985, Dr. Fish wrote the insurer indicating that claimant had returned to work for a "few days," had experienced a worsening of his condition and had left work again because of his worsened condition. The insurer received Dr. Fish's letter on July 18, 1985. In a subsequent letter dated August 19, 1985, Dr. Fish stated that she thought claimant had sustained some permanent impairment in the form of motor weakness in his right leg. She then stated: "It is my impression that [claimant] is currently stationery [sic] and that his claim should not be closed [sic]." When asked about this statement at the hearing, Dr. Fish responded: "Well, I felt as though [claimant] was impaired and that he was not likely to improve greatly."

In a report dated August 19, 1985, Dr. Silver stated that he thought claimant was medically stationary when he last saw him on February 14, 1985. This medically stationary date was two months prior to that indicated by the June 1985 Determination Order. Claimant was examined by Dr. Schader, an orthopedic surgeon, on September 17, 1985. Dr. Schader's diagnosis was thoracolumbar sprain with referred pain to the right hip. At the hearing, Dr. Schader testified that at the time of his examination, he thought claimant was medically stationary.

The insurer issued an aggravation denial on Septmeber 30, 1985, but paid no interim compensation for the two month period between the date it received Dr. Fish's July 1985 letter and the date of its denial. At the hearing, claimant testified that he again returned to work as a roofer on September 12, 1985 but had to quit after three days because the work was too heavy. After three or four days off, claimant found some lighter employment as a roofer and worked "about a week" at the first job site. Claimant continued to work as work became

available at other job sites through the time of the hearing in late October 1985.

In his Opinion and Order, the Referee ruled that the Determination Order had prematurely closed claimant's claim. In support of this ruling, the Referee cited the statement by Dr. Fish in March 1985 that claimant had improved "more than 50 percent" and her recommendation that claimant participate in an exercise program. He also cited the statement in June 1985 by the physical therapist at the work hardening program that claimant was making "gradual gains" and his recommendation that claimant continue in the program for another two to four weeks. The Referee refused to consider Dr. Silver's report of August 19, 1985 or Dr. Schader's testimony because this evidence was generated after the issuance of the Determination Order. The Referee's opinion contains little or no discussion of the Western Medical Consultants report of April 18, 1985, the correspondence from Drs. Snodgrass and Kiest in May 1985 indicating agreement with that report and the physical capacities assessment completed by Dr. Fish in May 1985.

I

To set aside a Determination Order as premature, the claimant has the burden of proving that his compensable condition or conditions were not medically stationary at the time of claim closure. Brad T. Gribble, 37 Van Natta 92, 97 (1985); see David C. Daining, 38 Van Natta 86, 87, 38 Van Natta 478 (1986). An injured worker is medically stationary when "no further material improvement would reasonably be expected from medical treatment, or the passage of time." ORS 656.005(17). The reasonableness of medical expectations for a claimant's condition must be judged in the context of the evidence available at the time of claim closure. Alvarez v. GAB Business Services, 72 Or App 524, 527 (1985); Richard C. Pell, 38 Van Natta 233, 234 (1986). Subsequent testimony, opinions or events may not be considered in determining the claimant's preclosure medical status. See Sullivan v. Argonaut Insurance Co., 73 Or App 694, 697 (1985); Ralph E. Moen, 37 Van Natta 1527, 1529-30 (1985); Robert E. Martell, 37 Van Natta 1074, 1076 (1985).

In light of the above principles, the Referee correctly refused to consider the postclosure opinion of Dr. Silver and the testimony of Dr. Schader in deciding whether the claim was properly closed. Even in the absence of this evidence, however, we disagree with the Referee's conclusion that the claim was closed prematurely.

The Western Medical Consultants, Dr. Snodgrass and Dr. Kiest all indicated that claimant was medically stationary as of April 18, 1985. The same conclusion is implicit in the physical capacities assessment completed by Dr. Fish in May 1985. That assessment gave various physical limitations for claimant and indicated that these limitations were permanent. Although Dr. Fish commented at the bottom of the form: "[Claimant] may improve slightly with time," that comment indicates that the prospect of improvement was speculative at best and, in any event, that only "slight" improvement was possible. That comment, therefore, in no way reflects a reasonable expectation of further material improvement in claimant's conditions. See Maxine J. Evans, 34 Van Natta 1021, 1022 (1982).

The report by Dr. Fish in March 1985, which stated that claimant's condition had improved "more than 50 percent" and recommended participation in an exercise program, suggests that further material improvement was expected at that time. The reports generated in April and May 1985, however, including the physical capacities assessment by Dr. Fish, indicate that by that time claimant had experienced all of the improvement that was likely through medical treatment or the passage of time.

As for claimant's participation in the work hardening program and the "gradual gains" reported by the physical therapist, we note that the "gains" experienced by claimant were mainly in the strength of his upper body. There is very little in the record to suggest that claimant's upper body was affected by his industrial injuries. Hence, although the work hardening program apparently was improving the overall condition of claimant's body, it was doing little or nothing to improve the medical conditions associated with claimant's claim.

We also note that at the time of claim closure, claimant had been participating in the work hardening program for more than a month. This was a week longer than Dr. Fish had recommended. In addition, it is clear from the physical therapist's report in early June 1985 that there was no reasonable expectation that claimant's condition would improve to the point that he would be able to return to his regular work as a roofer, even with additional conditioning. By the time of claim closure, therefore, it had become clear that the work hardening program was not going to accomplish what Dr. Fish had hoped.

We conclude that the evidence preponderates in favor of the conclusion that claimant was medically stationary before claim closure. We, therefore, reverse the Referee on this issue and reinstate the June 1985 Determination Order.

## II

On the interim compensation issue, we agree with the Referee that Dr. Fish's letter of July 16, 1985 was an aggravation claim and that the letter also established a medically verified inability to work within the meaning of ORS 656.273(6). The letter was received by the insurer on July 18, 1985. The Referee ordered the insurer to pay interim compensation for the period from July 18, 1985 through the date of the insurer's denial on September 30, 1985. We note that the Referee neglected to exclude from this period the days that claimant testified he worked beginning September 12, 1985. See Bono v. SAIF, 298 Or 405 (1984). With the exception of this error, we affirm this portion of the Referee's order.

Interim compensation paid for periods during which a claimant is working is not "compensation" within the meaning of ORS 656.313. See ORS 656.313(4); Terry L. Hunter, 38 Van Natta 134, 136 (1986). The interim compensation presumably paid by the insurer pursuant to the Referee's order for the periods claimant was working between September 12 and September 30, 1985, therefore, escapes the effect of ORS 656.313(2) as interpreted in Hutchinson v. Louisiana-Pacific Corp., 67 Or App 577, 581, rev den 297 Or 340 (1984). The Board authorizes an offset of such interim compensation against any award of permanent partial disability

granted in connection with claimant's compensable conditions. See ORS 656.268(4) & (6); Forney v. Western States Plywood Co., 66 Or App 155, 159 (1983), aff'd, 297 Or 628 (1984).

### III

Because the Referee ruled that claimant's claim had been prematurely closed, he did not reach the merits of claimant's aggravation claim. Given our ruling that the claim was not prematurely closed, we now turn to the aggravation issue.

To establish an aggravation claim, a claimant must prove by a preponderance of the evidence a worsening of his condition and a causal relation between the worsening and the original injury. ORS 656.273(1); Hoke v. Libby, McNeil & Libby, 73 Or App 44, 46 (1985). The worsening need not be substantial, Mosqueda v. ESCO Corp., 54 Or App 736, 739 (1981), rev den 292 Or 450 (1982), and may be established by lay as well as medical evidence. Garbutt v. SAIF, 297 Or 148, 151-52 (1984).

The evidence on the merits of claimant's aggravation claim consists of the Dr. Fish's letter of July 16, 1985, her testimony and the testimony of claimant and his wife. The evidence indicates that claimant's compensable conditions worsened after claim closure resulting temporarily in increased pain, increased physical limitations and increased medical treatment. Taking this evidence as a whole, we conclude that claimant has carried his burden of proving an aggravation.

After treating claimant's aggravated condition, Dr. Fish declared claimant medically stationary again in a report dated August 19, 1985. Dr. Schader, who examined claimant in mid-September 1985, opined that claimant continued to be medically stationary at that time. Claimant returned to work on September 12, 1985 and continued to work through the time of the hearing. This indicates that claimant continued in a medically stationary status. Under these circumstances, we proceed to the issue of extent of disability. See ORS 656.268(1); OAR 438-06-040, 438-08-020; Ronald R. Rust, 38 Van Natta 559, 561 (1986). We conclude that the record is sufficiently developed that we may address this issue.

### IV

In rating the extent of claimant's unscheduled permanent partial disability for his low back, 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 apply these rules as guidelines, not as restrictive mechanical formulas. See Harwell v. Argonaut Insurance Co., 296 Or 505, 510 (1984); Howerton v. SAIF, 70 Or App 99, 102 (1984).

Claimant is 44 years old, is of average intelligence and has a tenth grade education. Although he did not complete high school or obtain a GED, claimant has attended classes in sociology and psychology for two years at a community college and has attended classes in psychology for another two years at a university in Portland. In addition, approximately ten years prior to the hearing claimant successfully completed a course in air conditioning and refrigeration and also received training in advertising and commercial art. His work history is mainly in the area of roofing, but also includes construction and foundry work.

Following our de novo review of the medical and lay evidence, we conclude that claimant's low back impairment is in the minimal range. Exercising our independent judgment in light of claimant's level of impairment and the relevant social and vocational factors, we conclude that an award of 48 degrees for 15 percent unscheduled permanent partial disability adequately and appropriately compensates claimant for the permanent loss of earning capacity due to the industrial injury to his low back.

In rating the extent of scheduled permanent partial disability for claimant's right leg, we seek to determine the loss of use or function of the injured member due to the industrial injury. ORS 656.214(2). In determining loss of use or function, we consider the medical and lay evidence in light of the rules set forth in OAR 436-65-500 through 436-65-575, although, again, we apply the rules as guidelines and not as restrictive mechanical formulas. See SAIF v. Baer, 61 Or App 335, 337-38, rev den 294 Or 749 (1983); Isabel Aparicio, 38 Van Natta 421, 421-22 (1986). We recognize that loss of use or function does not necessarily correlate with mechanical impairment, although the latter is usually a relevant consideration. Boyce v. Sambo's Restaurant, 44 Or App 305, 308 (1980).

Following our de novo review of the medical and lay evidence and exercising our independent judgment in light of this evidence and the aforementioned guidelines, we conclude that claimant is adequately and appropriately compensated for the loss of use or function of his right leg due to the industrial injury by an award of 7.5 degrees for five percent scheduled permanent partial disability. This award is based upon evidence of disabling pain and some minimal motor weakness.

#### ORDER

The Referee's order dated December 17, 1985 as republished by the Order on Reconsideration dated January 28, 1986 is reversed in part. Those portions of the order that set aside the Determination Order of June 6, 1985 as premature and awarded claimant interim compensation for periods during which claimant was working on and after September 12, 1985 are reversed. The Determination Order is reinstated. The insurer's aggravation denial dated September 30, 1985 is set aside. Claimant's condition was again medically stationary on August 19, 1985. Claimant is awarded 15 percent (48 degrees) unscheduled permanent partial disability for his low back and five percent (7.5 degrees) scheduled permanent partial disability for his right leg. The insurer is authorized to offset overpaid interim compensation against these awards. The remainder of the Referee's order is affirmed. Claimant's attorney fee agreement is approved. Claimant's attorney is awarded 25 percent of the increased compensation awarded by this order, not to exceed \$1,500. Claimant's attorney is also awarded \$500 for services at the hearing for her efforts in overturning the insurer's aggravation denial, to be paid by the insurer in addition to compensation.

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ANNA M. ADSITT, Claimant  
Francesconi & Cash, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 84-02227  
October 1, 1986  
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Adsitt v. Clairmont Water District, 79 Or App 1, rev den, 301 Or 338, 301 Or 666 (1986). In accordance with the mandate, the SAIF Corporation's denial dated February 24, 1984 is set aside and the claim is remanded to SAIF for acceptance and processing in accordance with law.

IT IS SO ORDERED.

ROBERT J. BEATY, Claimant  
Malagon & Moore, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

Own Motion 84-0198M  
October 1, 1986  
Own Motion Order on Reconsideration

Claimant has requested reconsideration of our August 13, 1986 Own Motion Order in which he was awarded an additional 48 degrees for 15 percent unscheduled permanent partial disability for his psychiatric and low back conditions, bringing his total compensation for unscheduled permanent partial disability to 240 degrees for 75 percent. Claimant argues that he is entitled to compensation for permanent total disability. We have allowed the SAIF Corporation 20 days in which to respond to claimant's motion. OAR 438-12-005(1)(c).

The standards for determining disability under ORS 656.278 are the same standards that are used in all other cases. Edward Hines Lumber Co. v. Kephart, 81 Or App 43 (CA A36968, Filed September 3, 1986). In order to establish entitlement to an award of compensation for permanent total disability, a claimant must prove by a preponderance of the evidence that he is unable to regularly perform work at a gainful and suitable occupation. ORS 656.206(1)(a), (3); Wilson v. Weyerhaeuser Co., 30 Or App 403 (1977). A claimant must also establish a willingness to seek regular, gainful and suitable employment and that reasonable efforts have been expended to do so. ORS 656.206(3). A claimant may be excused from the requirement of seeking gainful and suitable employment if the record as a whole establishes that such efforts would be futile. Butcher v. SAIF, 45 Or App 313 (1980); see also George M. Turner, 37 Van Natta 531 (1985). Our analysis of the evidence in this case has been under these standards.

Expert medical evidence germane to claimant's disability since the last award or arrangement of compensation consists of reports from Doctors Gilsdorf, Brown and Gardner. Dr. Gilsdorf is an orthopedist and is claimant's treating physician for his organic low back condition. His most recent substantive report was issued in conjunction with the closure of claimant's claim in late 1983. In that report, Dr. Gilsdorf opined that claimant's physical impairment was moderate. Dr. Gilsdorf more recently, in July 1984, wrote that he agreed with Dr. Brown's evaluation of claimant "as described in [Dr. Brown's] letter to SAIF on February 17, 1984 . . . ." No letter from Dr. Brown bearing that date is in the record.

Dr. Brown is claimant's treating psychiatrist. On January 27, 1984 he reported a diagnosis of somatic reaction and passive dependent personality. His conclusions were, however,

inconsistent. At one point he stated: "[Claimant's] psychiatric problems while substantially aggravated by his injury and its sequelae are never the less not in themselves totally disabling as might be the case with some organic conditions or psychosis." He then concluded: "Infrequently do I conclude that an individual is totally disabled. In this case this is my conclusion. There are no known modalities of treatment that will return this man to the work force." We are unable to reconcile Dr. Brown's statement that claimant's psychiatric condition is not totally disabling with his conclusion on the same page that claimant is totally disabled. Nowhere in the record is this inconsistency explained. We find Dr. Brown's conclusions on the extent of claimant's disability to be unpersuasive. We do, however, agree with Referee Daron's conclusion that claimant's psychiatric treatment is compensable as having been necessitated by claimant's injury and multiple surgeries.

Other than Dr. Brown's inconsistent and conclusory statements regarding claimant's disability, no physician has stated that claimant is totally incapacitated on account of his physical or psychiatric conditions or a combination thereof. Neither has any physician stated persuasively that it would be futile for claimant to make reasonable efforts to become employed. The vocational reports are persuasive that claimant has transferrable skills that are compatible with his physical limitations. Claimant has not provided evidence that he has made a reasonable effort to obtain suitable employment and has been unable to do so.

Prior to our August 13, 1986 Own Motion Determination, claimant's psychiatric condition had not been included as a factor in rating the extent of his disability. We considered that condition in reaching that determination. Considering all of the relevant social and vocational factors in the totality of claimant's circumstances, we concluded that claimant was entitled to compensation for 240 degrees for 75 percent unscheduled permanent partial disability for injury to the low back, which was an increase of 48 degrees over prior awards. We have carefully reconsidered the entire record and we adhere to our Own Motion Determination dated August 13, 1986, which is republished effective this date.

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TERESIA N. ANDERSON, Claimant  
Kulongoski Law Office, Claimant's Attorney  
Daryl Nelson, Defense Attorney  
Bottini & Bottini, Defense Attorneys

WCB 83-07831 & 84-03385  
October 3, 1986  
Order on Review

Reviewed by the Board en banc.

Underwriters Adjusting Company (Underwriters) requests review of Referee Galton's order that set aside its denial of claimant's new injury claim and affirmed Liberty Northwest Insurance Corporation's (Liberty) denial of claimant's aggravation claim for the low back. The issue is responsibility.

We affirm the order of the Referee with the following comments. We are persuaded that claimant's increased work activity during her later employment independently contributed to a worsening of her underlying back condition. Thus, we agree with the Referee that Underwriters, which was on the risk during the later employment, is liable. See Hensel Phelps Construction v. Mirich, 81 Or App 290 (1986).

We disagree, however, with the Referee's findings as to the burden of proof in this case. The Referee found that the later insurer had the burden of proving that claimant's original injury was the "sole cause in fact" of her disability. He further held that Underwriters, the later insurer, had failed to satisfy its burden.

Since the Referee's order was submitted, we stated in Eva (Doner) Staley, 37 Van Natta 731 (1985), on reconsideration 38 Van Natta 1280 (WCB Case Nos. 83-07726 & 83-09071, decided this date):

"[I]n a successive injury case, in which an order pursuant to ORS 656.307 has been entered and compensability is not an issue, the initial burden of going forward lies with the first (aggravation) employer. . . .

"In reaching our conclusion we draw from the Supreme Court's discussion of the 'two last injurious exposure rules' in Bracke v. Baza'r, 293 Or 239 (1982). In a successive injury case, the first employer has already accepted an injury as being related to its employment. When additional disability to the same body part results at a later employment, the 'substantive rule of liability' of the last injury rule, Bracke, supra at 245, will assign liability to the later employer if the last employment independently contributed to causing the disability. Hensel Phelps Construction v. Mirich, 81 Or App 290 (1986). See also Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984); Smith v. Ed's Pancake House, 27 Or App 361 (1976). Under the 'rule of proof' of the last injury rule, Bracke, supra at 246, the first employer must first introduce evidence that the last employer's employment independently contributed to causing the disability in order to bring the substantive rule of liability into play. If the first employer does so, and the last employer does not meet that evidence with sufficient contrary evidence, liability is shifted to the last employer under the substantive rule of liability. Thus, the first employer has the initial burden of going forward with sufficient evidence to bring the rule of liability into play."

The present case is a successive injury case in which the Workers' Compensation Department issued an order pursuant to a ORS 656.307. Compensability was not an issue at the hearing. It was, therefore, the first employer's burden to go forward with evidence of an independent contribution to the cause of claimant's disability by the later employment. As stated above, there is persuasive evidence that claimant's recent work activity actually contributed to a worsening of her back condition. There was more than a recurrence of symptoms. We find, therefore, that the first insurer satisfied its burden of going forward, and proved by a

preponderance of the evidence that the second insurer is responsible.

ORDER

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

VICTORIO R. CASTILLEJA, Claimant  
Michael B. Dye, Claimant's Attorney  
Rankin, et al., Defense Attorneys  
Daniel DeNorch, Defense Attorney

WCB 84-00697 & 84-05900  
October 3, 1986  
Order on Reconsideration

Cascade Steel Corporation (Cascade) has requested that we reconsider our Order on Review dated December 3, 1985. In our order we affirmed the order of the Referee, who set aside Cascade's denial of claimant's new injury claim and upheld Liberty Northwest Insurance Company's denial of claimant's aggravation claim. Citing Boise Cascade Corp. v. Starbuck, 296 Or 238, 244-45 (1984), we found that because we were not convinced that either of claimant's employments was the "more likely" cause of his low back disability, the second employer, Cascade, was responsible in that its employment may have caused claimant's disability.

On December 27, 1985 we abated our order to allow opposing parties the opportunity to respond to Cascade's motion for reconsideration. Cascade's request for reconsideration is allowed. Our previous order is withdrawn for reconsideration. After reconsideration, we set our order aside and find Liberty Northwest to be the responsible insurer.

In its request for reconsideration, Cascade has asked us to reconcile what it asserts to be inconsistent statements made in our order in this case and in Bill B. Dameron, 36 Van Natta 592 (1984). In Dameron, we interpreted Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984) to require evidence of an actual, material contribution to claimant's disabling condition by the later employment in order for liability to "shift" from the first to the later employer. Dameron, 36 Van Natta at 597. In the order in the present case, however, we again drew from Starbuck, supra, and suggested that an actual contribution might not be required. We stated:

" . . . [W]e find that as a de novo trier of fact we are not convinced that either of claimant's employments was the more likely cause of his current disability. Under these circumstances, Starbuck requires that we allocate responsibility to the last employer whose employment 'may' have caused claimant's disability." (emphasis in original).

In our Order on Reconsideration in Eva (Doner) Staley, 38 Van Natta 1280 (WCB Case Nos. 83-09071 and 83-07726, decided this date), we noted the seemingly conflicting statements in Starbuck regarding whether there must be an actual contribution by the later employment in order shift liability to the later employer. We found that although the principles enunciated in Starbuck were confusing, the Court intended to require proof of an actual contribution by the later employment in order for liability to shift away from the first employer. The Court stated that the

last injurious exposure rule was not intended to transfer liability from an employer whose employment caused a disability to a later employer whose employment did not. We interpreted that statement to mean that if there was no proof that the later employment actually contributed to the cause of claimant's disability, liability would remain with the first employer.

In the present case, we found that claimant's later employment may have caused his disability. We remain of that opinion. There is no persuasive evidence, however, that the later employment made an actual contribution to the causation of claimant's disability. Under our recent interpretation of Starbuck, therefore, liability must remain with the first employer, whose employment, in fact, caused claimant's initial disability.

Now, therefore, having granted Cascade Steel Corporation's request for reconsideration, we withdraw our prior order and hereby find Liberty Northwest Insurance Corporation responsible for claimant's low back disability. Liberty shall process and pay claimant's claim according to law, and shall reimburse Cascade Steel Corporation for costs incurred on the claim to date.

IT IS SO ORDERED.

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

WCB 85-01679 & 84-13634  
October 3, 1986  
Amended Order On Reconsideration

Claimant has requested reconsideration of the Board's Order on Reconsideration dated September 5, 1986. The request is granted and our previous order is withdrawn for reconsideration. After reconsideration, we amend our order to award claimant's attorney a fee of \$450 to be paid by Liberty Northwest Insurance Corporation. With this amendment, the Board adheres to and republishes its previous order, effective this date.

IT IS SO ORDERED.

CHRIS L. JENKINS, Claimant  
Philip Schuster II, Claimant's Attorney  
Keith Skelton, Defense Attorney  
Roberts, et al., Defense Attorneys

WCB 84-11825 & 84-13661  
October 3, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

Liberty Northwest Insurance Corporation requests review of Referee Leahy's order that set aside its denial of claimant's new injury claim and upheld Maryland Casualty Company's denial of claimant's aggravation claim for the low back. The issues are whether claimant's low back claim is compensable and, if so, which insurer is responsible.

The Board affirms the order of the Referee with the following comment. In discussing the aggravation/new injury standard applicable to this case, the Referee held:

"For the first employer to be responsible requires an aggravation usually evidenced by

continuing symptoms . . . and the absence of identifiable incidents which reasonably could have caused a new injury."

Since the Referee's order the court has held: "[T]here is no requirement that there be a 'definable accident or event' to hold the later employer liable." Hensel Phelps Construction v. Mirich, 81 Or App 290 (1986). In the same case, the court noted that in order for the later employer to be held liable, there must be evidence of an actual contribution to the worsening of claimant's condition by the second employment. Thus, the mere showing that the second employment could have caused a new injury is insufficient to shift liability away from the first employer. Hensel Phelps Construction v. Mirich, *supra*. See Eva (Doner) Staley, Order on Reconsideration, 38 Van Natta 1280 (WCB Case Nos. 83-09071 and 83-07726, decided this date).

ORDER

The Referee's order dated February 25, 1986 is affirmed. Claimant's attorney is awarded a fee of \$600 for services on Board review, to be paid by the Liberty Northwest Insurance Corporation.

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TIMOTHY J. JENKS, Claimant  
Michael Dye, Claimant's Attorney  
Roberts, et al., Defense Attorneys  
Garrett, et al., Defense Attorneys

WCB 83-10924 & 83-10923  
October 3, 1986  
Order on Reconsideration

Diamond International has requested that we reconsider our Order on Review dated November 4, 1984. In that order, we affirmed without opinion the Referee's order overturning Diamond International's aggravation denial and upholding Kerr Concentrates' new injury denial of claimant's low back claim. Responsibility was the sole issue on review, compensability having been conceded by the parties pursuant to an ORS 656.307 order designating Diamond International as paying agent. Diamond International's request for reconsideration is allowed. Our previous order is withdrawn for reconsideration.

In its request for reconsideration, Diamond International asks us to comment regarding which insurer has the burden of proof in a successive injury case in which compensability is not an issue. Diamond International also asserts that there is persuasive evidence of a new injury occurring during claimant's later employment, so that responsibility should lie with the later insurer.

In Eva (Doner) Staley, 37 Van Natta 731 (1985), on reconsideration 38 Van Natta 1280 (WCB Case Nos. 83-07726 & 83-09071, decided this date), we discussed the burden of going forward with evidence in successive injury cases:

"[I]n a successive injury case, in which an order pursuant to ORS 656.307 has been entered and compensability is not an issue, the initial burden of going forward lies with the first (aggravation) employer. . . .

"In reaching our conclusion we draw from the Supreme Court's discussion of the 'two last injurious exposure rules' in Bracke v. Baza'r, 293 Or 239 (1982). In a successive injury case, the first employer has already accepted an injury as being related to its employment. When additional disability to the same body part results at a later employment, the 'substantive rule of liability' of the last injury rule, Bracke, supra at 245, will assign liability to the later employer if the last employment independently contributed to causing the disability. Hensel Phelps Construction v. Mirich, 81 Or App 290 (1986). See also Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984); Smith v. Ed's Pancake House, 27 Or App 361 (1976). Under the 'rule of proof' of the last injury rule, Bracke, supra at 246, the first employer must first introduce evidence that the last employer's employment independently contributed to causing the disability in order to bring the substantive rule of liability into play. If the first employer does so, and the last employer does not meet that evidence with sufficient contrary evidence, liability is shifted to the last employer under the substantive rule of liability. Thus, the first employer has the initial burden of going forward with sufficient evidence to bring the rule of liability into play."

Thus, Diamond International, as the first insurer, had the initial burden of going forward with evidence of a new injury during the later employment. In Hensel Phelps Construction v. Mirich, supra, the court clarified that in order for the later employer to be found liable, there must have been an actual contribution to the causation of claimant's condition during the later employment, as well as a worsening of the underlying condition. On reconsideration, we remain unpersuaded that claimant's later period of employment contributed to a worsening of his condition. Diamond International remains the responsible insurer.

Now, therefore, having allowed Diamond International's request for reconsideration, we adhere to and republish our Order on Review dated November 4, 1984.

IT IS SO ORDERED.

TROY W. KAUFFMAN, Claimant.  
HELEN V. PRATT or DAVID J. PRATT, Employer  
Macafee, et al., Claimant's Attorneys  
Gary G. Jones, Attorney  
SAIF Corp Legal, Defense Attorney  
Carl M. Davis, Dept. of Justice

WCB 85-03077 & 85-03078  
October 3, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

David J. Pratt ("Pratt"), an alleged non-complying employer, requests review of Referee Daron's order which set aside the SAIF Corporation's denial, on Pratt's behalf, of claimant's ankle injury claim. On review, Pratt contends that he was not an employer subject to the Workers' Compensation Law and that claimant was not a subject worker. We agree and reverse.

With his request for review, Pratt has included a request for remand for further evidence taking. Enclosed with the request is an affidavit from Pratt's mother in which she states that she was unable to appear at the hearing because of serious physical ailments. Pratt's mother concludes that she is presently physically and mentally capable of testifying to matters relevant to this proceeding.

We deny the request for remand. Following our de novo review, we are not persuaded that this record has been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5). Furthermore, it has not been shown that this evidence was not obtainable with due diligence before the hearing. Delfina P. Lopez, 37 Van Natta 164, 170 (1985).

Pratt is a city transportation planner. He is neither in the construction nor remodeling business. In September 1984, Pratt agreed to help his mother, a 68-year-old widow in ill health, repair and remodel her home. His mother was the sole owner of the home. Labor and material costs were to be paid from Pratt's mother's bank account. Pratt and his wife could withdraw funds from this account, but the funds belonged entirely to Pratt's mother. Pratt received no compensation for his efforts.

Pratt initially hired three workers for the project. The record does not suggest that any of the workers believed that Pratt was their employer. In particular, one of the workers, claimant's grand-uncle, was aware that Pratt was acting as representative for his mother. Claimant was subsequently added to the crew. Unaware of Pratt's mother, claimant believed that he was working for Pratt. Over the course of four to six days, claimant worked 37 hours at \$5 an hour. His duties ended on September 19, 1984 when he fell from the roof of the house, breaking his ankle. Claimant received \$185 for one week's work.

Claimant filed a claim against both Pratt's mother and Pratt. Neither person carried workers' compensation insurance. On recommendation from the Workers' Compensation Department, SAIF denied each claim. SAIF contended that claimant was not a subject worker and that neither Pratt nor his mother was a subject employer.

The Referee found that claimant was not a subject worker of Pratt's mother. This finding was based on ORS 656.027(2).

This statute excludes from subject worker status those workers who are employed to do gardening, maintenance, repair, remodeling or similar work in or about the private home of the person employing the worker.

Although claimant was precluded from seeking compensation from Pratt's mother, the Referee concluded that claimant was a subject worker of Pratt. Since Pratt had failed to disclose to claimant the identity of his mother as principal, the Referee reasoned that Pratt should be held personally liable as an employer. Furthermore, because the house was not Pratt's private home, the exclusion of ORS 656.027(2) was not applicable. Finally, the Referee found that there was a reasonable inference that the total labor cost during any 30-day period would exceed \$200. Thus, the Referee concluded that the casual employment exclusion of ORS 656.027(3) was also inapplicable.

Every employer employing one or more subject workers in the state is subject to ORS 656.001 to 656.794. ORS 656.023. Pursuant to ORS 656.005(14), "employer" means any person who contracts to pay a remuneration for and secures the right to direct and control the services of any person.

We find that Pratt was not a subject employer. Although Pratt supervised the repair of his mother's home, the preponderance of the evidence establishes that he did not agree to pay any remuneration for the restoration project. None of the wages for the project came from Pratt. Rather, all of the funds for the renovation were attributable to Pratt's mother. Thus, Pratt's mother was claimant's employer. Yet, she is exempt from subject employer status because the repair work was provided for her private home. See ORS 656.027(2).

Pratt was not engaged in an "industrial enterprise" as that phrase is used in describing the findings and policy of the Workers' Compensation Law. See ORS 656.012. He received no remuneration for the efforts expended on his mother's behalf. He had no commercial or financial interest in the remodeling project. The sole impetus for his activities appears to be a desire to aid his ailing mother in the renovation of her private home. We conclude that finding Pratt to be a subject employer under these circumstances would not serve the purposes of the Workers' Compensation Law. Moreover, such a finding could needlessly subject similar unsuspecting relatives of homeowners to the workers' compensation system. Considering the objectives of the system, we are not persuaded that the Legislature intended to include a private restoration project such as this within the confines of the Workers' Compensation Law.

Furthermore, we question the Referee's utilization of agency law in a purely statutory scheme such as workers' compensation. However, assuming for the sake of argument that Pratt was liable under the contract for hire as an agent for an undisclosed principal, we would still find that he was not a subject employer. This finding would be based on our conclusion that claimant was not a subject worker.

"Casual" workers are exempt from subject worker status. ORS 656.027. Pursuant to ORS 656.027(3)(a), a "casual" worker is one whose employment is not in the course of the employer's trade, business or profession. For purposes of this subsection, "casual"

refers only to employments where the work in any 30-day period, without regard to the number of workers employed, involves a total labor cost of less than \$200.

Claimant received \$185 for his services. The record establishes that at least three other workers were also paid for their services. Yet, there is no indication that any of these workers understood Pratt to be their employer. Moreover, at least one of the workers was aware that Pratt was acting as his mother's representative.

Claimant's wages placed him below the \$200 statutory minimum. However, he can still prevail if he can establish that Pratt was a subject employer through his employment of other subject workers. See Konell v. Konell, 48 Or App 551 (1980), rev den, 290 Or 449 (1981); Christopher M. Riddle, 37 Van Natta 1224, 1228 (1985). We find that claimant has not met this burden of proof. The preponderance of the evidence fails to establish that the other workers were working under the same understanding as claimant. That is, there is no persuasive evidence that any other worker understood Pratt to be the employer. In fact, the evidence would suggest just the opposite. Thus, because there is insufficient evidence to support a finding that Pratt employed any other potential subject workers, the total labor cost does not exceed the \$200 statutory minimum. Accordingly, claimant would be considered a "casual" worker and Pratt would not be considered a subject employer. ORS 656.027(3).

#### ORDER

The Referee's order dated November 21, 1985 is reversed in part. The SAIF Corporation's denial, on behalf of David J. Pratt, is reinstated and upheld. The attorney fee award and the authorization for recovery of all costs are also reversed. The remainder of the Referee's order is affirmed.

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OFELIA N. LOPEZ, Claimant  
Robert L. Chapman, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney  
Kay E. Kinsley, Defense Attorney  
Cowling & Heysell, Defense Attorneys

WCB 84-03969, 84-05136, 84-05437  
& 84-06589  
October 3, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of that portion of Referee Brown's order that set aside its de facto denial of claimant's left shoulder condition. Industrial Indemnity cross-requests review of that portion of the order that set aside its denial of claimant's new injury claim for carpal tunnel syndrome and upheld Liberty Northwest Insurance Corporation's aggravation denial for the same condition. The issues are the compensability of claimant's left shoulder condition and responsibility between insurers for claimant's carpal tunnel syndrome.

The Board affirms that portion of the Referee's order that found claimant's left shoulder condition compensable. We also affirm the order as it pertains to the responsibility issue, with the following comments.

Claimant is a 32-year-old plywood mill worker whose employer was insured by SAIF until October 1, 1982, when Industrial

Indemnity assumed coverage. On August 2, 1983, claimant jammed a splinter into her right hand on the job. The initial treating physician, Dr. Robertson, suspected median nerve root involvement and referred claimant to Dr. Worland. Dr. Worland noted some distal median nerve hypesthesia secondary to swelling. He released claimant to return to work without restriction as of August 22, 1983. Liberty Northwest assumed coverage on October 1, 1983.

In December 1983 claimant developed traction neuritis in the right ulnar nerve at the elbow. Soon thereafter, Dr. Robertson noted a positive Tinel's sign, diagnosed carpal tunnel syndrome and removed claimant from work as a means of therapy. Claimant filed a claim for her right upper extremity problems on January 17, 1984, indicating that the problem had begun in about May 1983. Both Liberty Northwest and Industrial Indemnity denied the claim on the basis of responsibility.

Dr. Saez, a neurosurgeon, examined claimant on February 16, 1984. Claimant reported intermittent right wrist pain, relieved greatly since she stopped work. Dr. Saez diagnosed right carpal tenosynovitis related to occupational activities, but noted that he did not find strong diagnostic signs suggestive of median nerve entrapment of the carpal tunnel. He noted on March 8, 1984 that EMG testing had been negative for carpal tunnel median nerve entrapment.

On May 3, 1984, pursuant to ORS 656.307, the Workers' Compensation Department designated Industrial Indemnity as paying agent for claimant's carpal tunnel syndrome.

Claimant was examined by Dr. Luce, a neurosurgeon, on July 12, 1984. He found no evidence of carpal tunnel tenosynovitis. He testified at hearing that claimant's discomfort in her right hand and the positive Tinel's sign were consistent with carpal tunnel syndrome. He opined that although claimant had had carpal tunnel syndrome associated with edema attendant to the splinter in her right hand, it had resolved before January 1984. He testified that based on his examination and the record he reviewed, the carpal tunnel symptoms were most probably related to the splinter and the treatment for the splinter, but that they could have been associated with later work activities.

Dr. Robertson testified that the carpal tunnel syndrome was caused by work activities. He explained that when the tendons or tendon sheaths in the wrist become inflamed and swell, they compress the median nerve. Any activity that moves the tendons would cause inflammation. He also testified that the last two or three months of work probably did not change claimant's condition.

The Referee found, primarily from Dr. Robertson's testimony, that although claimant's carpal tunnel symptoms continued after the last insurer assumed coverage, there was no independent worsening of claimant's condition during the later period of employment.

As we hold in our order on reconsideration in Eva (Doner) Staley, 38 Van Natta 1280(WCB Case Nos. 83-09071 and 83-07726, decided this date), in a successive injury case in which an order has issued pursuant to ORS 656.307, the insurer who originally accepted the condition for which claimant seeks compensation has the burden of going forward with evidence of an independent contribution to the

worsening of the condition by the later employment. See also Hensel Phelps Construction v. Mirich, 81 Or App 290 (1986). Unless the initial insurer succeeds in carrying this burden, liability remains where it originally began.

In the present case, claimant's carpal tunnel syndrome clearly originated with her splinter injury while Industrial Indemnity was on the risk. It is Industrial Indemnity's burden, therefore, to go forward with evidence of an independent worsening by the later employment. After reviewing both the medical evidence and claimant's testimony, we find that Industrial Indemnity has failed to sustain its initial burden of going forward. At most, there is evidence that a symptomatic exacerbation occurred during the later employment. Proof of a symptomatic worsening, however, does not shift liability from the original to a later insurer. Hensel Phelps Construction v. Mirich, supra. Liability shall remain with Industrial Indemnity.

ORDER

The Referee's order dated December 10, 1984 is affirmed. Claimant's attorney is awarded a fee of \$550 for services on Board review, to be paid by the SAIF Corporation.

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MIKEL T. MacDONALD, Claimant  
W.D. Bates, Jr., Claimant's Attorney  
Meyers & Terrall, Defense Attorneys

WCB 84-03634 & 84-03635  
October 3, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of those portions of Referee Brown's order, as adhered to on reconsideration, that: (1) set aside the employer's closure of claimant's low back claim as having been prematurely issued; (2) assessed a penalty and an associated attorney fee for what the Referee found to be an unreasonable employer closure; and (3) assessed a penalty and an associated attorney fee for the employer's alleged unreasonable failure to pay for certain chiropractic services. Claimant argues on review that if we should find that the employer's closure was proper, claimant has established a compensable aggravation of his condition since that closure was effected. The issues are premature closure, in the alternative, aggravation, and penalties and attorney fees.

We affirm that portion of the Referee's order that assessed a penalty and attorney fee for the employer's failure to pay for claimant's chiropractic services subsequent to August 2, 1985. Although claimant prevailed on this issue, he is not entitled to an attorney fee on that issue on Board review. On the remaining issues before us, we reverse.

Claimant is a grocery clerk who compensably injured his low back in May 1983. The claim was accepted as disabling. Claimant was subsequently seen by Dr. Boyd (who was the initial treating physician), Dr. Tearce and Dr. Abel. Dr. Abel saw claimant once on August 4, 1983. When claimant did not return for follow-up visits, Dr. Abel ultimately released him for regular work on October 8, 1983. Dr. Abel opined that claimant would have no permanent disability resulting from the compensable injury.

Ten days after Dr. Abel's report was received, the employer issued a Notice of Claim Closure pursuant to ORS 656.268(3). Claimant was awarded temporary total disability and was provided the required notice regarding his right to request a Determination Order from the Evaluation Division within one year of the notice's mailing date.

In the interim, claimant returned to Dr. Boyd, who examined him on September 15, 1983. Dr. Boyd's chart notes suggested that claimant was not medically stationary. The notes were not sent to the employer's insurance processor, however, until late November 1983, or nearly six weeks after closure had been effected. At the time the processor closed the claim, therefore, the only medical evidence in its possession were the reports of Dr. Abel, indicating that the claim could be closed with no permanent disability.

The Referee found that because Dr. Boyd was the initial treating physician, and apparently remained so at the time claimant was seen by Dr. Abel, the employer had a duty to contact Dr. Boyd before issuing its notice of closure. The Referee, therefore, set aside the closure as unreasonable and assessed a 25 percent penalty.

ORS 656.268(3) provides that when the medical reports indicate to the employer that claimant is medically stationary and without permanent disability, the employer shall issue a notice of closure to the claimant and to the Workers' Compensation Department. The notice must inform the claimant of the decision that no permanent disability exists, and must advise him of his right to request a Determination Order from the Department within one year of the closure date. If the claimant requests a Determination Order within one year, or if the Evaluation Division finds that the claim was improperly closed, a Determination Order will be issued.

In the present case, claimant did not request a determination within one year of the closure date. Neither did the Evaluation Division find the closure to be improper. A Determination Order, therefore, did not issue. Claimant did, however, request a hearing on what he alleged to be a premature closure, thereby asserting that the Hearings Division had jurisdiction to determine that issue.

On review, the employer argues that the Referee was without jurisdiction to set the closure aside. We agree. In Barbara A. Gilbert, 36 Van Natta 1485 (1984), the claimant sought review of the extent of her permanent disability after failing to request a Determination Order from the Evaluation Division within one year of the date her employer closed her disabling claim. We held that the Hearings Division and the Board were without jurisdiction to entertain her request, noting:

"ORS 656.268(3) could not be clearer. The procedure for contesting claim closure by an employer/insurer is to request a Determination Order from the Evaluation Division . . . Requesting a hearing is not a procedural remedy which is available as an alternative to requesting a Determination

Order . . . Nor does the filing of a request for hearing pursuant to ORS 656.283 satisfy the obligation to request a Determination Order from the Evaluation Division within one year of the employer/insurer's notice of closure. [Citations omitted]." 36 Van Natta at 1487.

ORS 656.268(3) vests the Evaluation Division with the initial authority to review the employer/insurer's claim closure. If the claimant is dissatisfied with the Division's administrative review, further review may be sought by requesting a hearing under ORS 656.283. Jurisdiction remains with the Evaluation Division, however, until its review is completed. If the claimant does not invoke the Evaluation Division's jurisdiction by requesting a Determination Order within one year of the employer's closure, the right to further review is effectively waived. See Adelie M. Webb, 37 Van Natta 1460 (1985).

Claimant argues that the Referee had jurisdiction because of claimant's right to request a hearing "at any time . . . on any question concerning a claim." ORS 656.283. While we agree that claimant had a right to request a hearing on this issue, we find that the Referee was without jurisdiction to entertain it because of the specific provisions of ORS 656.268(3). Because the Referee did not have jurisdiction, the employer's closure, which we find to have been proper on its merits, shall be reinstated. The Referee's assessment of a penalty and an associated attorney fee shall be set aside.

Having found the employer's closure to have been proper, we must now determine whether claimant has established a compensable aggravation since the closure was effected. After a review of the record we find insufficient evidence of an injury-related, material worsening of claimant's condition since the closure date. Neither do we find that claimant's disability is greater than it was at the time of closure. There has been no compensable aggravation.

#### ORDER

The Referee's order dated December 24, 1985, as adhered to on reconsideration on February 21, 1986, is reversed in part and affirmed in part. Those portions of the order that set aside the self-insured employer's notice of closure as prematurely issued and that assessed a penalty and attorney fee for the alleged unreasonable closure are reversed. The employer's closure is reinstated and claimant's alternative claim for aggravation is denied. The remainder of the Referee's order is affirmed.

HENRY L. MISCHEL, Claimant  
Peter O. Hansen, Claimant's Attorney  
Bullard, et al., Defense Attorneys

WCB 82-10262  
October 3, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The self-insured employer requests review of those portions of Referee Galton's order that partially set aside the employer's denial of claimant's "heart condition," awarded "interim" compensation and assessed penalties and attorney fees. The employer also objects to the Referee's exclusion of two pieces of documentary evidence. The issues argued by the parties are

compensability, "interim" compensation, penalties and attorney fees and the Referee's rulings excluding evidence.

We first address the evidentiary issue and conclude that both documents should have been admitted into evidence. The first document is a medical report authored by Dr. Kremkau. It was excluded because it was not provided to claimant at least 10 days prior to the hearing. See former OAR 436-83-400(3) (now OAR 438-07-005(3)). We find that the report was furnished to claimant's attorney and to the Referee on the same day it was received by the employer, which was nine days prior to the hearing. We further find that the employer exercised due diligence in obtaining and disclosing the report and that claimant was not prejudiced by the timing of the report. See Susan F. Vernon, 37 Van Natta 1562 (1985); Walter L. Hoskins, 35 Van Natta 885 (1983); Donald Young, 35 Van Natta 143 (1983).

The second document was a record maintained by the employer which was identified as a "credit follow-up" report. The overall significance of this document is discussed below. We disagree with the Referee's apparent finding that the document was substantive evidence that should have been disclosed prior to hearing under the provisions of former OAR 436-83-400(3). We find that the "credit follow-up" was offered to impeach claimant's testimony concerning an alleged occurrence that forms the basis of claimant's claim. As impeachment evidence, prior disclosure was not required under the relevant procedural rules. Both documents are contained in the record, and we have considered them on review. See Robert A. Leppla, 37 Van Natta 1698 (1985).

It is not disputed that claimant sustained a subendo-cardial myocardial infarction on December 16, 1980. Neither is it disputed that claimant was significantly at risk for such an event prior to that date on account of his family history, his history of cigarette smoking and the fact that claimant had severe atherosclerosis. There is no persuasive evidence, nor is there any serious assertion, that claimant's atherosclerosis was caused or worsened by his employment. The preponderance of the persuasive expert medical evidence is that claimant's myocardial infarction is a compensable industrial injury if and only if a specific incident, alleged by claimant to have occurred on December 16, 1980, actually occurred. Based upon our review of the entire record, we find that claimant has failed to prove by a preponderance of the evidence that the incident occurred as alleged. We, therefore, find that claimant has failed to prove the compensability of his claim.

Claimant was a "service inspector" or bill collector for the employer, a public utility. His job required that he make personal contact with customers with delinquent utility bills. The contacts involved either collecting the delinquent bills or initiating service disconnects. On December 16, 1980 claimant contacted a customer with a well-known reputation for being delinquent and difficult to deal with.

Claimant testified that when he encountered the customer and announced the purpose of his visit the customer threatened claimant with immediate bodily harm. According to claimant, he immediately began to feel ill, experiencing chest pain, a warm sensation and nausea. He left the customer's residence in Molalla

and drove to the employer's Molalla field office. At the field office, claimant told some clerical personnel that he did not feel well and that he was going to the employer's Oregon City office. When he arrived at the Oregon City office claimant spoke with his direct supervisor, Mr. Misterek. Misterek observed that claimant had "an ashen look" and suggested that claimant see a doctor. Claimant then drove home and because of continuing symptoms saw his family physician, who subsequently had claimant admitted to the hospital. A few days later claimant called either Misterek or Ms. Davis-Roake, a customer service representative at the Oregon City office, and informed them that he had had a "heart attack."

Claimant testified that he told the people in the credit department about the problem he had had with the customer because:

"Any credit problem -- any customer that's a credit problem, it's important for the other people in credit to know how to handle certain kinds of people. If we are out in the field, and the guy sics a dog on you or threatens you with a gun, or something to that effect, credit wants to know about that so they can write down on the follow-up, and we will know how to handle these people the next time we talk to them."

As noted above, the credit follow-up for the particular customer involved was offered into evidence at the hearing. The document notes that the customer was contacted on December 16, 1980 but recites no mention of any threat or altercation. Misterek and Davis-Roake both testified at the hearing and neither recalled any contemporaneous mention by claimant of a threat or altercation. The Referee found claimant, Misterek and Davis-Roake credible based upon their demeanor, although he found Misterek and Davis-Roake unreliable in part due to their uncertainty regarding dates and events.

We will ordinarily defer to a Referee's credibility finding when it is based upon actual observation of a witness. Humphrey v. SAIF, 58 Or App 360 (1982). We do so in this case. However, in assessing the overall effect of the credible testimony in this case, we find the testimony of Misterek and Davis-Roake at least as persuasive as claimant's. Claimant acknowledged the employer's practice of noting "credit problems," yet it is uncontroverted that the follow-up document for the customer in question recites nothing extraordinary having occurred on December 16, 1980. Neither is there any mention of such an episode in any of the contemporaneous medical reports. We conclude that it is as likely that the incident did not occur as it is that the incident did occur. The evidence being in equipoise, claimant has failed to sustain his burden of proof. The denial shall be reinstated.

Having concluded that claimant has failed to prove the compensability of his claim does not end the inquiry. The Referee held that, even if the claim was not compensable, claimant would be entitled to "interim" compensation from the date of the myocardial infarction to the date of the denial, almost two years later, less time worked. The question is whether the employer had "notice or knowledge" of an injury sufficient to trigger the duty

to pay "interim" compensation pending acceptance or denial. We conclude that the employer in this case did not have such notice or knowledge.

We have held that, "Mere knowledge that a worker has been hospitalized is hardly effective notice of a claim for compensation which would trigger the duty to pay interim compensation pending acceptance or denial." Warren M. Dye, 36 Van Natta 1712, 1713 (1984). See also Patricia G. Debates, 38 Van Natta 894 (1986). We have already concluded that claimant has not proven by a preponderance of the evidence that the alleged incident actually occurred. Based upon the entire record, we find that the persuasive evidence establishes that it is more likely than not that claimant did not report any such incident to any representative of the employer until June 1982 at the earliest.

Claimant himself did not initiate a workers' compensation claim until June 1982. We accept the Referee's analysis that the employer had notice of an injury sufficient to prevent the claim from being barred as untimely. Baldwin v. Thatcher Construction, 49 Or App 421, 425 (1980); Summit v. Weyerhaeuser Co., 25 Or App 851, 857 (1976). However, these cases distinguish between an employer's knowledge of an injury and knowledge that the injury may result in a claim for compensation. We hold that when disability occurs which would not suggest to a reasonable worker or employer that a potential workers' compensation claim exists, substantial justice requires a clear form of notice or knowledge that compensation is being claimed to trigger the employer's claim processing obligation. We find no such notice in this case until on or about June 14, 1982, when claimant contacted the employer's workers' compensation claims representative and informed him that he sought compensation. The employer's obligation to pay "interim" compensation arose 14 days thereafter. ORS 656.262(4).

The employer did not formally deny the claim until approximately five months had passed from its first notice or knowledge of the claim. During that time, however, claimant was working at his full wage and was not entitled to compensation. Bono v. SAIF, 298 Or 405 (1984). Although we agree with the Referee that the three-month delay in issuing its denial was unreasonable on the employer's part, there are no "amounts then due" upon which to base a penalty. See EBI Companies v. Thomas, 66 Or App 105 (1983). Claimant's attorney shall, however, be awarded an employer-paid attorney fee in connection with the employer's unreasonable conduct. ORS 656.262(10); 656.382(2). See Spivey v. SAIF, 79 Or App 568, 572 (1986). But see Anderson v. EBI Companies, 79 Or App 345, 351 (1986).

#### ORDER

The Referee's order dated November 23, 1983 is reversed in part and affirmed in part. That portion of the Referee's order that awarded claimant an employer-paid attorney fee of \$800 in connection with the employer's unreasonable delay in denial of the claim is affirmed. The remainder of the order is reversed. The employer's denial dated November 5, 1982 is reinstated in its entirety and approved.

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WILLIAM R. ROSE, Claimant  
Pozzi, et al., Claimant's Attorneys  
Roberts, et al., Defense Attorneys  
Tooze, et al., Defense Attorneys

WCB 84-12425 & 84-09803  
October 3, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Cascade Corporation requests review of Referee Menashe's order which set aside its denial of responsibility for aggravation of claimant's right knee claim. Both Cascade Corporation and CPP Security Service request review of the award of claimant's attorney fees. The issues are responsibility and attorney fees.

Claimant suffered a compensable injury to the right knee on April 1, 1982 while in the employ of Cascade Corporation (Cascade). Dr. Wells, an orthopedic surgeon, treated claimant for the right knee injury. In July of 1982, Dr. Wells requested authorization to perform arthroscopic surgery. Cascade sent claimant to Dr. Bachhuber and Dr. McNeil for independent medical examinations. Both doctors recommended against performing surgery. Dr. Wells disagreed with the reports of Dr. Bachhuber and Dr. McNeil and continued to request authorization to perform the arthroscopy. On February 1, 1983, Cascade issued a denial of the surgery from which claimant appealed.

Subsequently, claimant also appealed from a Determination Order dated March 28, 1983 which awarded no permanent partial disability for his knee. A hearing was held in June of 1984 before Referee St. Martin. At hearing, Cascade withdrew the denial of surgery. The Referee awarded claimant 20 percent scheduled permanent partial disability for his right leg.

In April of 1984, claimant went to work for CPP Security Service as a security guard. On July 21, 1984, claimant was working as a patrol driver when he slipped and fell injuring his right shoulder and right knee. Claimant testified that he felt severe pain in his right knee. Claimant began treating with Dr. Keist, an orthopedic surgeon, on July 24, 1984. Dr. Keist immediately recommended that arthroscopy be performed.

After performing the arthroscopy, Dr. Keist described claimant's knee condition as chronic in nature with a chronically torn medial meniscus. Dr. Keist stated that it was "criminal" that claimant did not have the arthroscopy performed two years ago and that "[h]e has simply been grinding his knee joint for the past two years." With regard to the 1984 injury, Dr. Keist stated that the current 1984 injury caused bruising, discoloration and some bleeding along the inside of the knee. Dr. Keist opined that the bleeding had no medical significance. Dr. Keist agreed with Dr. Wells that arthroscopy should have been performed in 1982 and that the 1984 incident merely precipitated claimant's visit to Dr. Keist. Dr. Keist's testimony clearly indicates that claimant's chronically torn meniscus, arthroscopic menisectomy and any resulting disability are related to claimant's 1982 knee injury for which Cascade is responsible.

On August 21, 1984, CPP Security denied claimant's claim stating that Cascade was the responsible employer. Cascade issued a denial of responsibility on November 9, 1984. On December 5, 1984, CPP Security was designated as paying agent pursuant to ORS 656.307. Prior to the October 22, 1985 hearing, CPP Security

issued an amended denial on October 16, 1985 which accepted claimant's shoulder and back condition as resulting from claimant's fall. CPP Security also accepted the knee condition solely for the internal bleeding and bruising as a non-disabling injury. CPP Security continued to deny claimant's chronically torn meniscus and any disabling right knee condition.

Cascade procedurally attacks the October 16, 1985 denial of CPP Security. Cascade claims that CPP Security's amended denial is a preclosure partial denial. Cascade argues that CPP accepted claimant's knee condition and then issued a partial denial on October 16, 1985. An employer may not accept a claim for a particular body part and then issue a partial denial of that body part, prior to the claim being closed by the Evaluation Division. Roller v. Weyerhaeuser Co., 67 Or App 583 (1984); Safstrom v. Riedel International, 65 Or App 728 (1983).

In the present situation CPP Security issued a total denial of responsibility for claimant's claim on August 21, 1984. CPP amended the denial on October 16, 1985 to partially accept claimant's work injury. CPP Security's denial of October 16, 1985 is more properly viewed as a partial acceptance. Nothing in the law prevents an employer from amending a denial to accept a part or all of a claimant's claim. Roller and Safstrom do not apply.

The Board finds nothing improper in CPP Security's amended denial of October 16, 1985 and, as supplemented above, affirms the Referee with regard to the issue of responsibility.

Both employers request review of the Referee's award of attorney fees. The Referee set aside both employers' responsibility denials and ordered each employer to pay claimant's attorney a \$750 attorney fee in addition to any compensation paid to claimant. In denying employers' motions for reconsideration, the Referee stated that the attorney fee award reflected the services rendered by claimant's attorney prior to hearing.

When a .307 order has been issued and compensability is not at issue, claimant's attorney is not entitled to an attorney fee. Petshow v. Farm Bureau Ins., 76 Or App 563 (1985); Pamela R. Stovall, 38 Van Natta 41 (1986). However, attorney fees are warranted for a claimant's attorney's efforts in procuring a ".307 order" and obtaining compensation for the claimant. Mark L. Queener, 38 Van Natta 882 (1986). Further, when compensability is not at issue, claimant must pay his attorney from the award of compensation. ORS 656.386 (1); Mark L. Queener, supra.

Claimant's attorney is entitled to an attorney fee for services rendered in obtaining the .307 order of December 5, 1984. Based on our review of the record, we find \$500 to be a reasonable attorney fee. This fee is to be paid out of claimant's award of compensation.

#### ORDER

The Referee's order dated January 9, 1986 is affirmed in part, reversed in part and modified in part. That portion of the Referee's order regarding responsibility, as supplemented above, is affirmed. Claimant's attorney is allowed \$500, as a reasonable attorney fee, to be paid from claimant's award of compensation. That portion of the order requiring Cascade Corporation and CPP Security to pay employer-paid attorney fees is reversed.

EVA L. (DONER) STALEY, Claimant  
Pozzi, et al., Claimant's Attorneys  
Keith Skelton, Defense Attorney  
Roberts, et al., Defense Attorneys

WCB 83-07726 & 83-09071  
October 3, 1986  
Order on Reconsideration

The Ingersoll-Rand Company, a self-insured employer, has moved the Board to reconsider our Order on Review dated June 25, 1985. It has also moved the Board to entertain oral arguments regarding the issues raised in its request for reconsideration. In our June 25, 1985 order we affirmed the order of the Referee, who set aside the employer's denial of claimant's "new injury" claim and upheld the Liberty Northwest Insurance Company's denial of claimant's aggravation claim for her low back condition. The sole issue on review was which of the two insurers was responsible for claimant's condition. The Referee held Ingersoll-Rand, claimant's most recent employer, to be responsible. The Referee relied on the Court of Appeals decision in Boise Cascade Corp. v. Starbuck, 61 Or App 631 (1983), and found that claimant's most recent employment independently contributed to her disability, although the employment did not worsen claimant's underlying condition. On our review of the record we were persuaded that claimant's condition had in fact worsened as a result of the later employment and that the most recent employment was in fact the more likely cause of claimant's disability. We also noted, citing the Supreme Court's decision in Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984), that even if we had been unconvinced as to which injury was the more likely cause, the last injurious exposure rule would have placed liability on the most recent employer, for its employment was capable of causing claimant's disability.

On July 10, 1985 we abated our order to allow opposing parties an opportunity to respond to Ingersoll-Rand's motion for reconsideration. Ingersoll-Rand's request for reconsideration is allowed. Our previous order is withdrawn for reconsideration. We deny the employer's motion for oral arguments, however, finding no compelling reason to entertain them. See Steve Krajacic, 37 Van Natta 1286 (1985); Frank R. Roberts, 37 Van Natta 730 (1985).

In its motion for reconsideration Ingersoll-Rand asks us to address three inquiries regarding the allocation of the burden of proof in successive injury cases where compensability is not an issue. We paraphrase the employer's inquiries:

1. In a successive injury responsibility dispute, which party has the initial burden of going forward with evidence?
2. Does placement of the burden of going forward depend on whether the factfinder identifies a significant traumatic incident during the most recent employment?
3. Does liability remain with the most recent employer where the factfinder is unconvinced, one way or another, that conditions of the most recent employment were a material contributing cause of claimant's disability?

With regard to Ingersoll-Rand's first inquiry, we find that in a successive injury case, in which an order pursuant to ORS 656.307 has been entered and compensability is not an issue, the initial burden of going forward lies with the first (aggravation) employer. We wish to make clear that this standard applies only in the following circumstances: (1) two employers/insurers are involved; (2) the first employer/insurer has accepted claimant's original claim for injury; (3) claimant has alleged increased disability during employment with the second employer/insurer; (4) claimant has made claims against the first employer/insurer for aggravation and against the second employer/insurer for a new injury; (5) both employer/insurers have denied responsibility, but not compensability.

In reaching our conclusion we draw from the Supreme Court's discussion of the "two last injurious exposure rules" in Bracke v. Baza'r, 293 Or 239 (1982). In a successive injury case, the first employer has already accepted an injury as being related to its employment. When additional disability to the same body part results at a later employment, the "substantive rule of liability" of the last injury rule, Bracke, supra at 245, will assign liability to the later employer if the last employment independently contributed to causing the disability. Hensel Phelps Construction v. Mirich, 81 Or App 290 (1986). See also Boise Cascade Corp. v. Starbuck, 296 Or 238 (1984); Smith v. Ed's Pancake House, 27 Or App 361 (1976). Under the "rule of proof" of the last injury rule, Bracke, supra at 246, the first employer must first introduce evidence that the last employer's employment independently contributed to causing the disability in order to bring the substantive rule of liability into play. If the first employer does so, and the last employer does not meet that evidence with sufficient contrary evidence, liability is shifted to the last employer under the substantive rule of liability. Thus, the first employer has the initial burden of going forward with sufficient evidence to bring the rule of liability into play.

Ingersoll-Rand next asks whether placement of the burden of proof depends on the identification of a traumatic incident during the second employment. The answer is: No. As the court recently held in Hensel Phelps Construction v. Mirich, supra, "[T]here is no requirement that there be a 'definable accident or event' to hold the later employer liable." What is required is that the first employer go forward with proof of the second employment's independent contribution, and that the second employer be unable to meet that proof with sufficient contrary evidence.

Last, Ingersoll-Rand asks whether liability remains with the first employer where the factfinder is unconvinced, one way or another, that the most recent employment contributed to claimant's disability. We conclude that to shift liability away from the first employer/insurer, the first employer/insurer must offer proof of more than a possible contribution by the second employment; it must prove that the later employment did, in fact, contribute to the cause of claimant's disability.

The answer to this inquiry is complicated by the Court's seemingly conflicting statements regarding successive injuries in Boise Cascade Corp. v. Starbuck, supra. At one point in the opinion, the court notes:

"In the situation where a compensable injury at one employment contributes to a disability occurring during a later employment involving work conditions capable of causing the disability, but which did not contribute to the disability, the first employer is liable." Id. at 244 (emphasis added).

This statement suggests that for liability to shift from the first employer to a later one, there must be evidence of an actual contribution to the causation of the claimant's disability by the second employment.

Later in the Starbuck opinion, however, the Court states:

"If the trier of fact is convinced that the disability was caused by successive work-related injuries but is unconvinced that any one employment is the more likely cause of the disability, the finding is for the worker whose employment may have caused the disability." Id. at 245 (emphasis added).

The "more likely" and "may have" language in this statement suggests that the second employer may be held liable even if the trier of fact is not convinced that the later employment did, in fact, contribute to the cause of claimant's disability.

Although the Starbuck statements are confusing, we find that the court intended to require proof of an actual contribution by the second employment in order for liability to shift to the second employer. We note that in discussing the last injurious exposure rule, the court states: "The last injurious exposure rule is not intended to transfer liability from an employer whose employment caused a disability to a later employer whose employment did not." Id. at 244 (emphasis added). This must mean that in order for liability to shift away from the first employer, whose employment, in fact, caused claimant's initial disability, that employer must offer proof of more than a possible contribution by the second employment; it must prove that the later employment did, in fact, contribute to the cause of claimant's disability.

On the merits of the present case, we remain convinced that claimant's most recent employment at Ingersoll-Rand independently contributed to the causation of her disability. Ingersoll-Rand, therefore, is responsible.

Now, therefore, having granted the self-insured employer's motion for reconsideration, we adhere to and republish our previous order, effective this date.

IT IS SO ORDERED.

RICHARD C. ALVAREZ, Claimant  
Roxie A. Cuellar, Claimant's Attorney  
Beers, et al., Defense Attorneys  
Alice M. Bartelt, Defense Attorney  
SAIF Corp. Legal, Defense Attorney  
Cliff, et al., Defense Attorneys

WCB 84-05129, 84-06369, 85-06405  
& 85-06519  
October 7, 1986  
Order Denying Motion for  
Reconsideration

Claimant has requested reconsideration of our Order on Review dated August 6, 1986. The request was received by the Board September 8, 1986. The thirtieth day after publication of the Order on Review was September 5, 1986. The order became final as of the close of business September 5, 1986. We have no jurisdiction to reconsider the order. The motion for reconsideration is denied as untimely.

IT IS SO ORDERED.

GORDON D. ARNOLD, Claimant  
Mitchell, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 84-13251  
October 7, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Leahy's order that upheld the SAIF Corporation's denial of claimant's industrial injury claim for a hernia. In its brief SAIF requests that we review that portion of Referee Leahy's order which awarded a penalty and attorney fee for the late payment of interim compensation. The issues are compensability and penalties and attorney fees.

The Board affirms that portion of the Referee's order that upheld the denial of Claimant's industrial injury claim.

Claimant has the burden of proving all aspects of his claim by a preponderance of the evidence. See Hutcheson v. Wyerhaeuser, 288 Or 51, 56 (1979). The record contains no evidence regarding what interim compensation was paid to claimant prior to SAIF's denial of November 19, 1984. Therefore, claimant has failed to carry his burden of proof. The Referee's award of a penalty and attorney fee for the failure to pay interim compensation is reversed.

ORDER

The Referee's order dated February 20, 1986 is affirmed in part and reversed in part. That portion of the order that awarded a penalty and attorney fee for the late payment of interim compensation is reversed. The remainder of the order is affirmed.

WILLIAM C. DILWORTH, Claimant  
Peter O. Hansen, Claimant's Attorney  
Schwabe, et al., Defense Attorneys

WCB 85-0050M  
October 7, 1986  
Own Motion Determination

The Board ordered claimant's claim reopened under the provisions of ORS 656.278 by our Own Motion Order dated September 25, 1986. The claim has now been submitted for closure. Based upon our review of the entire record in this matter, we conclude and find that claimant was medically

stationary as of March 8, 1985. Claimant is awarded compensation for temporary total disability from January 8, 1985 through March 8, 1985, inclusively.

Based upon the entire record, we find that claimant is entitled to compensation for permanent partial disability on account of his accepted psychiatric condition within the range outlined in OAR 436-30-540(4)(b), which we accept as a guideline. Claimant is awarded compensation for 128 degrees for 40 percent unscheduled permanent partial disability for psychiatric disability. This award is in addition to all previous awards for permanent partial disability.

The employer has requested authorization to offset overpaid temporary disability compensation against the permanent disability compensation awarded. The overpayment is based upon the stipulation of the parties, approved on the record by Referee Menashe, appointing the employer as "paying agent" between October 1, 1985 and April 9, 1986. Because jurisdiction over the self-insured employer arose solely under ORS 656.278, the formal procedure available under ORS 656.307 was not applicable to the parties in this proceeding. See OAR 436-60-180(3). However, the parties sought to implement, by agreement, an analogous procedure to ensure compensation to claimant pending resolution of a dispute as to employer-insurer responsibility. Had this been a case under ORS 656.307, designation as paying agent would not have operated as a waiver of the right to request authorization to offset overpaid compensation. While ORS 656.307 is not directly operable in this case, we conclude that its spirit and purpose are not abrogated by ORS 656.278. See Edward Hines Lumber Co. v. Kephart, 81 Or App 43, 46 (1986). We, therefore, authorize the self-insured employer to offset overpaid temporary disability compensation against the permanent disability compensation awarded by this order.

Claimant's attorney is allowed as a reasonable attorney fee 25 percent of the increased permanent partial disability compensation made payable by this order, not to exceed \$800.

IT IS SO ORDERED.

DENNIS S. BERLINER, Claimant  
Malagon & Moore, Claimant's Attorneys  
Foss, et al., Defense Attorneys

WCB 85-12191  
October 8, 1986  
Order on Review

Reviewed by the Board en banc.

The self-insured employer requests review of Referee Baker's order that disallowed an allegedly unauthorized offset and awarded penalties and attorney fees. The issue is offset.

Claimant compensably injured both knees and his low back in May 1975 and subsequently developed psychological problems. Claimant received treatment for his conditions and returned to work in August 1983. The employer continued to pay temporary disability benefits after claimant returned to work and an overpayment of more than \$7,000 resulted. In a letter dated March 23, 1984, the employer informed claimant that it would request authorization to offset the overpayment against any permanent partial disability awarded when the claim was closed.

The claim was closed by Determination Order dated December 17, 1984 with awards of scheduled and unscheduled permanent partial disability. The typed body of the Determination Order contained express authorization for "[d]eduction of overpaid temporary disability, if any, from unpaid permanent disability." The employer applied claimant's permanent disability awards toward its overpayment and by letter dated January 3, 1985, informed claimant that the overpayment still stood at more than \$2,700.

Claimant appealed the December 1984 Determination Order and Referee Pferdner increased the permanent disability awards for claimant's right knee and low back. The employer did not request that Referee Pferdner authorize further offset of the overpaid temporary disability compensation and the Referee did not address the issue in his Opinion and Order or in a subsequent Order on Reconsideration. By letter dated two days after the date of the Order on Reconsideration, the employer informed claimant that the additional permanent disability compensation awarded by Referee Pferdner had been applied to further reduce the overpayment. Claimant requested a hearing, alleging that this offset was unlawful.

Claimant's request came to hearing before Referee Baker. Referee Baker concluded that the offset was without authority, ordered the employer to pay the additional permanent disability compensation awarded by Referee Pferdner without offset and assessed penalties and attorney fees. On Board review, the employer contends that the authorization granted by the December 1984 Determination Order continued after its initial offset and permitted the later offset against the additional permanent disability compensation awarded by Referee Pferdner. We agree with the employer and reverse Referee Baker's order.

Offsets are permissible only when authorized by the Evaluation Division, a Referee, the Board or a court. Forney v. Western States Plywood, 66 Or App 155 (1983), aff'd 297 Or 628 (1984); Pauline V. Bohnke, 37 Van Natta 146 (1985) aff'd, United Medical Laboratories v. Bohnke, 78 Or App 671 (1986) (per curiam). In the present case, the Evaluation Division authorized the employer to offset overpaid temporary disability compensation against unpaid permanent disability compensation. That authorization continued after the initial offset because the amount of the overpaid temporary disability compensation exceeded the value of the permanent disability awards granted at that time. We conclude, therefore, that the offset taken by the employer was proper and that penalties and attorney fees were not warranted for the employer's action.

ORDER

The Referee's order dated February 14, 1986 is reversed.

Board Member Lewis, dissenting:

I would affirm the Referee's order and, therefore, I respectfully dissent.

Claimant was injured in 1975. Claimant returned to work in August 1983. In March 1984 the self-insured employer notified claimant that it intended to seek recovery of allegedly overpaid temporary disability compensation out of future awards of compensation. The first Determination Order was published in

December 1984. The employer sought and obtained authorization to offset overpaid temporary disability compensation out of permanent disability compensation awarded by the Determination Order. The overpayment exceeded the value of the permanent disability compensation awarded by the Determination Order.

Claimant requested a hearing on the issue of the extent of his permanent partial disability. There is no response from the employer in the record. The Referee's Opinion and Order recited that the only issue at the hearing was the extent of claimant's permanent disability. Claimant requested reconsideration and on reconsideration the Referee republished his order without modification. The Referee did not authorize an offset of overpaid temporary disability compensation out of compensation awarded. The employer notified claimant that because there was still an overpayment of temporary disability compensation that it would offset the overpayment out of the current award of compensation and out of mileage reimbursement claims presented after the hearing. The employer produced no evidence that it sought authorization of an offset by the Referee against any additional compensation that might have been awarded. The employer did not seek a reconsideration of the order to allow the Referee to consider authorization of an offset once additional compensation had been awarded.

The employer argues that its notice to claimant that it wished to recover the overpaid temporary disability compensation was the equivalent of raising the issue at hearing. There is no evidence that the issue of authorization of an offset was ever considered by the Referee at the hearing on extent of disability. The employer argues that the authorization by the Evaluation Division of the Workers' Compensation Department remains in effect until the overpayment is fully recovered and that it should not be necessary for the employer to request an offset out of each award of compensation.

I am not persuaded by the employer's argument. I believe that the policy stated by the Court of Appeals in Forney v. Western States Plywood, 66 Or App 155, 159-60 (1983), affirmed, 297 Or 628 (1984), requires that the employer seek and obtain authorization of any offset out of each award of compensation. I believe that the issue of an offset out of an award by a Referee must be raised as an issue for consideration by that Referee or by a reviewing body subsequent to the award. I do not believe that an initial authorization of an offset by the Evaluation Division out of one award of compensation carries with it the implied authority to offset future awards by a Referee, the Board, or the Court without notice or hearing on the issue of the offset. For this reason I would affirm the Referee's order, and I, therefore, respectfully dissent.

DAVID L. FLEMING, Claimant  
Evohl F. Malagon, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 85-09300  
October 8, 1986  
Order on Reconsideration

On September 3, 1986 the Board received the SAIF Corporation's request to reconsider and amend its Order on Review dated August 27, 1986. On September 10, 1986 claimant requested review by the Court of Appeals of the Order on Review. On September 17, 1986 the Board withdrew its Order on Review and notified all parties. Claimant submitted no response to SAIF's request.

SAIF requests that the Board modify its Order on Review to reinstate the Determination Order dated August 14, 1985 which was set aside because the Referee found that claimant's low back condition was compensable and was not stationary at the time of closure. The Board reversed the Referee's finding of compensability of the low back condition. Therefore the status of the low back condition was irrelevant to the issues whether the accepted upper back and neck conditions were stationary and the extent of claimant's permanent disability. Consequently the Determination Order should be reinstated.

The SAIF Corporation's request for reconsideration is granted. The Order on Review dated August 27, 1986 which was withdrawn on September 17, 1986 is republished and the order is amended by adding the following sentence: The Determination Order dated August 14, 1985 is reinstated and affirmed.

IT IS SO ORDERED.

JOSEPH L. GARVEY, Claimant  
William H. Skalak, Claimant's Attorney,  
Schwabe, et al., Defense Attorneys

WCB 84-02328  
October 8, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The United Employers Insurance Company requests review of that portion of Referee Peterson's order that set aside its denial of claimant's claim for medical services. The issue is medical services.

Claimant injured his low back in January 1982 in the course of his employment as a warehouseman when he attempted to move a heavy box on a shelf. The claim for this injury was accepted by the insurer, United Employers Insurance Company (United Employers). Claimant received conservative treatment, primarily from two chiropractors in the same office, Drs. Beeson and Valenzuela, but continued to complain of severe pain. Beginning in June 1982, claimant was examined by a number of independent medical examiners, many of whom thought that claimant's injury had resolved and that his continued complaints related to psychological factors which had nothing to do with the injury. Some of these examiners recommended that chiropractic treatment be discontinued as unnecessary and even harmful in the sense that such treatment tended to perpetuate claimant's psychological condition. Claimant's claim was closed by Determination Order in November 1982 with no award for permanent partial disability.

After claim closure, claimant's pain complaints continued and spread to other portions of his anatomy including his mid-back, hip and head. Subsequent medical reports discuss whether claimant's symptoms were psychological in origin and, if so, whether the psychological condition was compensably related to the original injury. Various doctors took positions on both sides of these questions. In November 1983, the parties entered into a Disputed Claim Settlement (DCS) which recited some of the evidence indicating that a bona fide dispute had arisen concerning the compensability of claimant's alleged psychological condition, awarded claimant a sum of money and provided that claimant's psychological condition was denied and was to remain in denied

status. The following month, claimant began treating with another chiropractor, Dr. Saalfeld. Dr. Saalfeld diagnosed chronic lumbar, thoracic and cervical strain or sprain and recommended ongoing treatment.

Claimant obtained employment as a grocery clerk with another employer in December 1983. In January 1984, claimant filed a claim with his new employer after his back "popped" while he was mopping a floor. This claim was accepted by the insurer of the new employer, Wausau Insurance Company (Wausau).

In February 1984, United Employers issued a denial of billings it had received from Dr. Saalfeld on the ground that the treatment related to the psychological condition which had been disposed of by the DCS. Thereafter, Dr. Saalfeld began billing Wausau. In March 1984, Dr. Saalfeld wrote Wausau stating that claimant's condition from the second injury was then stationary and that claimant had sustained no permanent impairment as a result of the injury. Thereafter, Dr. Saalfeld began billing United Employers again.

Claimant was examined by another chiropractor, Dr. Tilden, in June 1984. Dr. Tilden found no organic basis for any of claimant's ongoing complaints and stated that claimant had sustained no measurable permanent impairment as a result of the 1982 industrial injury.

Dr. Saalfeld disputed Dr. Tilden's conclusions and stated in July 1984 that he thought that claimant did have some physical impairment in the form of "structural problems" and that claimant's complaints were not entirely explained as psychological. Claimant continued to treat with Dr. Saalfeld one or two times per month through the time of the hearing.

At the hearing, claimant testified that he was continuing to work as a grocery clerk. He stated that he sought treatment on an "as needed" basis for muscle spasms and back pain and that the treatments helped relieve these problems. With regard to the injury while at the second employer, claimant stated that this injury had resolved and that his then current condition related back to his 1982 injury.

Dr. Saalfeld's testimony echoed that of claimant. He reiterated his conclusion that claimant continued to experience physical symptoms as a result of his 1982 injury. With regard to the injury at the second employer, Dr. Saalfeld stated that it had not worsened claimant's underlying condition. The Referee expressly found claimant and Dr. Saalfeld credible based on their demeanors at the hearing.

The Referee concluded that the treatment provided by Dr. Saalfeld was reasonable and necessary, that the treatment related, at least in part, to physical impairment sustained as a result of claimant's 1982 injury and that the injury at the second employer had not contributed independently to claimant's condition so as to shift responsibility away from the first employer. On Board review, United Employers argues that all three of the Referee's conclusions were erroneous.

After our de novo review of the record, we conclude that the complaints being treated by Dr. Saalfeld relate solely to the psychological condition which has been disposed of by the DCS.

The thorough examination by Dr. Tilden and the examinations by other medical professionals earlier in the record fail to demonstrate any physical basis for claimant's ongoing complaints. Those complaints have wandered far from the site of the original injury. The testimony of claimant and that of Dr. Saalfeld, although credible in the sense that it was offered in good faith, is outweighed by the contrary medical evidence. We, therefore, reverse that portion of the Referee's order that set aside United Employers' denial.

ORDER

The Referee's order dated February 21, 1986 is reversed in part. Those portions of the order that set aside the insurer's medical services denial, ordered payment of Dr. Saalfeld's billings subsequent to the date of the denial and awarded an associated attorney fee are reversed. The remainder of the Referee's order is affirmed.

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MARY L. TADLOCK, Claimant  
Malagon & Moore, Claimant's Attorneys  
Davis, et al., Defense Attorneys

WCB 85-04193  
October 8, 1986  
Order on Reconsideration

Claimant has requested abatement of the Board's Order on Review dated September 17, 1986. Specifically, claimant requests that we defer ruling on this matter until we have had an opportunity to consider arguments advanced in another case involving these parties which is currently pending before us.

Claimant argues that by allowing her request we would be advancing administrative economy. We disagree. First, claimant's request to postpone a decision in this matter was only received after we had completed our review and issued our order. Had we received claimant's request prior to our review, we could more readily appreciate claimant's "administrative economy" argument. However, considering the tardiness of the request, we fail to see how deferring our decision would now advance administrative economy. Moreover, some of the issues presented in the case currently awaiting our review have apparently evolved from this matter. Thus, a final determination on the issues involved herein would likely serve to further solidify and clarify a portion of the issues in the later case.

Accordingly, we deny claimant's request for abatement. Our previous order is withdrawn. On reconsideration, we adhere to and republish our former order, effective this date.

IT IS SO ORDERED.

PEDRO H. AYALA, Claimant  
Annala, et al., Claimant's Attorneys  
Beers, et al., Defense Attorneys

WCB 85-08770  
October 10, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Leahy's order that: (1) upheld the insurer's denial of claimant's claim for aggravation; (2) upheld the insurer's denial of claimant's claim for his low back; and (3) awarded claimant 15 percent unscheduled permanent partial disability. The issues are aggravation, compensability and extent of unscheduled permanent partial disability.

Just prior to hearing, the insurer verbally issued a denial of claimant's low back condition stating that it was not related to claimant's accepted June 7, 1984 industrial injury. The record reveals that a substantial portion of the testimony and medical evidence centered on the issue of the compensability of claimant's low back condition. The Referee, in his opinion, thoroughly analyzed the evidence and concluded that claimant had failed to prove by a preponderance that his low back condition was compensably related to his original industrial injury. On review, we agree with the Referee and modify the order to reflect that the insurer's denial of claimant's low back condition is affirmed.

The Board affirms the Referee's order as modified above.

ORDER

The Referee's order dated February 24, 1986, is modified to include upholding the insurer's denial of claimant's low back condition. As modified, the order is affirmed.

DARLEEN D. CAHALL, Claimant  
John D. McLeod, Claimant's Attorney  
Roberts, et al., Defense Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 84-05421, 85-06683, 85-07402  
& 85-07403  
October 10, 1986  
Order on Reconsideration

EBI Companies has requested reconsideration of our Order on Review dated May 27, 1986. We abated our order to allow the SAIF Corporation time to file a response. This case is factually analogous to the case of Nancy A. Fowler, 38 Van Natta 1291 (WCB Case Nos. 85-01218 & 85-04293; decided this date). For the reasons stated in Fowler, we withdraw our previous order and reverse the Referee's Order on Reconsideration dated November 7, 1985. After our de novo review of the record, we conclude that claimant sustained a new injury to her low back on December 31, 1984 and that SAIF is now responsible for that condition. SAIF's denial dated May 15, 1985 is reversed. EBI's denial dated April 3, 1985 is upheld. SAIF shall reimburse EBI for any monies the latter has paid on account of claimant's injury of December 31, 1984.

IT IS SO ORDERED.

THOMAS E. DeSYLVIA, Claimant  
Peter O. Hansen, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney  
Beers, et al., Defense Attorneys

WCB 84-13344 & 82-11158  
October 10, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests, and the SAIF Corporation cross-requests, review of that portion of Referee Knapp's order which: (1) set aside SAIF's denial of responsibility for claimant's current right elbow condition; and (2) upheld EBI Companies' denial of responsibility for the aforementioned condition. On review, the issue is insurer responsibility between multiple accepted injury claims.

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

Following our de novo review of the medical and lay

evidence, we are persuaded that claimant's current right elbow condition was caused by his 1966 compensable injury for which SAIF was the insurer on the risk, rather than his subsequent injuries for which EBI was responsible. Inasmuch as we find that claimant's disability was caused by his 1966 injury, the "last injurious exposure" rule, more appropriately identified for these purposes as the "last injury rule", has no effect. Boise Cascade Corp. v. Starbuck, 296 Or 238, 244 (1983); CECO Corp. v. Bailey, 71 Or App 782, 786 (1984). Consequently, we agree with the Referee that SAIF is responsible for claimant's current right elbow condition.

Had we applied the aforementioned rule, responsibility would still lie with SAIF because we are not persuaded that claimant's 1982 injuries, for which EBI was on the risk, independently contributed to the causation of claimant's current right elbow condition. In other words, EBI has persuasively rebutted the presumption that claimant's later compensable injuries contributed independently to his current condition. See Industrial Indemnity Co. v. Kearns, 70 Or App 583, 588 (1984). Accordingly, responsibility for claimant's current right elbow condition does not lie with EBI.

ORDER

The Referee's order dated January 14, 1986, as reconsidered on January 22, 1986, is affirmed.

NANCY A. FOWLER, Claimant  
Gatti & Gatti, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney  
Schwabe, et al., Defense Attorneys

WCB 85-01218 & 85-04293  
October 10, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

United Employers Insurance Company requests review of that portion of Referee Baker's order that found it rather than the SAIF Corporation responsible for an injury sustained in the course of claimant's employment under a wage subsidy agreement. The issue is responsibility.

Claimant compensably injured her neck, upper back and right shoulder in December 1983 while working for a restaurant insured by United Employers Insurance Company (United Employers). She was treated conservatively, received vocational assistance and obtained a new job in September 1984 under an eight-month wage subsidy agreement. The new employer was insured by SAIF. After claimant had worked for the new employer for 60 days, her eligibility for further vocational assistance ended pursuant to OAR 436-61-126(4) (since amended and renumbered OAR 436-120-090(4)) and the vocational assistance provider closed its file. Claimant's claim was closed by Determination Order in January 1985 with an award of 20 percent unscheduled permanent partial disability.

In February 1985, claimant filed a claim for a new injury in the course of her new employment. SAIF denied the claim on compensability grounds. Claimant then filed an aggravation claim with United Employers. United Employers denied the claim on compensability and responsibility grounds. SAIF added

responsibility as a basis for its denial at the time of the hearing.

The Referee ruled that claimant had sustained a new injury in the course of her employment with SAIF's insured, but because claimant was working under a wage subsidy agreement, the Referee assigned responsibility to the previous employer and its insurer, United Employers. The Referee concluded that this result was mandated by the Court of Appeals decisions in Wood v. SAIF, 30 Or App 1103 (1978) and Firkus v. Alder Creek Lumber Co., 48 Or App 251 (1980) and the Board case of John P. Keeble, 37 Van Natta 480 (1985). We agree with the Referee's factual conclusion that claimant sustained a new injury rather than an aggravation in February 1985. We disagree, however, with the Referee's legal conclusion that the aforementioned cases mandate assignment of responsibility to United Employers.

The Firkus case involved a claimant who sustained a compensable injury in the course of his employment and then sustained a new injury during a vocational training program developed by the Vocational Rehabilitation Division of the Department of Human Resources (VRD) on referral from the Field Services Division (FSD). The issue in that case was whether the employer at the time of the original injury or VRD was responsible for the new injury. The court ruled that VRD was not an "employer" within the meaning of ORS 656.005(14) when providing vocational services to workers' compensation claimants pursuant to contract with FSD and also ruled that VRD was not required to provide workers' compensation coverage for such claimants under its own controlling statutes, ORS 655.605 and 655.615. 48 Or App at 258-60. Instead, the court assigned responsibility for the new injury to the original employer under the rule that an injury during a vocational training program was a "direct and natural consequence of the original compensable injury." Wood v. SAIF, supra, 30 Or App at 1109. The only other alternative would have been to conclude that the injury was uninsured. See id. at 1110. On analogous facts in Wood, however, the court had rejected this alternative, citing the principle that the Workers' Compensation Act should be construed liberally in favor of the worker. Id.

The rules of Wood and Firkus are inapplicable in the present case. At the time of the new injury, claimant was working for a business which, unlike VRD, was an "employer" within the meaning of ORS 656.005(14) and was required to provide workers' compensation coverage for its employees. See ORS 656.017. We see no reason to distinguish this situation from any other responsibility case. Any language to the contrary in John P. Keeble, supra, is disavowed. We thus reverse the decision of the Referee and assign responsibility for claimant's conditions to the SAIF Corporation.

#### ORDER

The Referee's order dated November 19, 1985 is reversed. The SAIF Corporation's denial of June 4, 1985 is set aside and responsibility for claimant's neck, upper back and right shoulder conditions is assigned to the SAIF Corporation. The denial issued by United Employers Insurance Company on August 8, 1985 is reinstated.

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Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Fink's order, as amended, that: (1) interpreted the Determination Order of July 10, 1985 to award claimant 30 percent (96 degrees) unscheduled permanent partial disability for claimant's low back in addition to the 25 percent (80 degrees) previously granted by the Determination Order of February 8, 1984; (2) awarded penalties and attorney fees for the insurer's allegedly unreasonable interpretation of the July 1985 Determination Order; (3) awarded claimant 35 percent (112 degrees) unscheduled permanent partial disability for his low back in lieu of all prior awards; and (4) awarded claimant 15 percent (22.5 degrees) scheduled permanent partial disability for loss of use of his left leg. Claimant cross-requests review of that portion of the order that awarded him 35 percent (112 degrees) unscheduled permanent partial disability for his low back. He contends that the award should be increased to 65 percent (208 degrees). The issues are the interpretation to be given the Determination Order of July 10, 1985, penalties and attorney fees and extent of scheduled and unscheduled disability.

We affirm the Referee on the issues of extent of scheduled and unscheduled disability. Claimant's attorney is entitled to reasonable attorney fees in connection with these issues. See ORS 656.382(2); Shoulders v. SAIF, 300 Or 606, 609-10 (1986). With regard to the other issues presented, we reverse.

Claimant injured his low back in March 1983 in the course of his employment as a truck driver and mechanic when he lifted a heavy brake drum. A myelogram revealed a herniated disc at L5-S1 and an extruded disc fragment was surgically removed in July 1983 by Dr. Utterback, an orthopedic surgeon. In January 1984, a consulting orthopedic surgeon, Dr. Pasquesi, opined that claimant was medically stationary and rated his impairment at 20 percent of the whole person. Dr. Utterback later concurred in these conclusions. The claim was closed by Determination Order dated February 8, 1984 with an award of 25 percent unscheduled permanent partial disability.

In April 1984, the claim was reopened while claimant participated in a vocational training program. See ORS 656.268(5). After completing the program, claimant obtained employment as a truck dispatcher in August 1984 under a wage subsidy agreement. Claimant's back symptoms waxed and waned throughout the remainder of 1984 and early 1985. In November 1984, he underwent a CT scan which demonstrated no change in his medical condition. Claimant was examined by a consulting orthopedic surgeon, Dr. McFarland, in May 1985. Dr. McFarland found no condition which warranted further treatment. Claimant's claim was again closed by Determination Order dated July 10, 1985. This Determination Order stated in pertinent part:

"On redetermination, the Department finds your award for permanent disability should be increased. The total unscheduled award

to date is 30 percent equal to 96 degrees. The insurer is now ordered to pay you \$9,600.00. This is the value allowed by this order only and does not include payments previously ordered."

The Determination Order misstated the total unscheduled disability previously awarded as 30 percent. In fact, only 25 percent had been awarded. The Determination Order then ordered payment of the amount just stated as already paid. In view of this confusing language, the insurer interpreted the Determination Order to award 30 percent in lieu of the previous award of 25 percent, thus yielding a net award of five percent. The insurer sent claimant a payment in accordance with this interpretation along with an explanatory letter. Claimant requested a hearing asking penalties and attorney fees for the insurer's alleged noncompliance with the July 1985 Determination Order.

At the hearing, the insurer introduced the worksheets used by the Evaluation Division in computing the awards granted by the February 1984 and July 1985 Determination Orders. The impairment rating in both worksheets was the same. The only significant difference in the values assigned to the various social and vocational factors in the two worksheets was in the age category, which reflected that claimant had aged one year during the interval between Determination Orders. This difference, however, was sufficient to result in a five percent increase in claimant's overall disability rating in the July 1985 worksheet when the total was rounded to the nearest five percent in accordance with OAR 436-30-390(4). At the bottom of the July 1985 worksheet, there is a plain statement that claimant was entitled to a net award of 16 degrees or five percent unscheduled permanent partial disability. It is clear from these worksheets that the insurer's interpretation of the July 1985 Determination Order was correct.

In his order, the Referee acknowledged that the July 1985 Determination Order was "contradictory on its face." He nonetheless found the insurer's action unreasonable in light of the "clear" language of the order. He also found the insurer's action unreasonable because the insurer failed to follow the "standard practice in the industry" of telephoning the Evaluation Division and asking clarification of the order.

We disagree with the Referee's reasoning. An order that is "contradictory on its face" has no "clear" meaning. By itself, therefore, the language of the order provided no basis for the Referee's conclusion that the insurer acted unreasonably. See Irene M. Gonzales, 38 Van Natta 954 (1986) (when the language of an order is sufficiently vague that an employer or insurer has a reasonable doubt concerning its duties under the order, failure to have timely paid compensation ultimately determined to be due under the order is not unreasonable delay, refusal or resistance to the payment of compensation).

Further, even assuming that by not contacting the Evaluation Division and asking for a clarification of the order, the insurer failed to follow the "standard practice in the industry," this was no basis for finding the insurer's action unreasonable. There is no statute or regulation mandating such a procedure and the insurer was entitled to act upon any

interpretation of the order that it considered reasonable, at the risk, of course, that a Referee, the Board or a court would later find its interpretation unreasonable. As it turns out, in light of the language of the July 1985 Determination Order and the record as a whole, we find that the insurer's interpretation of the order was reasonable. We reverse, therefore, those portions of the Referee's order that interpreted the July 1985 Determination Order to award claimant 30 percent unscheduled permanent partial disability in addition to the 25 percent previously awarded and that assessed penalties and attorney fees against the insurer for unreasonable delay, refusal or resistance in the payment of compensation.

To avoid any possible confusion concerning the intended effect of our order, we add one further comment. In his original order, the Referee ordered the insurer to pay claimant an additional \$8,000 in unscheduled permanent partial disability compensation in accordance with the Referee's interpretation of the July 1985 Determination Order. In his amended order, the Referee authorized the insurer to offset this \$8,000 against the awards of permanent partial disability granted by the Referee's original order and against any future awards of permanent partial disability. We expressly affirm and continue the offset authorization stated in the Referee's amended order.

#### ORDER

The Referee's order dated March 20, 1986 as amended by the order dated April 18, 1986 is reversed in part. Those portions of the original order that interpreted the Determination Order of July 10, 1985 to award claimant 30 percent unscheduled permanent partial disability in addition to the 25 percent previously awarded and that assessed against the insurer a 25 percent penalty and an attorney fee of \$1,500 for unreasonable delay, refusal or resistance in the payment of compensation are reversed. The remaining portions of the Referee's orders are affirmed. Claimant's attorney is awarded \$100 for services on Board review in connection with the issue of extent of scheduled disability and another \$300 for services on Board review in connection with the issue of extent of unscheduled disability, to be paid by the insurer.

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DAVID J. HYDE, Claimant  
Roberts, et al., Defense Attorneys

WCB 85-01563  
October 10, 1986  
Order of Dismissal

The insurer has moved the Board for an order dismissing claimant's request for Board review of Referee Siefert's order on the ground that the request was not served or actual notice of the request otherwise obtained by the insurer within the time required by ORS 656.289(3) and 656.295(2) (30 days). From our review of the record, we find that: (1) the Referee's order was mailed August 19, 1986; (2) claimant's request for review was received by the Board on September 18, 1986; (3) claimant did not mail or otherwise serve a copy of the request on any other party or attorney; (4) the insurer's attorneys received notice of the request for review on September 26, 1986, the thirty-eighth day after the Referee's order was mailed.

Claimant has failed to meet the jurisdictional require-

ments of ORS 656.289(3) and 656.295(5). The insurer's motion is allowed and claimant's request for Board review is dismissed as untimely. Argonaut Insurance v. King, 63 Or App 847, 852 (1983).

IT IS SO ORDERED.

BEVERLY C. MORGAN, Claimant  
Peter O. Hansen, Claimant's Attorney  
Scott Kelley, Defense Attorney

WCB 85-02708  
October 10, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Daron's order which: (1) upheld the insurer's denial of her aggravation claim for a bilateral wrist condition; (2) affirmed a February 19, 1985 Determination Order that awarded five percent (7.5 degrees) scheduled permanent disability for loss of use or function of each of her forearms; (3) declined to award additional temporary partial disability and interim compensation; and (4) declined to assess penalties and accompanying attorney fees for allegedly unreasonable claims processing. On review, claimant contends that: (1) her compensable condition has worsened; (2) she is entitled to additional awards of permanent disability, temporary disability, and interim compensation; and (3) penalties and attorney fees are warranted for the insurer's unreasonable claims processing.

With its respondent's brief, the insurer has enclosed copies of correspondence between the parties' attorneys which concern the temporary disability and interim compensation issues. This submission is treated as a motion for remand. We deny the motion. After conducting our de novo review, we find that the record has not been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5). In any event, the record was specifically held open to enable the parties to produce the information which was eventually contained in the aforementioned letters. Moreover, each of the letters was either directed to the Referee or a copy was furnished to him prior to the issuance of his order. Thus, copies of these letters are already contained in the record.

The Board affirms the order of the Referee with the following comments concerning the aggravation and penalty issues.

We disagree with the Referee's conclusion that claimant has two separate compensable occupational diseases; i.e. the original bilateral carpal tunnel syndrome and a subsequent bilateral overuse syndrome. Consequently, we have applied an "aggravation" analysis to this matter. See ORS 656.273(1).

Following our de novo review of the medical and lay evidence, we are not persuaded that claimant's condition resulting from her compensable bilateral wrist condition has worsened since the last award of compensation. Therefore, although we disagree with the Referee's statements concerning the existence of two separate occupational diseases, we agree with him that the evidence fails to establish a compensable aggravation claim.

Finally, we are not persuaded that the insurer unreasonably delayed, refused, or resisted the payment of compensation. Thus, neither penalties nor accompanying attorney fees are warranted. ORS 656.262(10); 656.382(1).

ORDER

The Referee's order dated March 7, 1986 is affirmed.

DONALD L. OXFORD, Claimant  
Parker, et al., Claimant's Attorneys  
Annala, et al., Defense Attorneys

WCB 85-07128  
October 10, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The self-insured employer requests review of Referee Lipton's order which set aside its denial of claimant's occupational disease claim for chronic obstructive pulmonary disease. On review, the employer contends that claimant's work exposure was not the major contributing cause of the worsening of his underlying condition. We agree and reverse.

Claimant was 59 years of age at the time of hearing. From 1967 until approximately 1980, he worked as a mechanic in a cannery cook room. Eight large "cookers and coolers" were also located in the room. This equipment generated a great deal of steam. During this time, claimant periodically received treatments for shortness of breath and fatigue from Dr. Wade, a general practitioner. His condition was variously diagnosed as chronic bronchitis and asthma. In March 1975 Dr. Wade recommended that he stop smoking. Claimant, a pack-and-a-half-per-day smoker since the age of 16, eventually ended his habit in 1981.

Between 1981 and 1982 claimant worked in the stock room, which was located adjacent to the cook room. His shortness of breath continued, but it "wasn't as bad after [he] left the cook room." In approximately 1982 claimant was transferred to the cannery warehouse, where he maintained equipment. This environment consisted of "a great deal of fiber dust" and forklift fumes, which increased his breathing difficulties. He continued to treat with Dr. Wade, who noted that claimant attributed his lung problem to an on-the-job exposure to a chemical inhalant which occurred in approximately 1973.

In November 1984 Dr. Wade performed a complete general reevaluation of claimant's lung condition. Dr. Wade diagnosed chronic obstructive pulmonary disease and asthma. Claimant noted that his breathing was gradually worsening, particularly in association with exercise. Among other recommendations, Dr. Wade suggested that claimant proceed with his future plans to retire.

In February 1985 Dr. Wade reported that claimant's lung problems appeared to be definitely related to his dusty work environment. To further investigate this relationship, claimant was referred to Dr. Patterson, pulmonologist. Pending this consultation, Dr. Wade recommended that claimant refrain from working. Thereafter, claimant stopped working and, eventually, retired.

In March 1985 claimant was examined by Dr. Patterson. Claimant attributed his current breathing difficulties to his dusty work environment. Dr. Patterson diagnosed severe chronic obstructive pulmonary disease with an element of reactive airways disease. Concluding that an application for workers' compensation benefits would be appropriate, Dr. Patterson agreed with Dr. Wade that claimant's work exposure had aggravated his disease.

In May 1985 dust samples were taken from claimant's work place. The test results indicated airborne dust levels below permissible limits and at concentrations which should not cause problems to workers.

After reviewing the aforementioned test results, Dr. Patterson offered an additional report. Dr. Patterson opined that the major contributing factor in claimant's condition was his underlying predisposition to asthma. Although there was "no doubt that the dust and fumes at work are a contributing factor at least to his immediate symptoms, and quite possibly to his long-term disease," Dr. Patterson concluded that the degree of contribution from claimant's work environment was conjectural.

In July 1985 claimant was examined by Dr. Bardana, head of the Oregon Health Sciences University's Division of Allergy and Clinical Immunology. Dr. Bardana provided an extensive analysis of claimant's medical history, work exposure, and current pulmonary condition. In Dr. Bardana's opinion, claimant's progressive pulmonary complaints were the result of a long cigarette smoking habit coupled with a very strong genetic proclivity for emphysema and coronary heart disease. The medical history persuaded Dr. Bardana that claimant's cardiopulmonary health was rapidly deteriorating long before his work exposure to dust. Dr. Bardana agreed with Dr. Patterson that irritating dust could cause a symptomatic flare in his condition. However, despite the production of symptoms, Dr. Bardana found nothing in the nature of the dust that would change the fundamental course of claimant's disorder.

In November 1985 Dr. Wade stated that claimant's reactive airway disease was definitely aggravated by dust exposure at work. Furthermore, it would be reasonable to assume that repetitive exposures causing breathing difficulties would lead to an increased rate of pulmonary function deterioration. Dr. Wade concluded that claimant's work conditions were deleterious to his underlying pulmonary problem and were a major contributing cause of his accelerated progressive pulmonary deterioration.

Claimant credibly testified that he did not have any breathing difficulties prior to working for the cannery. His problems arose soon after he began working in the cook room. After he stopped smoking, his breathing "got some better." However, his symptoms increased shortly after he was transferred to the warehouse. Although he does feel "some better" since leaving work, his breathing difficulties are generally about the same.

The Referee acknowledged that Drs. Patterson and Bardana were pulmonary specialists, while Dr. Wade was a general practitioner. However, the Referee noted that Dr. Wade was the only physician who offered an opinion concerning the contribution of claimant's work exposure to his underlying pulmonary problem. Furthermore, Dr. Wade was claimant's treating physician. Consequently, relying upon Dr. Wade's opinion, the Referee found the claim compensable.

To establish his occupational disease claim, claimant must prove that work conditions caused a worsening of his underlying condition producing disability or the need for medical

services. Weller v. Union Carbide, 288 Or 27 (1979). In addition, he must establish that his work conditions were the major contributing cause of the worsening of his preexisting condition. Dethlefs v. Hyster Co., 295 Or 298 (1983); SAIF v. Gygi, 55 Or App 570, rev den 292 Or 825 (1982). A mere recurrence or exacerbation of symptoms is insufficient to establish a compensable condition. Wheeler v. Boise Cascade, 298 Or 452 (1985).

Following our de novo review of the medical and lay evidence, we are not persuaded that claimant's work conditions were the major contributing cause of any worsening of his underlying condition. In reaching this conclusion, we have considered claimant's credible testimony and the opinion of Dr. Wade, his long time treating physician. However, in view of the complex nature of claimant's pulmonary problems and his extensive medical history, we accord greater weight to the opinions of the pulmonary specialists. In particular, we find the opinion of Dr. Bardana most persuasive.

Dr. Wade supported the compensability of claimant's condition. As a treating physician, Dr. Wade's opinion is generally entitled to great weight, absent persuasive reasons to the contrary. Weiland v. SAIF, 64 Or App 810, 814 (1983). Moreover, his status as a general practitioner does not render him incompetent to testify as an expert merely because he is not a specialist. Barrett v. Coast Range Plywood, 294 Or 641 (1983).

Although we have given Dr. Wade's opinion due consideration, we do not find it as persuasive as that offered by Dr. Bardana, a pulmonary specialist. Dr. Bardana provided an extremely thorough report, which discussed claimant's extensive medical history, his work exposure, and its relationship to his current pulmonary problems. It was Dr. Bardana's opinion that claimant's problems were the result of his long history of cigarette smoking coupled with a strong family history for "emphysema and coronary heart disease." Dr. Patterson, another pulmonary specialist, agreed that the major contributing factor in claimant's condition was an underlying predisposition to pulmonary problems.

Dr. Patterson concluded that the work environment contributed, at least, to claimant's immediate symptoms and, quite possibly, to his long-term disease. Yet, Dr. Patterson was unable to render an opinion as to the relative degree of the contribution. Moreover, the opinion's speculative connection between claimant's work conditions and his underlying disease renders it insufficient to establish a compensable relationship. Gormley v. SAIF, 52 Or App 1055, 1060 (1981).

Contrary to the Referee's statement, Drs. Patterson and Bardana did address the relative contribution of claimant's work environment to his underlying condition. Neither specialist supported a compensable relationship. Dr. Bardana agreed with Dr. Patterson that dust from claimant's work environment could cause a symptomatic flare-up in his condition. However, Dr. Bardana concluded that this flare-up would not change the fundamental course of claimant's disorder. Thus, at best, the specialists' opined that claimant's work environment caused an exacerbation of his symptoms. Such a finding fails to satisfy the Weller / Wheeler standard for compensability.

ORDER

The Referee's order dated February 5, 1986 is reversed.  
The self-insured employer's denial is reinstated and upheld.

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PAUL E. PIER, Claimant  
Ann Kelley, Ass't. Attorney General

WCB CV-86003  
October 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 February 5, 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 August 20, 1986 by Roger C. Pearson, special hearings officer appointed by the Board. On August 29, 1986 the special hearings officer entered Findings of Fact, Conclusions and a Proposed Order. In essence, the special hearings officer recommended that the Fund's Order on Reconsideration be affirmed. This recommendation was based on the claim's untimeliness and a failure to qualify for a further time extension as provided by OAR 137-76-030. The special hearings officer also discussed the evolution of the aforementioned administrative rule as recently described in Lori Beghtol, 38 Van Natta 1003 (September 10, 1986).

Following our de novo review of the record, we agree with the conclusions reached by the special hearings officer. Accordingly, in conformity with those conclusions we order that the Department of Justice Crime Victim Compensation Fund's Findings of Fact, Conclusions, and Order on Reconsideration dated February 5, 1986 be affirmed.

IT IS SO ORDERED.

DANELDA S. STRODE, Claimant  
Coons & Cole, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-06909  
October 10, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of that portion of Referee Seymour's Order on Reconsideration that set aside the Determination Order of June 3, 1985 as premature. The issue is premature closure.

Claimant compensably twisted her left knee in January 1983. After a series of surgeries, claimant entered the Callahan Center on January 9, 1985 where she underwent physical therapy and vocational assessment. In a discharge report dated March 25,

1985, the neurologist attending claimant at the Center indicated that claimant was medically stationary. In another discharge report, the vocational specialist assigned to claimant stated: "[A]ll parties involved in the worker's vocational rehabilitation program felt that she was job ready at the time of discharge to return to work, . . . including the worker herself."

Claimant's treating orthopedic surgeon, Dr. Cronk, declared her medically stationary in a report dated April 8, 1985. Claimant complained of some discomfort and occasional swelling in her left knee at that time. Dr. Cronk noted some atrophy of claimant's left quadriceps muscle and stated that claimant's muscle strength should continue to improve over the next few months as she performed her regular exercises.

A few days later, claimant was examined by a panel from BBV Medical Services, Inc. The panel noted the atrophy of claimant's left thigh, but stated that no further treatment was indicated "other than exercises with weights, which she can do at home." They agreed that claimant was medically stationary.

On May 13, 1985, claimant returned to Dr. Cronk stating that she had fallen down in her bathtub at home and bumped her left knee. Dr. Cronk noted bruises and diagnosed a contusion of the left knee, but stated that no change in her "activity status" was necessary. Two weeks later, Dr. Cronk noted that claimant's contusion was healing without any apparent complications.

Claimant returned to Dr. Cronk on May 31, 1985 stating that while she was at a pharmacy a few days earlier she had slipped on some liquid spilled on the floor and fallen on both her knees. Dr. Cronk noted bruises on claimant's right knee, but could detect no additional damage to her left knee.

A few days later, on June 3, 1985, claimant's claim was closed by Determination Order with an award of 25 percent (37.5 degrees) scheduled permanent partial disability. The Determination Order terminated claimant's entitlement to temporary disability compensation on March 25, 1985, the date of claimant's release from the Callahan Center, and authorized deduction of overpaid temporary disability compensation from claimant's permanent disability award.

About three weeks after claim closure, SAIF received a form from Dr. Schroff, a family practitioner, indicating that he was now treating claimant's left knee. He mentioned the slip and fall in the pharmacy, noted pain, swelling and weakness in claimant's knee, gave a diagnosis of "contusion-sprain" and stated that claimant's condition was being treated with anti-inflammatory medication and exercise.

Six weeks after claim closure, claimant visited Dr. Takush, a physician at the Oregon State University Student Health Center, complaining about a small lump on her left knee. She told him that she had first noticed the bump one to two weeks earlier and that it had become increasingly painful ever since. Dr. Takush incised the bump, discovered a small subcutaneous abscess and prescribed antibiotics. Claimant returned to Dr. Cronk, who continued this course of treatment for a number of weeks. Claimant's condition did not improve significantly during this period.

Claimant began treating with another orthopedic surgeon, Dr. Erkkila, on October 22, 1985. Dr. Erkkila surgically opened the abscess and found a stitch which apparently had been left in place inadvertently after one of claimant's prior knee surgeries. After the stitch was removed, the wound healed rapidly. Based upon a time loss authorization slip received from Dr. Erkkila on November 15, 1985, SAIF reopened claimant's claim and began paying time loss. Dr. Erkkila indicated that claimant's condition was again medically stationary on November 26, 1985.

On December 16, 1985, Dr. Schroff wrote SAIF stating that he had first examined claimant on June 3, 1985 and that claimant's knee condition had precluded her from active employment from that date until after she recuperated from the surgery by Dr. Erkkila. Claimant's claim was closed again by Determination Order on January 8, 1986 and in light of the dates provided by Drs. Erkkila and Schroff, temporary total disability compensation was awarded claimant for the period from June 3 to November 26, 1985. No additional permanent disability was awarded.

At the hearing, claimant contended that her claim had been prematurely closed on June 3, 1985 and that she was entitled to temporary disability compensation for the period from March 25, 1985 (the date of her discharge from the Callahan Center) to the date of the Determination Order. Claimant testified that she first noticed a lump on her left knee while she was at the Callahan Center in March 1985 and that she brought this to the attention of the doctor there and later brought the lump to the attention of Dr. Cronk at the time of his closing examination. It is clear from claimant's testimony, however, that this lump was not the same as the "swelling" she complained of to Dr. Cronk at that time. The Referee found claimant to be an "entirely credible witness."

The Referee set aside the Determination Order of June 3, 1985 as premature. After quoting the definition of "medically stationary" found in ORS 656.005(17), the Referee stated:

"In retrospect, further medical treatment, in the form of removal of the stitch, would have improved the claimant's condition. The fact was that no doctor knew of the stitch abscess festering in the claimant's knee on March 25, 1985. All doctors agreed that the claimant was medically stationary at that time, but this does not alter the fact that the claimant was not medically stationary under the statutory definition."

In support of his reasoning, the Referee went on to cite and discuss our decision in William Bunce, 33 Van Natta 546 (1981).

Just prior to the issuance of the Referee's order, we expressly overruled the Bunce case in Richard C. Pell, 38 Van Natta 233 (1986) in light of the Court of Appeals' decision in Alvarez v. GAB Business Services, 72 Or App 524 (1985). We have interpreted Alvarez to preclude consideration of any subsequent testimony, opinions or events in determining a claimant's preclosure medical status. Richard B. Tattoo, 38 Van Natta 1255 (WCB Case Nos. 85-05487 & 85-10428; October 1, 1986); Ralph E.

Moen, 37 Van Natta 1527, 1529 (1985); Robert E. Martell, 37 Van Natta 1074, 1076 (1985). The Referee in this case clearly considered the postclosure discovery of the abscessed stitch and the testimony of claimant in deciding that the claim had been prematurely closed. This analysis was contrary to the court's decision in Alvarez.

Claimant nonetheless argues that considering only the preclosure evidence, her claim was improperly closed. We disagree. Claimant had been declared medically stationary by her treating orthopedist and by two independent medical examiners. There were no contrary opinions. These physicians were aware of the atrophy of claimant's left thigh and encouraged claimant to continue exercising it, but they did not expect any material improvement in claimant's medical condition from these exercises. We conclude, therefore, that the claim was not closed prematurely. See Richard B. Tattoo, supra, 38 Van Natta at 1257; Maxine J. Evans, 34 Van Natta 1021, 1022 (1982).

#### ORDER

The Referee's Order on Reconsideration dated April 1, 1986 is reversed in part. That portion of the order that set aside the Determination Order of June 3, 1986 as premature and awarded claimant temporary disability compensation for the period from March 26, 1985 through June 2, 1986 is reversed. The remainder of the Referee's order is affirmed.

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SALLY A. KLINE, Applicant  
Ann Kelley, Ass't. Attorney General

WCB CV-86004  
October 14, 1986  
Interim Order Dismissing Request  
for Hearing

Pursuant to notice, an evidentiary hearing was scheduled for 9:30 a.m. August 15, 1986 at Salem, Oregon. The applicant failed to appear at the hearing and on August 19, 1986 an order was issued requiring the applicant to show cause why the request for review should not be dismissed as abandoned. The applicant responded on August 26, 1986. The Department of Justice was given an opportunity to state its position, which was done September 8, 1986. Being fully advised, in accordance with OAR 438-82-040(4), it is:

ORDERED that good cause has been shown that the request for review has not been abandoned;

IT IS FURTHER ORDERED that the request for an evidentiary hearing is dismissed;

IT IS FURTHER ORDERED that the Workers' Compensation Board will proceed to review the decision of the Department of Justice Crime Victim Compensation Program without a hearing under the provisions of OAR 438-82-030(2); and,

IT IS FURTHER ORDERED that the Department of Justice shall be allowed 15 days from the date of this order to file its written argument on the merits of the review.

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STEPHEN C. MARR, Claimant  
Steven C. Yates, Claimant's Attorney  
Daniel J. DeNorch, Defense Attorney

WCB 84-02843  
October 14, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of those portions of Referee Seymour's order that: (1) set aside its denial of claimant's claim for chiropractic services; (2) awarded claimant 32 degrees for 10 percent unscheduled permanent partial disability for the low back; and (3) awarded claimant's attorney a fee of \$1,000 for services at hearing. The insurer also moves that we dismiss claimant's request for hearing from the outset for his alleged failure to show cause why his request should not have been dismissed for delay. Claimant cross-requests review of that portion of the order that upheld the insurer's denial of claimant's claim for thermographic services. Claimant also requests a greater attorney fee for services at hearing. Claimant has submitted no brief on review. The issues are whether claimant's request for hearing should have been dismissed and, if not, medical services, extent of unscheduled disability, and the Referee's award of attorney fees.

With regard to the insurer's motion to dismiss, we find that a prior Referee, who initially issued an Order to Show Cause and later withdrew it after receiving claimant's affidavit explaining the reasons for his delay, did not abuse his discretion by withdrawing his order. On the merits, we affirm that portion of the Referee's order that upheld the insurer's denial of thermographic services. On the remaining issues, we reverse.

Claimant compensably injured his thoracic and lumbar spine while employed at a food processing plant in October 1983. He consulted an osteopath who recommended five days of treatment. Claimant then changed physicians and began treating with Dr. Buttler, a chiropractor. Claimant was released to return to modified employment approximately two months later. He returned to work for one day and was terminated for reasons unrelated to his injury.

Dr. Bolin performed an independent chiropractic evaluation in December 1983. He found claimant stationary and in need of once-per-week palliative treatment only. Dr. Bolin released claimant to return to regular work, with stooping and heavy lifting restrictions.

Dr. Buttler disagreed with Dr. Bolin with regard to claimant's stationary status. He also remained of the opinion that claimant required chiropractic treatment on a basis greater than once per week. To resolve the dispute, claimant was referred to Dr. Hazel, who agreed with Dr. Bolin that claimant was in need of no curative treatment and that he was capable of returning to his regular job. The claim was thereafter closed by Determination Order in February 1984 with an award of temporary total disability only. Dr. Buttler continued treating claimant up to the time of the hearing.

On September 7, 1984 the insurer issued a denial of chiropractic services in excess of two treatments per month. Claimant was subsequently examined by Drs. Gatterman and Wei, chiropractors, who reported that claimant remained stationary, had no measureable impairment and was not in need of chiropractic treatment.

Claimant is entitled to all reasonable medical services, curative or palliative, so long as they are necessitated by the compensable injury. ORS 656.245(1); West v. SAIF, 74 Or App 317 (1985); Wetzel v. Goodwin Bros., 50 Or App 101 (1981). It is claimant's burden to prove the reasonableness and necessity of treatment. McGray v. SAIF, 24 Or App 1083 (1976).

The Workers' Compensation Department has promulgated a rule indicating that the usual range of the utilization of medical services does not exceed two visits per month after the initial 60 days. OAR 436-10-040(2)(a). The rule does not constitute an arbitrary limitation of services, but is a guideline to be used concerning requirements of accountability for the services provided. Kemp v. Workers' Compensation Dept., 65 Or App 659 (1983), modified on other grounds, 67 Or App 270, rev den 297 Or 227 (1984). In determining what is reasonable and necessary, we may consider the frequency of treatments. Thus, while we may find that a claimant is entitled to receive some chiropractic treatments, he may not expect to receive any number of treatments without showing that the treatments are reasonable and necessary. James v. Kemper Ins. Co., 81 Or App 80 (1986).

Claimant's treating chiropractor is Dr. Buttler. He has indicated that claimant requires regular chiropractic treatment on a basis of greater than two treatments per month. We generally defer to the treating doctor's opinion regarding medical services, absent persuasive reasons not to do so. Weiland v. SAIF, 64 Or App 810 (1983). We find from this record that claimant is entitled to insurer-paid palliative treatment, but at a frequency of one treatment per month. Although Dr. Buttler recommends more frequent treatment, he stands alone in that opinion. The opinion of four independent examiners is that claimant is either in need of no treatment whatsoever, or that one treatment per month is enough. The weight of the medical evidence, therefore, favors palliative care on a reduced schedule. The insurer's denial of excess chiropractic treatments will be reinstated.

The Referee awarded claimant 10 percent unscheduled disability, apparently based largely on claimant's subjective complaints of disabling pain. A claimant's subjective testimony alone may be sufficient to sustain an award of permanent disability. Garbutt v. SAIF, 297 Or 148 (1984). However, if we find the testimony unpersuasive or insufficient to resolve complicated medical issues, we are not bound by it; we may require expert medical opinion to resolve the issue presented. Kassahn v. Publishers Paper Co., 76 Or App 105 (1985).

Given the medical record in this claim, we are unpersuaded by claimant's testimony. The weight of the medical evidence is that claimant suffers no permanent impairment, a condition precedent to an award of permanent disability. See OAR 436-30-380. We find, therefore, that claimant is not entitled to an award of unscheduled disability. The Referee's award shall be reversed. The reversal obviates the need to discuss the Referee's award of attorney fees for services at hearing.

#### ORDER

The Referee's order dated January 27, 1986 is reversed. The insurer's denial is reinstated. The insurer's motion for the dismissal of claimant's request for hearing is denied.

DEL SEITZINGER, Applicant  
Ann Kelley, Ass't. Attorney General

WCB CV-86007  
October 14, 1986  
Order of Remand (Crime Victim  
Compensation Act)

The applicant having requested review of the decision of the Department of Justice Special Compensation Program, and the Board having found pursuant to motion of the Department of Justice that the issues raised by the applicant have not been reconsidered by the Department under the provisions of ORS 147.145, it is hereby

ORDERED that, pursuant to OAR 438-82-020(1), this matter is remanded to the Department of Justice Special Compensation Program for reconsideration and the entry of an appropriate order.

IT IS FURTHER ORDERED that within 30 days of the entry of an order on reconsideration by the Department, the applicant shall notify the Board in writing whether he requests further review by the Board.

CHARLEY E. FITE, Claimant  
Churchill, et al., Claimant's Attorneys  
Roberts, et al., Defense Attorneys

WCB 85-13834  
October 17, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Michael Johnson's order that upheld the insurer's denial of claimant's industrial injury claim for an inguinal hernia. The issues are compensability and penalties and attorney fees.

Claimant began working in the employer's food processing plant on October 7, 1985. Claimant worked as a cauliflower shredder from midnight to 7 a.m., seven days a week. The work consisted of picking up heads of cauliflower weighing six to seven pounds and placing them into a shredding machine.

On October 14, 1985, claimant began work at midnight. The shear gate arm, which fed cauliflower from the belt into claimant's bin, was broken and this forced claimant to have to stretch and reach further than normal for the cauliflower heads. At the time of the alleged injury, he shredded about 30 heads of cauliflower per minute. At about 1 a.m. claimant began to feel a stinging in his left groin. By 5 a.m. the stinging and burning had gotten worse and claimant went to see the nurse. The nurse called and made an appointment for claimant to see Dr. Peterson, a Salem internist, that morning.

That same day, claimant went to Dr. Peterson's office. Dr. Peterson was unavailable and claimant was examined by Dr. Carney. Dr. Carney diagnosed claimant as having an "acute left inguinal hernia" related to claimant's work. Dr. Carney referred claimant to Dr. Moe for surgery. On October 24, 1985, Dr. Moe performed surgery to repair the hernia. Claimant fully recovered from surgery and testified that he felt "great".

Subsequently, at the employer's request, Dr. Peterson inspected the work place and observed the shredding machine job performed by claimant at the time of his injury. On October 28, 1985, Dr. Peterson wrote a report in which he stated that, based on his observation of the job site, the job could not have been the "primary cause" of a hernia. The employer issued a denial of claimant's claim on October 28, 1985.

On December 16, 1985, Dr. Carney wrote a report stating that by history the injury occurred at work and that by history the hernia was not present before. Dr. Carney stated that there was no prior history or examination to dispute claimant's history that the injury occurred at work and he had to consider it a job related injury. On December 17, 1985, Dr. Moe wrote a report in which he disagreed with Dr. Peterson's statement of October 28, 1985. Dr. Moe stated:

"This patient came to me with a definite history of a work related onset of symptomatology with a definite hernia. In my experience these criteria are enough to establish the work relationship to the hernia."

On January 7, 1986, claimant's attorney gave Dr. Moe a description of claimant's job prior to the onset of his hernia symptoms. Based on that description, Dr. Moe agreed that it was medically probable that claimant's work activity caused or precipitated claimant's left hernia.

At hearing, claimant testified that before the incident at work he never had any symptoms or pain in his left groin area. He stated that he did have a prior hernia in 1980 on the right side, but had experienced no difficulty since its repair that same year. Prior to working in the food processing plant, claimant worked in Alaska for half a day sweeping and shoveling concrete. In the summer of 1984, claimant worked for several months rebuilding pallets. He stated that while rebuilding pallets he lifted a maximum of 60 pounds.

Dr. Peterson testified at hearing that based on his review of the medical records, observation of the claimant's work site, and claimant's testimony that claimant suffered an indirect left inguinal hernia. This finding led Dr. Peterson to conclude that claimant's hernia was the result of a congenital defect and not claimant's work activity of October 15, 1985. The hernia condition is worsened by a person straining and forcing the hernia mass through the congenitally made rupture. Dr. Peterson stated that a Valsalva's maneuver was not the only type of strain that could move the hernia along, but even bending over to tie your shoes could be sufficient to create the force necessary to worsen the hernia condition.

Claimant has the burden of proving by a preponderance of the evidence that there is a causal connection between the injury and resultant disability. Gormley v. SAIF, 52 Or App 1055 (1981). Generally, causation will not be inferred solely from a temporal connection. However, evidence of such a connection is probative. See Bradshaw v. SAIF, 69 Or App 587 (1984). Claimant does not have to establish the specific instant of work related trauma that results in disability. See Valtinson v. SAIF, 56 Or App 184 (1982).

On de novo review we find that claimant had a pre-existing congenital defect which caused him to suffer an indirect left inguinal hernia. No time frame was established as to when the hernia might have begun. Dr. Peterson testified that a person could go a long time with an indirect inguinal hernia before it became acute. Claimant credibly testified that he had no symptoms in his left groin prior to his working on the morning of October 15, 1985. Dr. Peterson testified that dynamics other

than Valsalva's maneuvers could worsen the hernia by pushing the hernia mass through the opening and moving it along the inguinal canal. This theory is consistent with the opinions of Dr. Carney and Dr. Moe that claimant's hernia is work related. Further, such a worsening is consistent with claimant's increasing complaints of pain over the course of his work. Claimant has established both a temporal relationship between his injury and resulting disability as well as the mechanism by which his work worsened the condition. Claimant has proven by a preponderance of the evidence that the symptoms he experienced on October 15, 1985 are work related.

Having established that at least a portion of claimant's injury is work related it is necessary to determine if the underlying pre-existing hernia is compensable. In order to establish the correct legal standard, we must first determine if claimant suffered an accidental injury or occupational disease.

In James v. SAIF, 290 Or 343, 348 (1981), the court distinguished between an injury and an occupational disease, stating:

"What set[s] occupational diseases apart from accidental injuries [is] both the fact that they can [not] honestly be said to be unexpected, since they [are] recognized as an inherent hazard of continued exposure to conditions of the particular employment, and the fact that they [are] gradual rather than sudden in onset." (quoting 1B Larson, Workmen's Compensation Law, Sec. 41.31 (1973)).

Further, the court has held that "sudden onset" does not necessarily mean instantaneous. Valtinson v. SAIF, supra.

At hearing claimant testified that he had worked at occupations more strenuous than at the food processing plant. The injury was unexpected as claimant had never experienced symptoms prior to the morning of October 15, 1985. The injury was sudden as it affected claimant in only a matter of hours. We conclude that claimant's hernia of October 15, 1985 was an accidental injury.

Having established that he suffered an injury, claimant has the burden of establishing that his injury materially worsened his underlying hernia condition. Jameson v. SAIF, 63 Or App 553 (1983). Dr. Peterson testified mechanics other than Valsalva's maneuvers could force the hernia mass down the inguinal canal and worsen the condition. We find that claimant's work activities were a material contributing cause of the worsening of his hernia condition. Claimant's hernia condition is compensable.

The insurer's denial was based on the report of Dr. Peterson after he had reviewed claimant's work activities. We conclude the denial was not unreasonable. Therefore, penalties and attorney fees are not appropriate.

Further, we find this case to have been of average difficulty with an ordinary likelihood of success on the compensability issue. A reasonable attorney fee is therefore awarded.

ORDER

The Referee's order dated March 5, 1986 is reversed. The insurer's denial dated October 28, 1985 is set aside and the claim is remanded to the insurer for processing according to law. For overturning the denial, claimant's attorney is awarded a reasonable attorney fee of \$1,300 for services at hearing and \$550 for services on Board review. Both fees shall be paid by the insurer.

LEON A. McDANIEL, Claimant  
Welch, et al., Claimant's Attorneys  
Robert, et al., Defense Attorneys

WCB 85-10712  
October 17, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Leahy's order that: (1) upheld the Determination Order insofar as it found claimant to have been medically stationary on April 11, 1985; and (2) awarded claimant 32 degrees for 10 percent unscheduled permanent partial disability for the low back, whereas the Determination Order awarded 16 degrees for five percent. The issues are whether claimant was medically stationary before April 11, 1985 and extent of unscheduled disability.

On the issue of extent of disability we affirm the Referee's order. We find, however, that claimant was medically stationary before April 11, 1985. We therefore modify the Referee's order with regard to claimant's medically stationary date.

Claimant initially injured his low back in Washington state in 1978. The injury necessitated a laminectomy and claimant received a ten percent award pursuant to Washington's workers' compensation law. Claimant later moved to Oregon where his various employments caused recurrences of back pain. He became employed as a general merchandise assistant by the present employer in September 1984. On December 4, 1984 he experienced a marked increase in lumbar pain while lifting a 30-pound box of merchandise. Dr. Stiger, an osteopath, ultimately became the treating physician.

Dr. Stiger suspected a recurrent disk extrusion and referred claimant to Orthopaedic Consultants for a surgical consultation. On March 12, 1985 the Consultants reported that claimant was medically stationary with no change in functional impairment. The insurer asked Dr. Stiger to comment on the Consultant's report. He stated:

"For the most part, I agree with their recommendations except for the fact that . . . they state 'he is medically stationary, there is no indication for any further surgery or diagnostic procedure. There has been no change in the functional impairment in the function of his back since his claim was last closed.'

"This last sentence is the one with which I most disagree . . . Clearly his situation has changed and clearly he is in much worse shape now that he was prior to his injury of December 4, 1984. -1309-

"I do agree that further treatment at this time is probably going to be nonproductive. For this reason I think that it is realistic to state that he is medically stationary."

The Evaluation Division apparently interpreted Dr. Stiger's report to indicate that claimant was not stationary until April 11, 1985, the date of the report. The Referee noted an ambiguity in Dr. Stiger's report, i.e., that while he agreed with the Consultants' findings "for the most part," he disagreed with at least a portion of their statement regarding claimant's permanent impairment and/or stationary status. The Referee held that because there was an ambiguity and the insurer did not request clarification from Dr. Stiger, the stationary date included in the Determination Order would not be disturbed.

While we agree that Dr. Stiger's report is somewhat unclear, we find that his disagreement with the Orthopaedic Consultants involved only their interpretation of claimant's functional impairment. Dr. Stiger specifically concurred with most of the Consultants' findings. He specifically disagreed with the impairment finding. He said nothing definitive about the other two. He ultimately concluded that claimant was medically stationary. Thus, it appears from the context of Dr. Stiger's report that he disagreed with the Consultants only with regard to claimant's functional impairment. That Dr. Stiger's report happened to issue on April 11, 1985 does not mean that he felt claimant was not stationary until that time. The Referee's order will be modified.

#### ORDER

The Referee's order dated February 5, 1986 is modified in part and affirmed in part. That portion of the order that affirmed the Determination Order insofar as it found claimant's medically stationary date to be April 11, 1985 is modified. Claimant is hereby found to have been medically stationary on March 12, 1985. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded a fee of \$500 for services on Board review.

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The Beneficiary of  
PAUL D. RASMUSSEN (Deceased), Claimant  
Malagon & Moore, Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 83-09373  
October 17, 1986  
Order on Reconsideration

Pursuant to the mandate of the Court of Appeals in Rasmussen v. SAIF, 79 Or App 527 (1986), we issued our Order on Remand awarding claimant compensation for permanent total disability effective November 15, 1982 and ordering claimant's beneficiaries' claim for survivor's benefits accepted. The SAIF Corporation has requested that we authorize it to offset payments of compensation for temporary total and permanent partial disability made subsequent to November 15, 1982. The Order on Remand dated September 19, 1986 is withdrawn for reconsideration.

On reconsideration, we grant SAIF's request for authorization to offset payments of temporary total and permanent partial disability compensation made subsequent to November 15,

1982 against the award for permanent total disability. Pacific Motor Trucking Co. v. Yeager, 64 Or App 28, 32 (1983); Donald W. Wilkinson, 37 Van Natta 927 (1985). As modified, our Order on Remand dated September 19, 1986 is republished effective this date.

IT IS SO ORDERED.

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GAYLON E. FISH, Claimant  
Evohl Malagon, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 85-08029  
October 22, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of those portions of Referee Holtan's order which: (1) awarded temporary total disability compensation from June 8 through July 24, 1985 during a period of suspension of benefits approved by the director of the Callahan Center; (2) awarded a penalty and attorney fees for improper submission of the claim for closure; and (3) awarded a penalty and attorney fees for unreasonable delay of correction of claimant's temporary total disability rate. The issues on review are temporary total disability compensation, suspension of benefits, and penalties and attorney fees.

On the issue of penalties and attorney fees for unreasonable delay of correction of claimant's temporary total disability rate, the Board affirms the order of the Referee. See ORS 656.382(1).

Claimant injured his low back in November 1982. He received a chymopapain injection without lasting benefit. In 1985 claimant was referred to a pain center. The pain center accepted him for treatment on the condition that he not use alcohol. Claimant was perceived to be under the influence of alcohol which interfered with the treatment and rehabilitation process. On June 7, 1985 claimant was suspended from the pain center program. On June 12, 1985 the administrator of the Callahan Center approved termination of temporary total disability compensation benefits for failure to participate in a rehabilitation program. On June 17, 1985 the medical director of the pain center reported that claimant was medically stationary regarding his work related injury. On July 24, 1985 the treating doctor agreed that claimant was medically stationary.

For the reasons explained in Connell R. Cambron, 38 Van Natta 927 (1986) the Board finds that termination of claimant's benefits by the authorization of the Callahan Center administrator was correct. In this case, as in Cambron, the Referee found that the authorization to suspend compensation did not satisfy the requirements of former OAR 438-54-284 because it did not cite the enabling statute or rule. As we found in Cambron the administrator's letter contained a sufficient reference to the enabling statute and administrative rule to satisfy the technical requirements of OAR 438-54-284. Therefore, the Referee's order shall be reversed on the issue of the validity of the suspension of benefits.

The remaining issue is the penalty and attorney fees for submitting the claim to the Evaluation Division of the Workers' Compensation Department for publication of a Determination Order. The Referee found that SAIF had submitted the claim for closure

before either the opinion of the treating doctor was obtained or the passing of 60 days from the administrative approval of the suspension of benefits.

The Board finds that the treating doctor's opinion was merely confirmatory. The preponderance of the evidence at the time the insurer sought the Determination Order was that claimant was medically stationary. That conclusion was unaffected by subsequent opinions. Consequently, with regard to the issue whether claimant was medically stationary, SAIF's action was proper at the time it sought the closure. See Martin v. SAIF, 77 Or App 640, 641 rev. den., 301 Or 240 (1986). Therefore, no penalties and attorney fees should be assessed on the basis of whether claimant was medically stationary.

At the time SAIF applied for the Determination Order, claimant was not in a program of vocational rehabilitation and he was medically stationary. The provisions of ORS 656.268(5) were satisfied. Publication of the Determination Order did not terminate claimant's entitlement to vocational rehabilitation. Resumption of vocational assistance could be accomplished without having to set aside the Determination Order if in fact claimant sought additional assistance. Claimant's right to request reconsideration or a hearing regarding the issue of the suspension of benefits for non-participation in the rehabilitation program was not compromised by the publication of the Determination Order. In addition we find no authority to penalize an insurer for applying for a Determination Order during the period of claimant's right to request a hearing. Therefore, because claimant was not enrolled in a vocational assistance program and was medically stationary, it was not unreasonable for SAIF to apply for a Determination Order. Consequently, that portion of the Referee's order which assessed a penalty and attorney fees for improper application for a Determination Order shall be reversed.

ORDER

The Referee's order dated November 27, 1985 is reversed in part and affirmed in part. That portion of the order which awarded temporary total disability compensation from June 8 through July 24, 1985 is reversed and the suspension of benefits approved by the director of the Callahan Center is reinstated. That portion of the order which awarded a penalty and attorney fees based on the temporary disability compensation awarded for the period from June 8 through July 24, 1985 for improperly requesting claim closure is reversed. The Determination Order dated August 1, 1985 is affirmed without modification. The remainder of the order is affirmed.

PATRICK J. HAVICE, Claimant  
David C. Force, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 83-08177 & 83-08027  
October 22, 1986  
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Havice v. SAIF, 80 Or App 448 (1986). The court has mandated that the SAIF Corporation accept claimant's claim for aggravation of his industrial injury. Accordingly, SAIF's denial dated August 17, 1983 is set aside and this matter is remanded to SAIF for acceptance and payment of compensation according to law.

IT IS SO ORDERED.

ALEXANDER M. JOHNSON, Claimant  
Jack Ofelt, Jr., Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 85-02859  
October 22, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of those portions of Referee Galton's order that upheld the SAIF Corporation's denial of claimant's claim for aggravation of his low back condition and awarded "interim" compensation for the period from December 7, 1984 to January 3, 1985. The issues are aggravation and interim compensation.

Claimant compensably injured his low back in November 1980 when the step ladder on which he was climbing collapsed and he fell backwards onto the ground. Claimant was treated conservatively and his claim was closed by Determination Order in September 1981 with no award of permanent partial disability. Claimant was subsequently awarded a total of 35 percent unscheduled permanent partial disability in two stipulations. After these events, claimant moved to Texas. According to the medical record, claimant did not find employment. Claimant testified at the hearing that he worked several months at various jobs after arriving in Texas. Based upon his observation of claimant's "attitude, appearance and demeanor" at the hearing, the Referee expressly found claimant neither credible nor reliable as a witness. We accept the Referee's credibility finding. On our de novo review of the record, we find that claimant did not return to work after moving to Texas and that his failure to return to work was not causally related to his industrial injury.

By letter dated September 20, 1984 claimant wrote SAIF requesting authorization to visit a doctor and stating that "urgent treatment" was needed. SAIF authorized claimant to see Dr. Mayer, an orthopedist, for evaluation purposes only. Dr. Mayer found claimant "severely depressed" and arranged for claimant to be further evaluated in anticipation of entering the "PRIDE" program. The nature of this program is not fully disclosed in the record but it appears to center around physical rehabilitation, pain control and psychiatric counseling. While awaiting SAIF's authorization for claimant to participate in the program, Dr. Mayer authorized time loss from October 17, 1984 through January 3, 1985. In a letter to claimant's attorney dated December 1, 1984 Dr. Mayer stated that claimant continued to be medically stationary with regard to his industrial injury and that there was no need to reopen his claim. SAIF paid time loss from October 17 through December 7, 1984 and then stopped making such payments.

Sometime shortly after January 1, 1985, SAIF authorized claimant's enrollment in the PRIDE program. In his chart note dated January 3, 1985 and a letter dated January 10, 1985, Dr. Mayer ultimately concluded that claimant was not interested in participating in the PRIDE program but only in getting his claim reopened and "document[ing] his disability."

By letter dated March 3, 1985 claimant requested a hearing on the issue of aggravation. By letter dated March 19, 1985 SAIF informed claimant that it had paid time loss while claimant was being evaluated for the PRIDE program but had not

reopened his claim because there was no indication of a worsening of his condition or that he was anything other than medically stationary.

Based upon his credibility finding and the medical record, the Referee upheld SAIF's aggravation denial. He ordered SAIF to pay claimant time loss, however, in the form of interim compensation for the period from December 7, 1984 through January 3, 1985 as authorized by Dr. Mayer and awarded penalties and attorney fees in connection with this unpaid compensation.

We affirm that portion of the order that upheld the aggravation denial. We reverse those portions of the order that awarded claimant additional interim compensation, penalties and attorney fees. Although we agree that claimant's request for "urgent medical treatment" constituted an aggravation claim, claimant had not returned to work since the date of his industrial accident for reasons unrelated to his injury and thus did not satisfy the "leaves work" requirement of ORS 656.210(3). See Cutright v. Weyerhaeuser Co., 299 Or 290, 300 (1985); Bono v. SAIF, 298 Or 405, 410 (1984). Interim compensation was not due, therefore, Miller v. SAIF, 78 Or App 158, 160 n.2 (1986), and any time loss payments made by SAIF were gratuitous. Termination of gratuitous payments does not give rise to penalties or attorney fees. See Theresa L. Welch, 36 Van Natta 1724, 1725 (1984).

#### ORDER

The Referee's order dated December 10, 1985 is reversed in part. Those portions of the order that awarded claimant interim compensation for the period from December 7, 1984 through January 3, 1985, and assessed penalties and attorney fees are reversed. The remainder of the order is affirmed.

CHARLES R. McDONALD, Claimant  
Peter O. Hansen, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 80-10662  
October 22, 1986  
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The SAIF Corporation requests review of those portions of Referee St. Martin's order that: (1) set aside its denial of claimant's occupational disease claim for myocardial infarction and its sequelae; and (2) awarded claimant's attorney a fee of \$4,000 for services at hearing. SAIF also protests the Referee's refusal to allow a physician to testify upon a continuance of the hearing and his refusal to hold the record open for the physician's deposition. Claimant cross-requests review, seeking additional "interim" compensation and penalties and attorney fees for SAIF's alleged failure to pay that compensation. Claimant also seeks a greater award of attorney fees for prevailing on the denied claim at hearing. The issues are compensability, the award of attorney fees at hearing, "interim" compensation and penalties and attorney fees.

We affirm those portions of the Referee's order regarding compensability and the award of attorney fees at hearing. The Referee did not address the "interim" compensation issue. By virtue of the underlying claim's compensability, claimant is entitled to temporary total disability compensation beginning November 16, 1979, the date of his compensable heart attack. The remaining issue is whether SAIF should be penalized

for failure to commence compensation within 14 days of claimant's heart attack. We find that the employer did not have sufficient notice or knowledge of claimant's claim to require claim processing until the time it was formally filed. Penalties and attorney fees, therefore, are not appropriate.

Claimant's heart attack occurred on November 16, 1979. His acting supervisor had been aware that claimant was operating under job-related stress for some time prior to the attack. The supervisor had noticed physical changes in claimant suggestive of stress-related illness. The supervisor testified, however, that when claimant's attack occurred off the job, it did not occur to the supervisor that it might be work-related. Claimant did not file a written notice of claim until July 23, 1980. SAIF issued its denial on November 26, 1980. No compensation was paid during the interim.

Claimant alleges that because his supervisor was aware of his stress and its effects before the compensable attack occurred, the employer effectively had notice or knowledge of a claim on the day of the attack. ORS 656.262(4) requires the employer to begin paying compensation within 14 days after the date it receives notice or knowledge of claimant's claim. Failure to commence payment in a timely manner may be deemed unreasonable, thereby subjecting the employer or insurer to penalties and attorney fees. ORS 656.262(10).

Clearly, the present employer had notice of an injury sufficient to prevent the claim from being barred as untimely. Baldwin v. Thatcher Construction, 49 Or App 421, 425 (1980); Summit v. Weyerhaeuser Co., 25 Or App 851, 857 (1976). However, knowledge of an injury does not necessarily equate with knowledge that the injury may result in a claim for compensation. See e.g., Henry L. Mischel, 38 Van Natta 1274 (WCB Case No. 82-10262, October 3, 1986). In Mischel we held that in order for a claimant to trigger an employer's claims processing obligation, he or she must provide a form of notice or knowledge that would apprise a reasonable employer or worker that a potential claim for compensation exists.

As previously noted, the present employer was aware that claimant had been having work-related physical problems prior to his heart attack. We find it reasonable, however, that the employer assumed the heart attack was not compensable, given that it occurred off the job. For us to find the employer's conduct unreasonable, we would have to assume that he was aware of the legal principle that off-the-job heart attacks may be compensable. We would also have to assume that he was aware of the possible medical connection between stress and myocardial infarction. Each assumption would hold the employer to a standard higher than that normally imposed on a layman.

We find that claimant's employer was not aware of a potentially compensable claim until the day claimant submitted a written claim for compensation. Having no knowledge of the claim on the date of the compensable incident, the employer did not act unreasonably when it failed to process the claim within 14 days of the compensable event. Claimant's request for penalties and attorney fees is, therefore, denied.

ORDER

The Referee's order dated January 31, 1984 is affirmed insofar as it sets aside the SAIF Corporation's denial of claimant's claim for myocardial infarction and its sequelae and awards claimant a SAIF-paid attorney fee of \$4,000 for services at hearing. Claimant is awarded an attorney fee of \$850 for defending the compensability issue on Board review. The attorney fee shall be paid by the SAIF Corporation.

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FRANCIS G. SHAW, Claimant  
Roll, et al., Claimant's Attorneys  
MacDonald, et al., Defense Attorneys

WCB 83-04250  
October 22, 1986  
Order on Remand

This case is before the Board on remand from the Court of Appeals. Shaw v. SAIF, 78 Or App 558 (1986). We are mandated to determine a reasonable attorney fee for services provided by claimant's attorney at the Board and Court of Appeals levels. We determine that a reasonable attorney fee in this matter is 25 percent of the compensation granted by the Court of Appeals, not to exceed \$850.

IT IS SO ORDERED.

VLISSIOS DAMIS, Claimant  
Pozzi, et al., Claimant's Attorneys  
Tooze, Marshall, et al., Defense Attorneys

WCB 85-06061  
October 27, 1986  
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The insurer requests review of Referee Fink's order that set aside its denial of injuries suffered when claimant fell down while at work. The issue on review is compensability.

Claimant was a warehouseman. He was in the employer's warehouse working alone on February 5, 1985. He was filling orders for shipment to the employer's retail stores when he suddenly fell and struck his head, losing consciousness. Other employes discovered him lying on the floor and summoned assistance. Claimant does not remember falling nor what he was doing immediately before he fell.

Subsequent medical testing revealed no cause for the fall. Many possible causes were considered and some were ruled out, but several possible idiopathic causes were not ruled out. No definite cause of the fall was found.

In Phil A. Livesley Co. v. Russ, 296 Or 25 (1983) the court stated that if a worker suffers a truly unexplained fall while at work and he proves that idiopathic causes did not cause the fall, then the claim is compensable. However, if the evidence does not eliminate idiopathic causes, then the claim will fail because claimant has not proven that the cause of the fall was not idiopathic.

Dr. Reinhart testified at the hearing that idiopathic causes for claimant's fall were not eliminated as probable causes of the fall. Dr. Wells opined by letter that a slip or fall were as likely causes of claimant's fall as some unidentified idiopathic cause. Dr. Grewe felt that he had to assume that

claimant must have "slipped, stumbled or something of the sort" because the medical tests did not reveal the true cause of the fall. The Board is persuaded by the opinions of Drs. Reinhart and Wells that claimant's fall was as likely caused by some unidentified idiopathic cause as it was by some work-related cause. Dr. Grewe's opinion is flawed by the necessity to assume facts which are not supported by evidence and therefore the Board finds his opinion is not persuasive. Consequently, claimant failed his burden of proving that his fall was not caused by some idiopathic factor and the claim should be denied.

ORDER

The Referee's order dated February 11, 1986 is reversed. The insurer's denial dated April 2, 1985 is reinstated and affirmed.

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WILLARD R. WHITNEY, Claimant  
Brasch & Messoline, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-05029  
October 27, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Brown's order which upheld the SAIF Corporation's denial of his occupational disease claim for bilateral carpal tunnel syndrome. On review, claimant contends that his condition is compensable.

With his appellant's brief claimant has enclosed two additional medical opinions. These opinions are from physicians who have previously offered opinions concerning claimant's condition. These prior opinions are already in the record. We treat claimant's submission as a motion to remand for the taking of further evidence.

We deny the motion for remand. After conducting our de novo review, we find that the record has not been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5). Moreover, it has not been shown that this evidence was unobtainable with due diligence before the hearing. Delfina P. Lopez, 37 Van Natta 164, 170 (1985).

Following our review of the medical and lay evidence, which includes claimant's completely credible testimony, we are neither persuaded that claimant's work activities were the major contributing cause of his bilateral carpal tunnel syndrome nor its worsening. Accordingly, the Referee's order is affirmed.

ORDER

The Referee's order dated February 27, 1986 is affirmed.

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

Own Motion 86-0334M  
October 28, 1986  
Own Motion Order

On August 7, 1986 the Board issued an Own Motion Order whereby all relief requested by claimant was denied. Claimant asked that the Board abate its order and reconsider his entitlement to temporary total disability and permanent partial disability compensation. The Board abated its order on August 28, 1986 and directed the insurer to provide claimant and the Board with copies of the cancelled checks for the period May 20, 1985 through June 21, 1985. The claimant was also allowed the opportunity to order a copy of the hearing transcript to aid the Board in its consideration of the extent of claimant's permanent disability.

After some research, it was discovered claimant never did receive the two time loss checks allegedly mailed by the insurer. Those have again been sent to claimant by the insurer. Claimant's attorney asks for a carrier-paid fee for the efforts he expended to resolve this issue. We must deny this request. Our rules do not provide for a carrier-paid fee in own motion cases.

Claimant also seeks an award for permanent partial disability, having received no award to date. The medical evidence simply does not support an award. Claimant's testimony at hearing shows that his compensable condition has not worsened since the last closure of his claim. The limitations he complains of currently were also present several years ago.

Claimant is hereby granted compensation for temporary total disability from May 20, 1985 through June 21, 1985, which amount has already been paid by the insurer. Claimant's attorney is granted as a reasonable fee an amount equal to 25 percent of the above compensation, payable out of said compensation.

IT IS SO ORDERED.

JAMES G. ADAMS, Claimant  
Peter O. Hansen, Claimant's Attorney  
Moscato & Byerly, Defense Attorneys  
Rankin, et al., Defense Attorneys  
Roberts, et al., Defense Attorneys  
Daryll E. Klein, Defense Attorney

WCB 86-08747, 85-15626, 86-01876  
& 86-08746  
October 29, 1986  
Order Denying Motion to Dismiss

United Pacific Insurance requests that we dismiss the pending request for review as to it on the ground that it was dismissed as a party by stipulation at the hearing. We conclude that although the Referee's order does dismiss the request for hearing against United Pacific based upon the stipulation of the parties, United Pacific must remain a "party" to Board review, although it may elect to be a nominal party. See Zurich Ins. Co. v. Diversified Risk Management, 300 Or 47, 51 (1985). The motion to dismiss the request for review as to United Pacific is denied.

IT IS SO ORDERED.

GLENN T. CALAWA, Claimant  
Galton, et al., Claimant's Attorneys  
Cummins, et al., Defense Attorneys

WCB 85-10308  
Order on Reconsideration  
October 29, 1986

The Board has received the insurer's motion for abatement and reconsideration of our Order on Review dated October 1, 1986.

The motion for reconsideration is granted and our previous order is withdrawn for reconsideration.

Claimant suffered a compensable injury to his back on October 19, 1983. On August 22, 1985, claimant's attorney sent a letter to the insurer along with a medical report alleging an aggravation as of August 1, 1985. A denial of that aggravation claim was issued on October 22, 1985. The denial of claimant's aggravation claim was set aside pursuant to hearing and an order dated January 10, 1986. The insurer moved the Referee to abate the January 10, 1986 order and reopen the hearing for additional evidence consisting of a medical report. The Referee denied the motion on February 4, 1986. The Referee's order was affirmed by the Board on October 1, 1986.

The insurer requests that the Board remand this case to the Referee on the basis of new evidence. Subsequent to hearing claimant had a myelogram performed which led to a lumbar laminectomy on May 16, 1986. The laminectomy revealed that claimant had a bilateral herniated disc, worse on the left than the right. The insurer's new evidence consists of a report from Dr. Puziss dated August 5, 1986 which summarized the treatment claimant had received and stated, "I believe that the patient in all probability had returned to his pre 10/19/83 injury status based upon his testimony and evaluation of medical records." Dr. Puziss' review included claimant's recent surgery and diagnosis of a bilateral herniated disc. The insurer also included a second report from Dr. Kam, a neurosurgeon, dated September 26, 1986 which agreed with Dr. Puziss' report. None of the surgical reports were provided.

We may remand to the Referee if we find that the record has been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5). Generally, where claimant has never received a satisfactory explanation for a chronic condition, the record may be reopened for objective evidence that does explain or clarify claimant's condition. Egge v. Nu-Steel, 57 Or App 327, rev den 293 Or 456 (1982); Thomas C. West, 38 Van Natta 855 (1986); Edith Grimshaw, 36 Van Natta 63 (1984). To merit remand, the newly discovered evidence must not have been obtainable with due diligence before the hearing. Egge, supra; Delfina Lopez, 37 Van Natta 164, 170 (1985). Further, it must be shown that the newly discovered evidence is material to the issue litigated. Id.; See also Armstrong v. SAIF, 67 Or App 498 (1984).

The only new evidence which should be considered is the subsequent diagnosis of claimant's herniated disc. Dr. Puziss' report is based upon his review of the medical record, and claimant's testimony. Dr Puziss noted that at the time of his last examination, claimant had:

"No evidence whatsoever, of any disc herniation problems, sciatica or radiculitis. His only pain was located

directly in the lower back. Therefore, all problems of herniated disc had to have occurred subsequent to that examination. Since the patient did not require medical treatment for his back, it seemed very clear to me that the patient only required back treatment and herniated his disc subsequent to the automobile accident of 1-10-85.

Dr. Puziss' report is predicated on claimant's symptoms at the time of his last examination in April of 1984 as compared to his symptoms after January 10, 1985.

The record indicates that claimant began to have low back complaints in early 1985. These complaints led to a CT scan performed on May 30, 1985 which showed a possible bulging at the L4-5 disc. Dr. Atkinson's report of August 1, 1985 noted that claimant had recurrent pain in his low back and right leg. On September 5, 1985, claimant was scheduled for in-patient bed rest and a myelogram if his pain not remit. All of this information regarding claimant's condition was available prior to the November 15, 1985 hearing and the December 13, 1985 closing arguments. Notably, Dr. Puziss' last report in the record is dated May 4, 1984.

Our review of Dr. Puziss' report indicates that the actual diagnosis of a herniated disc had little to do with his opinion regarding the etiology of claimant's complaints. The report refers to claimant's complaints in April of 1984 as opposed to after January of 1985. These complaints were present prior to the actual hearing. We do not conclude that Dr. Puziss' opinion would have been different without the subsequent diagnosis of claimant's herniated disc. The diagnosis of a herniated disc did not alter a previous opinion or create a new opinion regarding claimant's aggravation claim. Dr. Puziss' opinion and report could have been obtained prior to the November 15, 1985 hearing and cannot now be the basis for remand.

Dr. Kam's report is even less convincing. Dr. Kam does not even mention claimant's herniated disc, but noted that Dr. Puziss' report, "An excellent review of reports submitted to Dr. Puziss". Dr. Kam further stated that, "[I]f these records provided Dr. Puziss for review did indicate back problems following the motor vehicle accident, patient's back problem would then be more likely due to that motor vehicle accident in January of 1985 as he has summarized." Dr. Kam, like Dr. Puziss, is relying on information available prior to hearing upon which to reach his opinion. With due diligence these reports could have been obtained prior to hearing.

The worker's compensation system requires not only promptness, but also finality in the decision making process. See Compton v. Weyerhaeuser Co., 301 Or 641, 649 (1986).

#### ORDER

The insurer's request for reconsideration is granted. The insurer's request for remand is denied. The Board's order dated October 1, 1986 is adhered to in its entirety and republished, effective this date.

DAVID L. FLEMING, Claimant  
Evohl F. Malagon, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 85-09300  
October 29, 1986  
Order on Reconsideration

Claimant requests abatement and reconsideration of the Board's Order on Reconsideration dated October 8, 1986. Claimant requests remand of the case to the Hearings Division for a hearing on the issue of the extent of claimant's unscheduled permanent partial disability. Claimant desires the remand because "the referee made no findings in that regard."

Among the five issues at the hearing were the compensability of claimant's low back condition and the extent of claimant's permanent disability. At the hearing there was testimony which was relevant and material on the issue of the extent of claimant's permanent impairment and disability related to accepted and denied portions of the claim. Relevant and material documentary evidence on the issue of extent of permanent disability was also contained in the record.

The Referee concluded that claimant's low back condition was compensable and consequently that the Determination Order closed the claim prematurely. The Board reversed the Referee's finding of compensability of the low back condition. SAIF requested reconsideration of the Board's order and reinstatement of the Determination Order as the natural consequence of finding the low back injury not compensable. The order which granted SAIF's request is the Order on Reconsideration which claimant seeks to have modified.

Claimant's argument is without merit. A finding or order by a Referee on the issue of the extent of claimant's permanent disability is not a prerequisite to Board review of that issue. On this record there was a Determination Order which awarded compensation for permanent disability. The award was contested at the hearing. There is sufficient evidence in the record upon which to determine the extent of claimant's permanent disability related to his compensable injuries. The Board is authorized to make such disposition of the case as it deems appropriate. Destael v. Nicolai Co., 80 Or App 596 (1986); Marco Aguiar, 38 Van Natta 413 (1986).

Claimant's requests are denied. The Board's Order on Reconsideration dated October 8, 1986 is not abated, stayed, withdrawn, or otherwise modified. Appeal rights continue to run from the date of the Order on Reconsideration dated October 8, 1986. See International Paper Co. v. Wright, 80 Or App 444 (1986)

IT IS SO ORDERED.

NANCY A. FOWLER, Claimant  
Gatti & Gatti, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney  
Schwabe, et al., Defense Attorneys

WCB 85-01218 & 85-04293  
October 29, 1986  
Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Review dated October 10, 1986 to the extent that the order failed to provide for an attorney fee at the hearing level. The request is allowed and our previous order is withdrawn for reconsideration. After reconsideration, we conclude that claimant's attorney is entitled to a fee since compensability was

at issue at the hearing. We thus amend our previous order to allow claimant's attorney a reasonable fee of \$1,400 for services at the hearing, to be paid by the SAIF Corporation. As amended, the Board adheres to and republishes its previous order, effective this date.

IT IS SO ORDERED.

CATHIE R. JUDD, Claimant  
Welch, Bruun & Green, Claimant's Attorneys  
Schwabe, et al., Defense Attorneys

WCB 85-05063  
October 29, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The self-insured employer requests review of Referee Lipton's order which set aside its denial of claimant's nondisabling low back injury claim. On review, the employer contends that the claim is not compensable. We agree and reverse.

Claimant, a spooler for a woolen mill, was 44 years of age at the time of hearing. On February 13, 1985, she alleged that she pulled a muscle in the left side of her back while attempting to move a double basket of yarn. The basket weighed approximately 600 pounds. She immediately experienced a sharp pain "just about halfway down my left side and my low back and down into my hip."

Believing that the pain would subside, claimant continued working. Although she did not immediately report the incident to her supervisor, she did tell a co-worker a few days later. The co-worker corroborated this testimony. Claimant worked for two days, rested during a three day weekend, and then returned to work on February 19, 1985. Since her pain persisted, she then reported the incident to her supervisor and sought medical care.

Claimant was examined by Dr. Scott, chiropractor. Dr. Scott diagnosed acute lumbosacral sprain/strain, sciatica, acute thoracic sprain/strain, and subluxation of the thoracic vertebrae. Noting that claimant's back had not been previously injured, Dr. Scott related claimant's condition, in all probability, to her work injury.

In April 1985 Dr. Howell, osteopath, performed an independent medical examination. Contrary to the medical history provided to Dr. Scott, claimant had experienced prior injuries to her back. In 1982 she had received approximately one year of treatment stemming from a 1981 low back strain. Dr. Howell had provided some of that treatment. Dr. Howell noted that the resolution of these symptoms had been delayed due to a somatization disorder. In addition, claimant had sustained cervical and mid back strains from three separate motor vehicle accidents. She was unable to recall when these accidents had occurred.

Dr. Howell diagnosed low and mid back pain, without objective evidence of abnormality. Areas of muscle spasm in the cervical and thoracic area were noted, but Dr. Howell considered these findings incidental and unrelated to either claimant's work activities or to the February 1985 incident. In addition, Dr. Howell opined that psychological factors, as identified in

1981, could be playing a significant role in claimant's current complaints. Finding claimant's condition medically stationary, Dr. Howell concluded that claimant's complaints could not reasonably be attributed to her occupational activities.

Claimant credibly testified that she has continued to work as a spooler. She wore a back brace for a short time, but has since discarded it. She also receives chiropractic adjustments and physiotherapy from Dr. Scott on a weekly basis.

Claimant admitted that she had experienced prior back complaints for which she has received periodic medical treatment. She thought that her first motor vehicle accident occurred in 1967 and her third took place in 1977. Each accident concerned a "whiplash and my back." She also recalled that her 1981 injury involved her mid back and right shoulder. When shown a copy of a 1969 claim for a left low back injury, she did not remember filing it.

Although claimant conceded that she experienced back symptoms following each of the aforementioned incidents, she insisted that these symptoms had resolved prior to the February 1985 incident. Furthermore, she asserted that she had never had any low back problems similar to her current symptoms. Prior to the February 1985 incident, claimant last sought medical treatment for back complaints in 1982.

Testifying that he was claimant's treating physician for a time in 1982, Dr. Howell reiterated his opinion that the February 1985 incident probably did not materially contribute to claimant's need for medical treatment. Yet, Dr. Howell agreed that he was unable to determine if claimant had suffered a nondisabling injury or if her continuing symptoms were attributable to some other cause. In addition, Dr. Howell acknowledged that claimant's current complaints could possibly be due to psychological problems.

The Referee found neither medical opinion persuasive. Dr. Scott's opinion was considered conclusory and based upon an inadequate medical history. Dr. Howell's opinion was discounted because, among other reasons, he was unable to determine if claimant had sustained an injury or if her continued complaints were attributable to other causes. After rejecting the medical evidence, the Referee returned to the lay evidence. Citing Garbutt v. SAIF, 297 Or 148 (1984), the Referee relied on the credible lay testimony and concluded that the claim was compensable.

To establish compensability, claimant must prove that the February 1985 incident at work was a material contributing cause of her need for medical treatment. 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). Lay testimony concerning causation is probative evidence. Garbutt, supra. However, it may not be persuasive when the claim involves a complex medical question. 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, we are not persuaded that the February 1985 incident was a material contributing cause of claimant's need for medical

treatment. Consequently, the evidence fails to establish the claim's compensability.

Considering claimant's prior spinal injuries and her extensive history of back complaints, we have determined that the resolution of this complex causation issue can be best achieved through an appraisal of the medical opinions. Although the lay testimony is by no means rejected, the medical opinions are given significant probative value.

Dr. Scott supported the compensability of claimant's condition. Yet, this opinion was based on the erroneous impression that claimant had not suffered previous back problems. Inasmuch as this opinion was based on an inaccurate medical 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).

Claimant contends that her prior back symptoms had resolved before the February 1985 work incident. She also asserts that her current complaints are distinguishable from her past problems. These contentions may very well be true. However, because of the complex nature of this causation issue, we consider it incumbent upon claimant to provide a persuasive medical opinion discussing these previous back problems and their potential contribution, if any, to her current condition. The record is devoid of such an opinion. On the contrary, the record contains an opinion suggesting that claimant's condition is not attributable to the work incident.

Unlike Dr. Scott, Dr. Howell's opinion was based on a more complete history of claimant's prior back injuries and pain complaints. Furthermore, Dr. Howell had examined claimant approximately three years prior to the February 1985 incident. Thus, Dr. Howell had the opportunity to compare claimant's condition both before and after the alleged incident. Because of these advantages, we tend to place more weight on Dr. Howell's opinion that the work incident did not materially contribute to claimant's need for medical treatment. Although we concede that portions of Dr. Howell's opinion can be called into question, we do not totally reject it as probative evidence. However, had we discarded this opinion, the credible lay testimony would have still been insufficient to sustain claimant's burden of proving this complex medical causation issue. Kassahn, supra.

#### ORDER

The Referee's order dated January 24, 1986 is reversed. The self-insured employer's denial is reinstated and upheld.

JOHN C. RAMSEY, Claimant  
Marcus K. Ward, Attorney  
Robert L. Chapman, Attorney  
SAIF Corp Legal, Defense Attorney

WCB 84-10827 & 85-00380  
October 29, 1986  
Order of Dismissal

Claimant has requested Board review of Referee St. Martin's order dated June 4, 1986. Claimant's request was received by the Board on July 3, 1986 and was, therefore, timely received. ORS 656.289(3); 656.295(2). Claimant's request for review was acknowledged in the regular course of business on July 8, 1986. The acknowledgement was mailed to claimant, who is

not represented by an attorney, and to the SAIF Corporation's legal office in Medford. Claimant had been employed by one employer. The issue at hearing was whether claimant had sustained a new injury or an aggravation of an old injury. SAIF insured the employer for both exposures; however, because of a potential conflict of interest, the employer was represented by outside counsel for the aggravation claim and by SAIF associate counsel from the Eugene legal office for the new injury claim.

On September 24, 1986 the Board received a document from claimant that could be interpreted as either (1) a brief, (2) a request for an extension of time to file a brief or (3) a motion to remand for the taking of additional evidence. Because the nature of the document was unclear, we concluded that we could not rule upon the alternative requests without additional information from the parties. During the week of October 13, 1986 a member of our staff at our direction contacted both counsel for the employer by telephone to ascertain whether they had received a copy of the document. Upon being advised by our staff member that neither the employer, SAIF, nor the attorneys for SAIF and the employer had received copies of any documents from claimant since the entry of Referee St. Martin's June 4, 1986 order, we reviewed the file to determine whether our jurisdiction had been effectively invoked. See Schlecht v. SAIF, 60 Or App 449, 451 n.1 (1982) (Duty of reviewing body to determine its jurisdiction).

Strict compliance with the requirements of ORS 656.289(3) and 656.295(2) is jurisdictional. The Board is without jurisdiction to review a case unless a copy of a request for review is mailed to opposing parties or their attorneys or the parties or attorneys receive actual notice of the review no later than 30 days after the date of the Referee's order. Argonaut Insurance v. King, 63 Or App 847, 852 (1983). We have determined from our review of the record that claimant did not mail a copy of the request for review to anyone other than the Board. The Board's acknowledgement of the request for review was not mailed until the thirty-fourth day after the date of the Referee's order. The jurisdictional requirements of ORS 656.289(3) and 656.295(2) have not been met and the request for review is dismissed as untimely.

IT IS SO ORDERED.

WILLIAM J. ROBINSON, Claimant  
Malagon & Moore, Claimant's Attorneys  
Schwabe, et al., Defense Attorneys

WCB 85-08629  
October 29, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The self-insured employer requests review of Referee McCullough's order that awarded claimant permanent total disability in lieu of an award by Determination Order of 40 percent (128 degrees) for injury to his low back. The issue is extent of disability.

Claimant injured his low back in December 1982 in the course of his employment as a warehouseman when he lifted several heavy bags of starch. After two lumbar laminectomies by Dr. Hockey, a neurological surgeon, claimant was released to return to light work in March 1984. Claimant attempted to return to work as an inventory clerk, but within a few days it became

clear that this job was beyond claimant's intellectual abilities without further training. This conclusion was echoed by a vocational counselor who subsequently interviewed claimant and recommended a vocational training program.

During the period from May 1984 through June 1985, a number of vocational goals were explored, but little progress was made in returning claimant to work. In May 1985, Dr. Hockey declared claimant medically stationary and indicated that claimant was capable of light work. He did not rate claimant's level of impairment at that time.

A few days after Dr. Hockey's closing examination, claimant was diagnosed as having lung cancer and underwent surgery and radiation therapy. Claimant's lung cancer rendered him unable to participate in vocational training and his vocational file was closed. The low back claim was closed by Determination Order dated July 11, 1985 with an award of 40 percent (128 degrees) unscheduled permanent partial disability.

After claim closure, Dr. Hockey stated in a report dated January 16, 1986 that he would rate claimant's low back impairment as moderate to severe. He also stated that claimant would be able to return to light work were it not for his lung cancer. Claimant requested a hearing on the July 1985 Determination Order, contending that he was permanently and totally disabled.

The Referee concluded that claimant was permanently and totally disabled under the "odd-lot" doctrine because without further training he was unable to work at any suitable occupation. On Board review, the employer argues that claimant was unable to participate in vocational training because of his lung cancer (a noncompensable condition which developed after his industrial injury) and thus that claimant is not entitled to an award of permanent total disability. We agree. Disability relating to noncompensable conditions which develop subsequent to an industrial injury cannot be considered in rating the extent of a claimant's disability. See ORS 656.206(1)(a); Emmons v. SAIF, 34 Or App 603, 605 (1978). Claimant, therefore, is not entitled to an award of permanent total disability.

In rating the extent of the unscheduled permanent partial disability for claimant's low back, we consider the physical impairment relating to that condition 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 apply these rules as guidelines, not as restrictive mechanical formulas. See Harwell v. Argonaut Insurance Co., 296 Or 505, 510 (1984); Howerton v. SAIF, 70 Or App 99, 102 (1984).

Claimant is 44 years old, is of average intelligence and has a GED. His experience is almost exclusively in heavy jobs including work as a general laborer, mechanic, machinist, roofer, carpenter, truck driver and concrete layer.

Following our de novo review of the medical and lay evidence, we conclude that claimant's low back impairment is in the moderate category. Exercising our independent judgment in light of claimant's level of impairment and the relevant social and vocational factors, we conclude that an award of 224 degrees for 70 percent unscheduled permanent partial disability adequately and appropriately compensates claimant for the permanent loss of

earning capacity due to the industrial injury to his low back. This represents an increase of 30 percent (96 degrees) over the award granted by the Determination Order dated July 11, 1985.

No offset for compensation paid pursuant to the Referee's award of permanent total disability will be authorized. United Medical Laboratories v. Bohnke, 81 Or App 144, 146 (1986).

ORDER

The Referee's order dated February 21, 1986 is reversed. Claimant is awarded 70 percent (224 degrees) unscheduled permanent partial disability in lieu of the award granted by the Determination Order of July 11, 1985.

MARILYN E. LACY, Claimant  
Vick & Gutzler, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-03523  
October 31, 1986  
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Lacy v. Oregon State University (CA A39978, Order of Dismissal filed October 10, 1986). Pursuant to the Court of Appeals' decisions in Davison v. SAIF, 80 Or App 541 (1986) and Combs v. SAIF, 80 Or App 594 (1986) the parties stipulated and the court ordered that claimant's claim be remanded for submission of the claim to the Evaluation Division of the Workers' Compensation Department for closure under the provisions of ORS 656.268. This claim is remanded to the SAIF Corporation for further processing and submission for closure in accordance with the stipulation of the parties and the order of the court.

IT IS SO ORDERED.

BETTY E. LARSEN, Claimant  
Emmons, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-01802  
October 31, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Howell's order that increased her award for unscheduled permanent partial disability for her low back from 50 percent (160 degrees) to 95 percent (304 degrees) and awarded her 15 percent (22.5 degrees) scheduled permanent partial disability for her left leg. Claimant contends that she is entitled to an award of permanent total disability. The SAIF Corporation contends that claimant's awards should be reduced. The issue is extent of disability, including permanent total disability.

Claimant injured her low back in June 1979 in the course of her employment as a custodian. Her claim has been closed and reopened on several occasions and she has twice undergone surgery for lumbar disc herniations. After the most recent reopening of her claim and her latest surgery, claimant was declared medically stationary by her treating neurologist, Dr. McGee, on October 10, 1984. He stated that claimant would have permanent mechanical impairment in her low back as a consequence of the injury and permanent neurological impairment in her left leg as a result of nerve root impingement in her low back. In a later report, Dr. McGee stated claimant's work restrictions as follows: No lifting over 10 to 15 pounds and no repetitive lifting, twisting, pushing or pulling. He thought that she was capable of working a

total of four to five hours per day if she was permitted to alternate periods of sitting and standing every 20 to 30 minutes. Claimant's claim was closed by Determination Order dated November 20, 1984 with no award of permanent partial disability in addition to the 50 percent uncheduled award she had received for her low back pursuant to an earlier Board order.

Claimant was examined by Dr. Athay, an internist, in April 1985. He noted restrictions very similar to those listed by Dr. McGee and stated that claimant was permanently and totally disabled from any regular and suitable work.

Claimant was 62 years old at the time of the hearing. She testified that she had continuous pain in her low back which radiates across her left hip and down her left leg to slightly above the knee. This pain is often associated with muscle spasms that begin in her low back or left hip and travel down her left leg. Claimant also stated that her leg occasionally gives out on her without warning, causing her to fall. The Referee found claimant's testimony "entirely credible." Based upon the medical record and claimant's testimony, the Referee increased claimant's uncheduled award to 95 percent and also awarded claimant 15 percent scheduled disability for the partial loss of use of her left leg. He rejected claimant's claim of permanent total disability, primarily because he concluded that claimant was capable of performing piece-meal electronic fabrication work in her home.

We conclude that claimant has carried her burden of proving that she is permanently incapacitated from regularly performing work at a gainful and suitable occupation. ORS 656.206(1)(a). Although the ability of a worker regularly to perform suitable and gainful work on a part-time basis can preclude an award of permanent total disability, Pournelle v. SAIF, 70 Or App 56, 60 (1984), and claimant is able to perform some electronic fabrication work at home. However, we conclude on the record before us that this work cannot be characterized as regular, suitable and gainful.

On "good days," claimant must change positions or take extended breaks every 20 or 30 minutes. On "bad days," which, according to claimant, average two out of every five working days, she is unable to do more than simply lie in bed or on the couch and read or watch television. Because of her condition, claimant is not given work that requires completion by any particular deadline. Claimant is well motivated and has put forth commendable efforts in attempting to be productive. We conclude, however, that claimant is not currently able to sell her services on a regular basis in a hypothetically normal labor market. See Harris v. SAIF, 292 Or 683, 695 (1982). Consequently, we adjudge claimant to be permanently and totally disabled as of the date of the Referee's order.

SAIF is authorized to offset uncheduled permanent partial disability compensation paid pursuant to the Referee's order against the compensation granted by this order. See Pacific Motor Trucking Co. v. Yeager, 64 Or App 28, 31-32 (1983); Donald W. Wilkinson, 37 Van Natta 937, 937 (1985).

ORDER

The Referee's order dated September 24, 1985 is

modified. Those portions of the order that awarded claimant an additional 45 percent (144 degrees) unscheduled permanent partial disability for her low back and 15 percent (22.5 degrees) scheduled permanent partial disability for her left leg are modified to award compensation for permanent total disability as of September 24, 1985. The SAIF Corporation is authorized to offset permanent partial disability compensation paid pursuant to the Referee's order against the compensation awarded by this order. Claimant's attorney is allowed 25 percent of the increased compensation awarded by this order, not to exceed \$3,000, in lieu of the attorney fee awarded by the Referee.

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BARBARA A. LEWIS, Claimant  
Royce, et al., Claimant's Attorneys  
Rankin, et al., Defense Attorneys

WCB 85-03594  
October 31, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee St. Martin's order that upheld the insurer's denial of the occupational disease claim for asthma. Claimant argues that the Referee's opinion is deficient under ORS 183.470. Claimant requests a penalty and attorney fees for unreasonably delayed denial of compensation and submits an affidavit and supporting documents with a request for extraordinary attorney fees for services at hearing and on Board review. The issues on review are compensability, statutory sufficiency of the Referee's order, penalty and attorney fees, and extraordinary attorney fees.

At the beginning of review, the Board notes that ORS 183.470 does not apply to the Workers' Compensation Department. ORS 183.315. The Referees and the Board are part of the Department. ORS 656.708(1). Therefore ORS 183.470 does not apply to the Referee's order and the order was not statutorily deficient.

Claimant worked in the electronics assembly industry for about eighteen years. She has chronic obstructive pulmonary disease due to smoking of cigarettes. Compensability of the disability and medical services related to the chronic obstructive pulmonary disease is not an issue. In 1981 it was first suspected that claimant had asthma, which is a reversible temporary lung condition in addition to the chronic obstructive pulmonary disease. The asthma is not related to claimant's cigarette smoking according to the doctors.

In April 1984 claimant sought treatment of her asthma by Dr. Kelly who is a specialist in the treatment of lung diseases. He initially thought that the asthma was not work-related, but subsequent observation of claimant convinced Dr. Kelly that the asthma was related to smoke from a soldering process. Claimant was exposed to soldering smoke at her job. Dr. Kelly reported that a common resin, colophony, found in solder is a documented cause of asthma. On his recommendation claimant was placed away from the solder smoke and her asthma subsided.

Claimant was referred to Dr. Keppel, who is a specialist in the treatment of lung diseases, for his opinion of the cause of the asthma. Dr. Keppel examined claimant and opined that colophony was the cause of claimant's asthma. Dr. Keppel proposed challenge testing to confirm the diagnosis.

Dr. Montanaro, who is a specialist in the fields of internal medicine, allergy, immunology and rheumatology, also examined claimant. He felt that it was possible that claimant's asthma was worsened by exposure to colophony at work and opined that she could return to work if she were sheltered from exposure to colophony. He agreed that cigarette smoking was irrelevant to causation of the asthma. He made some suggestions about the design of the challenge testing proposed by Dr. Keppel.

The challenge test results showed a reaction to the smoke generated by soldering. Drs. Keppel and Montanaro disagreed about the significance of the amount and timing of the reaction. The remainder of the testing was further complicated by the administration of medication to prevent further reduction of claimant's ability to breathe. Drs. Keppel and Montanaro disagree about the influence of the medication on the results and the conclusions which can be drawn from the testing after claimant took the medication. Dr. Keppel concluded that the test was sufficiently positive to state that claimant's asthma was related to exposure to colophony. Dr. Montanaro concluded that the test was inconclusive and was not persuasive enough to rule out intrinsic, adult-onset asthma as the cause of claimant's condition. However, Dr. Montanaro suggested that he would recommend that claimant be removed from the workplace because exposure to the smoke from the soldering process temporarily aggravates claimant's asthma condition.

Claimant had no evidence of asthma before she began working for this employer although she had worked for other employers in the same industry. By claimant's testimony, her asthmatic episodes are related to exposure to smoke from the soldering process. The Referee made no express credibility finding.

The doctors reached contradictory conclusions about the cause of claimant's asthma. Dr. Kelly was claimant's treating physician and he is a lung disease specialist. His shortly stated opinion is that claimant's asthma is either caused or worsened by exposure to colophony based on his observations over a period of several months and claimant's description of the workplace. Dr. Keppel agrees with Dr. Kelly and bases his opinion on the results of the challenge testing and claimant's history. Dr. Montanaro believes that claimant has not proven by the challenge testing that colophony is the cause of her asthma, but he would remove her from the workplace because exposure to soldering smoke there causes aggravation of her asthma.

Claimant is required to prove by a preponderance of the persuasive evidence that her asthma condition was caused or worsened by her exposure at work. The challenge testing did not erase all doubt about the possibility that claimant's asthma is merely coincidentally related to the workplace exposure to solder smoke, but it did confirm that claimant's reaction to the solder smoke is a significant threat to her health and a different type of reaction than she had to the irritation of cigarette smoke. Dr. Kelly is claimant's treating doctor and he is a specialist in the field of lung diseases. Dr. Keppel relied in part on the testing and in part on a history consistent with the testimony. The Board is persuaded by the opinions of Drs. Kelly and Keppel to find that claimant's condition is compensable.

On the issue of a penalty and attorney fees for unreasonably late denial of the claim, there is no reason offered to explain the delay of more than eight months from the claim until denial. Claimant incurred medical bills which total \$345.97 for services obtained between the date of the claim and sixty days after the date of the claim. The amount of the bills was provided by claimant's testimony at the hearing. There is no request for temporary disability compensation. The insurer argues that it should not be subject to penalties for non-payment of bills which were not submitted until the date of the hearing. Claimant submitted her medical bills to her non-industrial insurer who apparently paid the bills.

A penalty is imposed for late denial, not for non-payment of medical bills, based on amounts then due. The amounts then due are the medical bills not paid and not denied within sixty days after the date of the claim. The Board finds that a penalty should be assessed for unreasonable delay of the denial beyond the sixty days provided by statute and awards 25 percent of the unpaid medical bills as the amount of the penalty. Claimant's attorney is awarded a fee associated with the penalty.

On the issue of the claim for extraordinary attorney fees for services at the hearing and on Board review, claimant has submitted an affidavit with a detailed list of the services performed. He requests \$6,375 for time invested and costs advanced to prepare for the hearing. For services on Board review he requests \$3,275. He suggests that the Board consider a forty percent risk factor, or approximately \$4,000, as a contingent fee factor in addition to a fee based on time expended. The insurer admits "that a fee not to exceed \$4,500 would fairly compensate claimant's attorney for services rendered at the hearing level."

No express consideration has been given of the contingency factor in the setting of a fee in this case. The Board's rules for setting attorney fees do not provide for a separate contingency factor. See Wattenbarger v. Boise Cascade Corp., 301 Or 12 (1986). There are two kinds of contingencies that apply to the likelihood of an attorney being compensated for services in contingent fee cases: the first contingency is the probability of success on the merits of the claim and obtaining a judgment; the second contingency is the probability of collecting the judgment. In workers' compensation cases, the first type of contingency is probably little different than in other types of contingent fee cases. However, in workers' compensation cases the second type of contingency is practically nonexistent. The probability of collecting fees allowed out of compensation is near certainty because the insurer or self-insured employer pays the attorney fees directly to the attorney simultaneously with payment of the award of compensation to the claimant. The probability of collecting fees awarded in addition to compensation is similarly near certainty because of the unique structure of the workers' compensation system.

The value of the medical services and temporary disability compensation which claimant has incurred as a result of her occupational disease is relatively small. Claimant's attorney specializes in the area of compensation for lung diseases and has established his expertise in workers' compensation hearings. He devoted over 60 hours to preparation for the hearing including

participation in two expert witness depositions. If claimant had prevailed at the hearing, the Referee could have awarded fees of up to \$3,000 within his discretion. OAR 438-47-020. The insurer admitted that \$4,500 would be a reasonable fee for services at the hearing.

Costs advanced to claimant are not reimbursable as attorney fees awarded in addition to compensation. Patricia M. Anderson, 36 Van Natta 588 (1984). Considering the time devoted to the case, the complexity of the issues, the value to the claimant, the skill and standing of claimant's attorney, the nature of the proceedings and the result obtained through the attorney's efforts, the Board finds that claimant should be awarded attorney fees of \$4,500 for services at the hearing. See Short v. SAIF, 79 Or App 423 (1986); Muncy v. SAIF, 19 Or App 783 (1974); Barbara A. Wheeler, 37 Van Natta 122 (1985). For services performed and results obtained on Board review, the Board awards attorney fees of \$750. See Short v. SAIF, 79 Or App 423 (1986); Francisco M. Hernandez, 37 Van Natta 1455 (1985).

#### ORDER

The Referee's order dated February 18, 1986 is reversed. The insurer's denial dated May 24, 1985 is set aside and the claim remanded to the insurer for acceptance and processing. Claimant is awarded attorney fees of \$4,500 for services at hearing and \$750 for services on Board review in addition to compensation. Claimant is awarded a penalty of 25 percent of \$345.97 and penalty-associated attorney fees of \$100 for unreasonably late denial of the claim.

WESLEY D. RANKIN, Claimant  
Coons & Cole, Claimant's Attorneys  
Cummins, et al., Defense Attorneys

WCB 84-08309 & 85-00141  
October 31, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The self-insured employer requests review of Referee Nichols' order that modified the Determination Order dated August 21, 1984 by awarding 320 degrees for 100 percent unscheduled permanent partial disability in lieu of the Determination Order award of compensation for permanent total disability for injury to claimant's right shoulder. The employer requests further reduction of the award of compensation for permanent disability. Claimant cross-requests review and requests reinstatement of the Determination Order award of compensation for permanent total disability. The issue on review is extent of unscheduled permanent partial disability including permanent total disability.

Claimant was a plywood press operator. Claimant's right shoulder was injured on August 16, 1982 and Dr. McHolick performed surgery to try to restore function. When claimant was medically stationary he was examined by Dr. Puziss who reported that claimant was appropriately awarded permanent partial disability compensation for 40 percent impairment of the right shoulder.

Claimant had a preexisting unscheduled disability award of compensation for 40 percent loss of earning capacity for a similar injury to his left shoulder. Claimant also had a preexisting unrelated Meniere's syndrome, which is a combination of hearing loss, tinnitus, and vertigo, which did not interfere with his work as a plywood press operator. Neither the left

shoulder injury nor the Meniere's syndrome were worsened by the injury to the right shoulder. Claimant has other health problems which were neither caused nor worsened by the right shoulder injury which subsequently worsened. The subsequent worsening of unrelated conditions was not considered by the Board.

Claimant worked at manual labor all his life and has not worked since the injury to the right shoulder. He completed the eighth grade and earned a GED but is functionally illiterate. He was 63 years old at the time of the hearing.

Vocational rehabilitation efforts were concentrated on returning claimant to work with the employer at a modified job sweeping and cleaning. The modified job was approved by both doctors. The employer would not return claimant to work within his restrictions in January 1983. Claimant tried the cleaning job for three days in September 1983 but his symptoms worsened. The vocational counselor subsequently reported that the employer had no additional light or sedentary employment available for claimant.

The right shoulder claim was originally closed by Determination Order dated February 15, 1984 with an award of 128 degrees for 40 percent unscheduled permanent partial disability. After additional testing and job searching the employer met with the vocational counselor in March 1984 and no light duty position was identified which could accommodate claimant's limitations. Further research and analysis of claimant's limitations resulted in the conclusion that claimant had no transferrable skills. With his work background claimant was theoretically eligible for a training program. Claimant's age, education, and other health factors in addition to his compensable disabilities led the vocational counselor to the conclusion that claimant's unemployability would not be resolved by attempting a training program. The vocational rehabilitation program was terminated May 29, 1984.

The original Determination Order was set aside on reconsideration. A new Determination Order dated August 21, 1984 awarded compensation for permanent total disability.

In a letter dated February 13, 1985 to Dr. McHolick the vocational rehabilitation counselor sought approval of a new job description:

"I have enclosed the Job Analysis for an assistant clerk working within the Environmental Quality Control section of [employer]. This is a new position created by [employer] specifically for [claimant]. The Job Analysis should give you a general idea of what is involved in this type of work. I would appreciate your comments on any physical capacities included in the Job Analysis which might prove above [claimant]'s limitations. My plan is to go back to [employer] at that point and attempt to amend the Job Analysis so that it is in [claimant]'s physical limitations. [Employer] is committed to bringing [claimant] back to work. It is unfortunate that this has taken so long to get to this

point, but as you are aware, some things just take time."

The attached job description concluded with this paragraph:

"This position is very deversed [sic]. [Claimant] may or may not choose to do various tasks depending on his physical limitations. The job can become as demanding and involved as the employee is wanting to pursue. There is high potential for learning many aspects of both environmental and quality control responsibilities. [Claimant] will have control over what he does or does not want to pursue given his physical limitations."

Dr. McHolick replied that the job described was not appropriate for claimant. He added a comment: "From the description of the job, I do not feel this is valid employment but should the patient be given some assurance that this will be a permanent job I would then feel he in all probabilities could carry out the job as described."

Dr. Puziss also re-examined claimant and was asked to consider the job description of the environmental quality control clerk position. He reported:

"When the patient was asked if he could return to his occupation, he said he does not know of any meaningful job that he could return to. Nevertheless, [employer] has created a job which has been described specifically [by] the title assistant clerk for environmental quality control. I have reviewed the job analysis, and certainly this analysis has been tailored to [the] physical capacities of an individual such as [claimant]. There is little that he cannot do with regard to this occupation, and I feel that the patient can perform the duties as described in the job analysis which you have provided me."

A formal job offer was made to claimant on June 11, 1985 by certified letter. Claimant replied that he was unable to accept the offer due to his health problems.

The vocational counselor who developed and sought approval of the environmental quality control position testified at the hearing. He testified that the job offer was not a sham. He also testified that a job guarding an unused gate to an abandoned mill site would be a real job in his opinion. He explained his role in the process of developing the job offer:

"My job was essentially as a coordinator. What I did was to bring together different factions within [employer], sit down in a room with them, and to say that there is employment within this mill. We just don't know what it is yet, and we need to find it."

On cross-examination he admitted that claimant was not competitive in the general labor market with his health problems and work history.

The employer had the burden of proof in this case to prove that claimant is no longer permanently and totally disabled as determined by the Evaluation Division of the Workers' Compensation Department. Bentley v. SAIF, 38 Or App 473 (1979). In order to overcome the determination the employer had to prove that claimant was regularly employable at a gainful and suitable occupation as of the date of the hearing. Harris v. SAIF, 292 Or 683, 695 (1982). The employer produced evidence that claimant is probably medically capable of performing a specific job tailor-made to his remaining physical capabilities but which claimant refused to try.

The ultimate decision thus turns on whether claimant's refusal to attempt the job was reasonable in the circumstances. The evidence proves that the employer did not consider placing claimant in the environmental quality clerk position until after the award of compensation for permanent total disability. The employer had been systematically reducing the staffing in the environmental quality control department for years until only one person in fragile health remained. That one person had been performing the environmental quality control functions by himself for several years at the time of the job offer to claimant. The job offer to claimant would have allowed him to choose those functions which he wished to perform with some other person to do what claimant could not. Claimant was to receive compensation initially at his old rate of pay but there was no guarantee of the future rate. The job offer was made to claimant in June 1985 and the position was still open at the time of the hearing in December 1985. The primary purpose of the job offer was to try to place claimant in a wage earning position and secondarily to fill a staffing need which the employer did not otherwise desire to fill.

The vocational counselor's admission that claimant was not competitive in the general labor market weighs heavily in favor of a finding that claimant is permanently and totally disabled. The evidence established that claimant is not totally disabled due to medical factors. The combination of medical factors with social and vocational factors can entitle an injured worker to the benefits of an award of compensation for permanent total disability as explained in Wilson v. Weyerhaeuser Co., 30 Or App 403, 409 (1977) and reaffirmed in Harris v. SAIF, supra:

"The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps." Harris, at 695.

In Harman v. SAIF, 71 Or App 724 (1985), the court found that the claimant was permanently and totally disabled because he was unemployable except in sheltered employment. The employer created a specific job for the claimant which utilized his training and experience. The job was only available to the

claimant because of his long work history with the employer and substantial subsidies. In Wiley v. SAIF, 77 Or App 486 (1986), the court found that a job watching a gate from a specially constructed booth and reclining chair was not regular employment and concluded that the claimant was permanently and totally disabled.

In Harman and Wiley the claimants had the burden to prove that they were permanently and totally disabled. In this case the employer had the burden of proving that the claimant was not permanently and totally disabled. The Board is not persuaded that the job offered to claimant was regular employment at a gainful and suitable occupation. As a result the Board finds that claimant's refusal to attempt to perform the ill-defined sheltered job offered by the employer was reasonable. Therefore, the Board finds that the employer has failed to carry its burden of proof that claimant was regularly employable at a gainful and suitable occupation as of the date of the hearing. Consequently the Referee's order shall be reversed and the award of compensation for permanent total disability reinstated.

#### ORDER

The Referee's order dated January 30, 1986 is reversed. The Determination Order dated August 21, 1984 is reinstated. Claimant's attorney is awarded \$750 for services on Board review, to be paid by the self-insured employer.

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HARVEY J. ENSMINGER, Claimant  
Carney, et al., Claimant's Attorneys  
Rankin, et al., Defense Attorneys  
Schwabe, et al., Defense Attorneys

WCB 85-06199 & 85-12034  
November 4, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Aetna Casualty Co. requests review of those portions of Referee Pferdner's order which: (1) set aside its denial of claimant's aggravation claim for an upper back, neck, and left shoulder injury; and (2) upheld the self-insured employer's denial of claimant's "new injury" claim for a back and shoulder condition. In its request for Board review, Aetna raises the issues of compensability, responsibility, and attorney fees.

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

Following our de novo review of the medical and lay evidence, we are not persuaded that claimant's work activities for the self-insured employer independently contributed to the causation of his disabling condition, i.e., to a worsening of the underlying condition. See Hensel Phelps Construction v. Mirich, 81 Or App 290 (1986). Accordingly, we agree with the Referee that Aetna is responsible for claimant's current condition.

In its brief to the Board, Aetna has not addressed the compensability issue. However, compensability was raised as an issue in Aetna's request for Board review. Claimant has addressed the issue in his respondent's brief. Under these circumstances, we find that claimant is entitled to a reasonable attorney's fee

regarding his defense of the Referee's compensability decision. ORS 656.382(2); OAR 438-47-010(2); 438-47-055. After considering the nature of the practice in general and the facts and circumstances of this case in particular, we conclude that \$250 is a reasonable award for claimant's attorney services on Board review concerning this issue.

ORDER

The Referee's order dated March 24, 1986 is affirmed. Claimant's attorney is awarded a reasonable attorney's fee of \$250 for services on Board review concerning the compensability issue, to be paid by Aetna Casualty Co.

LINDA S. JIRSCHLE, Claimant  
Francesconi & Cash, Claimant's Attorneys  
Roberts, et al., Defense Attorneys

WCB 85-05061  
November 4, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Leahy's order that: (1) denied her request for a continuance; (2) found her medically stationary at the time of hearing; (3) affirmed the January 31, 1985 and October 25, 1985 Determination Orders which awarded 10 percent for 32 degrees unscheduled permanent partial disability for claimant's neck condition, and; (4) assessed a penalty and attorney fee for the late payment of temporary total disability. The issues are claimant's request for a continuance, premature closure, extent of unscheduled permanent partial disability and penalties and attorney fees.

Prior to the hearing on January 14, 1986, claimant requested a continuance. The request for a continuance was based upon a handwritten letter of Dr. Mills, D.C., dated January 13, 1986. In the letter Dr. Mills stated that claimant had "experienced a marked increase in signs and symptoms" amounting to an "exacerbation" and was not "medically stationary at this writing." He further noted that claimant had "missed several days work due to these problems."

Claimant contended that the Referee could not rate claimant's disability as she was not medically stationary at the time of hearing. The Referee denied the request for a continuance and proceeded with the hearing. After considering the evidence, the Referee concluded that claimant was medically stationary and that he could rate claimant's disability.

On de novo review we agree with the Referee that at the time of hearing claimant was medically stationary. At hearing claimant testified that she had been back to work since September or August of 1985 and that she had been off work since then for only a few days. She stated that her last days off from work occurred a few days before Christmas, which would have been three weeks prior to the hearing. During direct examination, claimant's attorney asked her if during the last few days she had been staying the same, getting worse or getting better. Claimant responded that she has good days and bad days "so it just depends." Claimant specifically stated that "yesterday was bad." Notably, this is the same day Dr. Mills examined claimant and issued his report.

Claimant's testimony is inconsistent with Dr. Mills' report and she has failed to establish by a preponderance of the evidence that she was other than medically stationary at the time of hearing. The record supports the conclusion that claimant had a "bad day" on the day of Dr. Mills' examination. The waxing and waning of claimant's symptoms was contemplated in claimant's award of permanent partial disability and we cannot conclude that she was not medically stationary at the time of hearing.

After de novo review of the record we find no error in the Referee's decision. Claimant's brief was not timely filed and was not considered. The insurer filed no brief. The Board affirms the order of the Referee.

ORDER

The Referee's order dated February 14, 1986 as republished on March 31, 1986 is affirmed.

MERLYN G. JOHNSEN, Claimant	WCB 83-06970
Starr & Vinson, Claimant's Attorneys	November 4, 1986
SAIF Corp Legal, Defense Attorney	Order on Review
Davis, Bostwick, et al., Defense Attorneys	

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of Referee Nichols' order that dismissed the request for hearing of claimant's occupational disease claim for asbestosis. In its brief, Argonaut requests that Referee Nichols' order be modified to formally uphold the insurers' denials and remove the language regarding a possible future claim by claimant. The issues are compensability and modification of the Referee's order.

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

In its brief, Argonaut requests that we modify the Referee's order to affirm the insurers' denials and remove the language from the order stating, "that claimant doesn't have a compensable asbestosis condition at this time; however, this does not preclude him from filing a claim for asbestosis in the future if such a compensable claim should subsequently develop." Argonaut argues that this is a disposition of an issue not before the Referee.

We disagree. The Referee merely stated that a claim for asbestosis could be filed at a later date. Nothing was decided or litigated regarding the possible future application of res judicata. Further, the Referee's comment accurately stated the law.

Argonaut's argument that its denial and SAIF's denial should be affirmed is correct. Claimant failed to establish that he has a compensable occupational disease. The insurers' denials should, therefore, be affirmed.

ORDER

The Referee's order dated April 30, 1986 is modified to uphold the SAIF Corporation's denial dated July 1, 1983 and Argonaut Insurance Company's denial dated March 31, 1986. As modified, the Referee's order is affirmed.

PHILIP D. MAXCY, Claimant  
Francesconi & Cash, Claimant's Attorneys  
Edward C. Olson, Defense Attorney  
Roberts, et al., Defense Attorneys

WCB 84-12841 & 84-13718  
November 4, 1986  
Order on Review

Reviewed by Board Members Ferris and McMurdo.

American National Insurance Company requests review of Referee Shebley's order which: (1) set aside its denial of claimant's aggravation claim for a low back and bilateral leg condition; (2) upheld Northern Pacific Insurance Company's denial of claimant's aggravation claim for the aforementioned condition; and (3) awarded claimant an insurer-paid attorney fee. On review, American National contends that Northern Pacific is responsible for claimant's condition and that claimant is not entitled to an attorney fee for services rendered at the hearing.

The Board affirms that portion of the Referee's order which found American National responsible for claimant's current condition. See Nancy A. Fowler, 38 Van Natta 1291 (October 10, 1986).

We modify the Referee's award of attorney fees. Inasmuch as responsibility was the sole issue at the hearing level and on Board review, claimant is considered a nominal party. Petshow v. Farm Bureau Ins. Co., 76 Or App 563, 571 (1985); Stanley C. Phipps, 38 Van Natta 13, 16 (1986); Pamela R. Stovall, 38 Van Natta 41, 43 (1986). As such, we conclude that he has not "actively and meaningfully participate[d]" as that phrase is used in OAR 438-47-090(1). Thus, claimant is not entitled to an attorney's fee for services at the hearing level or on Board review. Phipps, supra.

Although claimant is not entitled to an insurer-paid attorney's fee, we find that he should receive a fee for services rendered prior to the issuance of a .307 order. Our review of the record suggests that claimant's attorney took affirmative steps to have a paying agent named pursuant to ORS 656.307. Under these circumstances, he is entitled to an attorney's fee payable out of compensation. See Mark L. Queener, 38 Van Natta 882 (1986); Bruce A. Hatleli, 38 Van Natta 1024 (1986). However, considering the relatively brief period between the issuance of the insurers' denials and the procurement of the .307 order, the award shall be modest.

#### ORDER

The Referee's order dated March 19, 1986 is affirmed in part and modified in part. In lieu of the Referee's award of an insurer-paid reasonable attorney's fee, claimant's attorney is allowed 25 percent of claimant's compensation, not to exceed \$300, for services rendered prior to hearing in procuring an order designating a paying agent under ORS 656.307. This fee shall be paid by American National Insurance Company. The remainder of the Referee's order is affirmed.

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MICHAEL MILLER, Claimant  
Francesconi & Cash, Claimant's Attorneys  
Cowling & Heysell, Defense Attorneys

WCB 85-07738  
November 4, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Mongrain's order which upheld the insurer's denial of his aggravation claim for a low back injury. On review, claimant contends that his condition has worsened since the last award of compensation.

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

Following our de novo review of the medical and lay evidence, we find that, since the last award of compensation, claimant has neither established that his symptoms have increased nor that his underlying condition has worsened, resulting in a loss of earning capacity. See Smith v. SAIF, 302 Or 109 (October 21, 1986). Furthermore, we consider claimant's current symptoms indicative of "waxing and waning" exacerbations which are contemplated by and consistent with his prior award of 25 percent unscheduled permanent disability. See Billy Joe Jones, 36 Van Natta 1230, 1235 (1984), aff'd mem. 76 Or App 402 (1985).

#### ORDER

The Referee's order dated April 10, 1986 is affirmed.

GERALD R. PECK, Claimant  
Vick & Associates, Claimant's Attorneys  
Schwabe, et al., Defense Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-07917 & 85-04186  
November 4, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Cigna Insurance Companies request review of Referee Leahy's order which: (1) set aside its denial of claimant's aggravation claim for a low back condition; and (2) upheld the SAIF Corporation's denial of claimant's "new injury" claim for the aforementioned condition. On review, Cigna contends that SAIF is responsible for claimant's current condition.

Following our de novo review of the medical and lay evidence, we find that claimant's subsequent work activities for SAIF's insured did not independently contribute to the causation of his disabling condition, i.e., to a worsening of the underlying condition. See Hensel Phelps Construction v. Mirich, 81 Or App 290 (1986). Rather, the evidence establishes that claimant's subsequent work activities aggravated his continuing back problem, which resulted in a second period of disability. See Crowe v. Jeld-Wen, 77 Or App 81, 87 (1985). Accordingly, we affirm the Referee's order which found Cigna responsible for claimant's aggravation claim.

Since responsibility was the only issue addressed on Board review, claimant is not entitled to an attorney's fee. Petshow v. Farm Bureau Ins. Co., 76 Or App 563, 571 (1985); Stanley C. Phipps, 38 Van Natta 13, 16 (1986).



of the injury; however, the Board agrees with the Referee's alternative finding that SAIF was not materially prejudiced.

The final issue is whether claimant's injury was sufficiently work connected to place responsibility for compensation with the employer and its insurer. Claimant was a teacher with diverse responsibilities. He taught social studies to adolescents. He instructed adolescents in basketball. He counselled students informally in addition to his teaching duties. The school encouraged teachers to counsel students informally although such counselling was not a condition of employment.

Claimant was a professional who utilized extracurricular sources to update his social studies teaching. He kept records of the tests he administered. He kept records of the abilities of the basketball players as they developed. He was paid a salary and was accorded wide latitude in maintaining his professional competency. He shared a classroom for the convenience of the school district and this room with his files was not available to him during the last classroom period of each day. There was, however, a teachers' lounge with storage area for files and tables which was available to him.

When considering whether a particular activity which results in injury was work connected we rely on the criteria set out in Rogers v. SAIF, 289 Or 633 (1980), and Jordan v. Western Electric, 10 Or App 441 (1970) for the framework upon which to decide. The final conclusion is not a mechanical process of merely finding yes or no answers to the questions posed in Jordan, but a weighing of the importance of each factor with the facts in each case. The relevant facts of the case are that a teacher at his home with a former student was accidentally injured in the course of searching for a file which belonged to the teacher. The file was part of a record of the school basketball program for which the teacher was responsible.

The whole picture is complicated by the professional nature of claimant's employment. He was not performing the kind of piecemeal work that requires attendance on the employer's premises for all aspects of his job. When, where, and whether a teacher updates and collates files are collateral matters which may reflect on the teacher's professional abilities and the employing school district's interests in the performance of its functions. When, where, whether, and to whom a teacher offers sympathetic counsel to adolescents may also reflect on the professional abilities of the teacher.

Claimant was working with his files at his home because of personal convenience. The school district made double use of a classroom for its convenience. A lounge room was available to claimant for use at the school for storage and file management. A former student who was no longer enrolled at the teacher's school was present for the student's convenience and was partially responsible for the injury. The Board does not mean to imply that the former student acted intentionally or negligently in causing claimant's injury, but the fact is that without that person's presence there would have been no damage to claimant's eye. The files which were involved remained in the possession of the teacher after he left the school district's employment and there is no contention that the files were property of the school district.

The Board has considered the factors enumerated in Jordan v. Western Electric, supra, in its analysis. The strongest support of the claim is that there is some benefit to the employer in having professional teachers perform activities similar to what claimant was doing at the time of his injury. The facts which do not support the claim are that the files on which claimant was working were his personal property which he was working on at his home for his convenience, on his own time and in the company of a person who was not a student at the school in which he taught at the time of the injury. There was storage space and a work area available for the claimant to use at the school. These factors strongly suggest claimant was on a mission of his own. The ultimate question to resolve was stated in Rogers v. SAIF, 289 Or 633, 642 (1980): "Is the relationship between the injury and the employment sufficient that the injury should be compensable?" The Board concludes that the answer is no because at some point the connection with claimant's employment at the school became too attenuated to connect the injury with the employment sufficiently to be compensable. We cannot point to a single factor which is the dividing line over which claimant crossed because it is the combination of all of the relevant factors which led to this conclusion. The denial shall be reinstated and the Referee's order reversed.

ORDER

The Referee's order dated March 21, 1986 is reversed. The SAIF Corporation's denial dated October 23, 1985 is reinstated and affirmed.

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MICHAEL D. VAUGHN, Claimant  
Roberts, et al., Defense Attorneys

WCB 85-12997  
November 4, 1986  
Order of Dismissal

The insurer has questioned our jurisdiction to entertain claimant's request for review of Referee Knapp's order dated July 28, 1986 on the ground of untimely notice to the insurer. On the basis of the record, we find that claimant hand-delivered his request for review to the Board on August 25, 1986 and did not mail or otherwise deliver a copy of the request to the employer, the insurer or the insurer's attorneys. We further find that we mailed an acknowledgement of the request to the parties on August 27, 1986 and that the acknowledgement was received by the attorneys for the insurer on August 28, 1986.

ORS 656.289(3) and 656.295(2) provide that a party requesting Board review of a Referee's order must do so not later than 30 days after the mailing date of the Referee's order. The statutes further provide that a copy of the request must be mailed to all adverse parties or their attorneys or that the parties or attorneys must receive actual notice of the request within the same 30 days after the Referee's order is mailed. Failure to strictly comply with the statutes is fatal to the jurisdiction of the Board. Argonaut Insurance v. King, 63 Or App 847, 852 (1983).

In this case, claimant did not mail a copy of his request for review to the insurer or its attorneys. The insurer's first notice of the request for review was received by its attorneys on the thirty-first day after the mailing of the Referee's order. The Board is, therefore, without jurisdiction to

review the Referee's order, which is final by operation of law. Claimant's request for review is dismissed.

IT IS SO ORDERED.

MARY L. TADLOCK, Claimant  
Malagon & Moore, Claimant's Attorneys  
Davis, et al., Defense Attorneys

WCB 85-04193  
November 5, 1986  
Second Order on Reconsideration

Claimant has requested reconsideration of the Board's Order on Reconsideration dated October 8, 1986. In our order, we declined claimant's request to defer our Order on Review to consider arguments presented in another case currently awaiting Board review.

In her motion, claimant implies that we accorded greater consideration to her opposition's wishes in these proceedings. We strenuously object to this implication.

The insurer's response to claimant's initial request for deferral was received after our decision on reconsideration had already been made. Thus, the insurer's response had no effect upon the Board's decision to deny claimant's request.

Furthermore, the insurer's request in WCB Case No. 85-08068 for a 14-day extension within which to file its respondent's brief was received timely. Inasmuch as this was the insurer's first request, pursuant to OAR 438-11-011(3)(c), the extension was granted. Under the aforementioned rule, the insurer's basis for the extension is irrelevant, as long as the request is: (1) the first request; (2) timely filed; and (3) for an extension of 14 days or less. Consequently, the insurer's reasons for the extension had no impact on the decision to grant the request.

We trust that we have resolved the so-called "contradictions" raised in claimant's recent request. In conclusion, we reiterate that each issue brought to our attention is given a full, fair, and impartial review before we arrive at a decision. It has never been, and it will never be, the policy of this Board to accord one party a greater degree of consideration than another.

Turning to the substance of claimant's repeat request to defer this matter, we stand by the reasoning expressed in our Order on Reconsideration.

Accordingly, claimant's request for reconsideration is granted. Our previous order is withdrawn. On reconsideration, we adhere to and republish our former order on reconsideration, effective this date.

IT IS SO ORDERED.

TIMOTHY J. JENKS, Claimant  
Michael Dye, et al., Claimant's Attorneys  
Roberts, et al., Defense Attorneys  
Garrett, et al., Defense Attorneys

WCB 83-10924 & 83-10923  
November 6, 1986  
Order on Reconsideration

Diamond International has requested that we correct our Order on Reconsideration dated October 3, 1986, which refers to the original Order on Review in this case as having been filed on November 4, 1984. That date is incorrect. The original Order on Review was filed on November 30, 1984. A corrected Order on Reconsideration was subsequently filed on December 12, 1984.

Except as modified by this corrected order, we adhere to and republish our October 3, 1986 Order on Reconsideration, effective this date.

IT IS SO ORDERED.

RICHARD L. MCGINNIS, Claimant  
Vick & Associates, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-08334  
November 6, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Leahy's order which dismissed his request for hearing as untimely. On review, claimant contends that his request for hearing from a Determination Order was timely.

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

A Determination Order issued July 19, 1984. On August 7, 1984, the SAIF Corporation submitted to the Evaluation Division additional information not available at the time of claim closure. The Evaluation Division concluded that the new information did not introduce any material which would modify the prior determination. Consequently, an August 16, 1984 Determination Order issued, affirming the July 19, 1984 Determination Order "in all respects." Both Determination Orders carried the standard bold face notice of appeal rights advising claimant that he had one year to request reconsideration or a hearing.

Claimant retained legal counsel on July 5, 1985. His hearing request was filed on August 9, 1985. Thus, the request was filed more than one year after the July 1984 Determination Order, but less than one year after the August 1984 order.

We agree with the Referee that this matter is governed by ORS 656.268(4), which provides as follows:

"The Evaluation Division shall reconsider determinations made pursuant to this subsection whenever one of the parties makes request therefor and presents medical information regarding the claim that was not available at the time the original determination was made. However, any such request for reconsideration must be made prior to the time a request for hearing is made pursuant to ORS 656.283. The time from request for reconsideration until decision on reconsideration shall not be counted in any limitation on the time allowed for requesting a hearing pursuant to ORS 656.283."

Applying ORS 656.268(4), claimant would receive a nine-day extension from the July 19, 1984 Determination Order within which to file his request for hearing. This nine day period pertains to the period between SAIF's August 7, 1984 submission of additional medical information and the August 16, 1984 Determination Order. With this extension, claimant's hearing request could be filed no later than July 28, 1985. Inasmuch as the request was not filed until August 9, 1985, we conclude that it must be dismissed as untimely.

We acknowledge that the bold face notice of appeal rights on the August 1984 Determination Order may have been misleading. However, we concur with the Referee's conclusion that the print of an administrative form cannot modify the express language of a controlling statute.

ORDER

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

SUSAN ARCHULETA, Claimant  
Emmons, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-01646  
November 11, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee Michael V. Johnson's order which set aside its denial of claimant's industrial injury claims for left carpal tunnel syndrome, low back condition and left shoulder condition. The issue is compensability.

Claimant was injured on August 17, 1984 when she lifted a box of books weighing 60 pounds and her left wrist gave out. Claimant saw Dr. Luce on August 20, 1984 who noted claimant's swollen wrist and hand. X-rays taken at the time revealed a mild superficial soft tissue injury. The claim was accepted by SAIF as a disabling injury.

Claimant continued to treat with Dr. Luce for her swollen wrist and on September 25, 1984 complained to Dr. Luce of low back pain. Dr. Luce's chart note reveals that claimant stated that the pain came on while she was making a bed. Dr. Luce hospitalized claimant for acute and chronic lumbosacral strain with right sciatica. In the admission sheet, Dr. Luce noted that claimant had been hospitalized previously for lumbosacral strain. The report also indicated that claimant had diabetes mellitus under poor control. Claimant was discharged on October 8, 1984.

On November 29, 1984, claimant was examined by a neurologist, Dr. Bernstein. Dr. Bernstein diagnosed deQuervain's syndrome on the left side and bilateral carpal tunnel syndrome. Dr. Bernstein stated that:

"It would be tempting to state that this is not industrially related and due to her diabetes, as her clinical presentation is rather poor for carpal tunnel syndrome. However, it is rather striking that her carpal tunnel syndrome is indeed worse on the left than the right, the reversal of

what one would usually expect to see in a right handed individual."

In his history Dr. Bernstein specifically noted that claimant "denied any neck pain."

Claimant was examined by Dr. Scheinberg on December 5, 1984 and December 12, 1984. After reviewing the report of Dr. Bernstein, Dr. Scheinberg concluded claimant was medically stationary with no evidence of deQuervain's syndrome. Dr. Scheinberg stated that claimant's carpal tunnel condition was most likely secondary to her diabetes rather than her industrial injury. In the December 5, 1984 report, Dr. Scheinberg noted that claimant, "denies any symptoms or pain relating to her neck or shoulders."

On January 3, 1985 SAIF Corporation issued a denial of claimant's left carpal tunnel syndrome as not being related to her industrial injury.

At SAIF's request, claimant saw Dr. Burr on January 4, 1985. Dr. Burr diagnosed: (1) strain, left wrist, subsiding; (2) mild deQuervain's tenosynovitis, left wrist; (3) mild carpal tunnel syndrome by history, left; (4) mild back strain; (5) functional overlay, mild; and (6) exogenous obesity, moderate. Dr. Burr rendered no opinion as to causation. He stated that claimant was medically stationary, but would continue to complain of the symptoms of mild straining of the wrist. He rated the impairment of the wrist as mild. In the history given to Dr. Burr, claimant stated she had pain in her left shoulder. Dr. Burr noted that there was tenderness on palpation.

Claimant received a Determination Order on January 30, 1985 and a second Determination Order on February 14, 1985, neither of which awarded claimant permanent partial disability.

Dr. Luce issued a report on March 19, 1985 in which he stated that claimant's hand, wrist, and lower arm problems were a direct result of her industrial injury. On March 26, 1985 Dr. Luce stated that with regard to claimant's wrist, his prognosis was guarded and that she would have permanent impairment. He also noted that claimant suffered from acute chronic lumbosacral strain.

On May 6, 1985, Dr. Erkkila began treating claimant for her shoulder condition. After several examinations, Dr. Erkkila diagnosed adhesive capsulitis of the left shoulder. In Dr. Erkkila's report of June 27, 1985, he noted that claimant had stated that she had suffered pain in the left arm since her industrial injury. He felt that claimant's adhesive capsulitis evolved from that event.

On July 2, 1985 Dr. Luce stated that claimant's low back problem was not associated with her industrial injury of August 17, 1984. He noted that claimant did not mention back problems for over a month after her injury.

Dr. Scheinberg again examined claimant on July 3, 1985. In the report, claimant complained of severe pain in her left shoulder. She stated that she had only minimal discomfort in the left shoulder at the time of her last visit with Dr. Scheinberg in December of 1984, but that shortly after that visit her shoulder

pain dramatically increased. Claimant denied any previous upper extremity or back problems.

Dr. Scheinberg diagnosed: (1) bilateral carpal tunnel syndrome; (2) adhesive capsulitis, left shoulder; (3) chronic musculoligamentous strain, lumbosacral spine; and (4) diabetes mellitus. Dr. Scheinberg stated that claimant's shoulder and back condition were not related to her industrial injury. Dr. Scheinberg felt that claimant's adhesive capsulitis could be secondary to her carpal tunnel syndrome. In the report, Dr. Scheinberg specifically noted that in his previous examination of claimant, she had denied any shoulder problems.

On September 11, 1985 SAIF issued a denial of claimant's left shoulder and low back condition.

In a report dated September 16, 1985 Dr. Aasum, a chiropractor, stated that he had first seen claimant in July of 1980 for mid and low back pain. He treated claimant with chiropractic adjustment of the spine between July 8, 1980 and October 9, 1981. He did not see her again until October 16, 1984.

At hearing claimant testified that prior to the August 17, 1984 industrial accident she had never seen any physicians for her low back, right leg, shoulder or wrist. She stated that she did not tell Dr. Luce about her back pain initially because she thought it was related to the flu. Claimant testified that she first experienced left shoulder pain approximately two to three weeks after the industrial injury. She stated she told all the doctors about her symptoms as she had seen them. She stated that the pain in her left arm initially was just below the left shoulder. She also stated that at the time of her injury she had pain in her right wrist, but did not notice it because she was primarily concerned with pain in her left arm.

Claimant testified that she had no back problems prior to her August 17, 1984 industrial injury. In Dr. Scheinberg's report of July 3, 1985, he noted that claimant denied any previous back problems. This testimony is directly contradicted by Dr. Aasum's report of September 16, 1985 in which he stated that he had treated claimant for over one year with chiropractic adjustment between July 8, 1980 and October 9, 1981. The Referee reconciled the discrepancy by concluding that claimant's "denial of prior back problems related to her contemporary industrial problems rather than some earlier difficulty for which she sought chiropractic care." We find that claimant's denial of prior back problems cannot be reconciled with Dr. Aasum's report and that claimant's credibility is assailed by this inconsistency.

Claimant further testified at hearing that her left shoulder began to hurt approximately three weeks after the initial injury. She also stated that she had told all the doctors about her symptoms as she had seen them. None of the medical reports prior to January 4, 1985 support this contention. Further, Dr. Scheinberg's report of December 5, 1984 stated that claimant "denies any symptoms or pain relating to her neck or shoulders." Claimant's denial of shoulder pain cannot be reconciled with her testimony on this point, causing us to further question claimant's credibility and reliability.

The Referee found that claimant was a credible witness, based upon his observation of her appearance and demeanor at the hearing. Although we generally defer to the Referee's findings insofar as they are based upon observation of a witness, the Referee has no greater advantage than we where the ultimate determination of the probative value of claimant's testimony must be based upon an objective evaluation of the substance of the testimony in view of the entire record. See Davies v. Hanel Lbr. Co., 67 Or App 35, 38 (1984). We find claimant's testimony, however sincere it may have been, to be so inconsistent with the remainder of the record that it is entitled to little weight.

Claimant asserts that her left carpal tunnel syndrome is related to her compensable wrist injury. Dr. Bernstein found it unusual that claimant's bilateral carpal tunnel was worse on the left than right, but does not relate the condition to her industrial injury. Dr. Scheinberg specifically stated that the carpal tunnel was most likely secondary to her diabetes rather than her industrial injury. No other doctors render an opinion as to the relationship of claimant's carpal tunnel to her injury. Claimant has failed to prove by a preponderance of the evidence that her carpal tunnel syndrome is related to her industrial injury.

Claimant alleges that her low back condition is related to her industrial injury. Dr. Luce, claimant's treating physician, specifically stated that claimant's low back condition was not related to the August 17, 1984 industrial injury. Claimant waited nearly a month to treat for a back condition she said started to hurt at the time of her injury because she felt that the back pain may be related to the flu. Nothing in Dr. Luce's chart notes indicates that claimant complained of back pain or the flu prior to September 25, 1984. The compensability of the back condition is supported solely by claimant's testimony. We have concluded that this testimony does not outweigh the contrary evidence in the record as a whole. Claimant has, therefore, failed to prove by a preponderance of the evidence that her low back condition is related to her industrial injury.

Claimant also asserts that her left shoulder condition is related to her industrial injury. Dr. Erkkila treated claimant's left shoulder and diagnosed adhesive capsulitis. Dr. Erkkila related the adhesive capsulitis to claimant's industrial injury, but did not explain the mechanics of that injury or why claimant had not experienced symptoms immediately after the injury. Further, Dr. Erkkila relied on claimant's statement that the pain in the shoulder had begun soon after the industrial injury. Dr. Scheinberg stated that claimant's adhesive capsulitis was not related to her industrial injury, but felt it could be secondary to claimant's carpal tunnel syndrome. Dr. Luce stated that only claimant's lower arm, wrist, and hand condition were related to her industrial injury. Claimant's testimony that her shoulder pain began about two to three weeks after the incident is not credible. Claimant has failed to prove that her shoulder condition is related to her industrial injury.

We find that claimant's accepted wrist condition was medically stationary at the time of hearing. Dr. Burr stated that claimant had minimal impairment of the wrist with a 50 pound lifting limitation. Dr. Luce generally agreed with Dr. Burr's assessment, but felt that claimant could lift no more than 15 to

20 pounds. On de novo review, we find that claimant is entitled to 7.5 degrees for five percent scheduled permanent partial disability for the loss of function of her left hand.

ORDER

The Referee's order dated March 17, 1986 is reversed. The SAIF Corporation's January 3, 1985 denial of claimant's carpal tunnel syndrome is reinstated. SAIF's September 11, 1985 denial of claimant's low back condition and shoulder condition is also reinstated. Claimant is awarded 7.5 degrees for five percent scheduled permanent partial disability for the loss of function of her left hand. Claimant's attorney is allowed 25 percent of claimant's scheduled award of permanent partial disability, not to exceed \$2000, as a reasonable attorney fee.

CHARLEY E. FITE, Claimant  
Churchill, et al., Claimant's Attorneys  
Roberts, et al., Defense Attorneys

WCB 85-13834  
November 11, 1986  
Order on Reconsideration

The insurer has requested reconsideration of the Board's Order on Review dated October 17, 1986.

The request for reconsideration is allowed, and the Order on Review dated October 17, 1986 is withdrawn for reconsideration.

The Board accepted Dr. Peterson's conclusion that claimant suffered from a preexisting congenital defect causing claimant's inguinal hernia. We also accepted his conclusion that physical activity forces the hernia through the rupture worsening the hernia condition. Notably, Dr. Peterson stated that once a hernia has started, the force necessary to worsen the condition is is much less than the force needed to traumatically induce a hernia. Claimant credibly testified that he never had any symptoms prior to his working on October 15, 1985. Claimant's testimony is consistent with Dr. Peterson's testimony of physical activity worsening the hernia and creating the symptoms. Further, Dr. Moe, the surgeon that actually repaired claimant's hernia, related claimant's work activity to the hernia condition, as did Dr. Carney, claimant's treating internist. We do not find the opinions of claimant's treating physicians to be totally inconsistent with Dr. Peterson's opinion. Claimant has established his claim by a preponderance of the evidence.

After reconsideration, the Board adheres to and republishes its previous order, effective this date.

IT IS SO ORDERED.

MARGIE M. GUILL, Claimant  
Welch, Bruun & Green, Claimant's Attorneys  
Schwabe, et al., Defense Attorneys

WCB 85-09065  
November 11, 1986  
Order on Review

Reviewed by Board Members Lewis and Ferris.

The self-insured employer requests review of Referee Thye's order that set aside its denial of claimant's occupational disease claim for her right foot and awarded claimant a \$1,500 attorney fee. The issues are compensability and attorney fees.

The Board affirms the order of the Referee as it relates to the compensability of claimant's occupational disease claim. We modify the award of attorney fees.

In determining the reasonableness of attorney fees, the factors considered are: (1) time devoted to the case; (2) complexity of the issues involved; (3) value of the interest involved; (4) skill and standing of counsel; (5) nature of the proceedings; and (6) results secured. Barbara A. Wheeler, 37 Van Natta 122 (1985).

The record consists of a total of 11 exhibits. Only two of those exhibits were produced at the request of claimant's attorney. The hearing lasted a total of one and a half hours ending with the Referee issuing a bench opinion. The sole issue at hearing was compensability. Claimant's claim was initially placed in deferred status and claimant obtained benefits from the time of filing in April of 1985 until the denial on July 19, 1985. At the time of the denial claimant was back working full time and had received temporary disability benefits. The Referee concluded that the occupational disease claim appeared to be only a "temporary worsening" of claimant's preexisting condition.

Applying these facts to the test described in Wheeler, supra, we conclude that the award of attorney fees for services at the hearing was excessive. Our review of the record indicates that \$750 is a reasonable attorney fee for services rendered through the hearing. We modify the Referee's opinion accordingly.

Further, we find this case to have been of average difficulty with an ordinary likelihood of success on Board Review.

#### ORDER

The Referee's order dated April 7, 1986, as modified, is affirmed. Claimant's attorney is awarded \$750 for services through hearing to be paid by the self-insured employer. For services on Board review, claimant's attorney is awarded \$500 to be paid by the self-insured employer.

JOHN KELLER, Claimant  
John C. O'Brien, Jr., Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 85-07814  
November 11, 1986  
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The SAIF Corporation requests review of that portion of Referee Galton's order, as adhered to on reconsideration, which assessed penalties and accompanying attorney fees for allegedly unreasonable claims processing. On review, SAIF argues that the penalty should be reduced. We agree and modify.

SAIF's insured learned of claimant's alleged disabling knee injury on March 21, 1985. The claim was placed in deferred status, but temporary disability benefits did not begin until May 16, 1985. At that time, claimant received temporary partial disability from March 25, 1985 through May 9, 1985. On May 30, 1985, SAIF made a two-week installment, which covered the period between May 9, 1985 and May 23, 1985. No further disability benefits were paid prior to SAIF's eventual denial on June 12, 1985.

In withholding seven days from each of the two disability payments, SAIF relied on OAR 436-60-150(4) which then provided as follows:

"Continued temporary total disability due should be paid current to date of payment at least once each 14 days thereafter, but in no event shall benefits due be more than one week in arrears."

The Referee penalized SAIF for three general instances of unreasonable conduct: (1) its delay in commencing temporary disability benefits from March 21, 1985, the date of notice, through May 16, 1985, the date of first payment; (2) its failure to pay benefits between May 23, 1985 and the June 12, 1985 denial; and (3) its withholding of seven days of temporary disability benefits from the May 16, 1985 and May 30, 1985 payments. The Referee acknowledged that he was not empowered to invalidate the administrative rule upon which SAIF relied in withholding the seven days of benefits. Yet, concluding that the rule was "contrary to dispositive statutory and case law authority," the Referee would not consider SAIF's reliance on the rule as a defense against the imposition of penalties and attorney fees.

SAIF concedes that its initial response to the claim was untimely and does not argue that its failure to pay benefits through the date of its denial was justified. However, it argues that the aforementioned rule permitted it to withhold seven days from each check.

We agree with the Referee that SAIF should be penalized for its unreasonable delay in responding to the claim and its unreasonable failure to continue paying temporary disability benefits prior to the date of its denial. Thus, penalties for this unreasonable conduct should be based on the compensation "then due" between: (1) March 21, 1985, when SAIF's insured learned of the alleged injury, and May 16, 1985, when SAIF finally responded to the claim; and (2) May 23, 1985, the last date for which claimant received benefits, and June 12, 1985, when SAIF issued its denial.

We disagree with the Referee's conclusion that SAIF acted unreasonable in following the aforementioned administrative rule. We have held that we are without authority to determine the validity of an administrative rule. James R. Frank, 37 Van Natta 1555, 1557 (1985). Furthermore, we consider it entirely reasonable for an insurer to comply with a validly enacted administrative rule. Consequently, we conclude that SAIF was justified in withholding seven days from each of its May 16, 1985 and May 30, 1985 payments.

Although these withholding periods should not be used for purposes of penalizing SAIF for complying with the administrative rule, they are already included within other penalties for unreasonable processing. The withholding periods concern May 9, 1985 to May 16, 1985 and May 23, 1985 to May 30, 1985. The former period is encompassed within the "unreasonable late response" penalty. Likewise, the latter period is enclosed within the "unreasonable failure to pay until denied" penalty.

SAIF also contends that each of its two installments

contained a seven day period which had been timely paid. We agree with this contention. However, for purposes of assessing a penalty, this conclusion effects only one of the seven day periods.

The May 16, 1985 installment timely compensated claimant for the May 2, 1985 and May 9, 1985 period. Yet, as with the May 9 - May 16 period discussed earlier, this period also pertains to the "unreasonable late response" penalty. Therefore, the penalty should remain undisturbed. However, the May 30, 1985 installment not only made timely payment for the May 16, 1985 to May 23, 1985 period, but this period is also not contained within any of the other instances of unreasonable conduct. Consequently, SAIF's penalty will not be based on this seven day period. This minor adjustment does not result in a modification of the Referee's attorney fee award.

#### ORDER

The Referee's order dated March 18, 1986, as adhered to on reconsideration dated March 27, 1986, is modified in part. In lieu of the penalty granted by the Referee's order, SAIF is assessed a 25 percent penalty based upon the temporary partial disability due claimant between March 21, 1985 and June 12, 1985, less compensation paid between May 16, 1985 and May 23, 1985. The remainder of the Referee's order is affirmed.

RICHARD G. SURPRISE, Claimant  
Malagon & Moore, Claimant's Attorneys  
Foss, Whitty & Roess, Defense Attorneys

WCB 85-03495  
November 11, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The self-insured employer requests review of those portions of Referee McCullough's order that: (1) assessed a penalty and attorney fee in connection with the employer's initial closure of claimant's low back claim by notice of claim closure; (2) awarded claimant additional temporary disability compensation; (3) set aside its denial of payment for claimant's pain center treatment; and (4) awarded claimant 20 percent (64 degrees) unscheduled permanent partial disability for claimant's low back in lieu of the award by Determination Order of five percent (16 degrees). The issues are medical services, temporary disability, extent of permanent disability, penalties and attorney fees.

Claimant compensably injured his low back in May 1983 when he slipped on an oil-covered surface and fell down. After a period of conservative treatment, a laminectomy and discectomy were performed at L4-5 by Dr. Bert, an orthopedist, in December 1983. Claimant recovered slowly after surgery. In October 1984, Dr. Bert completed a physical capacities assessment in which he indicated that claimant had minor, but permanent limitations in bending, squatting, climbing, crawling, reaching, lifting, carrying and sitting. The following month, Dr. Bert declared claimant medically stationary and reported:

"CURRENT STATUS: He now has minimal discomfort in his back. He is doing all usual and customary activity but is not employed yet. He is applying for work.

"PHYSICAL EXAMINATION: On exam he has a

full range of motion of his back. There is no motor, sensory or circulatory impairment. No calf or thigh atrophy.

"IMPRESSION: I feel he has made a complete recovery.

"RECOMMENDATION: He may be returned to all usual and customary work with no impairment.

...

The employer closed the claim by notice of claim closure on November 28, 1984. The Evaluation Division subsequently reviewed the notice of claim closure pursuant to ORS 656.268(3) and issued a Determination Order dated March 28, 1985 which modified the temporary disability compensation awarded by the employer and granted an award of five percent (16 degrees) unscheduled permanent partial disability.

In December 1984, claimant visited Dr. Bernstein, a neurologist, complaining of low back pain. Dr. Bernstein could find no objective evidence of a problem and prescribed conservative treatment. The following month, Dr. Bernstein wrote the employer stating that claimant should lift no more than 20 pounds and recommended that claimant receive vocational training. In March 1985, Dr. Bernstein noted that claimant's condition had not improved and suggested a pain clinic referral. The employer issued a denial in which it refused to authorize treatment at a pain clinic on the ground that such treatment was not reasonable or necessary. Claimant participated in the program despite the denial and reportedly made excellent progress.

After completing the pain center program, claimant was examined by Dr. Bert. Dr. Bert noted that claimant's treatment at the pain center had been quite successful, stated that claimant was medically stationary and indicated that claimant could perform any job not requiring repetitive or heavy lifting.

The Board affirms the order of the Referee on the medical services and temporary disability issues. Claimant's attorney is entitled to a reasonable employer-paid fee in connection with these issues. See ORS 656.382(2); *Shoulders v. SAIF*, 300 Or 606, 609-10 (1986).

On the issues of penalties and attorney fees for improper claim closure, we reverse. Under ORS 656.268(3), an employer or insurer may close a claim without submitting the claim to the Evaluation Division if the employer or insurer decides that "the claim is disabling but without permanent disability." If a hearing is later held on the claim and a finding is made that the closure decision was not supported by "substantial evidence," the employer or insurer is liable for a penalty and may also be liable for an associated attorney fee. See *Volk v. SAIF*, 73 Or App 643, 647 (1985).

"Substantial evidence" is any evidence which a reasonable mind could accept as adequate to support a conclusion. *Bay v. State Board of Education*, 233 Or 601, 605-06 (1963); see *Volk v. SAIF*, *supra*, 73 Or App at 646-47. Dr. Bert, claimant's treating orthopedist, plainly stated in his closing report that claimant was medically stationary and that claimant had sustained no permanent impairment. This was substantial evidence that

claimant's claim was "without permanent disability" at the time the employer issued the notice of claim closure. We thus reverse that portion of the Referee's order that assessed a penalty and attorney fee for improper claim closure.

With regard to the issue of extent of disability, we modify the award granted by the Referee. In determining the extent of unscheduled permanent partial disability for claimant's low back, 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 apply these rules as guidelines, not as restrictive mechanical formulas. See Harwell v. Argonaut Insurance Co., 296 Or 505, 510 (1984); Howerton v. SAIF, 70 Or App 99, 102 (1984).

Claimant was age 39 at the time of the hearing. He is of average intelligence, is a high school graduate and attended classes for another one and one-half years at a community college. His adult work experience has been in plywood mills in positions such as patcher, Raimann machine operator, core feeder and dryer feeder.

Following our de novo review of the medical and lay evidence, we conclude that claimant's low back impairment is in the minimal range. Exercising our independent judgment in light of claimant's level of impairment and the relevant social and vocational factors, 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 the industrial injury.

#### ORDER

The Referee's order dated April 8, 1986 is affirmed in part, reversed in part and modified in part. That portion of the order that assessed a penalty and associated attorney fee for improper claim closure is reversed. The Referee's award of 20 percent (64 degrees) unscheduled permanent partial disability for the low back is reduced to 10 percent (32 degrees). Claimant's attorney is awarded \$500 for services on Board review in connection with the medical services and temporary disability issues, to be paid by the self-insured employer.

DOROTHY J. HAYES, Claimant  
Velure & Bruce, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney  
Foss, et al., Defense Attorneys  
Marcus K. Ward, Defense Attorney

WCB 84-00578 & 84-00579  
November 12, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation, as insurer for Coos-Curry Manpower, requests review of Referee McCullough's order that: (1) found it, rather than SAIF as insurer for the Oregon Adult and Family Services Division, responsible for claimant's claim for chemical sensitivity; and (2) set aside as having been prematurely issued the Determination Orders dated January 11, 1984. The issues are responsibility and premature closure.

We affirm that portion of the Referee's order pertaining

to the responsibility issue. Bracke v. Baza'r, 293 Or 239 (1983). With regard to the issue of premature closure we find that claimant's claim was properly closed on November 25, 1983. We, therefore, reverse the Referee's order as it pertains to premature closure.

Claimant's chemical sensitivity problem began in 1980. After claimant changed jobs, her symptoms lessened for a time, then returned in September 1980 and remained fairly continuous thereafter. Claimant was seen in consultation on several occasions between September 1981 and November 1983 by Dr. Saddoris. After examining claimant on November 25, 1983, Dr. Saddoris reported that claimant continued to have intermittent coughing and wheezing. He concluded, however, that claimant was essentially stable because her condition had not materially changed for several years. He, therefore, found claimant medically stationary as of the date of the examination.

Determination Orders dated January 11, 1984 declared claimant medically stationary as of November 25, 1983. Claimant subsequently sought treatment from Dr. Morgan in mid-1984. Dr. Morgan testified at the hearing that claimant was not yet stationary. He indicated that claimant's condition had waxed and waned since 1981, but that she had probably not improved during the previous four years.

Claimant relies on the testimony of Dr. Morgan to establish that she was not stationary at the time the January 1984 Determination Orders issued. Dr. Morgan's testimony and reports, however, were made available after the Determination Orders issued. In Alvarez v. GAB Business Services, 72 Or App 524 (1985), the court made clear that medically stationary status is to be determined from the evidence available at the time of closure. Subsequent information is not to be considered. See also Maarefi v. SAIF, 69 Or App 527 (1984).

In the present case, the pertinent information available at the time of closure consisted of the reports of the consulting physician, Dr. Saddoris. It was his opinion that claimant was medically stationary on November 25, 1983. Claimant's claim was properly closed by the Determination Orders declaring that date as the date claimant reached medically stationary status.

#### ORDER

The Referee's order dated October 31, 1984 is reversed in part and affirmed in part. That portion of the order that set aside the Determination Orders dated January 11, 1984 is reversed and the Orders are reinstated. The remainder of the Referee's order is affirmed.

CHERYL FROMME, Claimant  
Coons & Cole, Claimant's Attorneys  
Moscato & Byerly, Defense Attorneys

WCB 85-10042  
November 13, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Brown's order that awarded claimant 15 percent (48 degrees) unscheduled permanent partial disability for her low back in addition to the 15 percent (48 degrees) awarded by Determination Order. The insurer cross-requests review, contending that the award granted by the

Determination Order should be reinstated. The issue is extent of disability.

Claimant injured her low back in May 1983 in the course of her employment as a grocery checker when she lifted a heavy bag of groceries to put it in a shopping cart. After a period of chiropractic treatment, the claim was closed by Determination Order in August 1983 with no award of permanent partial disability.

Claimant returned to work and experienced an exacerbation of her condition. A consulting orthopedist, Dr. Schroeder, suspected a herniated lumbar disc. Claimant underwent a CT scan and myelogram which revealed bulging discs at L4-5 and L5-S1. After further conservative treatment, the claim was again closed by Determination Order, this time with an award of 15 percent (48 degrees) unscheduled permanent partial disability. Dr. Schroeder rated claimant's impairment as mild. Other reports in the record indicate that claimant should not lift over 25 pounds on a regular basis.

After claim closure, claimant began working in a body shop as an estimator/bookkeeper. Claimant testified that she was able to perform this job without extreme discomfort on good days, but on bad days, which occur at least once a week, she could not work. Her employer had experienced a back injury himself and was tolerant of claimant's limitations and the problems created by claimant missing work on the bad days. The Referee found claimant credible based on her demeanor. He noted that after 40 minutes of testimony claimant appeared extremely uncomfortable and after an hour was on the verge of tears.

Based upon the medical record and the testimony, the Referee rated claimant's impairment at 10 percent of the whole person. The Referee then discussed the various social and vocational factors listed in OAR 436-30-400 through 436-30-460 and calculated claimant's unscheduled disability as 15 percent. He then added another 15 percent based upon the "unpredictability" of claimant's "bad days" and her employment by a "sympathetic employer" for a total disability rating of 30 percent or 96 degrees.

In rating the extent of unscheduled permanent partial disability for claimant's low back, we consider her 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 436-30-480 et seq. We apply these rules as guidelines, not as restrictive mechanical formulas. See Harwell v. Argonaut Insurance Co., 296 Or 505, 510 (1984); Howerton v. SAIF, 70 Or App 99, 102 (1984).

Claimant was 24 years old at the time of the hearing. She is of average intelligence, is a high school graduate and has two years of college. Her short work history is in the retail grocery industry where she had progressed in a relatively short time from an entry level position as a bottle counter to a position with some management responsibilities.

Following our de novo review of the medical and lay evidence, we conclude that claimant's low back impairment is in the lower end of the mild range. We have considered the "unpredictability" of claimant's "bad days" in arriving at this conclusion. Exercising our independent judgment in light of claimant's level of impairment and the relevant social and

vocational factors (including claimant's current employment with a "sympathetic employer"), we conclude that an award of 48 degrees for 15 percent unscheduled permanent partial disability adequately and appropriately compensates claimant for the permanent loss of earning capacity due to the industrial injury. We, therefore, reinstate the Determination Order award.

ORDER

The Referee's order dated April 8, 1986 is reversed. The award of 48 degrees for 15 percent unscheduled permanent partial disability for claimant's low back granted by the Determination Order dated August 2, 1985 is reinstated and affirmed.

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

Own Motion 85-0196M  
November 13, 1986  
Own Motion Order and Determination

On September 27, 1985 we issued our second order on reconsideration in this case, in which we withdrew two previous orders and ordered claimant's claim reopened for payment of compensation for temporary total disability, less time worked, commencing February 5, 1984. Claimant's aggravation rights, ORS 656.273(1), have expired. Subsequently, claimant has moved the Board for an order awarding a penalty and associated attorney fees for the self-insured employer's refusal to pay or delay in paying compensation ordered by the Board. On August 13, 1986 we issued an order requiring the employer to show cause why such relief should not be granted. Since the issuance of the show cause order, both the employer and claimant have provided us with evidence and argument relating to the issue of penalties and attorney fees. Additionally, on September 22, 1986 the employer requested that claimant's claim be closed.

We address first the question of penalties and attorney fees. ORS 656.262(10) provides:

"If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation . . . , the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees which may be assessed under ORS 656.382."

In our order reopening claimant's claim, we ordered the claim reopened and compensation paid for temporary total disability as of February 5, 1984, less time worked. The record establishes that employer began paying compensation for temporary total disability as of October 19, 1984, the date claimant ceased working entirely. Prior to requesting additional relief in the form of a penalty and attorney fees, claimant, through his attorney, made claim for temporary disability compensation for the periods February 5-12, 1984, February 27, 1984, April 10 through May 20, 1984, July 18, 1984, September 4, 1984 and "for any other time claimant lost as a result of his injury." Employer eventually paid compensation for the period April 11 through May 20, 1984, but as of this date all other claimed periods remain

Department published an order pursuant to ORS 656.307 which designated Safeco as the paying agent pending a hearing. On May 9, 1985 Industrial Indemnity denied responsibility for claimant's low back condition as an aggravation.

In May 1985 claimant's right ankle condition worsened. On May 22, 1985 Dr. Colistro reported that claimant's need for psychological treatment was now related to her right ankle injury rather than the low back injury. He related the psychological condition to the physical condition which was most disabling at the time.

On June 25, 1985 Safeco denied responsibility for claimant's leg, ankle, and foot related conditions including the psychological and emotional condition. On July 25, 1985 SAIF denied compensability of and responsibility for claimant's leg, ankle, and foot related conditions including the psychological and emotional condition. A stipulation dated August 8, 1985 between claimant and Industrial Indemnity acknowledged that Industrial Indemnity was not responsible for claimant's low back, leg, ankle, foot, and related psychological and emotional conditions and awarded 24 degrees for 7.5 percent unscheduled permanent partial disability for injury to claimant's neck and shoulders.

During cross-examination of claimant, SAIF and Safeco represented that they had requested a .307 order on the issue of responsibility for claimant's right ankle and related conditions and that compensability was not an issue. Claimant's attorney confirmed the representation.

The Board affirms the Referee's order on the issue of SAIF's responsibility for claimant's right leg, ankle, and foot injuries. The medical evidence is clear that there was no worsening of the underlying condition sufficient to shift responsibility to the subsequent employer.

The Referee found that Safeco was responsible for a new injury to claimant's low back based on the reasoning in Consolidated Freightways v. Foushee, 78 Or App 509, rev. den., 301 Or 338 (1986). He found that the sudden incident of pain and new symptoms in January 1985 constituted a new injury and that a worsening of the underlying condition was not necessary to shift responsibility. Since the Referee's decision the Court of Appeals published Hensel Phelps Construction v. Mirich, 81 Or App 290 (1986). In the aggravation or new injury context it is necessary that the accepted condition was worsened at the subsequent employment to shift responsibility. Mirich, id. at 294. See also Eva L. Doner (Staley), 38 Van Natta 1280 (1986). The medical evidence is unequivocal that claimant's January 1985 symptoms did not indicate a worsening of the underlying condition. There was merely a symptomatic exacerbation of the accepted condition. Consequently the Referee's order shall be reversed and responsibility for the low back condition assigned to SAIF.

The Referee divided responsibility for the psychological and emotional condition according to the opinion of the treating psychiatrist. When claimant's low back condition was the primary disabling factor contributing to the psychological and emotional condition then SAIF was responsible for the psychiatric care. When the right ankle condition was the primary disabling factor contributing to the psychological and emotional condition then Safeco was responsible for the psychiatric care. By this order we

have found that SAIF is responsible for both the low back condition and the right ankle condition. Consequently SAIF is the responsible insurer for the psychological and emotional condition as it is related to each physical condition.

The Referee awarded attorney fees to be paid by Safeco for services related to overturning its March 1, 1985 denial of responsibility for claimant's low back condition. The denial was solely a denial of responsibility. Compensability of the low back condition was not an issue and a .307 order was published promptly after the responsibility denials. Attorney fees should have been allowed out of compensation awarded to claimant rather than paid by the insurer on this issue. Calvin C. Bourne, 38 Van Natta 965 (1986); Mark L. Queener, 38 Van Natta 882 (1986).

The Referee awarded attorney fees to be paid by SAIF for services related to overturning its July 25, 1985 denial of compensability of and responsibility for claimant's lower extremities conditions and psychological and emotional condition. At the time of the hearing both insurers had denied compensability and no order pursuant to ORS 656.307 had been issued. During cross-examination of the claimant the parties stipulated that compensability was no longer an issue but that insurer responsibility remained as an issue. The parties represented that the actual acceptance of the compensability issue had been agreed to before the hearing commenced. Consequently claimant's attorney was entitled to a fee for overturning a denial of compensation without the necessity of a hearing. OAR 438-47-015; Dennis S. Current, 38 Van Natta 838, 839 (1986); Harold L. Dotson, 37 Van Natta 759 (1985), aff'd, Dotson v. Bohemia, Inc., 80 Or App 233 (1986). The Referee awarded a fee within his discretion for services related to the overturning of a denial of compensation to be paid by SAIF. There was no issue of claimant's right to or amount of compensation on Board review, therefore claimant's attorney is not entitled to a fee for services on Board review.

#### ORDER

The Referee's order dated January 22, 1986 as corrected and amended February 18, 1986 is reversed in part and affirmed in part. That portion of the order which set aside the March 1, 1985 denial by Safeco Insurance Company of responsibility for a new injury to claimant's low back is reversed and the denial is reinstated and affirmed. That portion of the order which upheld the March 28, 1985 denial of the SAIF Corporation of aggravation of claimant's low back condition is reversed and the claim is remanded to SAIF for acceptance and processing. That portion of the order which upheld a portion of the July 25, 1985 denial of the SAIF Corporation of claimant's psychological and emotional condition is reversed and the claim is remanded to SAIF for acceptance and processing. That portion of the order which set aside the de facto denial of Safeco Insurance Company of claimant's psychological and emotional condition is reversed. Those portions of the order which awarded attorney fees to be paid by Safeco Insurance Company are reversed. The remaining portions of the order are affirmed. Claimant's attorney is allowed reasonable attorney fees for services related to the low back condition of 25 percent of the compensation awarded to claimant for the low back injury up to a maximum of \$750.

JOYCE K. McNELLY, Claimant  
Emmons, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-13571  
November 13, 1986  
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The SAIF Corporation requests review of that portion of Referee McCullough's order that awarded claimant 192 degrees for 60 percent unscheduled permanent partial disability in lieu of a Determination Order award of 32 degrees for 10 percent unscheduled disability for the neck and upper back. Claimant cross-requests review of that portion of the order that denied her request for a separate scheduled award for the right arm. The issues are extent of unscheduled disability and whether claimant is entitled to a separate scheduled disability award for the right arm. We draw from the Referee's factual summary.

Claimant suffered a compensable injury to her neck and upper back while employed as a truck driver in August 1980. All treatment for the injured area has been conservative. In addition, claimant has received treatment for a psychological condition stemming from her physical injury.

Claimant continued to work for several months following her injury. She ultimately left her job in November 1980, however, due to the effects of her injury. She did not return to work until February 1986. At the time of the hearing she was employed in a light-duty job as a part-time motel desk clerk.

Following the 1980 injury claimant received job search assistance and vocational retraining. She successfully completed a training program in property appraising and is licensed as a certified appraiser of both real and personal property. At the time of the hearing she was 42 years old and had a high school diploma. In addition, claimant had completed two years of college coursework. Her past employment has been primarily light-duty and includes clerical work, cocktail waitressing and sales clerking. She also has management experience and a real estate license, although it had expired prior to the hearing date. The vocational evidence reveals that claimant is a highly motivated person who is quick to learn.

Claimant testified that she suffers constant headaches and neck pain, with symptoms varying depending on her level of activity. She has also lost at least some right arm function as a result of her compensable neck injury. Dr. Ray, the treating physician, has recommended that claimant not lift over 15 pounds and not engage in overhead lifting or prolonged pushing and pulling movements. The treating psychologist, Dr. McIver, has suggested that claimant avoid work situations involving demanding production schedules or supervisory pressures.

An October 16, 1985 Determination Order awarded claimant 32 degrees (10 percent) unscheduled disability for her neck and upper back. The Referee raised the award to 60 percent, finding that although claimant had acquired a new vocational skill, her employment options had been substantially limited by her compensable physical and psychological conditions. The Referee refused to award a separate sum for the scheduled right arm, however, stating that he had considered the scheduled right arm disability when making the unscheduled award.

From the outset, we find that claimant is entitled to separate awards for her unscheduled and scheduled conditions. In Foster v. SAIF, 259 Or 86 (1971), the court held that where an injury to an unscheduled portion of the body results in disability to both unscheduled and scheduled portions, separate awards should be made for each. Id. at 91. The granting of separate awards does not necessarily mean that claimant will secure greater compensation, however, for reduced earning capacity is considered for only that part of the disability that is unscheduled. Id.; Olds v. Superior Fast Freight, 36 Or App 673 (1978).

The present claimant's compensable injury resulted in disability to both unscheduled (neck and upper back) and scheduled (arm) parts of the body. She is, therefore, entitled to separate unscheduled and scheduled awards. We find, however, that the 60 percent award made by the Referee is excessive, even considering his inclusion of the scheduled condition in his analysis. Although claimant does suffer permanent physical and psychological disability, her age, past employment, education and superior learning abilities temper the loss of earning capacity resulting from the compensable injury. After considering these and other pertinent factors, we conclude that claimant's unscheduled neck and upper back disability does not exceed 25 percent. The Referee's award will be modified accordingly.

Claimant is also entitled to a scheduled award for loss of use of the right arm. After considering the medical evidence and claimant's credible testimony regarding loss of right arm function due to disabling pain, we conclude that she is entitled to an award of five percent scheduled disability.

#### ORDER

The Referee's order dated April 21, 1986 is modified. In lieu of the 60 percent (192 degrees) unscheduled permanent partial disability awarded by the Referee, claimant is awarded 25 percent (80 degrees) unscheduled permanent partial disability for the neck and upper back and five percent (7.5 degrees) scheduled permanent partial disability for the right arm. Claimant's attorney's fee shall be modified according to this order.

SUSAN TURNER, Claimant  
Lindsay, et al., Defense Attorneys

Own Motion 86-0170M  
November 13, 1986  
Own Motion Order

Claimant has requested that the Board exercise its own motion authority and reverse the decision of the Referee that she did not sustain any compensable consequences from the May 27, 1981 industrial injury. The Referee's Opinion and Order dated August 31, 1982 was affirmed by the Board on June 16, 1983 and by the Court of Appeals on February 29, 1984. The insurer contends that the Board has no authority under ORS 656.278 to make such a reversal.

ORS 656.278(5) provides in part:

"The provisions of this section do not authorize the board, on its own motion, to modify, change or terminate former orders:

"(a) That a claimant incurred no injury or incurred a compensable injury...."

Although there is no question that the claimant was involved in an accident on May 27, 1981, it has been determined that the claimant incurred no compensable injury as a result of that accident. ORS 656.278(5)(a) specifically prohibits the Board from exercising its own motion jurisdiction in this case. Claimant's request for own motion relief is hereby denied.

IT IS SO ORDERED.

HAZEL J. DEROSIA, Claimant  
Quintin B. Estell, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 85-09108  
November 17, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of those portions of Referee Quillinan's order that: (1) upheld a Determination Order awarding 48 degrees for 15 percent unscheduled permanent partial disability for the low back; and (2) denied claimant's request for additional vocational assistance. The issues are extent of unscheduled disability and entitlement to vocational assistance.

We affirm the Referee's order as it pertains to vocational assistance. With regard to the issue of extent we modify the Referee's award.

Claimant is a former nurse's aide who has had multiple job-related low back injuries. The first was a nondisabling injury occurring in 1981. The second injury occurred in 1983 and claimant was taken off work. On her release for return to work, claimant was given lifting restrictions by the then-treating physician. She was found to be medically stationary in June 1983. The subsequent Determination Order awarded no permanent disability compensation.

Claimant began working for the present employer in January 1984. Approximately five months after beginning work, claimant suffered a third compensable injury to the low back. The claim was accepted as disabling. Claimant returned to work for a short time, but was forced to quit after her low back symptoms returned. In the interim, a second Determination Order awarded claimant temporary total disability only.

Claimant returned to work once again, but was soon taken off the job by Dr. Peterson, the treating physician. A November 1984 CT scan revealed an L4-5 protruding disk fragment. A month later claimant underwent surgery to remove the fragment. Dr. Peterson opined that claimant could return to work following her recovery. Dr. Buza, the consulting neurologist who performed claimant's surgery, disagreed. He recommended that claimant lift no more than 10 to 20 pounds and that she avoid prolonged sitting, standing or walking. Dr. Buza declared claimant medically stationary in May 1985 and rated her permanent impairment as between mild and moderate. He recommended retraining for light duty employment. A July 1985 Determination Order awarded 15 percent unscheduled low back disability.

Vocational assistance was thereafter provided. Testing revealed that claimant is deficient in basic academic areas and will encounter difficulty in work settings requiring academic

ability. Labor market surveys revealed that claimant is physically capable of performing such jobs as file clerk, bank teller and medication aide. She secured several job interviews as a result of the assistance provided, but was not hired. Vocational closure was effected due to what appeared to be a depressed labor market.

Claimant testified that she is 29 years old and has completed ten formal years of education in Great Britain. She is a certified nurse's aide and medical aide, but has no other formal education or training. She has intermittent back pain that limits the time she can comfortably sit or stand. Bending and stooping cause aching in the low back. She has occasional exacerbations that resolve with conservative treatment. Claimant summed up her condition by testifying that she is uncomfortable, but not bedridden or totally inactive.

Two vocational consultants testified. Mr. McNaught noted claimant's lack of transferable skills, limited education and sparse employment background. In his opinion, claimant's injury had precluded her from approximately 55 percent of the labor market. Mr. Rees was more optimistic. He felt claimant's medical aide training represented a transferable skill that might open up employment in a hospital or pharmaceutical setting. He estimated that claimant had been precluded from approximately 26 percent of the labor market.

The Referee found that claimant had been adequately compensated by the 15 percent Determination Order award, finding claimant to be no more medically or vocationally disabled than the assessment rendered by the Evaluation Division would indicate. We disagree, primarily because we find the Evaluation Division's physical impairment rating does not adequately reflect claimant's physical restrictions. While claimant's testimony does suggest that she is not seriously hampered by the effects of her injury, the treating surgeon, Dr. Buza, states that she is impaired at least to a mild degree and is possibly moderately impaired. He has placed substantial limitations on claimant's lifting, bending, stooping, standing and walking and, while claimant is not totally inactive, normal activity regularly results in discomfort.

After considering the aforementioned medical factors and claimant's limited educational and vocational background, we conclude that claimant is entitled to a total award of 25 percent unscheduled permanent partial disability for the low back.

#### ORDER

The Referee's order dated February 26, 1986 is affirmed in part and modified in part. That portion of the order that denied claimant's request for additional vocational assistance is affirmed. That portion of the order that affirmed the Determination Order award of 48 degrees for 15 percent unscheduled permanent partial disability is modified. In addition to the award made by the Determination Order, claimant is awarded 32 degrees for 10 percent unscheduled permanent partial disability, for a total award of 80 degrees for 25 percent. Claimant's attorney is allowed a fee equal to 25 percent of the additional compensation awarded by this order, not to exceed \$3,000.

CAROL A. DODGE, Claimant  
Ringo, Walton, et al., Claimant's Attorneys  
Roberts, et al., Defense Attorneys

WCB 85-01398  
November 17, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of that portion of Referee McCullough's order that set aside its partial denial of claimant's alleged bilateral carpal tunnel syndrome. The issue is compensability.

On de novo review of the entire record, we find that claimant sustained on-the-job strains of both wrists. She strained her right wrist on September 13, 1984 and her left wrist on September 17, 1984. Employer consolidated the two claims into one for injury to both wrists, which it accepted. The diagnosis was bilateral tendinitis of the wrists. Claimant was treated conservatively by Dr. Brink, her family physician. At employer's request, claimant was examined by Dr. Nathan, a hand specialist. His diagnoses were bilateral wrist soft tissue irritation, resolved, related to claimant's employment, and bilateral carpal tunnel syndrome, right worse than left, idiopathic. The diagnosis of carpal tunnel syndrome was based upon electrical studies. Dr. Ellison, who examined claimant on referral by her attorney, essentially agreed with Nathan's opinion, except that he opined that claimant's job activities were "consistent with" her symptom complex. Nerve conduction studies done by Dr. Brooks for Dr. Ellison were, however, normal. There is no explanation of the inconsistency between Dr. Brooks' normal studies and the diagnosis of bilateral carpal tunnel syndrome.

The employer specifically denied responsibility for the alleged bilateral carpal tunnel syndrome. However, the employer specifically acknowledged that the soft tissue irritation arising out of the September 13 and 17, 1984 incidents were and remained accepted. We conclude that claimant has not established by a preponderance of the evidence that she has carpal tunnel syndrome or that, if she does, the condition was caused by her employment.

Assuming for the sake of discussion that claimant has carpal tunnel syndrome, the medical opinions do not support a finding of compensability. Dr. Nathan's opinion is that the condition is not work related. Dr. Ellison's opinion is only that claimant's job activities were "consistent with" the condition. Dr. Ellison's opinion is not sufficient to establish either that claimant's work was a material cause of the condition or that the work was a major contributing cause of an actual worsening of an underlying condition, nor does the opinion rule out other causes such as Dr. Nathan's opinion that the condition is idiopathic. See Bradshaw v. SAIF, 69 Or App 587 (1984). We conclude that the employer's denial of responsibility for bilateral carpal tunnel syndrome should be upheld.

#### ORDER

The Referee's order dated October 10, 1985 is reversed in part and affirmed in part. That portion of the order that set aside the self-insured employer's January 25, 1985 denial of responsibility for carpal tunnel syndrome and awarded an employer-paid attorney fee is reversed. The denial is reinstated and affirmed. The remainder of the Referee's order is affirmed.

ALLEN FANNO, Claimant  
Hayner, et al., Claimant's Attorneys  
Cummins, et al., Defense Attorneys

WCB 85-04539  
November 17, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Brown's order that failed to award an attorney fee at hearing for claimant's defense of the employer's cross-appeal of a Determination Order. The sole issue on review is attorney fees. We reverse.

Claimant was compensably injured in 1980. He was initially awarded 10 percent unscheduled permanent disability by way of Determination Order. On appeal, the award was raised to 20 percent. Claimant was twice reinjured. He ultimately became medically stationary in early 1985. A Determination Order issued on April 8, 1985, awarding claimant a period of temporary total disability compensation, but no additional permanent disability. Claimant requested a hearing on the order, initially asserting entitlement to additional permanent disability, an award of temporary partial disability and penalties and attorney fees.

The matter went to hearing on January 30, 1986. At the outset, claimant withdrew his request for hearing on all issues except extent of permanent disability. The employer, however, entered a cross-appeal on the Determination Order in its entirety, challenging the awards of both permanent partial and temporary total disability.

The Referee affirmed the Determination Order as written, but refused to award claimant an attorney fee for his successful defense against the employer's cross-appeal. The Referee cited Thomas Donahue 37 Van Natta 1282 (1985), in which we found that in order for claimant to be awarded an attorney fee for defending against an insurer's or employer's cross-appeal, the insurer or employer must have affirmatively initiated a cross-request on an issue separate from or in addition to the issues raised by the claimant. Id. at 1283. See also Teel v. Weyerhaeuser, 294 Or 588 (1983); Gleason W. Rippey, 36 Van Natta 778 (1984). The present Referee apparently believed that the employer's cross-appeal was a mere response to the issues raised by claimant. We disagree.

Under ORS 656.382(2), if an employer or insurer "initiates" a request for hearing and the Referee finds that the compensation awarded to the claimant should not be reduced or disallowed, the employer or insurer must pay a reasonable attorney fee in an amount set by the Referee. With regard to cross-appeals, OAR 438-47-075 provides:

"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."  
(emphasis added.)

In the present case, claimant withdrew his request for

hearing on the temporary disability issue. Despite the withdrawal, the employer elected to pursue the issue by way of cross-appeal. Under the aforementioned administrative rule, the employer became the "initiating party," and claimant was placed in a posture of defense against the issue "initiated" by the employer. By ultimately affirming the Determination Order on the issue of temporary disability, the Referee found that claimant's compensation should not be reduced. Thus, claimant successfully defended against a cross-appeal "initiated" by the employer, as that term is used in OAR 438-47-075, and a reasonable attorney fee for prevailing on that issue was required under ORS 656.382(2).

Although claimant is due an attorney fee for services at hearing, he is not entitled to a fee for prevailing on the attorney fee issue on Board review. The sole issue on review was attorney fees. See Dotson v. Bohemia, Inc., 80 Or App 233 (1986).

#### ORDER

The Referee's order dated March 21, 1986 is reversed in part and affirmed in part. That portion of the order that failed to award claimant an attorney fee for prevailing on the employer-initiated cross-request for hearing is reversed. Claimant is awarded a reasonable attorney fee of \$300 for services at hearing to be paid by the self-insured employer. The remainder of the order is affirmed.

FRANK E. NORELIUS, Claimant  
Pozzi, et al., Claimant's Attorneys  
Roberts, et al., Defense Attorneys

WCB 82-10763  
November 17, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of that portion of Referee Shebley's order which upheld the insurer's denial of a thought disorder and behavior changes. The insurer cross-requests review of that portion of the order which set aside its denial of tinnitus and acoustic trauma. The issues on review are compensability of a psychiatric condition and compensability of tinnitus.

On the issue of the compensability of the psychiatric condition the Board affirms the order of the Referee with the following comment. The Referee found that the treating psychiatrist's report was "very convincing" but relied on credible lay testimony which described claimant's behavior as more consistent with the diagnosis of an examining physician. We agree with the Referee to the extent that the treating psychiatrist's report was lucid and relied on claimant's description of the workplace. However, we find that the opinion of the examining physician is also clear and relies on a more persuasive description of the workplace and claimant's behavior. The Referee's conclusion was correct.

On the issues of tinnitus and acoustical trauma, we reverse. Claimant worked as a slitter operator at a tin can factory. The workplace was extremely noisy. All employees were required to wear hearing protection devices which were supplied by the employer. There was rigorous monitoring of compliance with the hearing protection requirements and claimant was acknowledged as one who always wore appropriate hearing protection. Hearing

tests conducted over the years of claimant's employment demonstrated that he suffered no hearing loss. Testing has confirmed that claimant probably does have tinnitus for which effective masking devices have been prescribed.

Dr. Johnson opined that claimant's tinnitus is related to his exposure to loud noise at the workplace. Dr. Wilson opined that claimant's lack of high frequency hearing loss meant that claimant's tinnitus was not caused by exposure to loud noise. Dr. Myers reported that tinnitus has many possible causes not related to noise. In the absence of evidence of cochlear trauma Dr. Myers opined that claimant's tinnitus was probably not noise induced.

Claimant had the burden of proving by a preponderance of the evidence that his tinnitus was caused by exposure to noise at the workplace. He had no hearing loss due to noise of any kind. There was no evidence of noise induced trauma to his hearing. Tinnitus is a condition which is not necessarily caused by exposure to noise. The opinion of Dr. Johnson relies on the faulty assumption that claimant's hearing was exposed to the loud noise of the slitter at the can factory. The opinions of Drs. Wilson and Myers rely on the lack of evidence of injury to claimant's hearing which is consistent with the evidence of claimant's protection from noise. The Board finds that the opinions of Drs. Wilson and Myers are more persuasive because they rely on more accurate information about claimant's exposure and response to noise. Consequently that portion of the Referee's order which set aside the insurer's denial of compensability of tinnitus and acoustic trauma shall be reversed.

The reinstatement of the denial of compensability of the tinnitus and acoustic trauma results in an alternative basis for upholding the denial of claimant's psychiatric condition. The psychiatric condition is not related to an industrial injury nor to an occupational disease. The persuasive evidence establishes that claimant's psychiatric condition may be related to the tinnitus which is not work related.

#### ORDER

The Referee's order dated January 24, 1986 is reversed in part and affirmed in part. That part which set aside the insurer's denial of tinnitus and acoustic trauma is reversed. The denial dated November 4, 1982 is reinstated and affirmed in all respects. The attorney fee award is reversed by operation of law. The remainder of the order is affirmed.

KATHLEEN M. SIMONSEN, Claimant  
Cash Perrine, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 85-07826  
November 17, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of those portions of Referee T. Lavere Johnson's order which: (1) upheld the SAIF Corporation's denial of aggravation of claimant's back injury; (2) upheld SAIF's denial of chymopapain neucleolysis as not reasonable and necessary medical treatment; and (3) denied penalties and attorney fees for: (a) late payment of interim compensation; (b) late denial of

aggravation; and (c) unreasonable denial of medical treatment. The issues on review are aggravation, compensability, and penalties and attorney fees.

The Board affirms and adopts the order of the Referee with the following modification. As the Referee found, the denial of aggravation was not made within 60 days of notice of the claim. Even though there is no compensation due claimant and the denial is upheld, claimant's attorney is entitled to a reasonable attorney fee because the denial was late. Hutchinson v. Louisiana-Pacific Corp., 81 Or App 162 (1986); Spivey v. SAIF, 79 Or App 568 (1986).

ORDER

The Referee's order dated April 1, 1986 is modified. Claimant's attorney is awarded \$100 as a reasonable fee for services related to the late denial of aggravation. The remainder of the order is affirmed.

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HARRY W. CLARK, Claimant  
Pozzi, et al., Claimant's Attorneys  
Schwabe, et al., Defense Attorneys

WCB 84-06827  
November 18, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of Referee Leahy's order that: (1) set aside its denial of responsibility; and (2) set aside its denial of aggravation. The issues are responsibility and aggravation.

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

In its brief, the employer argues that claimant's chain lifting incident in Idaho independently contributed to his original injury. Further, the employer argues that the contribution from this incident was sufficient to require claimant to file a claim in Idaho before it can be responsible for claimant's aggravation. In support of this contention the employer cites Miville v. SAIF, 76 Or App 603 (1985), and Olson v. EBI Companies, 78 Or App 261 (1986).

We disagree. Olson and Miville apply only in situations where the out of state incident materially contributes to claimant's current condition. In order to shift responsibility the second incident "must independently contribute to the causation of the disabling condition, i.e., to a worsening of the underlying condition." Hensel Phelps Construction Co. v. Mirich, 81 Or App 290, 294 (1986). An independent contribution to the worsening of symptoms alone is not enough to shift responsibility, even where the symptoms cause disability. Id.

We agree with the Referee that the chain lifting incident in Idaho did not independently contribute to a worsening of claimant's underlying condition and responsibility did not shift. As a result, claimant was not required to file a claim in Idaho and obtain a final determination there, before seeking benefits in Oregon.

Further, we find this case to have been of average difficulty with an ordinary likelihood of success on Board review.

ORDER

The Referee's order dated November 25, 1985 is affirmed. Claimant's attorney is awarded \$750 for services on Board review to be paid by the self-insured employer.

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JOHN K. EDER (Deceased)  
Jane Eder, Claimant  
Pozzi, et al., Claimant's Attorneys  
Davis, Bostwick, et al., Defense Attorneys

WCB 85-09171  
November 18, 1986  
Order Denying Motion for  
Abatement and Reconsideration

Claimant, through counsel, has moved the Board to abate and reconsider, and by implication withdraw, our order dated October 29, 1986 that dismissed the insurer's request for review of Referee Lipton's order. Claimant did not file a cross-request for review of the Referee's order, but did raise issues in the respondent's brief not raised by the insurer in its appellant's brief. The insurer filed a notice of withdrawal of its request for review on October 27, 1986. Claimant objects to our dismissal of review proceedings based upon the insurer's withdrawal of its request for review, arguing that claimant is entitled to have the matter reviewed. We disagree.

We may review all issues raised or raisable on the entire record of a case before us regardless whether a specific issue is raised or argued in briefs. Destael v. Nicolai Co., 80 Or App 596, 600-01 (1986); Russell v. A & D Terminals, 50 Or App 27, 31 (1981). However, a timely request for Board review is a jurisdictional prerequisite for our reviewing a case at all. ORS 656.289(3); 656.295(2); Argonaut Insurance v. King, 63 Or App 847, 852 (1983). Upon the filing of a request for review by one party, any other party may also request review and the time to do so may be extended by statute to up to 40 days after the mailing of the Referee's order. ORS 656.289(3). See Robert Casperson, 38 Van Natta 420 (1986). The request need not be in any particular form, but it must be timely.

Once the time for filing a request for review has expired, the only party who has a right to review is one who has timely requested review. We do not question the motive for a party withdrawing a request for review. See Rodney C. Strauss, 37 Van Natta 1212 (1985). Once the request is withdrawn for whatever reason, where no other party has requested review in a timely manner we no longer have jurisdiction to proceed. Any other holding would render the statutory basis for review of Referees' orders meaningless. See Argonaut Insurance v. King, supra.

The motion for abatement and reconsideration is denied. Appeal rights shall not be affected by this order.

IT IS SO ORDERED.

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JERRY F. FOSTER, Claimant  
Malagon & Moore, Claimant's Attorneys  
Constance L. Wold, Defense Attorney  
Cummins, et al., Defense Attorneys

WCB 84-11283 & 84-12837  
November 18, 1986  
Order on Reconsideration

Claimant and Western Employers Insurance Company both requested reconsideration of the Board's Order on Review dated June 12, 1986. We abated our order to allow the parties opportunity to respond to these requests.

Western Employers asks that the Board clarify the basis of its decision on the merits of this responsibility case. We adopted the reasoning of the Referee. After our de novo review of the record, we concluded that claimant's work for Western Employers' insured had independently contributed to a worsening of his underlying low back condition. The fact of this worsening was indicated by claimant's inability to return to heavy work and by Dr. Holbert's report of January 4, 1985. We are not persuaded upon further review that our decision was erroneous.

Claimant argues that by prevailing against Western Employers (the "new injury" insurer), his attorney obtained new aggravation rights and a higher rate of temporary disability compensation for him. These circumstances, he contends, takes this case out of the rule of Petshow v. Farm Bureau Insurance Co., 76 Or App 563 (1985), rev den 300 Or 722 (1986) and thus allows an award of insurer-paid attorney fees.

We do not accept claimant's argument. As we stated recently in Bruce A. Hatleli, 38 Van Natta 1024, 1026 (1986), "determination of the rate of temporary total disability benefits and the setting of aggravation rights are a natural outcome of the responsibility finding," which is actively litigated by the aggravation and new injury insurers. The insurers actively litigated the responsibility issue in this case. Under these circumstances, the efforts of claimant's attorney were superfluous and no attorney fee is warranted simply because the "natural outcome" of the litigation between the insurers included certain benefits to claimant which he would not have received had the other insurer prevailed.

After reconsideration, the Board adheres to and republishes its previous order, as supplemented herein, effective this date.

IT IS SO ORDERED.

PAULETTE L. GOLD, Claimant  
Jolles, et al., Claimant's Attorneys  
Meyers & Terrall, Defense Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 84-11332 & 85-04658  
November 18, 1986  
Order Denying Cross-Request  
for Review

Reviewed by Board Members Ferris and Lewis.

Claimant timely requested Board review of Referee Holtan's order dated July 7, 1986. Claimant filed a brief, which was followed by the SAIF Corporation's brief, which it captioned "Respondent's Brief and Cross-Appeal." On October 24, 1986 the Board received claimant's written withdrawal of her request for review. On October 31, 1986 the request was dismissed by order of that date. SAIF now requests that the review process continue based upon its "cross-appeal."

We may review all issues raised or raisable on the entire record of a case before us regardless whether a specific issue is raised or argued in briefs. Destael v. Nicolai Co., 80 Or App 596, 600-01 (1986); Russell v. A & D Terminals, 50 Or App 27, 31 (1981). However, a timely request for Board review is a jurisdictional prerequisite for our reviewing a case at all. ORS 656.289(3); 656.295(2); Argonaut Insurance v. King, 63 Or App 847, 852 (1983). Upon the filing of a request for review by one party, any other party may also request review and the time to do so may be extended by statute to up to 40 days after the mailing of the Referee's order. ORS 656.289(3). See Robert Casperson, 38 Van Natta 420 (1986). The request need not be in any particular form, but it must be timely. SAIF's "cross-appeal" was received on October 15, 1986, well beyond 40 days after the mailing of Referee's order, and is not timely.

Once the time for filing a request for review has expired, the only party who has a right to review is one who has timely requested review. We do not question the motive for a party withdrawing a request for review. See Rodney C. Strauss, 37 Van Natta 1212 (1985). Once the request is withdrawn for whatever reason, where no other party has requested review in a timely manner we no longer have jurisdiction to proceed. Any other holding would render the statutory basis for review of Referees' orders meaningless. See Argonaut Insurance v. King, supra.

The SAIF Corporation's request for review based upon its "cross-appeal" is denied. The time within which to appeal the October 31, 1986 Order of Dismissal shall not be affected by this order.

IT IS SO ORDERED.

The Beneficiaries of  
JANE GOODMAN, Deceased  
Pozzi, et al., Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-03858  
November 18, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of Referee Leahy's order which set aside its denial of the surviving spouse's claim for benefits. On review, SAIF contends that claimant is not entitled to survivor benefits. We affirm.

Claimant, Lloyd W. Goodman, is the surviving spouse of a worker who was receiving permanent total disability benefits at the time of her death. The decedent suffered her compensable injury in 1969. She was granted permanent total disability in 1973.

At the time of decedent's compensable injury, ORS 656.208 provided for survivor's benefits to the widow of a worker who was receiving permanent total disability at the time of his death. However, a widower was entitled to survivor's benefits only if he was also an "invalid." "Invalid" was defined as one who was physically or mentally incapacitated from earning a livelihood. ORS 656.002(14).

In November 1984 decedent died from causes not attributable to her compensable injury. At that time, ORS 656.208 made no distinction between a widow's or widower's entitlement to survivor's benefits.

SAIF denied claimant's claim for survivor's benefits, contending that he had failed to establish that he was an invalid. Thus, SAIF argued that the provision of ORS 656.208 which was in effect at the time of the compensable injury was applicable.

The Referee applied the version of ORS 656.208 which was in effect at the time of decedent's death. Accordingly, claimant was granted survivor's benefits.

We agree with the Referee that claimant is entitled to survivor's benefits. However, we follow a different analysis to reach the same conclusion.

As a general rule, 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 (1940); Tevepaugh v. SAIF, 80 Or App 685 (1986); Bradley v. SAIF, 38 Or App 559, 562-64, rev den 287 Or 123 (1979).

We followed this general rule in Donald L. Waldron, 38 Van Natta 461 (1986). In Waldron, a claimant requested additional permanent total disability benefits for minor children who were not yet born at the time of his compensable injury. Citing SAIF v. Brannon, 62 Or App 768 (1983), we concluded that pursuant to ORS 656.202(2) the date of injury is the date on which a worker's status conclusively determines his rate of compensation. Since the claimant was childless at the time of his injury, we found that he was not entitled to additional permanent total disability benefits for his post-injury children.

Relying upon the aforementioned authority, we find that this claim for survivor's benefits should be governed by the law in force at the time of the decedent's 1969 injury. Therefore, under the 1969 version of ORS 656.208, claimant, as a widower, is entitled to survivor's benefits only if he establishes that he is an "invalid." In other words, benefits under this statute are determined on a gender-based classification.

However, a gender-based distinction such as this has been found constitutionally impermissible. In Hewitt v. SAIF, 294 Or 33 (1982), the Supreme Court invalidated a former version of ORS 656.226 that allowed the female, but not the male member of an unmarried couple to collect death benefits. The Supreme Court concluded that a statutory classification relying on gender as legislative shorthand for dependency was the kind of stereotype that could not withstand a challenge under Article I, Section 20 of the Oregon Constitution. Hewitt, supra., 294 Or at 47. Yet, rather than invalidating the entire statute, the Supreme Court held that extending benefits to the excluded classification most effectively fulfilled the purpose of the legislation.

Here, we find no relevant distinction between the gender-based distinction which the Hewitt court found objectionable and the gender-based classification present in the

1969 version of ORS 656.208. Therefore, in accordance with the Hewitt holding, we find that this classification is prohibited. Furthermore, again following the Hewitt reasoning, we hold that benefits should be extended to the formerly excluded classification. Accordingly, we conclude that claimant, as a widower, is entitled to survivor's benefits.

We acknowledge that we have previously held that we are without authority to decide constitutional issues. Ray Lynn York, 35 Van Natta 558 (1983); Mellisa P. Johnson, 35 Van Natta 555 (1983); Sidney A. Stone, 31 Van Natta 84 (1981), rev'd in part on other grounds, Stone v. SAIF, 57 Or App 808 (1982). We adhere to this general proposition and do not repudiate the aforementioned cases. However, we are empowered to make such disposition of the case as we determine to be appropriate. ORS 656.295(6). Thus, in view of the irrefutable analogy between the Hewitt holding and the present issue, we believe that we are bound to follow the Supreme Court's rationale and find the gender-based classification constitutionally impermissible. To do otherwise would subject claimant to unnecessary hardship in that he would be forced to seek further appellate review to relieve himself from a result which we consider to be clearly unconstitutional.

Our decision to consider the constitutional application of the aforementioned statute appears to be in accordance with the Supreme Court's recent decision in Cooper v. Eugene School District No. 4J, 301 Or 358 (1986). In Cooper, the Supreme Court stated as follows:

"Long familiarity with the institution of judicial review sometimes leads to the misconception that constitutional law is exclusively a matter for the courts. To the contrary, when a court sets aside government action on constitutional grounds, it necessarily holds that legislators or officials attentive to a proper understanding of the constitution would or should have acted differently. Doubt of an agency's obligation to decide constitutional challenges to its governing statute is itself a question of interpreting the agency's statutory duties." 301 Or at 364-65.

We construe these statements to mean that, under certain specific circumstances, we are authorized to determine the constitutional applicability of a statute. As appointed officials we are sworn to support the Constitutions of the United States and the State of Oregon. ORS 656.716(2)(a); see Cooper, supra., 301 Or at 364, n. 7. In our capacity, this authority would necessarily include the interpretation of a statute so as to exclude its unconstitutional application. As a further safeguard to the exercise of this limited authority, we note that judicial review is available to question whether our decision was erroneous. Cooper, supra., 301 Or at 365.

ORDER

The Referee's order dated February 26, 1986 is

affirmed. Claimant's attorney is awarded \$650 as a reasonable attorney fee for services on Board review, to be paid by the SAIF Corporation.

DON L. ANDERSON, Claimant  
Emmons, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

Own Motion 86-0330M  
November 19, 1986  
Own Motion Order

Claimant has moved the Board for an order awarding a penalty and associated attorney fee for alleged unreasonable delay in payment of compensation on the part of the SAIF Corporation. The alleged delay was during the period June 7, 1986 to July 10, 1986. We find from the record before us that there was a delay in payment of some compensation.

SAIF voluntarily reopened claimant's claim effective April 1, 1986. See ORS 656.278(4). On June 10, 1986 the claim was submitted for closure by the Board. On June 16, 1986 we closed the claim by Own Motion Determination which awarded compensation for temporary disability from April 1, 1986 through May 27, 1986. Pursuant to the June 16, 1986 own motion closure, SAIF discontinued temporary disability benefits after having paid through June 6, 1986. Claimant requested reconsideration of the closure and SAIF furnished additional medical documentation. Pending our reconsideration, SAIF again voluntarily reopened the claim effective July 11, 1986. On August 19, 1986 we rescinded our June 16, 1986 order and ordered temporary disability compensation to commence May 28, 1986 until closure under ORS 656.278. Under the terms of our order, the only period of compensation then due was for the period June 7 through July 10, 1986. That compensation was paid September 10, 1986.

Compensation ordered paid by a litigation order is due within 14 days from the date of the order. See OAR 436-60-150 (3)(e). SAIF's payment of the compensation ordered for the period June 7 through July 10, 1986 was eight days late. Penalties and insurer-paid attorney fees may be allowed in instances where an insurer unreasonably delays or refuses to pay compensation due a claimant. ORS 656.262(10). This statute applies in proceedings under the provisions of ORS 656.278. See Edward Hines Lumber Co. v. Kephart, 81 Or App 43, 46 (1986).

SAIF's explanation for the late payment is that the claims examiner responsible for claimant's claim did not receive a copy of our order until six days after the 14 day period had expired. Payment was made two days later. There is no indication in the record that SAIF had any intent to flaunt or ignore the Board's order. Further, SAIF had already voluntarily reopened the claim and was paying compensation for temporary disability at the time our August 19, 1986 order was published. We nonetheless conclude that a penalty is warranted. We take notice of the fact that the Board's August 19, 1986 order was mailed to the SAIF Corporation's main office and conclude that the order was received by SAIF the next day. There is no explanation as to why the order was not given to the person charged with acting upon it for twenty days. We conclude that one purpose of ORS 656.262(10) is to assure that injured workers do not bear the risk of such delay, whether or not intentional. In this case, the delay was not great and the penalty is molded to reflect that fact.

The SAIF Corporation is ordered to pay to claimant a

penalty of 10 percent of the temporary disability compensation due for the period June 7 through July 10, 1986. Claimant's attorney is awarded a reasonable attorney fee of \$150 to be paid by SAIF in addition to compensation and the penalty.

IT IS SO ORDERED.

MILFORD W. HUFFMAN, Claimant  
Kenneth D. Peterson, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

Own Motion 84-0461M  
November 19, 1986  
Own Motion Order

Claimant has moved the Board for an order awarding a penalty and attorney fees for the SAIF Corporation's alleged unreasonable failure to pay compensation ordered by the Board in its Own Motion Order dated January 5, 1985. The facts underlying claimant's request were recited in our Order on Review in Milford W. Huffman, 38 Van Natta 426 (1986):

"On January 5, 1985 we issued an Own Motion Order reopening claimant's 1973 injury claim. The order directed that time loss compensation should begin May 1, 1984. By letter dated January 16, 1985, SAIF requested reconsideration, enclosing an additional medical report which indicated that claimant's time loss should begin at a later date. SAIF paid temporary disability as authorized by the additional medical report, but did not fully comply with the Board's Own Motion Order. On March 12, 1985 we issued an Own Motion Order on Reconsideration which reaffirmed our prior order. The following day SAIF complied with the order."

Penalties and insurer-paid attorney fees may be allowed in instances where an insurer unreasonably delays or refuses to pay compensation due a claimant. ORS 656.262(10). This statute applies in proceedings under the provisions of ORS 656.278. See Edward Hines Lumber Co. v. Kephart, 81 Or App 43, 46 (1986). What is unreasonable, however, must be judged in the context of an entire proceeding.

Upon receipt of our first Own Motion Order, SAIF speedily requested reconsideration based upon medical evidence it reasonably believed supported its position. We do not customarily abate or withdraw Own Motion Orders pending reconsideration. SAIF's immediate compliance with the order on reconsideration convinces us that its actions were not done with any intent to flaunt or ignore the Board's order in the first place. In the entire context of the proceeding, we conclude that SAIF's actions were not unreasonable. The motion for penalties and attorney fees is, therefore, denied.

IT IS SO ORDERED.

JERALD KAGELE, Claimant  
Myrick, Coulter, et al., Claimant's Attorneys  
Cowling & Heysell, Defense Attorneys  
Davis, Bostwick, et al., Defense Attorneys

WCB 85-05553 & 85-08261  
November 19, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

Argonaut Insurance Companies requests review of that portion of Referee Brown's order that set aside its denial of claimant's aggravation claim for a cervical condition and upheld Mission Insurance Companies' new injury denial involving the same condition. Argonaut additionally argues that this case should be remanded to the Hearings Division for the taking of deposition testimony from the treating surgeon. The issues are whether the case should be remanded and, if not, which insurer is responsible for claimant's cervical condition.

With regard to the remand issue, Argonaut argues that claimant changed responsibility theories shortly before the hearing and that the change prejudiced Argonaut's ability to develop its defense. We recognize that claimant's change of theories allowed Argonaut less time to develop its defense than it might normally have had. Argonaut did, however, receive an opinion report from the treating surgeon in time to seek clarification or expansion of the opinion, should it have decided to do so. It did not. Neither did it subpoena the surgeon. On the balance of the record, we are not persuaded that Argonaut could not have developed the evidence it now seeks to have admitted had it exercised due diligence before or at the time of the hearing. Its request for remand is, therefore, denied.

Although we deny Argonaut's request for remand, we agree with its assertion that claimant suffered a new injury while Mission was on the risk and that Mission is responsible for claimant's cervical condition. Claimant initially incurred what he thought was a muscle strain in March 1985 while lifting a transmission. The resulting pain was located from the shoulder blade into the back of the arm. Argonaut insured the employer at that time. Although claimant subsequently reduced his job duties, he continued to work throughout the period of Argonaut's coverage. On April 1, 1985, Mission began insuring the employer.

Two days after Mission came on the risk, claimant drove round-trip from Grants Pass to Portland for the purpose of attending a work-related training session. After the first hour of driving his arm and shoulder blade were very painful. He was able to continue on to Portland, but by the time he reached Salem on the drive home, the pain was excruciating. Claimant testified that the pain was in the same location as it had been at the time of the initial injury, but it was of much greater intensity.

The day after claimant arrived home he sought treatment from Dr. McCarthy, his long-time family physician. Dr. McCarthy referred claimant to Dr. Campagna, a neurosurgeon. A resulting myelogram revealed a protruding C6-7 disk. Dr. Campagna performed an anterior decompression laminectomy and diskectomy on April 12, 1985. Claimant reported immediate relief thereafter. Approximately ten days after the surgery claimant filed claims with both Argonaut and Mission, asserting the compensability of his disk condition. Mission subsequently denied responsibility only, while Argonaut denied on the basis of both compensability and responsibility.

Dr. McCarthy was deposed on January 20, 1986. He noted that claimant had not complained of neck symptoms until his visit shortly after he drove to and from Portland. Dr. McCarthy assumed from claimant's rendition of symptoms that the trip did have an effect on claimant's neck, although he did not feel that driving would be particularly significant in causing the further extrusion of an already-protruding disk. He noted that a cervical disk can herniate with little or no trauma and conceded that claimant's disk may have protruded during claimant's trip to Portland. He further conceded that claimant's increased symptoms during the trip could suggest further disk protrusion.

Dr. Campagna agreed that claimant's disk problem began with the initial lifting injury. In a December 4, 1985 opinion, however, Dr. Campagna stated that claimant's ultimate return to work during the second period of employment contributed to a worsening of his condition.

Claimant testified that he had no neck complaints until he took his trip to Portland. The drive caused severe pain both going and coming. Following the trip claimant became disabled and sought medical attention for the first time.

In a successive injury case, liability remains with the aggravation insurer absent persuasive evidence that the second period of employment independently contributed to the causation of claimant's disabling condition. Hensel Phelps Const. v. Mirich, 81 Or App 290 (1986). The second employment's contribution may not be substantial; it may only be slight. Smith v. Ed's Pancake House, 27 Or App 361 (1976). The Referee found that claimant's second period of employment merely precipitated an increase in symptoms without worsening the condition. He found, therefore, that the first insurer should remain responsible for claimant's cervical condition.

Although the case is close, we disagree with the Referee. We conclude that it is more probable than not that claimant's drive to and from Portland in April 1985 contributed to the protrusion of his cervical disk. Claimant experienced neck symptoms for the first time during the trip. They became progressively severe as the trip continued. Dr. McCarthy noted that a disk can herniate with little or no trauma. He further conceded that the development of claimant's symptoms during the Portland trip could suggest further herniation in an already protruding disk. Dr. Campagna, although not specifically discussing claimant's Portland trip, did opine that claimant's second period of employment contributed to his underlying condition, i.e., the disk herniation.

From the aforementioned facts, we conclude that claimant's work-related drive to and from Portland independently contributed to his cervical disk herniation. Mission was on the risk at the time of the second contribution. It is therefore responsible for claimant's condition. The Referee's order as it relates to responsibility shall be reversed.

#### ORDER

The Referee's order dated February 24, 1986 is reversed in part and affirmed in part. That portion of the order that set

aside Argonaut Insurance Companies' denials of claimant's aggravation claim for a cervical condition and upheld Mission Insurance Companies' denial of claimant's new injury claim is reversed. Argonaut's denials are reinstated. The remainder of the Referee's order is affirmed.

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GEORGE J. KOVARIK, Claimant  
McKeown & Odell, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-14017  
November 19, 1986  
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The SAIF Corporation requests review of Referee T. Lavere Johnson's order that assessed a 25 percent penalty and \$75 attorney fee for late payment of "interim" compensation. In his brief on Board review, claimant contends that the attorney fee should be increased. The issues are penalties and attorney fees.

The parties agree that after claimant filed an aggravation claim, SAIF began paying interim compensation two days after the deadline imposed by ORS 656.262(4). SAIF offers no reason or excuse for this delay. Instead, it argues that a delay of two days is too inconsequential to warrant a penalty or associated attorney fee, citing our decision in Zelda M. Bahler, 33 Van Natta 478, 479 (1981), rev'd on other grounds, Bahler v. Mail-Well Envelope Co., 60 Or App 90 (1982).

Under subsection (4) of ORS 656.262, an employer or insurer must begin payment of interim compensation no later than the 14th day after it has notice or knowledge of a claim. Under subsection (10) of the same section, an employer or insurer "shall be liable" for penalties if it "unreasonably" delays or refuses to pay compensation "then due."

When absolutely no reason for a delay in payment is offered and none is evident from the record, the delay, by definition, is unreasonable. Under the clear language of the subsections quoted above, an employer or insurer is liable for penalties for any unreasonable delay, no matter how brief. To hold otherwise would be tantamount to amending the statute. Any reasoning to the contrary in Zelda M. Bahler, supra, is disavowed. The length of the unexplained delay, of course, should be considered in setting the percentage factor of the penalty so that the "punishment fits the crime." See Lawrence E. Saxton, 37 Van Natta 692, 693 (1985), aff'd, Saxton v. SAIF, 80 Or App 631 (1986); Zelda M. Bahler, supra, 33 Van Natta at 479.

In light of the above discussion, the Referee correctly assessed a penalty against SAIF. We conclude, however, that the penalty was excessive and substitute a penalty of five percent.

In addition to penalties, ORS 656.262(10) imposes liability against an employer or insurer for "any attorney fees which may be assessed under ORS 656.382." According to subsection (1) of ORS 656.382, an employer or insurer "shall pay" the claimant or the claimant's attorney a reasonable fee when the employer or insurer "unreasonably resists the payment of compensation." In Zelda M. Bahler, supra, 33 Van Natta at 481, we interpreted these subsections to allow but not require assessment of attorney fees in cases of unreasonable delay. We then established certain guidelines for exercising discretion in

assessing attorney fees in such cases. Id. We find no abuse of discretion in this case and thus do not disturb the attorney fee assessed by the Referee.

ORDER

The Referee's order dated May 27, 1986 is affirmed in part and modified in part. The SAIF Corporation shall pay to claimant a penalty in an amount equal to five percent of the first interim compensation installment due on claimant's aggravation claim. This penalty is in lieu of the 25 percent penalty assessed by the Referee. The remainder of the Referee's order is affirmed.

JOANNE C. KRAUSE, Claimant  
Bennett, et al., Claimant's Attorneys  
Roberts, et al., Defense Attorneys

WCB 86-05815  
November 19, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Fink's order that denied her request for payment of temporary total disability compensation until publication of a Determination Order. The issue is temporary total disability.

Claimant's low back was injured on January 17, 1984. Claimant's upper back and left shoulder were injured in June 1984. The two insurers involved denied responsibility for compensation. On January 31, 1985 the treating doctor for the low back condition reported that claimant was medically stationary. The treating doctor did not release claimant to return to regular work and claimant has not returned to regular work. An order was published pursuant to ORS 656.307. On February 18, 1986 an Opinion and Order was published which settled the issue of responsibility for the low back condition. The Referee's order was affirmed by the Board on October 10, 1986.

The insurer responsible for the low back condition paid temporary total disability compensation (TTD) for the period from August 1, 1984 through January 31, 1985 and submitted the claim to the Evaluation Division of the Workers' Compensation Department for closure. The insurer refused to pay additional TTD after the medically stationary date. Claimant sought an order to compel payment. There was no evidence that a Determination Order had been published by the date of the hearing, May 22, 1986.

The Referee found that the insurer's reliance on Sharon Bracke, 36 Van Natta 1245 (1984) was correct and reasonable even though the Board's order had been reversed by the Court of Appeals in Bracke v. Baza'r, 78 Or App 128 (1986). The Referee found that the court's opinion explicitly did not address the question which is presented in this case: Whether an insurer may unilaterally terminate temporary disability compensation based on a medically stationary date when ordered to accept a denied claim when the claimant has not returned to regular work nor been released to return to regular work.

In Richard M. Deskins, 38 Van Natta 494, modified on other grounds, 38 Van Natta 629, 38 Van Natta 825, 38 Van Natta 908 (1986), we acknowledged that the court explicitly did not decide the issue of unilateral termination of TTD by an insurer. However we also stated, "our decision in Bracke is of dubious

precedential value." In Irene M. Gonzalez, 38 Van Natta 954 (1986), we repeated our statement in Deskins about the Board's 1984 Bracke decision. In Oscar L. Drew, 38 Van Natta 934 (1986), we stated that claimant was entitled to compensation for temporary disability until claim closure under ORS 656.268 because claimant did not return to regular work and was not released to return to regular work.

Administrative rules provide that payment of temporary disability compensation which becomes due as a result of a Referee's order must be paid within fourteenth days of that order. See OAR 438-60-150(3)(3). The insurer relied on the authorization of the Board's order in Sharon Bracke, 36 Van Natta 1245 (1984) to unilaterally terminate TTD upon the first date claimant was declared medically stationary. By the fourteenth day after the Referee's order awarding TTD the Evaluation Division of the Workers' Compensation Department had not issued a Determination Order which authorized termination of TTD. There was no authorization for termination of TTD. We find that the insurer must resume payment of temporary total disability compensation until termination of the compensation is authorized by the Evaluation Division of the Workers' Compensation Department in accordance with ORS 656.268. See Georgia Pacific v. Awmiller, 64 Or App 56 (1983).

Although we find that the insurer's action was incorrect we do not find that it was unreasonable. At the time the insurer made the decision not to pay TTD beyond the medically stationary date the Board's 1984 order in Bracke was still in effect. Reasonable reliance upon an order of the Workers' Compensation Board which was still valid at the time a decision was made is not unreasonable conduct. See Forney v. Western States Plywood, 297 Or 628, 633 (1984). Therefore, penalties and attorney fees are not assessed.

#### ORDER

The Referee's order dated May 30, 1986 is reversed. Claimant is awarded temporary total disability compensation less any wages or other compensation earned in accordance with ORS 656.212 until termination of temporary disability compensation is authorized by the Evaluation Division of the Workers' Compensation Department. Claimant's attorney is awarded \$500 for services at hearing and on Board review, to be paid by the insurer.

RODGER K. BLANK, Claimant  
Minturn, et al., Claimant's Attorneys  
Rankin, et al., Defense Attorneys  
Roberts, et al., Defense Attorneys

WCB 84-07206 & 84-06182  
November 24, 1986  
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Louisiana-Pacific Corp. v. Blank, 81 Or App 284 (1986). We have been mandated to enter an order holding Hudspeth Sawmill and its insurer, EBI Companies, responsible for claimant's low back condition as an aggravation of claimant's February 1981 injury. Therefore, Louisiana-Pacific Corp.'s denial dated June 21, 1984 is reinstated and affirmed. EBI Companies' denial dated May 29, 1984 is set aside and the claim is remanded to EBI Companies for acceptance and processing in accordance with law.

IT IS SO ORDERED.

LINDA L. CATES, Claimant  
Pozzi, Wilson, et al., Claimant's Attorneys  
Bullard, Korshoj, et al., Defense Attorneys

WCB 85-07481  
November 24, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Leahy's order that: (1) upheld the self-insured employer's denial of claimant's surgery for a ganglion on the left wrist; (2) declined to award temporary total disability from April 5, 1983 to March 4, 1985; (3) found that the payment of temporary total disability after March 8, 1985 was not commenced late and warranted no penalties and attorney fees; and (4) found that claimant was not entitled to additional scheduled permanent partial disability. The issues are compensability, payment of temporary total disability, extent of scheduled permanent disability and penalties and attorney fees.

Claimant had worked as an electronic assembler when in 1981 she was diagnosed as having deQuervain's syndrome in both wrists. The treating physician, Dr. Noall, performed a deQuervain's release on claimant's right wrist in November of 1981. Claimant was found medically stationary in October of 1982 and the claim was closed by a January 1983 Determination Order which awarded her scheduled permanent disability for both wrists. Claimant appealed from this Determination Order solely on the issue of extent of permanent disability.

Claimant continued to have difficulties with pain and Dr. Noall requested authorization to perform a deQuervain's release of claimant's left wrist on April 5, 1983. Dr. Noall was initially reluctant to perform the surgery and requested it in spite of Dr. Button's opinion that the surgery was not necessary. The insurer denied the request for surgery and claimant timely appealed the denial. At hearing claimant was awarded a total of 25 percent scheduled permanent disability for the right wrist and a total of 10 percent for the left wrist. The Referee affirmed the denial of surgery.

In our Order on Review dated December 27, 1984, we affirmed the Referee's award of permanent disability and reversed the Referee on the denial of surgery. In that appeal the employer asserted that claimant could not be both awarded additional permanent partial disability and have her claim reopened. The Board specifically found that claimant was medically stationary in October of 1982 and that the awards of permanent disability were appropriate. Claimant underwent surgery on March 8, 1985 on her left wrist for the deQuervain's syndrome.

Claimant asserts that she is entitled to temporary total disability benefits from April 5, 1983, the date that Dr. Noall requested surgery, through the date of her actual reopening for surgery on March 4, 1985. Claimant asserts that the surgery requested by Dr. Noall was treatment from which claimant could reasonably expect improvement as defined in ORS 656.006(17). Claimant, therefore, argues that she was not, nor has she been, medically stationary since the original request for surgery in 1983 and that she is entitled to temporary disability less time worked.

On de novo review we disagree. Once a claim has been closed, claimant may be entitled to claim reopening either after

having suffered an aggravation or by showing that the claim was prematurely closed. ORS 656.268; 656.273. In our order of December 27, 1984 we specifically found that claimant was medically stationary in October of 1982. Thus, the claim was not prematurely closed. Claimant did not assert in the 1983 hearing that Dr. Noall's request for surgery was also a request for reopening for an aggravation. Claimant's failure to raise this issue at hearing or on appeal barred her from raising it at a later date without new operative facts. Million v. SAIF, 45 Or App 1097 (1980); Carr v. Allied Plating Co., 81 Or App (1986). Claimant has failed to demonstrate that she was entitled to temporary disability after the 1983 request for surgery.

The Board reverses that portion of the Referee's order that affirmed the employer's December 4, 1985 denial of surgery.

At the request of the employer, claimant was seen by Dr. Nathan on August 28, 1985. Dr. Nathan diagnosed:

1. Status post industrial incident, July, 1981, resolved;
2. Mild bilateral carpal tunnel syndrome, idiopathic, right greater than left;
3. Mild slowing of right ulnar nerve at elbow, involving sensory and motor fibers, idiopathic;
4. Ganglion, left wrist, idiopathic; and
5. Status post bilateral deQuervain's releases.

Dr. Nathan concluded that claimant's symptoms were secondary to her idiopathic bilateral carpal tunnel syndrome and that there was no evidence of permanent impairment. Dr. Nathan recommended surgery for claimant's bilateral carpal tunnel syndrome.

On September 24, 1985 Dr. Wilson, a neurosurgeon, examined claimant at the request of Dr. Noall. He reviewed the electrical studies performed by Dr. Nathan and found them to be within normal limits. He did not feel that claimant would benefit from carpal tunnel releases. Dr. Noall concurred with Dr. Wilson's opinion. Sometime in October, Dr. Noall requested authorization to perform surgery to remove the ganglion in claimant's left wrist. On December 4, 1985, the insurer issued a denial of Dr. Noall's request for surgery based on the ganglion condition being unrelated to claimant's accepted wrist condition.

Dr. Noall testified at hearing that claimant suffered from a diffuse tendinitis of both hands involving all the tendons to some degree. The tendinitis was first symptomatic in the deQuervain's area, but since then had shifted to other areas around the hands. He stated that the ganglion condition was a reflection of this diffuse tendinitis caused by claimant's work activity as an electronic assembler. Dr. Noall testified that lasting relief would be achieved only by surgical removal of the ganglion.

Claimant has the burden of proving her case by a preponderance of the evidence and of demonstrating that there is a causal connection between her injury and the resultant disability. Gormley v. SAIF, 52 Or App 1055 (1981). When medical evidence is divided, greater weight will be given to the

conclusions of a claimant's treating physician, absent persuasive reasons not to do so. Weiland v. SAIF, 64 Or App 810, 814 (1983).

Dr. Noall has treated claimant since 1981 for her deQuervain's syndrome and diffuse tendinitis of both hands. He concluded that the ganglion was related to this diffuse tendinitis. Dr. Nathan examined claimant only once. The opinion of Dr. Noall regarding the causation of claimant's ganglion condition is entitled to greater weight because of his first-hand knowledge of claimant's condition. Further, Dr. Noall offers an explanation of how claimant's ganglion condition is related to her industrial injury. Dr. Nathan states only that the ganglion condition is idiopathic. We conclude that Dr. Noall's opinion is more persuasive and that claimant has established by a preponderance of the evidence that her ganglion condition is compensably related to her accepted occupational disease claim for her wrist. We reverse the Referee on this point and set aside the insurer's December 4, 1985 denial of claimant's surgery.

Further, we find this case to have been of average difficulty with an ordinary likelihood of success for claimant on Board review. A reasonable attorney fee for services on Board review, concerning the denial of surgery issue is therefore awarded.

ORDER

The Referee's order dated March 31, 1986 is reversed in part and affirmed in part. That portion of the order that upheld the insurer's denial of surgery is reversed. The remainder of the order is affirmed. Claimant's attorney is awarded \$1000 for services through hearing and \$700 for services on Board review to be paid by the self-insured employer.

THOMAS E. DeSYLVIA, Claimant  
Peter O. Hansen, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney  
Beers, et al., Defense Attorneys

WCB 84-13344 & 82-11158  
November 24, 1986  
Order on Reconsideration

On October 10, 1986 we issued our Order on Review in which we affirmed Referee Knapp's January 14, 1986 and January 22, 1986 orders. On or about October 21, 1986 claimant filed a petition for judicial review of our order in the Court of Appeals. Shortly thereafter we were advised by the parties of an ambiguity in the Referee's orders that was not corrected in our previous order. We withdrew our October 10, 1986 order for reconsideration on November 10, 1986. See ORS 183.482(6); ORAP 5.35.

After reconsideration, we supplement our Order on Review, as follows: The Referee's order dated January 14, 1986 as reconsidered January 22, 1986 is modified to set aside the SAIF Corporation's de facto denial of claimant's claim for medical services for his right elbow condition, which services shall be accepted and paid under SAIF Claim No. C050710, date of injury November 24, 1966; as modified, the Referee's order is affirmed. As supplemented, our Order on Review dated October 10, 1986 is adhered to and republished effective this date.

IT IS SO ORDERED.

CHARLES S. HAYNES, Claimant  
Malagon & Moore, Claimant's Attorneys  
Schwabe, et al., Defense Attorneys

WCB 85-03498  
November 24, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The self-insured employer requests review of that portion of Referee Garaventa's order which set aside its partial denial of claimant's medical services claim for psychiatric treatment. Claimant cross-requests review, contending that the Referee erroneously upheld the employer's partial denial of his medical treatment for a cervical condition. On review, the issues are whether claimant's current medical treatments for his psychiatric and cervical conditions are causally related to his compensable low back condition.

The Board affirms the order of the Referee with the following comments concerning the issue raised in claimant's cross-request.

Claimant's cervical problems arose well after his low back injury claim had been accepted. After learning of the cervical symptoms, the employer continued, for several years, to pay for claimant's medical treatments. Since the employer had previously paid for these treatments, which included the cervical condition, claimant contends that a denial of that condition is now prohibited under the rationale expressed in Bauman v. SAIF, 295 Or 788 (1983). In effect, claimant argues that the employer cannot issue a "back-up" denial of his cervical condition.

In Gregg v. SAIF, 81 Or App 395 (1986), the Court of Appeals recently addressed this issue "to correct what [it] perceive[s] to be a persistent misconception" of the Bauman decision. The court's holding lends further support to the Referee's conclusion that the employer's prior payments for claimant's cervical treatments did not preclude it from subsequently denying the condition.

In Gregg, the court stated that the payment of benefits does not constitute constructive acceptance of a claim. Citing ORS 656.262(9) and Frasure v. Agripac, 290 Or 99 (1980), the court reasoned that the Bauman rule does not apply when the claim has not been expressly accepted. Accordingly, the court held that an employer/insurer is not precluded from denying that a condition, which arose subsequent to the initial claim's acceptance, was a result of the industrial accident.

Finally, we find that the compensability of the psychiatric treatment was an issue of ordinary difficulty with the usual probability of success for claimant. Consequently, a reasonable attorney fee is awarded.

#### ORDER

The Referee's order dated December 31, 1985 is affirmed. Claimant's attorney is awarded \$500 for services on Board review concerning the psychiatric treatment issue. This attorney fee award shall be paid by the self-insured employer.

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ROBERT E. LUNDEEN, Claimant  
Malagon & Moore, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 86-00008  
November 24, 1986  
Order Directing Republication  
of Referee's Order

Claimant has requested Board review of the Referee's order dated July 21, 1986. Claimant acknowledges that the request is made more than 30 days after the date of the Referee's order. However, claimant has included with the request a memorandum of authorities, an affidavit of counsel and a stipulation of the attorneys for the parties to the effect that the Referee's order was not mailed to all parties. If the order was not mailed to all parties, the order is not final and is not subject to our review. ORS 656.289(2), (3); Armstrong v. SAIF, 65 Or App 809 (1983), after remand, 67 Or App 498 (1984).

The documents, in particular the stipulation, submitted with the request for review, convince us that at least one statutory party to the case, the SAIF Corporation, was never mailed a copy of the Referee's order as required by ORS 656.289(2). We, therefore, conclude that the time within which to request Board review has not begun to run. We accept claimant's request and documentation as a motion to the Board to direct republication of the Referee's order under our general authority to administer the Hearings Division, ORS 656.726(2), and we grant the motion.

#### ORDER

The Referee is directed to issue a republished order bearing a new date of actual mailing to all parties.

WESLEY D. RANKIN, Claimant  
Coons & Cole, Claimant's Attorneys  
Cummins, et al., Defense Attorneys

WCB 84-08309 & 85-00141  
November 24, 1986  
Order on Reconsideration

Claimant has requested reconsideration of our Order on Review dated October 31, 1986. Claimant requests an award of attorney fees for services before and at the hearings. The request for reconsideration is granted. The Order on Review dated October 31, 1986 was not withdrawn nor abated pending consideration of this issue.

The self insured employer also requested abatement and reconsideration of our Order on Review. On review the Board considered the arguments and the evidence and found that claimant had proven that he was permanently and totally disabled as awarded by Determination Order. The employer now offers the same arguments to the Board which it originally presented in its appellant's opening and reply briefs on review. The employer's requests for abatement and reconsideration are denied.

Claimant's attorney is awarded reasonable attorney fees for services before and at the hearings in addition to fees for services on Board review. ORS 656.382; OAR 438-47-050(1); Martin W. Greenslitt, 38 Van Natta 1047 (1986). Claimant's attorney is awarded \$2,000 for services before and at the hearings to be paid by the self-insured employer in addition to compensation paid to claimant. This award is also in addition to attorney fees awarded for services on Board review. The Order on Review dated October 31, 1986 is republished as amended.

IT IS SO ORDERED.

ROBERT H. BARR, Claimant  
James P. O'Neal, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 86-00136  
November 26, 1986  
Order Dismissing Request for  
Board Review

Claimant has requested Board review of a disputed claim settlement approved by Referee Shebley under the provisions of ORS 656.289(4). The request is acknowledged. However, we dismiss the request. Based upon the available record, we conclude that claimant has not been denied any compensation. Claimant's current dissatisfaction is, therefore, not a "question concerning a claim." In the event claimant's compensation is denied on the basis of the settlement, he may request a hearing under the provisions of ORS 656.283(1). See e.g. Roberts v. Willamette Industries, 82 Or App 188 (CA A36437, Filed November 12, 1986). The request for Board review is dismissed.

IT IS SO ORDERED.

WILLIAM H. KAPPITZ, Claimant  
Jack Bernstein, Claimant's Attorney

Own Motion 86-0331M  
November 26, 1986  
Own Motion Order

Claimant has requested that the Board reopen his 1979 industrial injury claim for additional compensation. Claimant's aggravation rights have expired. Claimant asserts that he is entitled to compensation for permanent total disability on account of his psychiatric condition.

In WCB Case No. 81-08674 the Referee upheld a June 6, 1982 denial of the compensability of this claimant's psychiatric condition. The Referee's order was affirmed by the Board in a memorandum order issued March 31, 1983. The Board's order was not further reviewed and became final. The Board may not on its own motion modify, change or terminate a former finding that a claimant's condition is not compensable under the Workers' Compensation Law. ORS 656.278(5)(a). We conclude that the final order in WCB Case No. 81-08674 is such a former finding. The request for own motion relief is, therefore, denied.

IT IS SO ORDERED.

GARY L. PURVINE, Applicant  
Gerri L. Christensen, Dept. of Justice

WCB CV-85002  
February 7, 1986  
Crime Victim Compensation Order  
on Review

The applicant has requested review of the Findings of Fact, Conclusions and Order on Reconsideration of the Department of Justice Crime Victims' Compensation Fund dated August 14, 1985. Our jurisdiction exists pursuant to ORS 147.155(1). The parties have waived an evidentiary hearing and this matter is being decided on de novo review of the record submitted by the Crime Victims' Compensation Fund. OAR 438-82-025; Jill M. Gabriel, 35 Van Natta 1224, 1226 (1983). This is an accepted claim. The only issue is whether the applicant is entitled to compensation for lost earnings.

We make the following findings of fact:

1. The applicant was the innocent victim of a crime that occurred in Multnomah County, State of Oregon, on February 12, 1984.
2. The applicant has complied with all of the requirements of ORS 147.015, relating to eligibility for compensation as the victim of a crime.
3. As a direct result of the compensable crime, the applicant sustained serious bodily injury and was medically disabled from engaging in his regular occupation from February 13, 1984 through May 1, 1984.
4. During the period of his medical disability, the applicant lost earnings in the gross sum of \$3,799.
5. In addition to his lost earning, the applicant incurred expenses for medical care in excess of \$3,500, all of which have been paid by a private insurance carrier.
6. The applicant has received payments from collateral sources, to which he was entitled as a result of his injury, exclusive of any sums paid to the applicant or on his behalf for medical care and services, in the sum of \$2,759.

Based upon our findings of fact, we make the following conclusions. ORS 147.035(1)(a)(B) provides that compensation for earnings lost as the result of a compensable crime cannot exceed \$200 per week and cannot in the aggregate exceed \$10,000. The applicant lost earnings over a period of eleven weeks and one day, thereby entitling him to a maximum benefit of \$2,240. The maximum benefit is further reduced by the statutory \$250 deductible, ORS 147.125(4), there being no showing of hardship to the applicant. ORS 147.125(5) further provides that the benefit shall be reduced by all sums paid to the applicant from all collateral sources where the payment is the result of an entitlement arising out of the injury. The applicant's entitlement to compensation of \$1,990 is less than the amount, exclusive of sums paid for medical care and services, received from collateral sources, which is \$2,759 under the Department's calculation most favorable to the applicant. The applicant is, therefore, not entitled to compensation for lost earnings during the period February 13, 1984 through May 1, 1984.

ORDER

The Order on Reconsideration of the Department of Justice Crime Victim Compensation Fund dated August 14, 1985 is affirmed.

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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 October 29, 1985. The Fund accepted claimant's claim for compensation as the victim of a crime under ORS 147.005 to 147.365, but allowed compensation for only 50 percent of the compensable loss. Claimant contends that he is entitled to full compensation. We review pursuant to ORS 147.155. At claimant's request, an evidentiary hearing was conducted on March 21, 1986 by a special hearings officer appointed by the Board. On March 27, 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 began drinking beer at the Log Cabin Tavern in Ashland, Oregon at about 5 p.m. on February 2, 1985. All events relevant to this matter occurred at that tavern on that date.

"At about 10 p.m. claimant was engaged in a game of pool with Dale Floyd Garrett when a disagreement arose between claimant and Garrett. Garrett raised his pool cue in a threatening manner, and claimant raised his pool cue in a defensive manner. No blows were exchanged between claimant and Garrett, and claimant eventually returned to his table which was approximately 20 feet from the pool table. It is more probable than not that both claimant and Garrett were legally intoxicated at the time of this confrontation.

"At about 10:30 p.m. Emmalisa Whalley began her shift as the bartender. Approximately 15 minutes later, Whalley was escorting an intoxicated patron out of the tavern when claimant approached her and offered his assistance. Whalley viewed claimant's offer as an interference and informed claimant that no assistance was required. Claimant then returned to his table and continued to drink beer.

"At about 11 p.m. claimant was standing at his table with his back toward the bar when Garrett approached from behind with a pool cue. Claimant viewed Garrett's action as a threat and raised a chair to be used as a shield. Whalley then observed Garrett with a raised pool cue and claimant with a raised chair, both standing facing each other in the middle of the room. Whalley came from behind the bar, positioned herself between claimant and Garrett and broke up the confrontation. Garrett then returned to the area of the pool table in the rear of the tavern, and claimant returned to the vicinity of his table.

"Whalley followed claimant to his table. In part because of her earlier contact that evening with claimant, Whalley informed claimant that he would not be allowed to consume any more beer and would have to leave the tavern. Claimant turned toward the exit, then turned and moved back toward the rear of the tavern. Whalley attempted to block claimant's route and take a

glass of beer out of claimant's hand. Claimant pushed his way past Whalley, and Whalley was pushed against a chair and into a table.

"Whalley then went behind the bar to call the police. Claimant continued toward the rear of the tavern, intending to retrieve his coat and other personal items and use the restroom before leaving the tavern. Claimant did not clearly communicate his intent to Whalley. Claimant knew that Garrett remained in the tavern and that he would probably have to walk past Garrett to reach the restroom. Before claimant reached the restroom, Garrett jumped on his back and the two wrestled to the floor. While claimant and Garrett were wrestling on the floor, Garrett bit claimant on the nose, resulting in the traumatic avulsion of the end of claimant's nose. Claimant and Garrett then separated and both left the tavern. While claimant was waiting outside the tavern for assistance, Garrett and another, unidentified, male threw several rocks in his direction but did not strike him.

"Claimant has satisfied all the eligibility prerequisites of ORS 147.015.

"Based upon my personal observation of claimant and Whalley, I find that both are credible and reliable witnesses.

#### "CONCLUSIONS

"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). In arriving at its decision to accept claimant's claim for compensation but to reduce compensation to 50 percent of the otherwise compensable loss, the Fund relied upon ORS 147.125(3). That statute provides that the Fund, after reviewing the facts stated in the application for compensation, 'shall determine the degree or extent to which the victim's acts or conduct provoked or contributed to the injuries or death of the victim, and shall reduce or deny the award of compensation accordingly . . . .' Although the Fund has promulgated rules relating to the compensation of crime victims, OAR 137-76-000 to 137-76-065, no rules have been adopted that delineate standards for the application of ORS 147.125(3).

"Two previous Board cases decided under the Crime Victim Compensation Act are similar to this case. In Michael J. Dyer, 35 Van Natta 663 (1983), the claimant was in a tavern drinking beer and playing pool with a group of 'bikers.' In the course of events, the claimant threw pool chalk into a pitcher of beer belonging to his assailant and used abusive language. Claimant was thereafter assaulted and injured. The Board affirmed the Fund's order denying compensation on the ground that the claimant had substantially provoked his assailant. In Jeffery D. Newton, 35 Van Natta 66 (1983), the claimant and a friend were in a tavern and evidently irritated the assailant by 'bothering' some women. The assailant attacked the claimant's friend, and the claimant joined in the fight, in the course of which he was stabbed. The Board reversed the Fund's order denying compensation, holding that the assailant was the aggressor and the claimant his innocent victim.

"Although the Fund has argued that, faced with the

circumstances existing at the Log Cabin Tavern on the night in question, a reasonably prudent person in claimant's position would not have gone to the back of the tavern knowing that Garrett remained, I am persuaded that claimant's conduct was not unreasonable. It would not have been reasonable for claimant to have left the tavern without his coat and personal belongings, nor would it have been unreasonable for claimant to wish to use the restroom after having spent six hours drinking beer.

"There is no evidence that claimant provoked Garrett at any time during the evening of February 2, 1985. According to Whalley's credible testimony, she did not see the first incident with the pool cues nor the ultimate fight that resulted in claimant's injury. By the time she became aware of the incident with the pool cue and chair, both parties had reached a-- 'standoff,' and Whalley did not know how the incident began. There is no evidence contrary to claimant's credible testimony that Garrett was the aggressor in each case. Claimant's conduct was in no respect as provocative or contributory as was that of the claimant in Jeffery D. Newton, supra. Based upon the evidence as a whole, it is my conclusion and recommendation that claimant was the innocent victim of an unprovoked assault and that none of claimant's conduct or acts were sufficient to justify a reduction in compensation."

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 October 29, 1985 be modified to award claimant full compensation for all compensable loss sustained by reason of his being the victim of a crime on February 2, 1985. In all other respects, the Fund's order is affirmed.

IT IS SO ORDERED.

MARY A. CLOVER, Claimant  
Dwyer, et al., Claimant's Attorneys  
Rankin, et al., Defense Attorneys

WCB 85-10034  
December 2, 1986  
Order on Review

Reviewed by Board Members Lewis and Ferris.

The self-insured employer requests review of Referee Foster's order that awarded claimant's attorney an employer-paid attorney fee for "obtaining payment of medical bills." The issue is attorney fees.

This case concerns medical services associated with a compensable low back injury. Claimant's original claim was accepted and closed. Several years later, in August 1984, claimant experienced an aggravation of her condition and underwent a laminectomy on August 24, 1984. The employer voluntarily reopened claimant's claim and paid the medical bills it received in connection with this surgery.

Apparently by mistake, claimant forwarded one medical bill to her private medical insurance carrier. The private insurer paid all but about 15 percent of the bill. The unpaid balance remained unpaid and eventually was sent to a collection agency. When the collection agency contacted claimant concerning the unpaid balance, claimant retained an attorney. The attorney wrote the collection agency on August 6, 1985, stating that the

bill was the responsibility of the employer. A carbon copy of this letter was sent to the employer. One week later, on August 13, 1985, claimant requested a hearing asking penalties and attorney fees for late payment of medical services. The employer first received a copy of the errant bill on or about November 1, 1985. The employer paid the unpaid balance of the bill on November 26, 1985 and reimbursed the private insurance carrier on December 6, 1985.

The parties waived a hearing and submitted the case to the Referee on the record. The Referee found no basis for assessing a penalty against the employer, but assessed a \$300 employer-paid attorney fee for the efforts of claimant's attorney in obtaining payment of the medical bill. The employer argues that it paid the errant medical bill in a timely fashion and hence that there is no statutory authority for awarding an employer-paid attorney fee under the circumstances of this case.

The employer had 60 days within which to pay or deny claimant's claim for medical services. ORS 656.262(6); Billy J. Eubanks, 35 Van Natta 131, 135 (1983). If the employer unreasonably failed to do either within this period, it is liable for penalties and attorney fees. ORS 656.262(10); 656.382(1). The correctness of the Referee's action in this case turns largely upon a determination of when the employer's duty to process the claim arose. If the duty arose at or near the time of claimant's surgery in August 1984, payment was delayed more than a year. If the duty arose when the employer received the copy of the letter from claimant's attorney to the collection agency in August 1985, payment was delayed more than three months. If the duty arose when the employer actually received the copy of the errant bill in November 1985, payment was timely.

Until the employer received the copy of the letter from claimant's attorney to the collection agency, it was unaware that any medical services relating to claimant's August 1984 surgery remained unpaid. There is nothing in the record to suggest that this lack of awareness was attributable to any unreasonable action by the employer. We conclude, therefore, that the employer's duty to process claimant's claim for the errant medical bill arose, at the earliest, when the employer received the copy of the letter from claimant's attorney to the collection agency in August 1985. See ORS 656.005(7); Billy J. Eubanks, supra, 35 Van Natta at 132, 135.

It is unnecessary for us to decide the remaining question of whether the employer's duty to process the errant medical bill arose in August 1985 or in November 1985, when the employer actually received a copy of the bill. Claimant filed her request for hearing on August 13, 1985, one week after the date of the letter from claimant's attorney to the collection agency. Even assuming that the employer's duty to process the claim began when it received the copy of that letter, the hearing request was premature by at least 53 days. See ORS 656.262(6); Billy J. Eubanks, supra, 35 Van Natta at 135. The Referee, therefore, did not have jurisdiction to rule on any of the issues raised in that request. Syphers v. K-W Logging, Inc., 51 Or App 769, 771, rev den 291 Or 151 (1981). We reverse the Referee's order on this basis.

ORDER

The Referee's order dated May 21, 1986 is reversed.

GENE GOSDA, Claimant  
Heiling & Morrison, Claimant's Attorneys  
Gleaves, Swearinger, et al., Defense Attorneys

WCB 86-00044  
December 2, 1986  
Order of Dismissal

The insurer has requested review of Referee's order dated October 20, 1986. The request for review was filed with the Board on November 20, 1986, more than 30 days after the date of the Referee's order. It is not timely filed.

ORDER

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

BETTY L. HUTTON, Claimant  
Schwabe, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB TP-86009  
December 2, 1986  
Third Party Order

Claimant petitioned the Board to resolve a dispute as to the distribution of the proceeds of a settlement of a civil action brought against a third party under the provisions of ORS 656.576 to 656.595. The Board, having been formally advised that the workers' compensation paying agency, the SAIF Corporation, asserts no claim of lien against any of the proceeds of the civil action, finds that there is no dispute arising under ORS 656.576 to 656.595. Claimant's petition is, therefore, dismissed.

IT IS SO ORDERED.

SALLY A. KLINE, Applicant  
Ann Kelley, Assistant Attorney General

WCB CV-86004  
December 2, 1986  
Crime Victim Compensation Order  
on Review

This matter is before the Board at the request of the applicant for review of the Department of Justice Crime Victim Compensation Program's Findings of Fact, Conclusions and Order on Reconsideration dated January 16, 1986. The Crime Victim Compensation Program denied the applicant's claim for benefits under the Compensation Act for Victims of Crime, ORS Chapter 147, after concluding that there was insufficient evidence that a crime had occurred. ORS 147.015(1). We review pursuant to ORS 147.155. An evidentiary hearing was waived after nonappearance at an earlier scheduled hearing.

Due to the age of the applicant and the nature of the alleged crime, we conclude that public discussion of the facts of this case is not appropriate. See ORS 147.115(1)(b) and (c); OAR 438-82-040(7)(b). After de novo review of the entire record, we conclude that the applicant has not established by a preponderance of the evidence that she was the victim of the alleged crime. We, therefore, affirm the order of the Crime Victim Compensation Program.

ORDER

The Findings of Fact, Conclusions and Order on Reconsideration of the Department of Justice Crime Victim Compensation Program dated January 16, 1986 is affirmed.

CHESTER R. RHODES, Claimant  
Olson Law Firm, Claimant's Attorney  
Roberts, et al., Defense Attorneys

WCB 84-08167  
December 2, 1986  
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of those portions of Referee Seifert's order that: (1) denied his request that his claim be reclassified from nondisabling to disabling; (2) denied his request for penalties and attorney fees for the insurer's alleged improper claims processing; and (3) denied his request for penalties and attorney fees for the insurer's alleged improper denial of certain chiropractic treatments. The insurer originally cross-appealed that portion of the Referee's order regarding frequency of chiropractic treatments. In its brief before the Board, however, the insurer has withdrawn its cross-request for review. The issues are whether claimant's claim should have been reclassified and penalties and attorney fees.

Claimant suffered an injury to his low back in July 1983 while employed as a laborer. He reported the injury to his foreman and immediately returned to work. He continued working until September 14, 1983, when he was laid off for reasons unrelated to his injury. He filed a claim for his low back condition and it was accepted as nondisabling on October 7, 1983.

Claimant sought medical attention from Dr. Howard, a chiropractor, in September 1983. Dr. Howard released claimant to return to work on September 26, but advised that claimant's work should be modified to avoid future aggravation. Claimant returned to work the next day, but was laid off once again after two weeks.

Dr. Stellflug, a chiropractor, became the treating physician on December 12, 1983. He diagnosed a cervical-thoracic strain and advised claimant to avoid heavy lifting and excessive bending and twisting. He opined that claimant was capable of sedentary employment. Dr. Howard later agreed that claimant was precluded from employment involving heavy lifting.

On May 8, 1984, which was within one year of claimant's injury, claimant requested that the insurer reclassify his claim to disabling. He also asked that temporary total disability compensation be paid from the date of the October 7, 1983 layoff, and that the Evaluation Division be contacted when claimant reached stationary status. The insurer responded on July 13, 1984 by refusing claimant's requests, indicating that there was no evidence that claimant's condition had worsened and that he had lost no time from work as a result of his compensable injury. The "denial" letter gave no indication that claimant's claim had been closed.

On September 17, 1984, claimant requested a hearing on the insurer's denial. The insurer took no further action on claimant's claim until May 22, 1985, when it asked the Evaluation Division to review claimant's file to determine whether the claim should be reclassified to disabling. The Division responded on May 22, 1985 that it was the insurer's responsibility to determine the status of claimant's claim. It further noted that because more than a year had passed since claimant's injury, it was without authority to determine the claim's status. See ORS 656.262(12). The Division advised the insurer to submit a Form

1502 reclassifying the claim to disabling if it wished the Division to take further action on the claim.

The insurer submitted a Form 1503 seeking redetermination by the Division the next day. There is no indication in the record that the Evaluation Division took further action. Claimant was paid no compensation by the insurer.

Claimant was seen by Dr. Poulson in August 1985. Dr. Poulson opined that claimant required ongoing conservative treatment and that he would experience permanent disability in the form of mild, recurrent pain in both the cervical and lumbar areas of the spine. Dr. Zivin disagreed, stating that claimant had always been medically stationary and had incurred no permanent residuals.

Claimant testified that he returned to work after his injury, but that he needed assistance thereafter in performing the heavy aspects of his job. He indicated that he had incurred no back injuries before the compensable event. He continued to work until being laid off in mid-September 1983, and then worked for another two-week period before being permanently laid off in early October 1983. Claimant collected unemployment compensation during the layoff, indicating to the Employment Division that he was physically capable of employment. At the time of the hearing, claimant was employed at a service station. He was precluded from all but light work, however, due to the effects of his injury.

The Referee found that there had been no improper claim closure because claimant returned to his regular job and continued working until he was terminated for reasons unrelated to his injury. The Referee acknowledged that the insurer had failed to process claimant's claim according to ORS 656.262(12), but found that because claimant had never been unable to work as a result of his injury, there were no amounts due from which to calculate a penalty.

Claimant asserts that his injury is disabling and that the Referee erred by failing to set aside the insurer's July 1984 denial. He also asserts that the Referee erred in failing to find the denial to have been procedurally improper. Last, claimant argues that the insurer's failure to close his claim was improper. As a result, he asserts entitlement to penalties and attorney fees based on any permanent disability compensation to which he may be entitled once the Evaluation Division determines the degree of his disability.

We agree with claimant on all points. There is ample evidence that claimant's compensable injury has resulted in permanent disability. Although he was able to return to his job immediately after his injury, we are persuaded that he was soon incapable of performing that work without assistance. At the time claimant sought reclassification of his claim, Dr. Stellflug had stated that claimant was precluded from all but sedentary work. Dr. Poulson later agreed that claimant will have permanent residuals manifested by disabling pain and an inability to do heavy work.

Where a claim is initially nondisabling but later becomes disabling, ORS 656.262(12) applies. Davison v. SAIF, 80 Or App 541 (1986). That statute requires the insurer to immediately notify the director of any claim by claimant that his

nondisabling claim has become disabling, so long as claimant acts within one year of his injury. The statute is mandatory. The present insurer simply refused to take action on claimant's request once it was made. When it ultimately did take action, it was more than a year after the injury. The effect of the insurer's action, or inaction, was to preclude the Evaluation Division from determining the amount of permanent disability compensation, if any, to which claimant was entitled. In addition, the insurer failed to formally close what originally was a nondisabling claim. Claimant's claim, therefore, remains open, and his right to seek a Determination Order has not yet expired. Davison, supra 80 Or App at 544. The claim shall be remanded to the insurer for processing according to law.

Although we find the insurer's conduct to have been improper, claimant lost no time from work as a result of his injury. Therefore, no temporary total disability compensation is due from which to calculate a penalty. Davison, 80 Or App at 544; see also Bono v. SAIF, 298 Or 405 (1984). Should claimant be determined to have permanent partial disability after his claim has been processed by the Evaluation Division, however, a penalty may be calculated therefrom. See Harold A. Lester, 37 Van Natta 745 (1985). Further, we may award an insurer-paid attorney fee at this time, despite the fact that we do not now know whether claimant will later receive disability compensation. Spivey v. SAIF, 79 Or App 568 (1986).

The remaining issue is whether claimant is entitled to a penalty and associated attorney fee for the insurer's alleged unreasonable refusal to approve chiropractic services at a frequency exceeding the Department's administrative guidelines. OAR 436-69-201(2)(a). The basis for the insurer's refusal was that it was not persuaded by Dr. Stellflug's justification report that excess treatments were required. The Referee overturned the insurer's denial, but made no finding with regard to whether the insurer acted reasonably in issuing the denial.

After reviewing the record, we find that the insurer's conduct was unreasonable. Dr. Stellflug provided sufficient information in his report to justify treatments beyond those set forth in the administrative guidelines. A modest penalty is appropriate.

#### ORDER

The Referee's denial is reversed in part and affirmed in part. That portion of the order that refused to remand claimant's claim for the determination of its status is reversed. The claim is remanded to the insurer, which shall classify it as disabling and submit it to the Evaluation Division for the determination of permanent disability, if any. Should claimant be found to be entitled to permanent partial disability compensation, the insurer shall, as a penalty for its unreasonable refusal to reclassify claimant's claim, pay an amount equal to 25 percent of the permanent partial disability compensation owing, not to exceed \$1,000. For overturning the insurer's denial, claimant is entitled to an attorney fee of \$850 for services at hearing and an additional \$500 for services on Board review, to be paid by the insurer. For prevailing on the reclassification penalty issue, claimant's attorney is awarded a fee of \$300 on Board review, to be paid by the insurer. For its unreasonable denial of chiropractic services, the insurer is assessed a penalty equal to 10 percent of the amounts owed to claimant's chiropractor prior to

the insurer's denial dated March 4, 1985. For prevailing on the penalty issue, claimant is awarded an attorney fee of \$150 on Board review, to be paid by the insurer. The remainder of the Referee's order is affirmed.

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CAROL J. RODEHEFFER, Claimant  
Bischoff & Strooband, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-07265  
December 2, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of Referee Foster's order that set aside an alleged back-up denial of claimant's psychological condition, ordered payment of additional temporary disability compensation and awarded penalties and attorney fees. The issues are back-up denial, compensability, medical services, temporary disability compensation, penalties and attorney fees.

Claimant filed a claim on April 23, 1985 alleging that beginning in February of the same year she had experienced anxiety, insomnia, headaches, gastric distress, elevated blood pressure and other symptoms as a result of stress associated with her employment as the business office manager of a hospital. Claimant was examined by a psychologist, Dr. Serkownek, in May 1985. She told Dr. Serkownek that her stress arose from a conflict with her immediate supervisor whom she thought was trying to force her to resign her job. Dr. Serkownek diagnosed "adjustment disorder with depressed mood" and recommended treatment with medication and biofeedback. This diagnosis was echoed by a psychiatrist, Dr. Middlekauff, later the same month.

Claimant was examined by another psychiatrist, Dr. Gardner, in May 1985. Dr. Gardner concluded that claimant had experienced job related stress which had caused a temporary symptomatic flare-up of preexisting personality disorders. He thought that claimant's temporary flare-up had subsided and that her work-related condition was medically stationary, but recommended treatment for the underlying personality disorders which, he stated, had not been permanently worsened by her employment activity.

On June 10, 1985, SAIF issued a partial acceptance of what it termed claimant's "transient episode of work-related stress" and a partial denial of what it termed claimant's "pre-existing underlying psychiatric condition." SAIF closed the accepted portion of the claim by notice of claim closure on June 15, 1985.

In August 1985, claimant was examined by a third psychiatrist, Dr. Holland. He agreed with Dr. Gardner that claimant had a preexisting psychological condition, the symptoms of which had been temporarily worsened by the stress associated with her job.

Dr. Middlekauff declared claimant medically stationary on August 13, 1985 and released her for regular work without restrictions on November 29, 1985. Claimant returned to work at the hospital and continued to work there through the time of the hearing in February 1986. Claimant's former supervisor was no longer employed by the hospital when she returned to work.

Claimant testified at the hearing that she was

continuing to receive treatment from Dr. Middlekauff and that he intended to continue treatment for several more months. She indicated that he was treating her for the same kinds of problems that she had experienced as a result of her job stress.

The Referee concluded that SAIF's partial denial was actually a back-up denial of the entire claim and set it aside as contrary to Bauman v. SAIF, 295 Or 788 (1983). He ordered SAIF to pay all medical expenses associated with claimant's psychological condition and ordered payment of temporary disability compensation from the date of the notice of claim closure through the date on which Dr. Middlekauff had declared claimant medically stationary. He also found SAIF's denial unreasonable and ordered SAIF to pay a 25 percent penalty on the additional compensation. He awarded claimant's attorney a total fee of \$1,500 for prevailing on the denial and for establishing the unreasonableness of the denial.

On Board review, SAIF's first argument is that the Referee did not have jurisdiction to disturb the award of temporary disability compensation granted by the notice of claim closure. It contends that claimant's only recourse was to request that the Evaluation Division issue a Determination Order under ORS 656.268(3). We agree. See Adelie M. Webb, 37 Van Natta 1460, 1463 (1985); Barbara A. Gilbert, 36 Van Natta 1485, 1487 (1984); Alma M. Berry, 35 Van Natta 1386, 1387, 35 Van Natta 1597 (1983). We, therefore, reverse this portion of the Referee's order.

SAIF's second argument is that its partial denial relating to claimant's preexisting psychological condition was not precluded by Bauman. We agree. Claimant submitted her claim on April 23, 1985. The claim form indicates that the employer first knew of claimant's condition and its potential relation to her work on April 19, 1985. The employer's duty to process the claim, therefore, did not arise before April 19, 1985 at the earliest. See Henry L. Mischel, 38 Van Natta 1274 (1986). SAIF's partial denial was issued on June 10, 1985, within 60 days of claimant's claim, and thus was procedurally permissible under the rule of Wheeler v. Boise Cascade Corp., 298 Or 452, 456 (1985). The question thus becomes whether the partial denial was substantively correct.

To establish the compensability of her claim, claimant must prove that her employment activity was the major contributing cause of a pathological worsening of her preexisting psychological condition. See Weller v. Union Carbide Corp., 288 Or 27, 35-36 (1979); Adsitt v. Clairmont Water District, 79 Or App 1, 6, rev den 301 Or 338, 301 Or 666 (1986). The worsening need not be permanent, so long as it is, in fact, a worsening. Adsitt v. Clairmont Water District, supra, 79 Or App at 6. The Court of Appeals recently ruled that there is no difference between the symptoms of a psychological condition and the condition itself; if the symptoms worsen, the underlying condition worsens. Adsitt v. Clairmont Water District, supra, 79 Or App at 7. But see William C. Dillworth, 38 Van Natta 1036, 1037-38 (1986) (the Adsitt rule does not apply in responsibility cases).

There is no dispute in this case that claimant's work activity was the major contributing cause of a worsening of the symptoms of her preexisting psychological condition. Under the rule of Adsitt, therefore, claimant's preexisting psychological condition worsened when the symptoms of that condition worsened.

This worsening satisfies the rule of Weller and hence SAIF became liable for claimant's worsened psychological condition at the time of the worsening.

As for the the compensability of claimant's ongoing psychological care, claimant must prove that such care is reasonable and necessary and that such care is causally related to her industrial injury. ORS 656.245. After our de novo review of the record, we conclude that claimant has failed to prove a causal relation between her industrial injury and the psychological treatment she received after November 29, 1985. On that date, Dr. Middlekauff, claimant's treating psychiatrist, released claimant to return to work without restrictions. Dr. Middlekauff's report indicates that as of November 29, 1985 claimant's psychological condition had returned to its preexacerbation state. Psychological treatment after that date was not the responsibility of SAIF. See Adsitt v. Clairmont Water District, supra, 79 Or App at 7; Aldrich v. SAIF, 71 Or App 168, 172-73 (1984). We, therefore, set aside SAIF's partial denial to the extent that it denied payment of psychological treatment through November 29, 1985, but uphold the denial thereafter.

On the issue of penalties and attorney fees for unreasonable denial, we reverse. The denial did not violate Bauman, as the Referee assumed, and was supported by some medical evidence. Of the \$1,500 awarded by the Referee as attorney fees, we conclude that \$300 of the total represents services rendered on the unreasonable denial issue and that the remaining \$1,200 represents services rendered on the compensability and medical services issues.

ORDER

The Referee's order dated March 24, 1986 is affirmed in part, reversed in part and modified in part. Those portions of the order that awarded claimant temporary disability compensation from June 6 through August 13, 1985 and awarded a 25 percent penalty and what we have construed as a \$300 attorney fee for unreasonable denial, are reversed. That portion of the order that set aside the SAIF Corporation's partial denial dated June 10, 1985 is modified. SAIF's partial denial is upheld to the extent that it denied responsibility for claimant's psychological treatment after November 29, 1985, but is set aside to the extent that it denied responsibility for claimant's psychological treatment through that date. That portion of the order that awarded claimant what we have construed as a \$1,200 attorney fee on the compensability and medical services issues is affirmed.

CHESTER R. ROSS, Claimant  
Esler & Schneider, Claimant's Attorneys  
Roberts, et al., Defense Attorneys

WCB 85-13373  
December 2, 1986  
Order of Dismissal

The claimant has requested review of Referee's order dated October 22, 1986. The request for review was filed with the Board on November 24, 1986, more than 30 days after the date of the Referee's order. It is not timely filed.

ORDER

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

JANET GAYLE SMITH, Claimant  
Gary K. Jensen, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

Own Motion 85-0035M  
December 2, 1986  
Own Motion Order

SAIF Corporation initially submitted to the Board claimant's claim for an alleged worsening of her April 17, 1974 industrial injury. Claimant's aggravation rights had expired. SAIF issued a formal denial of medical services on April 15, 1985. Claimant appealed the denial to the Hearings Division and the Board postponed action on the own motion request until resolution of WCB Case No. 85-05425.

Claimant has requested that the Board again consider her request and reopen her claim for benefits resulting from the January 1985 surgery. Claimant has indicated that she underwent further surgery on July 1, 1986 and seeks benefits for her inability to work during that time also. SAIF Corporation has not yet made a determination of its responsibility for the second surgery.

By Opinion and Order dated February 20, 1986, Referee Howell determined that claimant's condition which necessitated the surgery in January 1985 was not related to her 1974 industrial injury. He affirmed SAIF Corporation's April 15, 1985 denial of benefits. The Board, by order dated October 10, 1985, has affirmed the Referee's order. Claimant has appealed the Board's order to the Court of Appeals.

The condition for which claimant seeks benefits remains, at this juncture, in a denied status. The Board will not reopen a claim for further disability benefits on a denied claim. Should the Court of Appeals overturn the rulings of the Referee and the Board, claimant may again petition the Board for own motion relief. Claimant's request for claim reopening for the January 1985 surgery must be denied.

Board consideration of claim reopening for the July 1986 surgery is premature at this point. If SAIF accepts responsibility for this surgery, claimant may again request the Board to reopen her claim. However, if SAIF denies responsibility, claimant will need to pursue this matter in the Hearings Division pursuant to ORS 656.245.

The request for own motion relief is hereby denied.

IT IS SO ORDERED.

GARLAND COMBS, Claimant  
Kelley & Kelley, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 84-05836  
December 4, 1986  
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Combs v. SAIF, 80 Or App 594 (1986) (Per Curiam). Based upon its decision in Davison v. SAIF, 80 Or App 541 (1986), the court has remanded this case for closure of the claim.

In Davison v. SAIF, *supra*, the court concluded that claims for nondisabling injuries must be closed before the time within which a claimant may seek a Determination Order begins to run. We interpret this holding to mean that an insurer's alleged misclassification of an injury as nondisabling may be challenged within one year after an insurer notice of claim closure without

reference to the date of the injury. In this case, as in Davison, there has been no valid closure of the claim, which was initially accepted as nondisabling.

Therefore, in accordance with the court's mandate, this claim is remanded to the SAIF Corporation for closure under the provisions of ORS 656.268.

IT IS SO ORDERED.

GARY J. HANSON, Claimant  
Galton, et al., Claimant's Attorneys  
Schwabe, et al., Defense Attorneys  
Mitchell, et al., Defense Attorneys  
Daryll E. Klein, Defense Attorney

WCB 85-15530, 85-15934 & 86-00516  
December 4, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

Loggers Assurance Company (Loggers) requests review of that portion of Referee T. Lavere Johnson's order that set aside its denial of claimant's new injury claim for the low back and upheld the aggravation denials of Martin Marietta Aluminum (Martin Marietta), a self-insured employer, and American States Insurance (American States) for the same condition. The issue is responsibility.

Claimant compensably injured his low back while employed by Martin Marietta in June 1981. Dr. Neller, the initial treating physician, diagnosed a lumbosacral strain/sprain with right sciatic neuralgia. Claimant was allowed to return to light duty employment on June 26, 1981. His symptoms continued thereafter. He was seen by Dr. Pasquesi in November 1982 with complaints of ongoing low back pain. Dr. Pasquesi rated claimant's impairment at 10 percent and suggested that claimant limit his work to lighter duty.

A February 17, 1983 Determination Order awarded claimant 15 percent unscheduled low back disability. Two months later, Martin Marietta stipulated to an increase of 15 percent, bringing claimant's total award to 30 percent. Claimant later left work for reasons unrelated to his injury.

In February 1984 claimant began work for a painting contractor insured by American States. Although claimant's symptoms continued throughout this employment and he needed intermittent medical attention, there is no evidence that his underlying condition was worsened by the painting job. Claimant continued painting into early 1985 and then left that job.

In May 1985 claimant began work for a company insured by Loggers. Claimant felled trees for approximately six months. Although there was no identifiable injury during this last employment, claimant ultimately left work because of an increase in his low back pain. Dr. Neller later stated that claimant was disabled from employment due to an aggravation of the 1981 injury. Claimant then returned to Dr. Pasquesi, who noted in his November 7, 1985 report that claimant had experienced ongoing symptoms since the original injury. Dr. Pasquesi found repeat x-rays to be similar to those done in 1981, and he felt that claimant's impairment remained at approximately 10 percent. He opined that claimant's later employments had contributed to his pain syndrome and that the logging employment "could be considered to be accumulated trauma." -1403-

Claimant filed claims with Martin Marietta, American States and Loggers, asserting an aggravation of his original injury or, in the alternative, the occurrence of a new injury during later employments. Martin Marietta denied on the basis of responsibility only. American States denied compensability. Loggers asserted as an affirmative defense claimant's alleged failure to timely file his claim.

Claimant was examined by Dr. Thompson, an orthopedist, in February 1986. In a February 28, 1986 report, Dr. Thompson stated:

"Certainly, if anything aggravated [claimant's] back and caused him to be in the condition he is now, would be the work as a timber faller. [sic]"

A month later, Dr. Neller, the initial treating physician, reported:

"[I]t appears that the normal physical demands of [claimant's logging job] did exceed his physical abilities and resulted in a return and continuation of the symptomatology experienced since 1981."

Claimant testified that he was never symptom-free following his original injury and that he consistently required medical treatment. He characterized his condition as simply getting progressively worse throughout both of his later employments, until he ultimately left work because of severe symptoms. His pain was always in the same area of the back and was consistently of the same character. Only the severity of symptoms changed.

Dr. Pasquesi also testified at hearing. When asked whether claimant's last employment contributed to the low back condition, Dr. Pasquesi replied: "My opinion is that that work and every day that he lived contributed." He went on to note, however, that claimant's complaints at the time of the last examination were the same as those claimant had described following the first injury, only worse. Dr. Pasquesi replied to the various inquiries of counsel for Loggers:

"Q. So I guess essentially what you're saying, then, isn't it, that depending upon the type of activity he does, the bending, the stooping, the lifting, that's going to contribute to his pain?"

"A. Yes.

"Q. And his symptomatology?"

"A. Yes.

"Q. But as far as you know, as far as you can tell in terms of his overall condition, it's the same now as it was back in 1982?"

"A. I felt that his impairment would be about the same. His symptoms, he said, were worse.

"Q. I take it that impairment relates to the condition, and the symptomatology relates to the pain and the subjective complaints?

"A. No. The impairment is based primarily on the pain in this case . . .

"Q. Is there anything based on the condition?

"A. As far as measurable impairment, there wasn't.

"Q. So you were measuring his impairment in both cases by pain?

"A. Yes, I did.

"Q. And in both cases it was the same?

"A. About the same."

The Referee found Loggers, as insurer for the last employer, to be responsible. He found: "Dr. Pasquesi felt that claimant's job duties at [the last employer] made an actual, material contribution to a worsening of the underlying condition." He also found the opinions of Drs. Thompson and Neller "not to the contrary."

We disagree with the Referee. In Hensel Phelps Const. Co. v. Mirich, 81 Or App 290 (1986), decided since the Referee's order, the court held that in order for a later employer to be held liable, there must be evidence that the later employment "independently contributed to the causation of the disabling condition, i.e., to a worsening of the underlying condition." Id. at 294 (emphasis in original). A worsening of symptoms alone does not shift liability to a later employer. As the Mirich court noted, "If worsened symptoms alone were enough to place liability on [a later employer], the first employer would never be responsible." Id. There must be a worsening of underlying condition rather than a mere contribution to the disability.

In the present case, there is no persuasive evidence that claimant's employment as a painter contributed to his underlying condition. American States is not responsible. Neither do we find persuasive evidence that claimant's last employment contributed to his underlying condition. Unlike the Referee, we find Dr. Pasquesi's opinion to be that claimant's underlying condition was unaffected by the last employment. Dr. Pasquesi's hearing testimony is clear that little in the way of new objective physical signs were found at the time of claimant's last examination. Rather, claimant's "overall back condition" remained the same; only his pain increased. Dr. Pasquesi's opinion is supported by claimant's own testimony of progressively increasing pain throughout his later employments.

Dr. Neller has never stated that claimant's last employment contributed to the underlying condition. In fact, his statement that the last employment "resulted in a return and continuation of the symptomatology experienced since 1981," suggests that the effect of claimant's last employment was limited to an increase in symptoms. While Dr. Thompson did state that the last employment "aggravated" claimant's condition, he in no way suggested that the underlying condition was altered by the last period of employment.

Our review of the record persuades us that the first employer, Martin Marietta, is responsible for claimant's condition. The condition arose during the first employment, and subsequent employments did no more than change the level of symptoms claimant experienced at various times. Without an actual worsening of the underlying condition during a later employment, the first employer remains liable. The Referee's finding that the last insurer is responsible will be reversed.

Although the compensability of claimant's claim with American States was an issue at hearing, responsibility was the only issue on Board review. An attorney fee, therefore, shall not be awarded in this forum. Petshow v. Farm Bureau Ins. Co., 76 Or App 563 (1985).

#### ORDER

The Referee's order dated May 20, 1986 is reversed in part and affirmed in part. That portion of the order that set aside Loggers Assurance Company's denial of claimant's new injury claim and upheld Martin Marietta's denial of claimant's aggravation claim is reversed. Martin Marietta shall accept claimant's aggravation claim, process it according to law, and reimburse Loggers Assurance for costs incurred in processing claimant's claim thus far. The remainder of the Referee's order is affirmed.

THOMAS E. HARLOW, Claimant  
Hayner, et al., Claimant's Attorneys  
Brian L. Pocock, Defense Attorney

WCB 84-09970, 85-02851, 85-02852  
& 85-02853  
December 4, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

The self-insured employer requests review of those portions of Referee Leahy's amended order that: (1) awarded claimant five percent (16 degrees) unscheduled permanent partial disability for injuries to his low back in each of WCB Case Nos. 85-02851, 85-02852 and 85-02853 in lieu of Determination Orders which awarded no permanent disability; (2) awarded claimant a 25 percent penalty and his attorney a fee of \$250 in each of the same cases for untimely claim closure and (3) awarded claimant 25 percent (80 degrees) unscheduled permanent partial disability for injury to his low back in WCB Case No. 84-09970 in lieu of the award by Determination Order of 20 percent (64 degrees). The issues in the first three cases are jurisdiction, extent of disability, penalties and attorney fees. The issue in the fourth case is extent of disability.

Claimant injured his low back on April 18, 1983 in the

course of his employment when his foot slipped in some oil as he was loading a garbage can onto the bed of a truck. Claimant visited Dr. Bert, an orthopedist, complaining of low back and right leg pain. Claimant's condition did not improve with bed rest and Dr. Bert ordered a myelogram which was performed in early May 1983. The myelogram revealed a small disc herniation at L4-5.

After a six-week trial of conservative treatment without significant improvement, Dr. Bert performed chemonucleolysis in mid-July 1983. Claimant's back pain slowly lessened after this procedure and Dr. Bert released him for regular work in mid-October 1983. Dr. Bert declared claimant medically stationary in early January 1984 and his claim was closed by Determination Order dated February 10, 1984 with an award of 20 percent (64 degrees) unscheduled permanent partial disability. In September 1984 claimant requested a hearing on this Determination Order on the issue of extent of disability and a hearing was scheduled for February 13, 1985.

In October 1984 the employer submitted to the Referee copies of the documents upon which it intended to rely at the hearing. The submissions included documents connected with the February 1984 Determination Order and also included documents connected with three previous low back injuries and copies of three other Determination Orders all dated March 2, 1984. None of the March 1984 Determination Orders had awarded any permanent partial disability for the previous back injuries. In its response to claimant's request for hearing, the employer contended that both the February 1984 Determination Order and the March 1984 "Determination Order [sic]" were correct and should be affirmed. Claimant's attorney first knew of the March 1984 Determination Orders when he received the employer's submissions and answer.

The hearing on the February 1984 Determination Order was held as scheduled on February 13, 1985. At the hearing, claimant's attorney stated that he intended to raise as issues not only the extent of disability in connection with the February 1984 Determination Order, but also the extent of disability in connection with the three March 1984 Determination Orders and penalties and attorney fees for the untimely submission of these three claims to the Evaluation Division. Counsel for the employer claimed surprise with regard to the issues raised in connection with the three March 1984 Determination Orders and objected to the Referee considering these issues because claimant had requested a hearing only on the February 1984 Determination Order. The Referee took the employer's objections under advisement.

In an Opinion and Order dated March 14, 1985 the Referee decided that the issues raised by claimant at the hearing in connection with the three March 1984 Determination Orders were properly before him. The Referee concluded that the employer had placed the March 1984 Determination Orders in issue by including copies of the orders and related documents in its submissions prior to the hearing and by addressing them in its answer to claimant's request for hearing on the February 1984 Determination Order. The Referee then proceeded to award five percent permanent partial disability on each of the three March 1984 Determination Orders and to assess penalties and attorney fees for untimely submission of these claims to the Evaluation Division. With regard to the February 1984 Determination Order, the Referee awarded claimant 25 percent permanent partial disability in lieu

of the 20 percent awarded by that order. In an Amended Opinion and Order dated April 8, 1985 the Referee adjusted the award of attorney fees, but otherwise refused to modify his previous order.

In addressing the issues raised in connection with the three March 1984 Determination Orders, the Referee concluded, in essence, that the employer's evidentiary submissions and its answer to claimant's request for hearing on the February 1984 Determination Order constituted a request for hearings on the March 1984 Determination Orders. We disagree with this conclusion. Neither the employer's evidentiary submissions nor its answer state that any hearings on the March 1984 Determination Orders were desired. See ORS 656.283(3). Absent any such statement, mere submission by the employer of copies of the three March 1984 Determination Orders and the associated documents cannot reasonably be construed as requests for hearings on those orders. The March 1984 Determination Orders related to prior injuries to the same part of claimant's body which was the subject of the February 1984 Determination Order. Copies of the March 1984 Determination Orders and the associated documents were needed to confirm the natures and locations of the prior injuries and to establish whether any compensation had been awarded for those injuries, thereby assuring that compensation for the latest injury would be computed in accordance with ORS 656.222. This logically explains the submission of these documents by the employer and negates the inference drawn by the Referee.

Further, although the employer's answer to claimant's request for hearing on the February 1984 Determination Order refers to the March 1984 Determination Orders, it asserts only that they should be affirmed. Such an assertion cannot reasonably be construed as a request for hearings on the March 1984 Determination Orders because it does not assert any error in or ask for any modification of the orders.

We conclude that neither the employer's evidentiary submissions nor its answer to claimant's request for hearing on the February 1984 Determination Order constituted a request for hearing on any of the March 1984 Determination Orders. Even assuming, arguendo, that the employer's submissions or its answer could be construed as a request for hearings on the three March 1984 Determination Orders, we conclude that the employer withdrew its request by virtue of its strenuous objection at the hearing to consideration of the issues associated with those orders. Either way, the Referee was without jurisdiction to decide any issues relating to the orders unless claimant independently requested hearings on those orders. See Charles W. Roller, 38 Van Natta 50 (1986); Jimmie Parkerson, 35 Van Natta 1247, 1250 (1983).

This leads us to an examination of claimant's actions and to the question of whether claimant validly requested hearings on the March 1984 Determination Orders. The only timely action by claimant which can be construed as a request for hearings on the March 1984 Determination Orders was his attorney's oral request that the Referee consider issues associated with these orders at the time of the hearing on the February 1984 Determination Order. The issue thus becomes whether such a request was sufficient to provide the Referee with jurisdiction over the March 1984 Determination Orders.

The procedural requirements for requesting a hearing are

set out in ORS 656.283. The first problem we see with claimant's oral request for hearing is its apparent conflict with subsection (3) of that statute. Subsection (3) provides as follows:

"A request for hearing may be made by any writing, signed by or on behalf of the party and including the address of the party, requesting the hearing, stating that a hearing is desired, and mailed to the Board."

In light of the other ostensible requirements of the subsection including the requirement that the request be "signed by or on behalf of the party," that it include "the address of the party" and that it be "mailed to the Board," it is more reasonable to conclude that a writing of some kind is mandatory in every case and that only the form of the writing is variable. See State ex rel United Railways Co., v. Ekwall 135 Or 439, 444-45, (1931). Claimant did not deliver to the Board any kind of writing requesting a hearing on any of the three March 1984 Determination Orders. He thus failed to satisfy this requirement.

The next problem we see with claimant's request for hearing is its timing. Subsection (5) of ORS 656.283 provides in pertinent part:

"At least 10 days' prior notice of the time and place of hearing shall be given to all parties in interest by mail."

Through enactment of this subsection, the legislature clearly contemplated that a request for hearing would be filed and that notice of the hearing on that request would be given at least ten days prior to the hearing. Claimant and his attorney were aware of the March 1984 Determination Orders months in advance of the hearing on the February 1984 Determination Order. To comply with subsection (5) of ORS 656.283, claimant should have requested hearings on the March 1984 Determination Orders and then moved to consolidate these requests with the request on the February 1984 Determination Order at least ten days in advance of the hearing. Instead, claimant made his request for hearings on the March 1984 Determination Orders at the beginning of what turned out to be the hearing on the same orders.

In determining whether claimant's failure to comply with the above requirements deprived the Referee of authority to address issues associated with the March 1984 Determination Orders, we must first decide whether either of the requirements which claimant failed to satisfy is jurisdictional. Two Court of Appeals cases indicate that they are not. In both Murphy v. SAIF, 13 Or App 105 (1973) and Thomas v. SAIF, 64 Or App 193 (1983), the Court held that the Referee had jurisdiction to rule on the merits of a subsequent aggravation claim made orally at the time of the hearing on a prior aggravation claim. For the reasons given below, however, we conclude that these cases conflict with subsequent decisions of the Supreme Court and thus are no longer viable.

Prior to the 1965 amendments to ORS Chapter 656, the law with regard to the procedural requirements of Oregon workers' compensation law was summarized in the leading case of Demitro v. State Industrial Accident Commission, 110 Or 110, 112 (1924) as follows:

"The whole scheme of workman's compensation law is purely statutory and not according to the course of the common law. It is elementary that in acquiring jurisdiction in pursuit of a statutory remedy, the requirements of the enactment must be complied with strictly."

The Court in Demitro went on to hold that a notice of appeal which had been personally served upon the Commission rather than served by certified mail as required by statute was insufficient to vest jurisdiction in the Circuit Court. Accord McCain v. State Tax Commission, 227 Or 486, 491-93 (1961).

After the 1965 amendments, Demitro was expressly overruled in Stroh v. SAIF, 261 Or 117, 120 (1972). The Court in Stroh ruled that service of a notice of appeal by regular mail was sufficient to confer jurisdiction in the Circuit Court despite the statutory requirement of service by registered or certified mail when the notice was received by the adverse party prior to the expiration of the statutory time limit. Although Stroh contained no sweeping language indicating a major shift in orientation by the Supreme Court, the Court of Appeals gave the case a liberal interpretation and began citing it as the leading case on the procedural aspects of workers' compensation law. The two cases we cited earlier, Murphy v. SAIF and Thomas v. SAIF, were decided by the Court of Appeals under this liberal interpretation of Stroh. In Murphy, for instance, the rule of Stroh was expansively restated as follows: "Failure to strictly comply with a notice requirement does not necessarily preclude jurisdiction over a claim where no prejudice results from the failure to give such notice." 13 Or App at 108.

In two recent decisions, the Supreme Court has made it clear that such a broad reading of Stroh was unwarranted. In Southwest Forest Industries v. Anders, 299 Or 205 (1985), the Court held that the employer's failure to file a notice of appeal within the statutory 30-day time limit and its failure to serve a copy of the notice of appeal on the Workers' Compensation Board were both fatal to the jurisdiction of the Court of Appeals. In reaching these conclusions, the Court relied upon a number of early cases including Demitro, quoted the language from Demitro which we quoted earlier and emphasized that the procedural requirements of the workers' compensation law must be complied with strictly. The Court did not discuss or even cite Stroh. Similarly, in Zurich Ins. Co. v. Diversified Risk Management, 300 Or 47 (1985) the Court held that the claimant's failure to serve a copy of the notice of appeal on one of the parties who appeared in the proceeding before the Board was fatal to the jurisdiction of the Court of Appeals. The Court relied upon Anders and again upon Demitro. The Court cited Stroh, but distinguished it on its facts.

These two recent pronouncements of the Supreme Court lead us to the conclusion that Stroh should be given a restrictive reading and that cases such as Murphy and Thomas which were decided under a liberal interpretation of Stroh have been overruled sub silentio. We conclude, therefore, that we may reconsider the question of whether the requirements which claimant failed to satisfy in the present case are jurisdictional.

In addressing this question, we begin with one of the

purposes of the Workers' Compensation Law as declared by the legislature in ORS 656.012(2)(b):

"To provide a fair and just administrative system for delivery of medical and financial benefits to injured workers that reduces litigation and eliminates the adversary nature of the compensation proceedings, to the greatest extent practicable."

We are mindful that an overly technical reading of procedural requirements can be contrary to the policies expressed in this subsection. See Stroh v. SAIF, supra. It is equally important to recognize, however, that the same policies can be similarly frustrated when procedural requirements that are essential to the orderly, efficient and fair operation of the workers' compensation system are not enforced. As stated by Professor Larson in his discussion of the subject:

"[T]here is a point beyond which the sweeping-aside of 'technicalities' cannot go, since evidentiary and procedural rules usually have an irreducible hard core of necessary function that cannot be dispensed with in any orderly investigation of the merits of a case." A. Larson, The Law of Workmen's Compensation §77A.10 at 15-3 to 15-4 (1983).

We conclude, therefore, that in order to determine whether a particular procedural requirement is jurisdictional, the purpose of the requirement should be examined and its functional importance in the workers' compensation scheme should be assessed. Basic requirements that are essential to the orderly, efficient and fair operation of the workers' compensation system should be declared jurisdictional and strict compliance with such requirements should be demanded. On the other hand, technical requirements that are not essential to the accomplishment of these purposes should not be deemed jurisdictional. This approach will accomplish the policies expressed by the legislature and is consistent with the decisions of the Supreme Court.

Returning to the present case, a request for hearing has two basic purposes: (1) to invoke the jurisdiction of the Hearings Division and (2) to inform the parties and the Referee that some aspect of a particular claim is being contested, thus allowing them to prepare for the hearing. See Culver v. Sheets, 13 Or App 405, 409, rev den (1973). We conclude that fulfillment of these purposes is central to the orderly, efficient and fair operation of the workers' compensation system and further conclude that these purposes would be frustrated in the absence of a timely written request for hearing. The certainty and permanence of a writing and the preparation allowed by ten days advance notice are essential to the fulfillment of these purposes. Permitting anything less than strict compliance with these basic requirements is an invitation to confusion, unfair surprise, inefficiency and needless delay. Failure to enforce these requirements would be contrary to the legislative policies expressed in ORS 656.012(2)(b). We conclude, therefore, that these two requirements are jurisdictional: (1) a written request for hearing and (2) ten days advance notice of the hearing on that request.

Claimant failed to satisfy either of the above requirements in connection with the three March 1984 Determination Orders. The Referee was without jurisdiction over those orders, therefore, and erred in addressing the issues associated with those orders.

On the issue of the extent of disability with regard to the February 1984 Determination Order, on our de novo review of the record, considering claimant's impairment together with the pertinent social and vocational factors, see ORS 656.214(5); OAR 436-30-380 et seq., we find that claimant is adequately and appropriately compensated for the permanent loss of earning capacity due to the compensable injury of April 18, 1983 by an award of 80 degrees for 25 percent unscheduled permanent partial disability. We thus affirm the Referee's award for this injury. Claimant's attorney is entitled to a reasonable attorney fee for prevailing on this issue. ORS 656.382(2).

#### ORDER

The Referee's amended order dated April 8, 1985 is reversed in part. Those portions of the order that awarded claimant five percent (16 degrees) unscheduled permanent partial disability for injury to his low back and penalties and attorney fees in each of WCB Case Nos. 85-02851, 85-02852 and 85-02853 are reversed. 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 WCB Case No. 84-09970, to be paid by the self-insured employer.

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WILLIAM H. HOOVER, Claimant  
Edward C. Olson, Defense Attorney

WCB 84-06560  
December 4, 1986  
Order of Dismissal

Claimant has requested review of Referee Baker's order that dismissed his request for hearing on the ground of abandonment. OAR 438-06-085. The insurer has moved to dismiss the request for review on the ground that the request was not served upon the insurer or its attorney within 30 days after the issuance of the Referee's order. ORS 656.289(3); 656.295(2). We find that claimant's request for review was mailed to and received by the Board within 30 days after issuance of the Referee's order, but that copies of the request were not mailed to the insurer or its attorney and neither had actual knowledge of the request until beyond 30 days from the date of the order.

We conclude that claimant's request for review does not comply with the requirements for mailing and service set forth in ORS 656.289(3) and 656.295(2). We, therefore, lack jurisdiction over the case. Argonaut Insurance v. King, 63 Or App 847, 852 (1983). Claimant's request for Board review is dismissed. The Referee's Order of Dismissal is final.

IT IS SO ORDERED.

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JAMES M. KLEFFNER, Claimant  
Welch, et al., Claimant's Attorneys  
Roberts, et al., Defense Attorneys  
SAIF Corp Legal, Defense Attorney  
Beers, et al., Defense Attorneys

WCB 86-06012, 85-10340 & 85-11469  
December 4, 1986  
Order Denying Motion to Strike  
Brief

Claimant has moved the Board for an order striking the SAIF Corporation's appellant's brief on the ground that it was not served upon all parties to the hearing. The brief was served upon the attorney for claimant. At the time the brief was filed, our rules of procedure provided that a brief or other document not simultaneously served on all other parties "may" be stricken. OAR 438-11-010(3)(c) (WCB Admin. Order 1-1986). The current rules of procedure do not expressly provide that a brief not served on all other parties may be stricken, OAR 438-11-035(2) (WCB Admin. Order 5-1986), but we conclude that such a remedy is implied. Whether to strike a brief is within our discretion.

On review, the only issue raised by SAIF is whether the attorney fee due claimant should be paid out of or in addition to compensation. SAIF has not objected to the Referee's finding that it is responsible for claimant's compensation. This issue is between claimant and SAIF alone. Claimant has not been aggrieved by SAIF's failure to serve the brief on the other insurers who were parties to the hearing. Under these circumstances, we do not believe the brief should be stricken.

The motion to strike SAIF's brief is denied. Claimant is allowed 21 days from the date of this order to file his respondent's brief.

IT IS SO ORDERED.

ROBERT E. NICKLIN, Claimant  
Malagon & Moore, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney  
E. Jay Perry, Defense Attorney

WCB 85-07087 & 85-06093  
December 4, 1986  
Order on Review

Reviewed by Board Members Lewis and Ferris.

Liberty Northwest Insurance Corporation (Liberty) requests review of that portion of Referee Foster's order that set aside its denial of claimant's new injury claim for the low back and upheld the SAIF Corporation's denial of claimant's aggravation claim for the same condition. The issue is responsibility.

Claimant compensably injured his back while employed by SAIF's insured on February 10, 1979. SAIF accepted the claim as nondisabling. The claim was closed by Determination Order in December 1979 with an award of temporary total disability. Although claimant's back symptoms continued, he worked into mid-1981. He was then determined to have suffered a herniated L5-S1 disk. The disk was surgically removed by Dr. Serbu on July 31, 1981. Claimant ultimately returned to his regular job in late 1981. The claim was again closed by Determination Order with an award of 32 degrees (10 percent) unscheduled disability for the low back. By way of a June 1982 stipulated agreement, claimant received an additional 2.5 percent unscheduled disability. He continued to work and continued to be symptomatic. He left work for several days in May 1984 after experiencing increased low back symptoms, but then once again returned to his job.

On January 1, 1985, the employer's insurance coverage transferred from SAIF to Liberty. Ten days later, claimant experienced an acute exacerbation after pushing a heavy cart at work. He continued to work, however, until April 2, 1985 when he visited Dr. Baker complaining of low back and leg pain. He then returned to Dr. Serbu, to whom he described an acute return of symptoms without the occurrence of a new injury. Dr. Serbu found little in the way of new objective physical signs. In May 1985, claimant filed claims with both SAIF and Liberty, asserting that he had suffered either an aggravation or a new injury in January. Each insurer issued a denial.

Claimant's complaints continued. Although Dr. Serbu suspected a functional component to the claim, a May 24, 1985 myelogram revealed a minimal bulging disk at L4-5. Dr. Serbu interpreted the myelogram and CT scan reports as "almost normal," and suggested that there was no explanation for claimant's ongoing complaints. Dr. Serbu suggested no further therapy.

Claimant was seen by Dr. D.T. Smith in July 1985. Dr. Smith suspected a recurrent disk herniation and opined that claimant's lumbar condition was "a combination of degenerative changes which probably have been aggravated by trauma or which are directly and causally related to [claimant's] original injury of 1979." He further stated that claimant's L5-S1 canal changes were "directly attributable to the original lesion and its subsequent surgery."

Claimant was examined by Orthopedic Consultants in December 1985. In their December 3, 1985 report, they stated:

"The present low back problem is definitely related to the original injury, particularly in view of a temporary episode in 1984 prior to the repeated activation by a second injury in January of 1985."

Dr. Smith was deposed on December 20, 1985. He testified that he first saw claimant six months after the January 1985 work incident. When asked his opinion regarding the contributions of the first and second incidents, Dr. Smith suggested that the surgery necessitated by claimant's first injury contributed to the development of the new disk prolapse at L4-5. He stated:

"I don't believe this man would have had difficulty today necessarily at L-4, 5 if it hadn't been he had a disc at L5-S1. But conversely his acuteness of symptoms . . . was an outgrowth of the injury of 1985, not a direct outgrowth of his lumbar surgery and the narrowing of the disc interspace . . . ."

Dr. Smith also testified that claimant's leg radicular symptoms "probably developed more specifically after [the January 1985 injury] and were not of themselves prior to that time a rather pronounced part of [claimant's claim]." Claimant's testimony, however, reveals that he had acute radicular symptoms as early as May 1984, following an acute exacerbation. It also reveals that claimant was never symptom free after the first injury, but that he had a worsening of those symptoms after January 1985.

The Referee found "from the medical evidence and claimant's testimony" that claimant suffered a new injury in January 1985. He therefore found Liberty responsible.

In Hensel Phelps Const. Co. v. Mirich, 81 Or App 290 (1986), decided subsequent to the Referee's order, the court held that in order for the later employer in a successive injury case to be held liable, there must be evidence that the later employment "independently contributed to the causation of the disabling condition, i.e., to a worsening of the underlying condition." Id. at 294 (emphasis in original). A worsening of symptoms alone does not shift liability. As the Mirich court noted, "If worsened symptoms alone were enough to place liability on the second employer, the first employer would never be responsible." Id.

After reviewing the record, we find no persuasive evidence that claimant's second injury worsened his underlying condition. Rather, it appears that his symptoms merely worsened, resulting in further disability. Dr. Serbu has stated that claimant's condition arose from the first injury. Orthopedic Consultants agree. Dr. Smith's reports have been somewhat inconsistent. Whereas he definitively stated in a July 1985 report that claimant's condition resulted from the first injury, his deposition testimony suggests that the second injury may have also contributed. The gist of Dr. Smith's entire testimony, however, is that the second injury's contribution was to worsened symptoms only. Claimant's testimony also suggests that the second injury resulted only in increased symptoms. He was consistently symptomatic following the first injury, and the second incident merely resulted in an exacerbation of claimant's already-existent pain.

Without a worsening of claimant's condition by the second employment, the first insurer remains responsible. The Referee's responsibility holding shall be reversed.

#### ORDER

The Referee's order dated May 9, 1986 is reversed in part and affirmed in part. That portion of the order that set aside Liberty Northwest Insurance Corporation's new injury denials is reversed and the denials are reinstated. The SAIF Corporation's denial of claimant's low back aggravation claim is set aside and SAIF is ordered to process the claim according to law. SAIF shall reimburse Liberty for its costs incurred thus far in processing claimant's claim. The remainder of the Referee's order is affirmed.

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JUNE E. RITTER, Claimant  
Roll, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-07390  
December 4, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of that portion of Referee Fink's order which set aside its denial of claimant's occupational disease claim for bilateral carpal tunnel syndrome. On review, SAIF contends that claimant failed to prove that her work activities were the major contributing cause of her condition.

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

In finding the claim compensable, the Referee discounted the opinion of Dr. Nathan, an independent medical examiner. Dr. Nathan opined that claimant's condition was not causally related to her work activities. The Referee found Dr. Nathan's conclusions "virtually worthless" because Dr. Nathan had viewed a videotape of work activities at SAIF's insured. Since the videotape was not specifically offered as evidence, the Referee reasoned that Dr. Nathan's opinion was entitled to "very little weight."

We disagree with the Referee's reasoning. To avoid unnecessary delay and expense, medical evidence is generally presented in the form of written reports. ORS 656.310(2); OAR 438-07-005(2). Among other points, the reports should include: (1) a history of the injury; (2) a pertinent medical history; (3) all sources of history and complaints; (4) an opinion whether all or part of the disability is work related; (5) and the reason for the opinion. OAR 438-07-005(2)(a), (b), (d), (h), and (k).

Dr. Nathan's review of the videotape, as well as his tour of the employer's facility, should not discredit the conclusions drawn from his investigation. If anything, the information from this investigation, if accurate, further enhances Dr. Nathan's opinion. Such an investigation is no different than obtaining a description of claimant's work activities. Yet, as with a medical or work history, this investigation is but one of several components which form the basis of a medical opinion. Each component has a significant or insignificant contribution to the relative persuasiveness of the medical opinion.

Accordingly, in conducting our de novo review, we have not discounted Dr. Nathan's opinion. However, following our review of all of the medical and lay evidence, which includes claimant's entirely credible testimony, we are persuaded that her work activities were the major contributing cause of her bilateral carpal tunnel syndrome, or its worsening.

#### ORDER

The Referee's order dated April 23, 1986 is affirmed. Claimant's attorney is awarded \$600 for services on Board review, to be paid by the SAIF Corporation.

ROBERT L. TRUMP, Claimant  
Wade P. Bettis, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 84-11081 & 84-11082  
December 4, 1986  
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Hallmark Furniture v. SAIF, 81 Or App 316 (1986). We have been mandated to reinstate the order of the Referee. Therefore, the Referee's order dated February 15, 1985 is reinstated and affirmed.

IT IS SO ORDERED.

EDWARD WALTERS, Claimant  
Vick & Gutzler, Claimant's Attorneys  
EBI, Defense Attorney.

Own Motion 86-0605M  
December 4, 1986  
Order Withdrawing Own Motion  
Determination

On November 13, 1986 we issued our Own Motion Determination closing claimant's claim under the provisions of ORS 656.278. Claimant has now requested that the Board withdraw its claim closure on the ground that he made a claim for aggravation of his 1978 industrial injury prior to the expiration of his aggravation rights under ORS 656.273. If claimant made a claim for aggravation prior to the expiration of his aggravation rights, we are without jurisdiction to close the claim. ORS 656.278(2).

After reviewing the record in light of claimant's request, we conclude that there are several medical reports predating the expiration of claimant's aggravation rights that may or may not constitute aggravation claims. Claimant has requested a hearing on this very issue. Pursuant to our administrative rules governing procedure in own motion claims, we do not act upon requests for own motion relief while a claimant has other administrative or judicial remedies available. OAR 438-12-005(1)(a). The Own Motion Determination dated November 13, 1986 is, therefore, withdrawn pending resolution of the matters contested in WCB Case No. 86-16291.

IT IS SO ORDERED.

DWAYNE KESTER, Claimant  
Velure & Bruce, Claimant's Attorneys  
Schwabe, et al., Defense Attorneys

WCB 86-01617  
December 5, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of that portion of Referee Brown's order which assessed a penalty-associated attorney fee of \$100 for the self-insured employer's unreasonable denial of a medical services claim for chiropractic treatment. On review, claimant contends that his attorney fee should be increased.

With his appellant's brief, claimant has enclosed copies of several documents which pertain to another case. Two of the documents concern a Referee's and a Board's order. As such, we are permitted to take administrative notice of these documents. Dennis Fraser, 35 Van Natta 271, 274 (1983). However, the remaining documents concern a fee petition to the circuit court and circuit court order. We have no authority to consider these materials. See Groshong v. Montgomery Ward Co., 73 Or App 403 (1985). We treat the submission of these remaining documents as a motion to remand for the taking of additional evidence.

We deny the motion. After conducting our review, we find that the record has not been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5). Moreover, it has not been clearly shown that material evidence was not obtainable with due diligence before the hearing. Delfina P. Lopez, 37 Van Natta 164, 170 (1985).

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

Because of the employer's unreasonable denial, claimant is entitled to a reasonable attorney fee. ORS 656.262(10); ORS 656.382(1). Pursuant to OAR 438-47-010(2), the amount of the fee shall be based on the efforts of the attorney and the results obtained. In determining the reasonableness of attorney fees, the following factors are considered: (1) the time devoted to the case; (2) the complexity of the issues presented; (3) the value of the interest involved; (4) the skill and standing of counsel; (5) the nature of the proceedings; and (6) the results secured. Charlene Brotherton, 38 Van Natta 256 (1986); Barbara A. Wheeler, 37 Van Natta 122, 123 (1985).

After conducting our de novo review of the record and considering the aforementioned factors, we conclude that \$100 is a reasonable attorney's fee concerning the penalty issue. In reaching this conclusion, we note that the disputed medical services cost \$324.40.

ORDER

The Referee's order dated June 9, 1986 is affirmed.

WARD NEIHART, Claimant	WCB 85-13216
Malagon & Moore, Claimant's Attorneys	December 5, 1986
Cowling & Heysell, Defense Attorneys	Order on Review
Reviewed by Board Members Lewis and Ferris.	

The insurer requests review of Referee Foster's order that set aside its denial of claimant's request for elective low back and cervical spine surgery. The issue is compensability of medical services under ORS 656.245. Claimant also requests that his claim be reopened and that he be awarded compensation for temporary total disability under the provisions of ORS 656.278. Claimant's aggravation rights, ORS 656.273, have expired.

Claimant sustained an industrial injury to his low back in 1979. In 1980 he sustained another injury to his low back and neck. The 1980 injury was accepted as an aggravation of the 1979 injury. In 1980 Dr. Streitz performed a hemilaminectomy at L5-S1. Dr. Streitz noted that claimant's back pain persisted after the surgery. Claimant was released to modified work in November 1980. After claim closures and stipulated settlements, claimant has received total awards of 80 degrees for 25 percent unscheduled permanent partial disability for injury to his lumbar and cervical spine.

The current controversy revolves around a request for authorization for surgery by Dr. Donald T. Smith. Dr. Smith proposes to perform a laminectomy and possible discectomy at L5-S1 and a laminectomy, possible discectomy and interbody fusion at C6-7. Dr. Smith estimates the probability of successful surgery as 50 percent for the low back and 70 percent for the cervical spine. Prior to proposing surgery, Dr. Smith saw claimant one time for two and one-half hours. Several physicians who have recently examined or treated claimant have opined that there are no signs of neurological involvement at either level of the proposed surgery that would be improved by surgery. These physicians include Dr. Patterson, Dr. Coull, Dr. Mundall and a panel of the Orthopaedic Consultants. Claimant's initial treating physician, Dr. Streitz, and Dr. Norris-Pierce have not issued recent opinions, but both were of the opinion in 1983 that surgery

was not indicated. The only opinion in favor of the proposed surgery was given by Dr. Smith, the physician who would perform the surgery.

The Referee accorded Dr. Smith's opinion "special consideration," on the basis of his finding that Smith was claimant's "treating physician." In Nancy E. Cudaback, 37 Van Natta 1580, withdrawn on other grounds 37 Van Natta 1596 (1985), republished 38 Van Natta 423 (1986), appeal dismissed (CA A39850, August 20, 1986), we concluded that the standard of persuasion in cases in which the medical evidence is divided on a treatment question "is to give the greater weight to the conclusions of a claimant's treating physician unless there are persuasive reasons not to do so." 37 Van Natta at 1581. Prior to our decision in Cudaback, we had applied a standard that accorded greater weight to the opinion of a treating physician unless there were compelling reasons not to do so. See e.g. Victor Derkacht, 36 Van Natta 184 (1984); Lucine Schaffer, 33 Van Natta 511 (1981). In either case, however, a physician must be a "treating" or "attending" physician to be entitled to "special consideration."

An "attending physician" is one who is primarily responsible for the treatment of a compensable injury. ORS 656.005(13); OAR 436-10-005(1), (22). Based upon the entire record, we conclude that at the relevant times claimant's "attending physician" was Dr. Sacks. Dr. Sacks' consistent opinion is that claimant has continued to be medically stationary. His statements about the proposed surgery are equivocal at best. We, therefore, conclude that Dr. Smith's opinion is not entitled to greater weight as that of an "attending physician." Weighing all physicians' opinions equally, we conclude that a preponderance of the evidence establishes that the proposed surgery is not reasonably related to the nature of claimant's injuries nor necessary to the process of recovery.

In the alternative, assuming for the sake of argument that Dr. Smith's status is that of "attending physician," we conclude that there are persuasive reasons to not accord his opinion "special consideration." These are: (1) the brevity of his contact with claimant; (2) the overwhelming weight of contrary medical opinion; (3) the failure of studies performed by Dr. Haber at Smith's request to persuasively establish objective neurological findings; and, (4) the lack of any attempt to explain why his opinion that surgery should be performed should outweigh the opinions of the other physicians who persuasively opine that surgery should not be performed. See Nancy E. Cudaback, supra; Stephanie A. Grimsley-Bruni, 37 Van Natta 437, 439 (1985), aff'd mem, 77 Or App 726, rev den, 301 Or 193 (1986).

For these reasons, we conclude that claimant has not met his burden of establishing that the proposed surgery is reasonably related to his industrial injuries and necessary to the process of recovery. The Referee's order is reversed.

#### ORDER

The Referee's order dated May 5, 1986 is reversed. The insurer's denial dated January 22, 1986 is reinstated and affirmed.

PERRY S. SEAGROVE, Claimant  
Quintin B. Estell, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney  
Reviewed by Board Members Lewis and Ferris.

WCB 85-06379  
December 5, 1986  
Order on Review

Claimant requests review of Referee Quillinan's order that awarded no scheduled permanent disability for claimant's right arm and granted the SAIF Corporation an offset for an overpayment of temporary disability. The issues are the extent of scheduled permanent disability and the rate of temporary disability.

The Board affirms the Referee with the following comment.

Prior to claimant's industrial injury he had worked for SAIF's insured as an on-call employee. In February of 1984 he worked a total of six hours. In March he worked 9 1/2 hours over three days and in April he worked 10 1/2 hours. Mr. Williams, claimant's supervisor, testified that he did not intend to call claimant back to work after April 1984 and considered him terminated. Claimant did not work at all during May of 1984. Subsequently, claimant called Mr. Williams and requested that he again be considered for employment. As a result, claimant worked 3 1/2 hours on June 25, 1984. In July he worked 3 1/2 hours on the day he was injured. The evidence is uncontroverted that claimant was an on-call employee.

The payment of temporary disability for on-call employees is governed by OAR 436-60-020(4)(a). The rule states:

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

"Employed on on-call basis: Use average weekly earnings for past 26 weeks, if available, unless periods of extended gaps exist. then use no less than last four weeks of employment to arrive at average. For workers employed less than four weeks or where extended gaps exist within the four weeks use intent at time of hire as confirmed by employer and worker."

In the present case, claimant worked sporadically with extended gaps existing in his prior 26 weeks and the four weeks prior to his injury on July 10, 1984. Therefore, in order to determine claimant's average weekly earnings, we examine the intent of the employer and worker at the time of hire. Both the employer's and claimant's intent was for claimant to perform work as it became available. The best evidence of how much claimant could be expected to work should be based on claimant's actual work history. Claimant's longest period of continuous work as an on-call employee occurred in February, March and April of 1984 and is the best indication of the parties' intent at the time he was rehired in June of 1984. The Referee correctly used this period to determine claimant's average weekly earnings.

ORDER

The Referee's order dated April 30, 1986 is affirmed.

ROBERT THOMPSON, Claimant  
Michael Dye, Claimant's Attorney  
John Snarskis, Defense Attorney  
Daniel DeNorch, Defense Attorney

WCB 85-10266 & 85-07408  
December 5, 1986  
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of that portion of Referee Foster's order that upheld the denials of Liberty Northwest Insurance Corporation (Liberty) and Industrial Indemnity regarding claimant's right shoulder injury claim. Liberty cross-requests review of that portion of the order setting aside its denial of claimant's claim for a new injury regarding his low back. Liberty asserts that claimant suffered no more than an aggravation of his compensable low back condition and that Industrial Indemnity is responsible. The issues are the compensability of claimant's right shoulder condition and responsibility for his compensable low back condition.

We affirm that portion of the Referee's order upholding the insurers' denials of claimant's right shoulder claim. With regard to the responsibility issue, we reverse.

Claimant is an employe of a soft drink bottling company who compensably injured his low back in December 1983. Industrial Indemnity insured the employer at that time. The claim was accepted as disabling and was subsequently closed by Determination Order with an award of temporary total disability only. Claimant returned to work and thereafter experienced intermittent discomfort. Liberty insured the employer beginning October 1, 1984.

On March 19, 1985 claimant suffered a second industrial injury when he slipped and fell on his buttocks. His low back pain increased shortly thereafter and he sought medical treatment. Dr. Whitman, who had treated claimant following the December 1983 injury, opined that claimant's current back condition was related to the original injury. Dr. Shorb, a chiropractor who saw claimant for the first time following the second injury, stated that the later injury contributed slightly to claimant's condition.

The Referee found that the second injury contributed independently to claimant's "overall back condition." He consequently found Liberty, the second insurer, to be responsible.

In Hensel Phelps Const. Co. v. Mirich, 81 Or App 290 (1986), decided subsequent to the Referee's order, the court held that in order for the later employer to be held liable, there must be evidence that the later employment "independently contributed to the causation of the disabling condition, i.e., to a worsening of the underlying condition." Id. at 294 (emphasis in original). A worsening of symptoms alone during the later employment does not place liability on the second employer. As the Mirich court noted, "If worsened symptoms alone were enough to place liability on the second employer, the first employer would never be responsible." Id. There must be a worsening of underlying condition rather than a mere contribution to the disability.

After reviewing the record, we find no persuasive evidence that claimant's second injury worsened his underlying condition. Rather, it appears that his symptoms merely worsened,

resulting in further disability. Under Mirich, supra, the first employer remains liable. The Referee's holding with regard to responsibility will be reversed.

ORDER

The Referee's order dated March 6, 1986 is reversed in part and affirmed in part. That portion of the order that set aside Liberty Northwest Insurance Corporation's denial of claimant low back injury claim is reversed. Liberty's denial is reinstated and Industrial Indemnity's denial of claimant's low back aggravation claim is set aside. Industrial Indemnity shall accept claimant's claim and process it according to law. Industrial Indemnity shall reimburse Liberty Northwest Insurance Corporation for all compensation and attorney fees paid to claimant pursuant to the Referee's order. The remainder of the Referee's order is affirmed.

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ALSON R. VALENTIC, Claimant  
Pozzi, et al., Claimant's Attorneys  
Roberts, et al., Defense Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 84-08961 & 85-07071  
December 5, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Kemper Insurance Company requests review of those portions of Referee Lipton's order which: (1) set aside its denial of claimant's low back condition; and (2) set aside its denial of responsibility for claimant's upper back, right shoulder, right arm, and psychological conditions after December 17, 1984 and which upheld the SAIF Corporation's denial of responsibility for the aforementioned conditions. Kemper argues that SAIF did not rebut the presumption that its accepted injury was a material contributing cause of the permanent disability and need for medical services after December 17, 1984. Claimant formally cross-requests review of those portions of the order which: (1) denied penalties and attorney fees for Kemper's refusal to resume payment of medical bills based on medical opinions of responsibility; (2) denied penalties and attorney fees for SAIF's late acceptance of the June 1984 injury; and (3) awarded an attorney fee of \$1,000 to be paid by Kemper for services at hearing.

The Board affirms the Referee's order with the following comments.

Kemper is responsible for compensation for an accepted October 1980 disabling injury. SAIF accepted a June 1984 injury as a non-disabling claim. SAIF denied responsibility for treatment after a December 17, 1984 medical examination because the medical opinions at that time were persuasive that the June 1984 injury had resolved without permanent impairment and that claimant's continuing need for treatment was related to the October 1980 injury. Although the claim was not closed by Notice of Closure nor Determination Order, SAIF's denial of responsibility was allowable. See Mason L. Asbury, 38 Van Natta 961 (1986); Frank L. Lomas, 37 Van Natta 1437 (1985).

At the time of the responsibility denials there was no claim for temporary disability compensation and claimant did not leave work due to his 1984 industrial injury. Both insurers denied responsibility for medical services. At the time of each

denial the available medical reports were sufficiently confusing that an insurer could reasonably doubt its responsibility to pay compensation at that time. There is no statute which requires an insurer who has reasonably denied responsibility for medical services to pay medical bills pending determination of responsibility by a Referee if the Workers' Compensation Department refuses to issue a .307 order. It was not unreasonable for the insurers to refuse to pay the medical bills pending determination of responsibility by the Referee. Consequently, there is no reason to assess penalties and attorney fees.

Although SAIF accepted the June 1984 injury as a new non-disabling injury, the medical evidence is persuasive that the 1984 injury was not a material contributing cause of claimant's permanent disability or continuing need for treatment after December 1984. The evidence is persuasive that the June 1984 incident produced a temporary exacerbation of prior symptoms without any worsening of claimant's underlying condition. Therefore, SAIF rebutted the presumption that the last injury was a material contributing cause of claimant's permanent disability. See Louisiana-Pacific Corp. v. Blank, 81 Or App 284 (1986); Ceco Corp. v. Bailey, 71 Or App 782 (1985). Consequently, Kemper is responsible for compensation for claimant's treatment and disability which are related to the 1980 injury after December 17, 1984.

The Referee awarded attorney fees to be paid by SAIF. On reconsideration, the Referee rescinded the award of attorney fees because SAIF did not deny or delay compensation to claimant. The Referee's order was correct.

The Referee also awarded attorney fees within his discretion to be paid by Kemper for prevailing on the denial of the low back claim. The amount of the fee awarded was reasonable for services related to the claim denied by Kemper. Claimant's attorney is entitled to a fee paid by Kemper for services on which claimant prevailed against Kemper. See Shoulders v. SAIF, 73 Or App 811 (1985), modified, 300 Or 606 (1986). He is also entitled to attorney fees for services on Board review. ORS 656.386(1).

#### ORDER

The Referee's order dated March 28, 1986 is affirmed. Claimant's attorney is awarded \$500 as a reasonable attorney fee for services related to the compensability of the low back condition for services on Board review, to be paid by Kemper Insurance Company.

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HARRY DRISCOLL, Claimant	WCB 85-00506, 85-00507, 85-00679
Stephen P. Forte, Claimant's Attorney	& 85-00680
Schwabe, et al., Defense Attorneys	December 8, 1986
Roberts, et al., Defense Attorneys	Order on Review
Moscato & Byerly, Defense Attorneys	

Reviewed by Board Members Ferris and Lewis.

Diamond International, a self-insured employer, requests review of Referee Nichols's order that set aside its denial of responsibility for claimant's low back and cervical condition and upheld the responsibility denials of United Pacific Insurance and Industrial Indemnity. Claimant joins the employer's request for review and brief, and requests attorney fees for services at

hearing if the employer prevails. We have issued an Order on Own Motion in the companion case under ORS 656.278 this date. The issues on review are responsibility and attorney fees.

The Board affirms the order of the Referee with the following comment. The Board is persuaded by the ultimate opinion of the treating doctor, Dr. Newby, that claimant's condition after the attempt to work cleanup is a symptomatic worsening only of the accepted 1983 injury. The employer did not prove that there was a worsening of the underlying condition. Therefore, responsibility remains with the self-insured employer. Hensel Phelps Construction v. Mirich, 81 Or App 290 (1986); Eva L. (Doner) Staley, 38 Van Natta 1280 (WCB Case Nos. 83-07726 and 83-09071; October 3, 1986).

Claimant actively litigated a position adverse to one of the potentially responsible insurers. That insurer was found not to be responsible. Claimant's attorney's services resulted in neither overturning of a denial nor increased compensation to claimant. Claimant's request for attorney fees for services at hearing is denied.

ORDER

The Referee's order dated March 27, 1986 is affirmed.

JOY D. GILLHAM, Claimant  
Peter O. Hansen, Claimant's Attorney  
Schwabe, et al., Defense Attorneys  
Davis, et al., Defense Attorneys

WCB 84-10924 & 85-08405  
December 9, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Pferdner's order which: (1) upheld Liberty Northwest Insurance Corporation's "de facto" denial of a medical services claim for her current right arm and shoulder condition; and (2) upheld Aetna Casualty Company's denial of her "new injury" claim for the aforementioned condition. On review, claimant contends that a prior disputed claim settlement should have been invalidated in its entirety and that her claims are compensable.

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

Following our de novo review of the medical and lay evidence, we are not persuaded that claimant's 1976 compensable right elbow injury was a material contributing cause of her current right arm and shoulder conditions. Thus, we agree with the Referee that Liberty's "de facto" denial of claimant's medical services claim should be upheld.

In reaching this conclusion, we have construed the September 1982 disputed claim settlement as solely a resolution of claimant's prior aggravation claim. The settlement was neither interpreted as an attempt to resolve a previously accepted injury claim nor a waiver of all future claims, including medical services claims pursuant to ORS 656.245.

Finally, after conducting our review, we find that

claimant's activities while working for Aetna's insured was neither a major nor material contributing cause of her right arm and shoulder condition, or its worsening. Accordingly, Aetna's denial is upheld.

ORDER

The Referee's order dated May 9, 1986 is affirmed.

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

WCB 85-10769  
December 9, 1986  
Order on Review

Reviewed by Board Members Lewis and Ferris.

The self-insured employer requests review of those portions of Referee Myers' order which: (1) set aside its denial of claimant's medical services claim, insofar as it denied responsibility for diagnostic testing; and (2) awarded \$1,000 as a reasonable attorney fee. On review, the employer contends that the diagnostic tests were not causally related to claimant's compensable injury, or alternatively, that the attorney fee award should be reduced.

Following our de novo review of the medical and lay evidence, we are persuaded that the diagnostic tests were reasonable and necessary to determine the causal relationship, if any, between claimant's erythrocytosis and his compensable low back and left hip injury. Accordingly, we affirm that portion of the Referee's order which found the testing compensable.

We modify the Referee's award of attorney fees. Attorney fee awards are based on efforts expended and results obtained. OAR 438-47-010(2). In determining the reasonableness of attorney fees, several factors must be considered. These factors include: (1) the time devoted to the case; (2) the complexity of the issues presented; (3) the value of the interest involved; (4) the skill and standing of counsel; (5) the nature of the proceedings; and (6) the results secured. Barbara A. Wheeler, 37 Van Natta 122, 123 (1985). Generally, "results obtained" in the form of medical services are considered to be rather modest. Derry D. Blouin, 35 Van Natta 570 (1983). We consider this general principle to be similarly applicable to diagnostic procedures.

We note that claimant's attorney developed the record by eliciting several medical opinions concerning the compensability of the testing, as well as the diagnosed conditions of hypertension and erythrocytosis. However, since the denial of compensability for these conditions was not overturned, a substantial portion of claimant's attorney's efforts were unsuccessful. Consequently, after considering the efforts expended and the results obtained in establishing the compensability of the diagnostic tests, we conclude that an attorney's fee of \$600 is a reasonable award for services rendered at the hearing level.

Finally, we find that the compensability of the diagnostic testing presents an issue of ordinary difficulty with the usual probability of success for claimant. Accordingly, a reasonable attorney fee is awarded for claimant's successful defense of this issue on Board review.

ORDER

The Referee's order dated March 11, 1986 is affirmed in part and modified in part. In lieu of the Referee's attorney fee award, claimant's attorney is awarded \$600 for services rendered at hearing in setting aside the self-insured employer's denial, insofar as it denied diagnostic testing. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded \$500 for services on Board review concerning the compensability issue, to be paid by the self-insured employer.

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LEO D. JEFFERS, Claimant  
McKeown & Odell, Claimant's Attorneys  
Schwabe, et al., Defense Attorneys

WCB 84-13712 & 85-05857  
December 9, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Mongrain's order of dismissal of claimant's request for hearing. In the alternative, claimant requests that we vacate the Referee's order and remand this matter for a decision on the merits. We conclude that because there has been no decision on the merits, the only relief available to claimant by way of the request for review is the same relief requested by the motion, i.e. to vacate of the Referee's order and remand. Accordingly, we decide the issue on the basis of the materials submitted in support of claimant's motion and the employer's response thereto.

This matter was set for hearing on June 11, 1985. We infer from the record that at or near the time of the scheduled hearing the parties agreed to submit the matter to the Referee for a decision on the basis of stipulated facts. We find that the attorney for the employer mailed the original stipulation to claimant's attorney on August 1, 1985. The original stipulation prepared by the employer's attorney has been submitted to us along with the motion and other materials offered in support of the motion. The stipulation bears the original signature of the employer's attorney opposite the date July 31, 1985 and the original signatures of claimant and claimant's attorney opposite the date October 27, 1986. The stipulation also bears a "received" stamp with the name of claimant's attorney's law firm and the date August 2, 1985. We find that the stipulation was received by claimant's attorneys on August 2, 1985 but was not signed by claimant and his attorney until approximately 15 months later, 30 days after the entry of the Referee's order of dismissal.

The employer's attorney followed up the stipulation by letter to claimant's attorney on August 30, 1985 and by letter to the Referee with a copy to claimant's attorney on October 1, 1985. On September 26, 1986 the Referee entered the following order:

"There has been no action on this file for nearly a year. Apparently, the issues raised by the claimant's request for hearing have been abandoned. Therefore,

IT IS HEREBY ORDERED THAT the claimant's request for hearing is dismissed."

OAR 438-06-085 provides:

"DISMISSAL FOR DELAY. A request for hearing may be dismissed for want of prosecution where the party requesting the hearing occasions a delay of more than ninety (90) days without good cause. Prior to dismissal an order may be entered allowing a specific time within which the party requesting the hearing will have the opportunity to show cause why the case should not be dismissed. The filing of an application for a hearing date without explanation for the prior delay does not constitute a showing of good cause."

"Good cause" means "mistake, inadvertence, surprise or excusable neglect" that permits relief from a default judgment in a civil action under former ORS 18.160 and current ORCP 71B.(1). Anderson v. Publishers Paper Co., 78 Or App 513, rev den, 301 Or 666 (1986). In Sekermestrovich v. SAIF, 280 Or 723, 726-27 (1977), however, the Supreme Court held that the personal negligence of a claimant's attorney was not, as a matter of law, good cause unless the attorney's neglect would be excusable if attributed to the claimant. See also EBI Companies v. Lorence, 72 Or App 75 (1985); Vernon L. Wellington, 37 Van Natta 183 (1985), aff'd mem., 77 Or App 276 (1986). Anderson v. Publishers Paper Co., supra, did not involve an attorney's personal negligence and we see nothing in Anderson that purports to change the approach to cases involving that issue.

Claimant in this case has averred that he did not receive the stipulation from his attorney. We accept that statement. However, under the Sekermestrovich analysis what is relevant is that claimant's attorney unquestionably did receive the stipulation on August 2, 1985 and thereafter did nothing for 15 months in spite of followup requests. No excuse has been offered for this neglect, and we find none in the record as a whole. Attributing this neglect to claimant, as we must under Sekermestrovich, we conclude that good cause for delay has not been shown. We, therefore, affirm the Referee's order dismissing the request for hearing.

#### ORDER

The Referee's order dated September 26, 1986 is affirmed.

JIMMY L. MASSEY, Claimant  
Fellows, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-11390  
December 9, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Galton's order which affirmed Determination Orders that awarded temporary disability and declined to award permanent disability in excess of the 30 percent (48 degrees) unscheduled permanent disability he had previously received for a low back injury. On review, the issues are extent of temporary and permanent disability.

Claimant, in his own behalf, also requests a "fair and

unbiased hearing" before a Referee other than the Referee who presided over his hearing. Alleging a past confrontation with the Referee, claimant contends that the Referee "should have disqualified himself from presiding over the hearing." Claimant confirms that he informed his attorney of this matter during the hearing. Since claimant asserts that this past incident was "vividly in the [Referee's] mind," he requests a new hearing based on the facts and "not on past conflicts or personal grudges."

A Referee may withdraw from a case whenever he or she considers himself or herself disqualified. OAR 438-06-095(1). Any party may request a Referee's removal on the grounds of personal bias or conflict of interest. OAR 438-06-095(2). Such a request is made by filing with the Presiding Referee, promptly upon discovery of the alleged facts, an affidavit which sets forth in detail the matters believed to constitute the grounds for disqualification. Id. If, in the opinion of the Presiding Referee, the request is filed with due diligence and the supporting affidavit is sufficient on its face, the Presiding Referee shall either disqualify the Referee and assign another Referee or order a hearing on the allegations in the affidavit. OAR 438-06-095(3).

We interpret claimant's request for a new hearing to be a motion for a change of Referee. We deny the motion. We conclude that the request is untimely and not in accordance with OAR 438-06-095.

The Referee neither mentions the alleged past confrontation nor does he suggest that he is aware of a prior relationship, of any kind, involving claimant. Since the Referee gives no indication that he was unable to render a fair and impartial decision, we find no reason to believe that he considered himself disqualified to preside over claimant's hearing. See OAR 436-06-095(1).

Furthermore, neither before, nor during, the hearing was an objection raised concerning the Referee's presence. No objection was forthcoming even though claimant now confirms that he had recognized the Referee during the hearing and so advised his counsel. In fact, no request for disqualification was lodged until after the Referee's order had been issued and appealed.

The allegations made in claimant's request raise serious questions. We do not consider these questions lightly. However, if nothing else, the timing of this request suggests a certain degree of gamesmanship. Moreover, the request can hardly be considered as promptly and diligently filed. See OAR 438-06-095(2),(3). Finally, inasmuch as claimant acknowledges that both he and his counsel were aware of the potential for the Referee's personal bias during the hearing, we conclude that their silence until this late date constitutes a waiver of the issue.

We turn to the merits. Following our de novo review of the medical and lay evidence, we are not persuaded that claimant has established entitlement to additional awards of temporary or permanent disability. Accordingly, we affirm the Referee's order.

ORDER

The Referee's order dated April 24, 1986 is affirmed.

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of Referee St. Martin's order that upheld the self-insured employer's denial of medical treatment for claimant's low back condition. The issues are whether claimant's claim was barred by the findings of a Referee in a prior Opinion and Order and, if not, whether the claim is compensable on the merits.

We affirm the order of the Referee with the following comments. Claimant twisted his hip while descending a ladder in 1980. Later medical tests revealed the presence of degenerative disease in both claimant's hip and low back. Claimant made a claim for the hip only and the claim was accepted. A Determination Order ultimately closed the claim and claimant appealed from that Order. The sole issue at the ensuing hearing was extent of unscheduled disability.

In an Opinion and Order dated June 30, 1982, Referee Forrest James reviewed the medical record, awarded claimant 15 percent unscheduled permanent partial disability for the hip, and added the comment: "[Claimant] has lumbar arthritis, unrelated to his industrial accident." The Referee's order was not appealed.

In early 1985 claimant submitted a claim for low back pain, which he alleged was the result of the 1980 compensable injury. The employer issued a denial and claimant requested a hearing. At hearing, the employer asserted that claimant's claim was barred by the findings set forth in the previous, unappealed Opinion and Order. The present Referee acknowledged that the prior Opinion and Order did not squarely resolve the issue of claimant's low back condition. He noted, however, that "it would appear that the Referee's finding that the low back arthritis is unrelated would be binding." He then held that even if claimant's claim was not barred, it was not compensable on the merits.

We agree that claimant's claim is not compensable. We disagree, however, that claimant was precluded from litigating the compensability of his low back condition before the current Referee. The court has recently discussed the applicability, or nonapplicability, of res judicata and collateral estoppel in workers' compensation cases. Res judicata bars claims which were or could have been litigated in the prior proceeding. Collateral estoppel precludes relitigation of issues actually litigated and determined, if their determination was essential to the prior order. Consolidated Freightways v. Poelwijk, 81 Or App 311 (1986); Carr v. Allied Plating Co., 81 Or App 306 (1986).

After reviewing the record, we find that neither res judicata nor collateral estoppel apply here. Res judicata does not apply because the issue of the compensability of claimant's low back condition was not before the prior Referee and was, therefore, not litigated. Further, although claimant had low back pain both before and after the compensable injury, we find it reasonable that he did not present that issue at the prior hearing when he viewed his sole compensable problem following the injury to be his hip condition.

Collateral estoppel does not apply here because claimant's low back condition was not actually litigated in the prior hearing. Neither was the determination of that issue "essential to the prior order." Rather, it appears that the prior Referee's finding that claimant's low back condition was not compensable was a gratuitous one sought by neither party in its pleadings.

ORDER

The Referee's order dated April 10, 1986 is affirmed.

The Beneficiaries of  
JANE GOODMAN, Claimant (Deceased)  
Pozzi, et al., Defense Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-03858  
December 10, 1986  
Order on Reconsideration

The SAIF Corporation has requested clarification of the Board's Order on Review dated November 18, 1986. In our previous order, we affirmed the Referee's order which had found that claimant was entitled to survivor's benefits.

The Referee granted survivor's benefits, but based his decision on the law in effect at the time of the decedent's 1984 death. We agreed that claimant should receive survivor's benefits. However, we followed a "different analysis to reach the same conclusion." Specifically, our reasoning was based on the law in effect at the time of the 1969 compensable injury.

SAIF requests clarification of whether the survivor's benefits are to be paid based on the law in effect at the time of the compensable injury or on the law in effect at the time of decedent's death. Since we "simply affirm[ed]" the Referee's order, SAIF contends that we left the aforementioned issue unresolved.

We consider our order to be both clear and unambiguous. However, to avoid any possible future confusions we shall repeat our conclusion. Claimant is entitled to survivor's benefits based on the law in effect at the time of the 1969 compensable injury.

Accordingly, SAIF's request for clarification is granted. Our previous order is withdrawn. On reconsideration, we adhere to and republish our former order as supplemented herein, effective this date.

IT IS SO ORDERED.

DALE E. MARQUAND, Claimant  
Peter O. Hansen, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 85-06483  
December 10, 1986  
Order of Remand

The insurer requests review of those portions of Referee Lipton's order that awarded claimant 10 percent (32 degrees) unscheduled permanent partial disability for his skin condition and awarded 20 percent (64 degrees) unscheduled permanent partial disability for nonvisual conditions associated with claimant's right eye in addition to the award granted by Determination Order of 100 percent (100 degrees) scheduled permanent partial disability for the same eye. Claimant cross-requests review of

the same portions of the order and also of that portion of the order that assessed penalties and attorney fees for late payment of temporary disability compensation. In addition, claimant requests that the Board consider a computer printout generated after the hearing in determining the dates associated with the late payment issue. We treat this latter request as a request for remand. See ORS 656.295(3) & (5); Judy A. Britton, 37 Van Natta 1262, 1262 (1985). The issues are remand, extent of disability, penalties and attorney fees.

After our de novo review of the record, we have determined that remand is appropriate in this case on the issues relating to late payment of temporary disability compensation in light of the computer printout submitted by claimant on Board review. More than a month before the hearing claimant's attorney wrote SAIF requesting copies of SAIF's claim summary sheets. Two weeks later, SAIF forwarded copies of claim summary sheets composed of handwritten and rubber stamped entries. Claimant's attorney submitted these summary sheets as an exhibit.

In his order, the Referee indicated that he had difficulty reading a number of the entries in the claim summary sheets and awarded penalties and attorney fees based upon a very limited number of entries. In his cross-appellant's brief on Board review, claimant argued that the Referee had erred in failing to award penalties and attorney fees for a large number of late temporary disability payments. In an appendix to his brief, claimant presented a typewritten summary of late payment dates which he contended were reflected in the claim summary sheets.

Two days after claimant filed his brief, his attorney received a telephone call from a legal assistant at SAIF who indicated that she had run a computer printout on the payment history of claimant's claim. SAIF subsequently disputed a number of the dates reflected in claimant's brief in its respondent's brief. Claimant thereafter demanded and ultimately received a copy of the computer printout and submitted it with his reply brief.

Under these circumstances, we find that the record has been insufficiently developed with regard to the payment history of claimant's claim. ORS 656.295(5). We further find that this lack of development cannot be attributed to any lack of due diligence on the part of claimant or his attorney. We conclude, therefore, that this case should be remanded to the Referee for reconsideration of the issues of penalties and attorney fees for late payment of temporary disability compensation in light of the computer printout submitted by claimant on Board review.

Claimant's request for remand is allowed. The scope of the remand is: (1) for receipt into evidence of the computer printout of the payment history of claimant's claim (Exhibit "A" to claimant's Reply Brief on Board review); and (2) for reconsideration of the issues of penalties and attorney fees for late payment of temporary disability compensation. At the conclusion of proceedings on remand, the Referee shall issue a second Order on Reconsideration and forward the order together with all additional evidence received and a transcript of further oral proceedings, if any, to the Board. Further Board review is stayed pending proceedings on remand. See OAR 438-11-020.

IT IS SO ORDERED.

DAVE S. McELMURRY, Claimant  
James T. Bow, II, Claimant's Attorney  
David Force, Claimant's Attorney  
Cowling & Heysell, Defense Attorneys

WCB 85-12308  
December 10, 1986  
Order of Remand

This matter is before the Board on claimant's request for review of Referee Quillinan's order that upheld the insurer's denial of his aggravation claim. Claimant has moved the Board for an order remanding the claim to the Hearings Division for the admission of further evidence.

The Referee upheld the denial on the ground that claimant had failed to pursue a colorable workers' compensation claim in the state of California, which precluded him from establishing a claim for aggravation of his Oregon industrial injury, relying upon Miville v. SAIF, 76 Or App 603 (1985) and Olson v. EBI Companies, 78 Or App 261 (1986). In the interval since the Referee's order was issued, claimant has pursued his California claim and has proffered evidence of the outcome of the California proceedings. We conclude that this evidence is highly relevant to the determination of claimant's claim.

We find the situation in this case to be analogous to the posture of Parmer v. Plaid Pantry #54, 76 Or App 405 (1985). In that case, the court held that it was error to deny a motion to remand the matter for consideration of a post-hearing surgical report that was relevant to the question of the reasonableness of elective surgery. Although the insurer has argued that the evidence in this case was obtainable with due diligence at some earlier time, we conclude that claimant had no control over the timing within which our California counterpart would rule upon his claim. We also conclude that the Miville/Olson rule was of sufficiently recent genesis that what delay occurred in seeking alternative remedies is understandable.

The insurer has also argued that claimant's California proceeding was collusive and was contrived only to obtain a denial of that claim to establish benefits in Oregon. We conclude that whether the insurer's allegations are true and, if so, what the legal effect may be are matters best decided by the Referee in the first instance.

Claimant's request for remand to the Hearings Division is allowed. The scope of the remand is to consider evidence relating to claimant's claim for workers' compensation under California law. At the conclusion of proceedings on remand, the Referee shall issue an Order on Reconsideration and forward the order together with all additional evidence received and a transcript of further oral proceedings, if any, to the Board. Further Board review is stayed pending proceedings on remand. See OAR 438-11-020.

IT IS SO ORDERED.

DOYLE E. ROBERTS, Claimant  
Dick & Dick, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-07395  
December 10, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee Shebley's order that increased claimant's award of unscheduled permanent partial disability for his low back from the 15 percent (48 degrees) granted by Determination Order to 60 percent (192 degrees). The issue is extent of disability.

Claimant injured his low back in October 1983 in the course of his employment as a forklift driver when he was severely jolted after one of the wheels of the forklift hit a large hole. Claimant visited his family practitioner, Dr. Wymore, who referred him to Dr. Mason, a neurological surgeon. After a myelogram, Dr. Mason diagnosed a herniated L5-S1 disc. He subsequently performed a laminectomy during which several disc fragments were removed. Claimant recovered slowly after surgery and Dr. Mason released him to return to work in March 1984. Claimant experienced exacerbations and remissions of low back pain and muscle spasms throughout the next six months and finally had to quit his job as a forklift driver.

Claimant was examined by a panel of the Orthopaedic Consultants in May 1984. The panel thought that claimant was medically stationary and rated his impairment as mild. In August 1984, Dr. Mason completed a physical capacities assessment which indicated that claimant should lift no more than 50 pounds. The following month, SAIF wrote a one sentence letter to Dr. Mason asking whether claimant was medically stationary and asking for a description of any residuals of the injury. Two short lines were typed on the letter by Dr. Mason or someone in his office: "1) Medically stationary as of 7-23-84; 2) None." In a subsequent "fill-in-the-blanks" report, Dr. Wymore indicated his disagreement with Dr. Mason and stated that claimant had residual back pain which prevented him from working at his usual occupation. Dr. Wymore, however, did not offer an impairment rating at that time. The claim was closed by Determination Order in November 1984 with an award of 48 degrees for 15 percent unscheduled permanent partial disability.

After claim closure, claimant began working as a self-employed security guard. He continued to experience considerable low back pain and muscle spasms. In a letter to claimant's attorney in April 1985, Dr. Wymore reviewed claimant's physical limitations and stated that claimant had lost "50 percent of the useful function of his back." At the hearing in February 1986, claimant testified of constant severe low back pain and muscle spasms. The Referee accepted Dr. Wymore's 50 percent impairment rating and claimant's "totally credible" testimony and increased claimant's permanent partial disability award from 15 to 60 percent.

In rating the extent of claimant's permanent partial disability for his low back, 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 apply these rules as guidelines, not as restrictive mechanical formulas. See Harwell v. Argonaut Insurance Co., 296 Or 505, 510 (1984); Howerton v. SAIF, 70 Or App 99, 102 (1984).

Claimant was 57 years old at the time of the hearing. He is of average intelligence and has a 10th grade formal education. His work experience includes employment as a forklift driver, a police officer and a carpenter. He is currently employed as a security guard, although he periodically experiences symptomatic exacerbations of his condition which cause him to miss work.

Following our de novo review of the medical and lay evidence, we conclude that claimant's low back impairment is in the upper end of the mild category. Exercising our independent judgment in light of claimant's level of impairment and the relevant social and vocational factors, 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 the industrial injury.

The Board modifies the order of the Referee.

#### ORDER

The Referee's order dated March 3, 1986 is modified and claimant is awarded 96 degrees for 30 percent unscheduled permanent partial disability for his low back. Claimant's attorney's fee is adjusted accordingly.

DENNIS A. SCHULTZ, Claimant  
Francesconi & Cash, Claimant's Attorneys  
Garrett, et al., Defense Attorneys

WCB 85-07517  
December 10, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Seifert's order that affirmed the February 20, 1986 Determination Order that awarded 25 percent (80 degrees) unscheduled permanent disability for a back injury. The issue is the extent of unscheduled permanent disability.

On April 5, 1984, claimant suffered a back strain while troughing gravel for the City of Salem. The claim was accepted as a disabling injury. Claimant was initially treated by Dr. Colgan, D.C., and was taken off work for about two weeks. At the insurer's request claimant was seen by Dr. Murphy on May 1, 1984. Dr. Murphy noted that claimant had a history of recurrent back problems, but did not anticipate any impairment as a result of this injury. He felt claimant could return to his previous job. Dr. Colgan released claimant to regular work on May 7, 1984.

Claimant continued to have problems and saw Dr. Becker, an orthopedist, on July 18, 1984. Dr. Becker diagnosed chronic lumbosacral strain with degenerative disc disease, lumbar spine. Claimant's condition worsened and Dr. Becker on August 18, 1984 stated that claimant had radicular symptoms with objective neurological findings. On August 31, 1984 Dr. Becker stated that claimant would not be able to return to his former employment as a laborer and would need vocational rehabilitation.

On August 9, 1985, Dr. Becker stated that claimant should not participate in occupations that require him to stand, sit, bend or walk more than occasionally. He also stated that claimant was not to lift or carry more than 10 pounds nor participate in occupations involving twisting or reaching. Dr. Becker found claimant medically stationary on January 10, 1986 and stated that he had moderate permanent impairment with only mild impairment attributable to his industrial injury. Claimant was limited to occupations with no prolonged stooping or heavy lifting with twisting.

At the time of hearing claimant was 41 years old and had a 12th grade education. However, testing by claimant's vocational counselor revealed that claimant's ability to "catch on" or understand instructions was well below average. In the past, claimant has worked as a janitor, farm laborer, landscaper, and service station attendant. Since 1974, claimant had worked for the City of Salem first on the asphalt crew and then in the drainage section. None of these occupations required special training. At the time of hearing claimant was unemployed.

Claimant testified that he has pain in his back and down his left leg. He has trouble sitting, standing, bending, lifting or carrying over 20 pounds. He has sought other employment, including a job as a heavy equipment operator and with the Physical Education Department for Oregon State University. Claimant was unable to train as a heavy equipment operator because of an unrelated seizure problem.

In rating the extent of claimant's permanent disability, we consider his physical impairment, which includes his credible testimony concerning his pain, physical limitations and 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 claimant is entitled to an additional 10 percent permanent partial disability for a total of 35 percent unscheduled permanent partial disability.

#### ORDER

The Referee's order dated May 2, 1986 is modified. In addition to the Determination Order's award of 25 percent (80 degrees) unscheduled permanent disability, claimant is awarded 10 percent (32 degrees) for a total award of 35 percent (112 degrees) unscheduled permanent disability for his back injury. Claimant's attorney is allowed 25 percent of the additional compensation granted by this order, not to exceed \$2000 as a reasonable attorney's fee.

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MICHAEL E. WALLEN, Claimant  
SAIF Corp Legal, Defense Attorney

WCB 86-02744  
December 10, 1986  
Order of Dismissal

The claimant has requested review of Referee's order dated October 29, 1986. The request for review was filed with the Board on November 30, 1986, more than 30 days after the date of the Referee's order. It is not timely filed.

ORDER

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

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JAMES C. WATTS, Claimant  
Velure & Bruce, Claimant's Attorneys  
Schwabe, et al., Defense Attorneys

WCB 85-12616  
December 10, 1986  
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of Referee Brown's order that affirmed the Determination Order dated April 29, 1985 which awarded 16 degrees for five percent unscheduled permanent partial disability for injury to claimant's low back. The issue on review is extent of unscheduled permanent partial disability.

Claimant injured his low back while lifting a pump while working as a heavy equipment mechanic. Surgery was performed and claimant returned to work at the same occupation with the employer. He was 40 years old at the time of the hearing and has a high school education plus a community college certificate in diesel mechanics. Claimant's additional education in diesel mechanics is considered part of the specific vocational preparation for his trade rather than general educational experience. Claimant's long experience as a heavy equipment mechanic has established his specialized skills in that area but they have limited application in the broad range of occupations. He is required to take some additional breaks while working and has a new symptom of pain in his left leg which we find from the record is probably related to the back injury or the surgery.

The extent of disability is measured by the loss of earning capacity caused by the industrial accident and "taking into consideration the worker's loss of earning capacity, if any, resulting from symptoms caused by the injury." Barrett v. D & H Drywall, 300 Or 325 (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).

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); Owen v. SAIF, 33 Or App 385 (1978).

Considering all of the relevant factors, the Board is persuaded that claimant would be appropriately compensated for the permanent lost earning capacity that resulted from this injury by a total award of 32 degrees for 10 percent unscheduled permanent partial disability. The Referee's order shall be modified.

ORDER

The Referee's order dated April 28, 1986 is modified. The Determination Order dated April 29, 1985 is modified to award 32 degrees for 10 percent unscheduled permanent partial disability for injury to claimant's low back. Claimant's attorney fee agreement is approved and claimant's attorney is allowed 20% of the additional compensation granted by this order, not to exceed \$1,500, according to the terms of the fee agreement.

ANNA M. ZIMMERMAN, Claimant  
Roberts, et al., Defense Attorneys

WCB 84-05720  
December 10, 1986  
Order of Dismissal

The insurer has moved the Board for an order dismissing claimant's request for review of Referee Tenenbaum's order dated October 1, 1986. The insurer asserts that claimant's request did not comply with the filing and service requirements of ORS 656.289(3) and 656.295(2) and, therefore, the Board lacks jurisdiction. See Argonaut Insurance v. King, 63 Or App 847, 852 (1983).

We give claimant, who is not at this time appearing through counsel, the benefit of every reasonable inference. We conclude that claimant's communication with the Referee, if construed as a request for Board review, was timely received by the Board. However, no other party to the hearing was mailed a copy of claimant's letter and no other party had actual knowledge of the letter until after the expiration of 30 days after issuance of the Referee's order. We thus conclude that claimant failed to comply with the strict jurisdictional requirements of ORS 656.289(3) and 656.295(2). In accordance with the Court of Appeals decision in Argonaut Insurance v. King, supra, the Referee's order is final as a matter of law and we are without jurisdiction to review it.

The insurer's motion to dismiss claimant's request for review is granted. The Referee's order is final.

IT IS SO ORDERED.

STEVEN H. GILBERT, Claimant  
Vick & Associates, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-08337  
December 11, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee Lipton's order which awarded claimant an additional 15 percent (48 degrees) unscheduled permanent disability for a low back injury, whereas a June 14, 1985 Determination Order did not award permanent disability in excess of the 20 percent (64 degrees) awarded by a previous Determination Order and Stipulation. On review, SAIF contends that claimant is not entitled to an additional award of

permanent disability. Claimant has not submitted a brief on Board review. We agree with SAIF's contention and reverse.

Claimant was 39 years of age at the time of hearing. In May 1983, while working as a service station attendant, he tripped and fell down some stairs. The initial diagnosis was low back strain with left sciatica. A CT scan later suggested the existence of an extruded disc fragment at the L4-5 level. Dr. Stewart, orthopedist, recommended further diagnostic procedures, including a myelogram. However, claimant apparently disregarded this advice and began treating with Dr. Eleson, chiropractor. In September 1983, Dr. Eleson released claimant to modified work, subject to a 25 pound lifting limitation.

In February 1984 Dr. Duff, orthopedist, performed an independent medical examination. Claimant's symptoms had basically resolved, except they would resurface after prolonged periods of sitting or whenever he was physically active. Dr. Duff recommended that claimant refrain from heavy labor, wear a back brace, and reduce his weight. In Dr. Duff's opinion, claimant's permanent impairment was mild.

Thereafter, claimant attended the Callahan Center. In addition to working at service stations, he had been employed as a dishwasher, cook, and bartender. Claimant had obtained his GED and had taken some college courses in cooking and general studies. Dr. Toon, the Center's medical examiner, concluded that claimant could perform medium duties, subject to a 50 pound lifting and carrying restriction. Dr. Toon also recommended that claimant frequently change his body position, avoid heavy lifting, and restrict his repetitive bending and twisting motions.

A March 1984 Determination Order closed the claim. Claimant received 10 percent unscheduled permanent disability. A June 1984 Stipulation increased this award to 20 percent.

Vocational assistance was initiated. However, these services were terminated in August 1984, after claimant declined further assistance. Apparently, claimant wished to pursue his own business opportunities. These efforts have been unsuccessful.

Claimant continued to receive periodic chiropractic treatments, primarily from Dr. Collison. In January 1985 Dr. Collison released claimant to light duty employment. Dr. Collison recommended a 20 pound lifting restriction, a chair with a back support, and frequent changes of body position.

In February 1985 Dr. Collison reported that claimant had suffered a "major exacerbation of his low back." Due to this "severe symptomatology," claimant was unable to work for approximately one month. Thereafter, SAIF reopened the claim. In March 1985 Dr. Collison again released claimant to return to work, subject to the January 1985 "light duty" restrictions.

A June 1985 Determination Order reclosed the claim. Claimant received approximately two months of temporary disability. In addition, the Evaluation Division found that claimant was not entitled to additional permanent disability in excess of the 20 percent he had previously received.

In August 1985 claimant returned to Dr. Stewart. Claimant described ongoing low back pain, without left leg complaints. His overall condition, in terms of symptoms, had "really not changed over the last year and a half." However, recent x-rays indicated moderate narrowing, sclerosis, and mild hypertrophic changes in the low back. These findings represented a change from the July 1983 x-rays which had demonstrated essentially negative findings. Recommending light duty, Dr. Stewart concluded that claimant's permanent impairment remained in the same realm as it had previously been.

Claimant was examined by Dr. Wiebe. Claimant complained of intermittent low back pain and stated that he was seeking treatment because he could not find a job. Finding little objective evidence of a back disability, Dr. Wiebe referred him to Dr. Bald, orthopedist. Dr. Bald examined claimant without benefit of x-rays. Diagnosing chronic lumbosacral strain, Dr. Bald concluded that apparently claimant's current level of complaints had not significantly changed in the past several months.

Claimant credibly testified that he experiences occasional low back pain which "about every three weeks, ... gets bad enough to where I'm down for a couple of days." When these complaints appear, he takes "a lot of Aspirin." Claimant agreed with Dr. Stewart's assessment that his symptoms had not changed over the past 1 1/2 years. Since his February 1985 aggravation, claimant felt that his condition had "gotten back to where it was previously."

Prior to his low back injury, claimant could lift 100 pounds. Presently, he believes he could handle 20 to 25 pounds on a non-repetitive basis. He also avoids prolonged periods of sitting, bending, and twisting. These limitations prevent him from returning to bartending, as well as the heavier aspects of the duties of a service station attendant. Since the injury, he has sought employment, primarily in the restaurant field. However, he has remained unemployed, except for a few months of part-time work at a service station in late 1985.

The Referee noted that claimant had entered the Workers' Compensation System without a great deal of earning capacity. However, the Referee was persuaded that claimant's earning capacity had been further reduced. After considering the guidelines contained in OAR 436-30-380 and claimant's credible description of his disabling pain, the Referee increased claimant's total permanent disability award from 20 percent to 35 percent.

Following our review of the record, we are persuaded that claimant's condition has permanently worsened. In reaching this conclusion, we find the recent x-rays, as interpreted by Dr. Stewart, most persuasive. These x-rays demonstrated objective changes in claimant's compensable low back condition since the last arrangement of compensation. Accordingly, since claimant's condition has permanently worsened, he is entitled to a redetermination of the extent of his permanent disability. Stepp v. SAIF, 78 Or App 438 (1986), remanded 302 Or 148 (October 28, 1986).

Although claimant's condition has permanently worsened,

we find that this worsening has not resulted in additional permanent impairment. After re-examining claimant and reviewing the aforementioned x-rays, Dr. Stewart concluded that claimant's permanent impairment remained in the same general range. Furthermore, Dr. Stewart reported, and claimant later acknowledged, that his symptoms had not changed. Finally, these assessments were also shared by the other examining physicians.

In rating the extent of claimant's permanent disability, we consider his physical impairment, which includes his credible and reliable testimony concerning his disabling pain and physical limitations, and all of the relevant social and vocational factors set forth in OAR 436-30-380 et seq. We apply these rules as guidelines, not as restrictive formulas. Harwell v. Argonaut Insurance Co., 296 Or 505, 510 (1984); Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982). After conducting our de novo review of the medical and lay evidence, we conclude that claimant is not entitled to an award of permanent disability in excess of his previous permanent disability awards.

ORDER

The Referee's order dated April 15, 1986 is reversed.  
The June 14, 1985 Determination Order is reinstated and affirmed.

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RETA D. GULLATT, Claimant  
Welch, et al., Claimant's Attorneys  
Roberts, et al., Defense Attorneys

WCB 85-05713  
December 11, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of that portion of Referee Howell's order which upheld the insurer's denial of her aggravation claim for a low back injury. On review, claimant contends that her condition had worsened, at least temporarily, since the last award of compensation.

Following our de novo review of the medical and lay evidence, we are not persuaded that, since the last award of compensation, claimant's symptoms attributable to her compensable injury have increased or that her underlying condition has worsened resulting in a loss of earning capacity. Smith v. SAIF, 302 Or 109 (October 21, 1986). Furthermore, we consider claimant's current symptoms indicative of "waxing and waning" exacerbations which are contemplated by and consistent with her prior award of 20 percent unscheduled permanent disability. See Billy Joe Jones, 36 Van Natta 1230, 1235, aff'd mem. 76 Or App 402 (1985). Accordingly, we affirm the Referee's order.

ORDER

The Referee's order dated June 2, 1986, as amended  
June 16, 1986, is affirmed.

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MICHAEL B. KINSLOW, Claimant  
Imperati, et al., Claimant's Attorneys  
Roberts, et al., Defense Attorneys

WCB 86-00988  
December 11, 1986  
Order Denying Motion to Dismiss

Claimant has moved the Board for an order dismissing the employer's request for review of Referee Pferdner's order on the ground that the request for review was untimely. The Referee's order was mailed August 22, 1986. The thirtieth day thereafter was September 21, 1986, a Sunday. See ORS 656.289(3); 656.295(2). The request for review was mailed on September 22, 1986 and received by the Board in the ordinary course of the mail the next day. Because the thirtieth day after mailing of the Referee's order was a Sunday, mailing the request for review on the next business day was timely. ORS 174.125. The motion to dismiss the request for review is denied.

IT IS SO ORDERED.

EDWARD A. SPRAGUE, Claimant  
Charles Robinowitz, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 86-00119  
December 11, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of that portion of Referee T. Lavere Johnson's order that failed to award claimant a penalty and attorney fee for the SAIF Corporation's seven day delay in the payment of temporary disability benefits. The issue is penalties and attorney fees.

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

The Board has no authority to determine the validity of an administrative rule. That authority lies with the Oregon Court of Appeals. ORS 183.400; James R. Frank, 37 Van Natta 1555, 1557 (1985); Further, it is entirely reasonable for an insurer to comply with a validly enacted administrative rule. John Keller, 38 Van Natta 1351 (WCB # 85-07814, filed November 11, 1986).

ORDER

The Referee's order dated March 21, 1986 is affirmed.

LINDA R. WIKANDER, Claimant  
Roger Wallingford, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 85-07298  
December 11, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of those portions of Referee Tenenbaum's order that: (1) upheld the Determination Orders dated January 3 and 17, 1986 awarding temporary total disability only for a cervical and right trapezius strain; and (2) denied claimant's request for penalties and attorney fees for the SAIF Corporation's failure to properly and timely calculate claimant's temporary total disability rate. Claimant asserts entitlement to an award of unscheduled permanent partial disability for the neck and upper back, and entitlement to penalties and attorney fees for SAIF's alleged unreasonable claims processing.

We affirm that portion of the Referee's order that upheld the Determination Orders awarding temporary total disability only. We reverse the Referee's denial of penalties and attorney fees.

Claimant incurred a compensable cervical and trapezius strain while employed as a pharmacy technician in March 1985. SAIF originally calculated claimant's temporary total disability payments based on an hourly wage of \$6.04. The correct hourly wage was \$6.55. The incorrect calculation resulted in an underpayment of nearly \$500. Claimant raised the issue of the improper calculation in her June 17, 1985 request for hearing, along with a request for penalties and attorney fees on that issue. The issues were again raised in claimant's January 15, 1986 application to schedule a hearing. SAIF's only response occurred more than six months after the issues were first raised, when in response to claimant's request for hearing, SAIF denied that an improper calculation had occurred.

Hearing was held on February 24, 1986. At the outset, SAIF stipulated that there had been an error in the calculation of claimant's temporary total disability payments. In a subsequent Opinion and Order, the Referee held that while SAIF's calculation of temporary disability had been incorrect, there was no evidence that it had been unreasonable. The Referee, therefore, found no basis for the assessment of penalties or attorney fees.

Claimant asserts on review that SAIF's failure to timely respond on the issue of the improper calculation was unreasonable, given that SAIF had been put on notice of the error more than eight months earlier. We agree. In Michael L. McKinney, 37 Van Natta 688 (1985), the claimant's attorney advised the employer's claims adjuster that the claimant was entitled to have his temporary total disability rate calculated to include certain overtime hours. The employer's adjuster took no action until the time of the hearing six weeks later, at which time the employer admitted that its temporary disability calculation had been incorrect. The Referee held that the employer's conduct was reasonable under the circumstances. We reversed, holding that under the pertinent statutes and administrative rules, 14 days is sufficient time for an employer/insurer to either correct its error or to notify the claimant that it considers its calculation to have been correct. McKinney, 37 Van Natta at 689. We found the employer's six weeks of inaction unreasonable and imposed a 25 percent penalty and an associated attorney fee.

The present case is similar to McKinney. Here, SAIF was advised of an alleged error by way of claimant's request for hearing. SAIF took no action, however, until more than six months later when it denied that an improper calculation had occurred. Under McKinney, a six month delay in responding to claimant's allegation was unreasonable. Penalties and attorney fees are appropriate.

#### ORDER

The Referee's order dated March 10, 1986 is reversed in part and affirmed in part. That portion of the order that denied claimant's request for penalties and attorney fees for SAIF's delayed response to claimant's allegation of an improper benefit

calculation is reversed. SAIF shall pay, as a penalty for its delayed action, an amount equal to 25 percent of the amount of underpaid temporary total disability compensation due and owing to claimant. For prevailing on the penalty issue, claimant's attorney is awarded a fee of \$150 for services at hearing and \$100 for services on Board review. Both fees shall be paid by the SAIF Corporation. The remainder of the Referee's order is affirmed.

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DAVID E. KEENEY, Claimant  
Emmons, et al., Claimant's Attorneys  
Schwabe, et al., Defense Attorneys

WCB 85-08238 & 85-10083  
December 12, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests, and claimant cross-requests, review of that portion of Referee Foster's order which increased claimant's unscheduled permanent disability award for a low back injury from five percent (16 degrees), as awarded by a May 23, 1985 Determination Order, to 25 percent (80 degrees). On review, the sole issue is extent of unscheduled permanent disability. We find that the award should be reduced. Consequently, we modify the Referee's order.

Claimant was 32 years of age at the time of hearing. In October 1984, while lubricating a debarker at a lumber mill, he slipped, injuring his low back. A herniated disc was subsequently confirmed. Thereafter, a hemilaminectomy was performed by Dr. Klump, neurosurgeon.

In February 1985 Dr. Klump released claimant to return to work, but recommended the avoidance of heavy lifting and excessive bending or stooping. Stating that claimant was more prone to future back problems, Dr. Klump concluded that there was no permanent residual.

Soon after returning to his work as a millwright, claimant reinjured his low back while catching a falling oxygen bottle. Dr. Klump initially suspected a recurrent disc problem, but the eventual diagnosis was a muscle strain. In April 1985, Dr. Klump released him to return to work, subject to the previously recommended restrictions. Dr. Klump concluded that claimant sustained no permanent impairment as a result of this muscle strain.

A May 1985 Determination Order closed the October 1984 injury claim. Claimant was awarded five percent unscheduled permanent disability. The "muscle strain" claim was closed without a permanent disability award.

In November 1985 claimant was examined by Dr. Warren, orthopedist. Claimant reported that he had returned to work in April 1985, but had been laid off "a few months ago." He was told to return when he had a full work release. After recently receiving a full release from Dr. Klump, claimant had returned to work. He was able to perform his duties, but was experiencing low back and left leg pain. Dr. Warren placed no specific restrictions on claimant's activities, but suggested the avoidance of heavy lifting, bending, and twisting motions. Based on the surgery, claimant's moderate pain, and the modification of his work activities, Dr. Warren concluded that the permanent impairment and loss of physical function was 20 percent.

Claimant is a high school graduate and has completed about 140 hours of college coursework. In addition to his millwright duties, he is currently attending college, majoring in mechanical engineering. He needs to successfully complete 50 additional hours to obtain an associate degree. Another 60 hours would entitle him to a bachelor's degree.

Claimant experiences a constant "dull, annoying ache" in the lower back and left leg, which increases whenever he is physically active. He tries to alternate his body position every 20 minutes and refrains from lifting or carrying more than 40 or 50 pounds. To relieve his pain, claimant takes prescribed medication and aspirin on a daily basis. He also exercises, takes hot showers, uses a heating pad, and has his back massaged. As a result of his injury, claimant has curtailed, if not eliminated, several of his former recreational and household activities. For example, he no longer plays baseball or touch football and he limits his golfing, fishing, and hunting activities. His wife performs all of the yard work.

Claimant continues to work as a "shift millwright." His duties primarily pertain to the general maintenance and repair of sawmill machinery. The job can involve a great deal of lifting, bending, and walking. Although he is able to perform his duties, these activities generally aggravate his symptoms. Claimant feels that he is physically incapable of performing work activities which require prolonged sitting or standing. In addition, he will have to limit repetitive lifting, bending, or stooping activities.

Although claimant had been able to return to work, the Referee found that the compensable injury had forced him to modify his activities. The subsequent muscle strain was a further indication to the Referee of the trouble claimant could expect in the future. When compared with the degree of claimant's physical impairment, the Referee found the Determination Order's permanent disability award of five percent inadequate. Accordingly, claimant's award was increased to 25 percent.

We agree that claimant's injury, surgery, and physical limitations have resulted in a permanent loss of earning capacity in excess of the Determination Order's award. However, we consider the Referee's award to be excessive. In arriving at this conclusion, we tend to accord a greater degree of weight to the opinion of Dr. Klump, the treating surgeon. Weiland v. SAIF, 64 Or App 810 (1983). Dr. Warren's opinion is not discarded, but it is tempered by the findings and conclusions expressed in Dr. Klump's chart notes and reports.

In rating the extent of claimant's permanent disability, we consider his physical impairment, which includes lay testimony concerning his disabling pain and physical limitations, and all of the relevant social and vocational factors set forth in OAR 436-30-380 et seq. We apply these rules as guidelines, not as restrictive mechanical formulas. Harwell v. Argonaut Insurance Co., 296 Or 505, 510 (1984); 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 15 percent uncheduled permanent disability adequately compensates claimant for his compensable low back injury.

ORDER

The Referee's order dated May 5, 1986 is modified in part. In lieu of the Referee's award of unscheduled permanent disability, and in addition to the Determination Order's award of five percent (16 degrees), claimant is awarded 10 percent (32 degrees) unscheduled permanent disability which gives him a total award to date of 15 percent (48 degrees). Claimant's attorney's fee shall be adjusted accordingly. The remainder of the Referee's order is affirmed.

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DWAYNE L. VARNER, Claimant  
Malagon & Moore, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-12134  
December 12, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Foster's order that upheld the SAIF Corporation's denial of claimant's occupational disease claim for mental stress. The issue on review is compensability.

Claimant is a former deputy sheriff who sought psychiatric treatment in May 1985 for an alleged work-related psychological condition. Claimant filed a claim for the condition two months later. He testified that a demotion and friction between him and his supervisors resulted in the need for psychological treatment.

Dr. Henderson is the treating psychiatrist. He has diagnosed three current conditions: (1) major depression; (2) psychogenic pain disorder; and (3) episodic alcohol abuse. Dr. Henderson also diagnosed an underlying preexisting schizoid type personality disorder. He opined that several psychosocial stressors related to claimant's employment situation contributed to claimant's current condition. He found no off-the-job causes.

Dr. Holland performed an independent psychiatric examination. He diagnosed two current conditions: (1) dysthymic disorder, based on claimant's two-year history of depression; and (2) stress-related psychological factors producing gastrointestinal complaints. Dr. Holland diagnosed an "Atypical, Mixed, or Other Personality Disorder," which he felt preexisted claimant's employment. He found claimant's reprimand and demotion to be job-related stressors. Dr. Holland identified no off-the-job stressors. He felt that claimant's preexisting personality problems had been temporarily aggravated by his work, but that the underlying condition had not been worsened. Dr. Holland felt that claimant could continue working in his regular employment.

Dr. Henderson essentially concurred with Dr. Holland's medical report, although he maintained that claimant's depressed mood had been materially worsened by events at work. He also suggested that claimant's current mental disorder was a form of psychogenic pain separate from the preexisting condition.

The Referee found that claimant had experienced an exacerbation of symptoms without a concomitant worsening of his underlying psychiatric condition. He, therefore, upheld SAIF's

denial, finding a symptomatic worsening alone to be insufficient to sustain the claim. Since the Referee's decision, the Court of Appeals has discussed the compensability of psychiatric conditions in Adsitt v. Clairmont Water District, 79 Or App 1, rev den, 301 Or 388, 301 Or 666 (1986). 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 constitute[s] a worsening of her disease." Id. at 7.

We are persuaded that the present claimant's preexisting psychological disorder was symptomatically exacerbated by work-related stress. No off-job causes have been identified as contributory. Relying on the criteria set forth in Adsitt v. Clairmont Water District, supra, therefore, we find claimant's claim to be compensable. The Referee's order shall be reversed.

This case was one of ordinary difficulty and usual probability of success for claimant. Therefore, a reasonable attorney fee for services at hearing and on Board review is awarded.

ORDER

The Referee's order dated March 14, 1986 is reversed. The SAIF Corporation's denial dated September 23, 1985 is set aside and the claim is remanded to SAIF for acceptance. Claimant's attorney is awarded reasonable attorney fees of \$1,200 for services at hearing and \$600 for services on Board review, to be paid by the SAIF Corporation.

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

WCB 82-07774  
December 15, 1986  
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Anderson v. Publishers Paper Co., 78 Or App 513, rev den, 301 Or 666 (1986). We have been mandated to reconsider the case in view of the standard for determining "good cause" for failure to timely request a hearing on a denied claim, ORS 656.319(1), enunciated by the court. We decided this case previously by concluding that claimant's subjective belief as to the non-compensability of his aggravation claim against his Oregon employer was not good cause for his failure to timely file a request for hearing on the denial of the claim. As we interpret the court's opinion and mandate, we must now decide whether claimant's failure to timely appeal the denial was due to his "mistake, inadvertence, surprise or excuseable neglect" as those terms are used in former ORS 18.160 (now ORCP 71B.(1)). (We note that the Supreme Court has held in one case that former ORS 18.160 "has no application to instances in which . . . a complaint was filed after the statute of limitations had run." Fellman v. Department of Revenue, 292 Or 569, 572 (1982). We follow the mandate in this case nonetheless.) The relevant facts are clearly

set forth in the court's opinion, 78 Or App at 515-16, and will not be repeated.

We have reviewed the cases interpretive of former ORS 18.160 and current ORCP 71B.(1) and find them to be of little aid. As a general rule, the cases evaluate whether the lower courts' exercise of discretion was in conformity with the spirit of the statute and not so arbitrary as to defeat substantial justice. See, e.g., Coleman v. Meyer, 261 Or 129, 134 (1972). Although it is clear that the party seeking to set aside a default judgment in a civil action must prove "mistake, inadvertence, surprise or excuseable neglect," see, e.g., Lowe v. Institutional Investor's Trust, 270 Or 814, 817 (1974), the case law does not define those terms in any useful way. On the record before us, we find that there is no showing of inadvertence, surprise or neglect. There is no question but that claimant received the denial letter, read it, understood it and consciously chose not to act within 60 days. The question as we see it is whether claimant's conscious choice to not act was "mistake" of the kind that would entitle him to relief from a civil default judgment.

Dr. Button's opinion that claimant's condition is not related to his Oregon injury is but one fact in the context of this proceeding; Dr. Lawton's opinion that the condition is related is another. There has been no determination on the merits as to which opinion is more likely correct, and we make no such determination now. Thus, we are unable to find that Dr. Button's opinion was a "mistake." We are likewise unable to find that claimant's reliance upon that opinion was a "mistake." Claimant was not misled as to any fact or the law. He simply chose a course of action, or of inaction, knowing the probable result. Under the definition we are mandated to apply, claimant has not shown "good cause" for his failure to appeal the denial within 60 days.

#### ORDER

The insurer's denials dated April 28, 1982 and November 10, 1982 are reinstated and affirmed.

Board Member Lewis, dissenting:

I respectfully dissent.

I continue to primarily base my conclusion on the reasoning expressed in my previous dissent. William J. Anderson, 36 Van Natta 1489, 1491 (1984). To reiterate, I would find that under certain circumstances, a claimant's reliance on a physician's advice can constitute "good cause" for failing to timely appeal a denial. In my opinion, the facts presented in this matter meet the requisite criteria for "good cause."

Claimant was unrepresented until the time to request a hearing had elapsed. Moreover, he was unaccustomed to workers' compensation procedures. Finally, I am persuaded that it was reasonable for him to rely on the physician's opinion that his claim was not compensable.

I agree with the majority that we can reach no determination concerning whether the physician's opinion was

correct. Such a determination would inevitably lead to the merits of the claim itself. Consequently, I concur that we are unable to find that the physician's opinion was a "mistake."

However, under these circumstances, I would consider claimant's reliance upon the physician's opinion a "mistake" as that term is used in former ORS 18.160 (now ORCP 71B.(1)). Since this "mistake" resulted in claimant's late appeal, I would find that he has established "good cause" for failing to request a hearing within 60 days. See ORS 656.319(1)(a).

THOMAS MALLOS, Claimant  
Welch, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-05386  
December 15, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee St. Martin's order that awarded compensation for permanent total disability in addition to the Determination Order dated April 24, 1985 which awarded 96 degrees for 30 percent unscheduled permanent partial disability for claimant's situational stress reaction, depression, and atypical chest pain conditions. In his brief claimant requests review of that portion of the order which awarded compensation for permanent total disability to begin as of the date of the hearing rather than the date claimant was medically stationary. Claimant admits that SAIF should be allowed to offset all compensation for temporary and permanent disability already paid since the medically stationary date. The issues on review are extent of unscheduled permanent partial disability including permanent total disability, the date to begin compensation for permanent total disability, and offset.

The Board affirms the Referee's order with the following modifications. Compensation for permanent total disability should begin on the earliest date when the elements of permanent total disability were established. Morris v. Denny's, 53 Or App 863 (1981); Robert Tucker, 37 Van Natta 952 (1985). A finding of the effective date is based upon all of the relevant medical, social and vocational factors. Morris v. Denny's, supra. We find that claimant's vocational disability was not changed after he became medically stationary and that he was, therefore, permanently and totally disabled at the time he became medically stationary, which we find was February 21, 1985.

SAIF shall be allowed to offset compensation paid for permanent partial disability pursuant to the Referee's order and the Determination Order against the increased compensation awarded by this order. Pacific Motor Trucking Co. v. Yeager, 64 Or App 28 (1983); David C. Daining, 38 Van Natta 86 (1986).

On review of the record, the Board noted that claimant's attorney fee agreement executed January 30, 1985 provides for a maximum fee of \$2,000 out of compensation awarded to claimant for services related to the extent of permanent disability. The fee agreement is consistent with OAR 438-47-025 which authorizes a Referee to allow attorney fees of 25 percent of increased permanent disability compensation awarded at hearing up to a maximum of \$2,000. OAR 438-47-010(2) authorizes a Referee to allow a fee in excess of the recommended maximum "for

extraordinary services on a showing by claimant's attorney in a sworn statement the services performed by the attorney." Claimant's attorney made no request for extraordinary attorney fees at the hearing and submitted no sworn statement of services upon which to base an award of extraordinary fees. The Referee exceeded his authority by allowing \$3,000 attorney fees out of claimant's award of compensation. See Martin W. Greenslitt, 38 Van Natta 1047 (1986). Claimant's attorney is allowed \$2,000 out of claimant's award of compensation for services before and at hearing.

On review claimant is awarded reasonable attorney fees for successfully defending the award of compensation against reduction. ORS 656.382(2).

#### ORDER

The Referee's order dated February 12, 1986 is modified. That portion of the order which awarded compensation for permanent total disability is affirmed. Claimant's award of compensation for permanent total disability shall begin February 21, 1985. The SAIF Corporation is authorized to offset temporary and permanent disability compensation awarded by the Determination Order dated April 24, 1985 which was paid for disability after February 21, 1985 out of this award of compensation. Claimant's attorney fee agreement is approved and claimant's attorney is allowed 25 percent of claimant's increased compensation up to a maximum of \$2,000 for services before and at hearing and a reasonable fee of \$800 for services on Board review.

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ANNETTA R. MCKINSTRY, Claimant  
Welch, et al., Claimant's Attorneys  
Scott M. Kelley, Defense Attorney

WCB 85-09657  
December 15, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Pferdner's order which upheld the insurer's denial of her occupational disease claim for mental stress. On review, claimant contends that her claim is compensable.

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

In finding the mental stress claim not compensable, the Referee apparently discarded the opinion of Dr. Schroeder, claimant's treating surgeon, because he was neither a psychologist nor a psychiatrist. We disagree with the Referee's reasoning. A physician or surgeon is not incompetent to testify as an expert merely because he or she is not a specialist in the particular branch of the profession involved in the case. Barrett v. Coast Range Plywood, 294 Or 641 (1983). Accordingly, Dr. Schroeder's opinion has been given due consideration during our review.

Furthermore, we disagree with the Referee's conclusion that claimant had a "preexisting psychological or psychiatric problem." The vast majority of the medical and lay evidence contradicts this conclusion.

Finally, we disapprove of the Referee's speculation as to the cause of claimant's alleged mental disorder through the use

of materials outside of the record. Our review is statutorily limited to evidence found in the record from the hearing below. ORS 656.295(5); Groshong v. Montgomery Ward Co., 73 Or App 403, 407 (1985). Consequently, in conducting our de novo review, we have not considered materials outside of the record. Instead, we have based our review only on the record before the Referee, as developed by the parties. Stanley C. Stanchfield, 38 Van Natta 146, 147 (1986).

After conducting our review of the medical and lay evidence, we find that although real conditions claimant faced on the job were objectively capable of producing stress, these conditions neither produced stress nor, assuming that the conditions did produce stress, were they a major contributing cause of her alleged mental disorder. See McGarrah v. SAIF, 296 Or 145 (1983).

Assuming for the sake of argument that we found the claim compensable, the insurer would still not be responsible. Where the employer against whom the claim is filed is not the last employer where working conditions were potentially injurious, that employer may assert the last injurious exposure rule as a defense. Runft v. SAIF, 78 Or App 356 (1986); SAIF v. Luhrs, 63 Or App 78 (1983).

The record establishes that claimant experienced work conditions in a later employment which could have caused, or independently contributed to a worsening of, the disease. Thus, the insurer would be entitled to assert the last injurious exposure rule defensively. Runft, supra; Luhrs, supra. Since we are persuaded that work conditions at this subsequent employer not only could have caused the disease, but were injurious, the insurer would have successively established this defense and would not have been held responsible for the claim.

#### ORDER

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

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MARY V. SCHOLL, Claimant  
Peter O. Hansen, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 84-13401  
December 15, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Tenenbaum's order that: (1) found that the appropriate time to rate claimant's impairment was at the time of the last Determination Order on December 12, 1984 and; (2) awarded claimant an additional 35 percent unscheduled permanent disability for a total of 100 percent unscheduled permanent disability. The SAIF Corporation, on cross request, requests we reduce the Referee's award of additional permanent disability. The issue is extent of unscheduled permanent disability including permanent total disability.

Claimant injured her low back on March 9, 1977 while employed as a kitchen aide. As a result, she underwent a laminectomy and decompression performed at the L4-5 in 1977 and a repeat laminectomy in 1980. Claimant suffers from spinal

stenosis, degenerative disc disease and degenerative spondylolithesis. She went to hearing on October 7, 1981 before Referee Neal on the issue of extent of permanent disability. The Referee awarded claimant permanent total disability. In our Order on Review dated August 23, 1982 we reduced that award to a total of 65 percent (208 degrees) unscheduled permanent partial disability. Mary V. Scholl, 34 Van Natta 1146 (1982).

Claimant went to hearing again on March 29, 1984 before Referee Shebley. In his order dated April 16, 1984, the Referee set aside the SAIF Corporation's August 1, 1983 denial of claimant's aggravation claim. We affirmed the Referee's order in our Memorandum Order dated February 27, 1985. Claimant's claim was again closed on December 12, 1985 by a Determination Order which awarded claimant temporary disability, but no additional permanent disability. Claimant's request for a hearing on that Determination Order resulted in this proceeding.

Claimant was seen on July 1, 1983 by Orthopaedic Consultants who diagnosed: (1) L4-5 spondylolisthesis grade II; (2) status post lumbar laminectomy decompression times two; (3) Degenerative arthritis, lumbar spine, especially L4-5 and L5-S1 intervertebral disk spaces, severe; (4) peripheral vascular disease, status postoperative endarterectomy and; (5) obesity. They concluded that claimant was medically stationary and had worsened since they last saw her on November 3, 1980. They rated her impairment at moderately severe and felt she was not employable. They felt there was no interference from functional disturbance.

Claimant's treating physician, Dr. Matheson M.D., on May 29, 1984 stated that claimant had persistent low back pain, muscle spasm, and sciatic nerve irritation. He opined that claimant will never be completely free of pain and will be restricted even as to the amount of housework she can do. He felt she was not gainfully employable. On August 1, 1984, Dr. Matheson stated that claimant had improved and that the permanent disability involving her back was not changed by her recent aggravation. Dr. Matheson stated on October 5, 1984 that claimant was not employable, but was improving.

Dr. Pasquesi M.D., examined claimant at SAIF's request on November 8, 1984. He felt she was medically stationary with a moderate degree of impairment. In his opinion, claimant could perform work if she were allowed to sit and stand alternately as she felt necessary, avoiding repetitive bending, stooping and twisting, or lifting more than 25 pounds. He noted that claimant's age of 67 would limit her employability. Dr. Matheson concurred in this report on December 4, 1984. A Determination Order was issued on December 12, 1984 that awarded claimant temporary disability, but no additional permanent disability.

Dr. Matheson referred claimant to a chiropractor on February 26, 1985 for physical therapy. On April 5, 1985 Dr. Matheson opined that claimant would never be gainfully employable. Dr. Matheson stated that this would be his opinion even if claimant were 55 years old rather than 67. He expected her to get worse with time rather than better.

Dr. Kendrick M.D. saw claimant on July 3, 1985 at SAIF's request. Dr. Kendrick felt claimant was not employable in her present condition and was not likely to become so unless something

changed significantly. Claimant's degenerative disc disease had further worsened both with the simple passage of time and progression of the disease which he felt was exacerbated by her 1977 injury. Dr. Kendrick also concluded that her condition was worsened by her inability to lose weight and maintain any type of an active lifestyle. No further neurosurgical investigation was warranted. He recommended she see a vascular surgeon for peripheral vascular disease which was apparently unrelated to her industrial injury. On October 8, 1985, Dr. Kendrick again opined that claimant was totally disabled.

Dr. Matheson referred claimant to Dr. Sproat due to her peripheral vascular disease. On December 16, 1985, Dr. Sproat stated that claimant's chronic hip pain was due to her back condition. He felt that claimant's limiting factors were her back, knee and ankle symptoms unrelated to claudication from her vascular disease. Claimant's limitations were primarily felt to be the result of her low back condition. Dr. Sproat recommended that claimant be followed with annual exams for her peripheral vascular disease.

At the time of this hearing claimant was 68 years old and had a 12th grade education. Claimant worked in the 1930's as a professional seamstress and in the 1960's selling jewelry and Avon products. She had worked three years as a kitchen helper when she incurred this back injury. Since that time, claimant has been unemployed. Claimant has a dull normal IQ, poor hand and finger dexterity and a low vocational aptitude. Prior to hearing on October 7, 1981, claimant had sought employment as a teacher's aide. She testified that in 1982 or 1983 she had applied for employment at the Unemployment Division for the State of Oregon. She has received Social Security since 1981.

At hearing claimant testified that she had gotten worse since 1984 and is more limited. She cannot sit or stand more than 10 minutes without becoming uncomfortable. Claimant's pain is generally sharp and radiates down her right leg. Claimant is able to do some housework including dishes and sweeping the floor. She also washes laundry and will carry laundry if her husband is not available to aid her. She has difficulty with steps and generally needs assistance to go up them. Walking more than 25 feet is difficult and she stated that she would never bend over to pick weeds out of her yard. Several weeks after her hearing in 1984 claimant testified that she was involved in a car wreck for which she received treatment from June 1984 to September 1984. She stated that treatment was confined to her upper back and neck and did not involve her low back.

Byron McNaught, a vocational rehabilitation counselor, testified in behalf of claimant. He stated that claimant is permanently precluded from returning to regular gainful employment. This conclusion was based on claimant's age, limited work skills and physical impairment. He stated that his opinion would not change regardless of which doctor's assessment of claimant's physical impairment was used. Claimant has no transferable skills and Mr. McNaught concluded that it would be futile for her to look for employment.

Michael Mehring, a private investigator for SAIF, testified at hearing for the sole purpose of impeachment. He observed claimant bend over in her yard approximately five to six

times over a period of three hours. He also observed her hang laundry and provided movies and still photos of that activity. On a different occasion he observed claimant climb into a pick-up truck and walk up four steps unassisted. The Referee concluded that this impeachment evidence suggested claimant could do more than she had testified to.

A claimant is entitled to have disability rated at the time of hearing after the claimant's aggravation rights have expired if: (1) the claim was in an open status when aggravation rights expired; (2) the claim thereafter was closed pursuant to ORS 656.268; (3) claimant timely requested a hearing contesting that Determination Order and; (4) the evidence established that claimant's condition was medically stationary at the time of hearing. Jeffrey Barnett, 36 Van Natta 1636 (1984). If, prior to hearing, claimant experiences an aggravation then the claim would have to be reopened pursuant to an own motion request and closed pursuant to ORS 656.278. However, claimant is still entitled to a hearing on the extent of disability from her appeal of the last Determination Order. If claimant was not medically stationary at the time of hearing then claimant is entitled to be rated based on the facts and circumstances existing at the time she was last medically stationary, i.e. prior to the worsening of claimant's injury related condition. Pauline Travis, 37 Van Natta 194 (1985), reversed and remanded on other grounds, Travis v. Liberty Mutual Ins. Co. 79 Or App 126 (1986).

The facts in this case are similar to those in Travis, supra. However, in the present situation the claim was not reopened for aggravation nor was any own motion request made. The Referee determined that claimant had, since the last Determination Order, experienced a worsening of her condition and was not medically stationary at the time of hearing based on the chart notes of Dr. Matheson. The Determination Order of December 12, 1984 was the last date the Referee felt claimant was medically stationary and the date chosen upon which to rate her disability. After de novo review we disagree and conclude claimant was medically stationary at the time of hearing and that she was entitled to have her disability rated as it existed on the day of hearing. See Barnett, supra. We also conclude that the record is sufficiently developed that remand is not necessary for the taking of additional evidence.

To establish permanent total disability, claimant must prove that she is unable to perform any work at a gainful and suitable occupation. Wilson v. Weyerhaeuser, 30 Or App 403 (1977). Permanent disability may be established through medical evidence of physical incapacity or through the "odd lot" doctrine, under which a disabled person may remain capable of performing work of some kind, but still be permanently disabled due to a combination of medical and non-medical disabilities which effectively foreclose him from gainful employment. Welch v. Banister Pipeline, 70 Or App 699 (1984). Non-medical factors include age, education, adaptability to nonphysical labor, mental capacity, emotional conditions, as well as conditions of the labor market. Livesay v. SAIF, 55 Or App 390 (1981). In addition, claimant has the burden to establish that she is willing to seek regular gainful employment and that she has made reasonable efforts to obtain such employment. ORS 656.206(3); Laymon v. SAIF, 65 Or App 146 (1983). Claimant may be excused from the requirement of seeking regular gainful employment if she

establishes it would be futile. Butcher v. SAIF, 45 Or App 146 (1983).

After de novo review, we conclude that claimant has established that she is permanently totally disabled.

Claimant is 68 years old with a 12th grade education. She has minimal work experience, a dull normal IQ and no transferable skills. Every doctor who examined claimant expressed the opinion that she was totally disabled except Dr. Pasquesi, who rated her disability as moderate. Mr. McNaught, the vocational expert, testified that even assuming that Dr. Pasquesi's physical assessment of claimant was correct he would still conclude that claimant was unemployable. He further stated that considering claimant's impairment and the other vocational factors that it would be futile for her to look for work. Based on our review of the record, we disagree with the Referee's conclusion that claimant was not motivated to return to work and find that it would have been futile for her to have sought employment. See Butcher, supra. Accordingly, claimant is entitled to permanent total disability.

#### ORDER

The Referee's order dated February 28, 1986 is modified to award claimant permanent total disability effective December 12, 1984. Claimant's attorney is awarded 25 percent of the additional compensation granted by this order, not to exceed \$3,000. SAIF is entitled to offset any permanent partial disability compensation paid after December 12, 1984 as prepayment of the permanent total disability award. Pacific Motor Trucking Co. v. Yeager, 64 Or App 28 (1983).

JOHN K. SCHURZ, Claimant  
W.D. Bates, Claimant's Attorney  
Marcus Ward, Defense Attorney

WCB 84-10189  
December 15, 1986  
Order on Review

Reviewed by the Board en banc.

Claimant requests review of Referee McCullough's orders that refused to reopen the record for the receipt of additional evidence and upheld the SAIF Corporation's back-up denial of claimant's industrial injury claim. The issues are remand and back-up denial.

Claimant filed a claim on March 11, 1983 for an injury to his right shoulder allegedly sustained the previous day during the arrest of an unruly suspect in the course of his employment as a police officer. SAIF formally accepted the claim in April 1983. Claimant received conservative care until October 1983 when claimant's treating orthopedic surgeon, Dr. Butters, diagnosed a rotator cuff tear and recommended surgery. The surgery was approved by SAIF and was performed in January 1984. In August 1984, SAIF issued a back-up denial stating that it had received information which indicated that claimant had not in fact sustained a work-related injury to his right shoulder on or about March 10, 1983. Claimant timely requested a hearing on this denial.

After a claim has been formally accepted and the 60-day time limit of ORS 656.262(6) has passed, a back-up denial of the

claim is impermissible in the absence of evidence of fraud, misrepresentation or other illegal activity on the part of the claimant in obtaining acceptance of the claim. Bauman v. SAIF, 295 Or 788, 793-94 (1983); see Wheeler v. Boise Cascade, 298 Or 452, 455-56 (1985); Donald D. Milburn, 38 Van Natta 215, 216 (1986); Tom C. Reeves, 38 Van Natta 31, 32 (1986); Carolle J. Tucker, 36 Van Natta 1374, 1376 (1984). The employer or insurer has the burden of proving fraud, misrepresentation or other illegal activity by a preponderance of the evidence. Parker v. D.R. Johnson Lumber Co., 70 Or App 683, 687 (1984). Once the employer or insurer has carried its burden of proof and the back-up denial is found procedurally permissible, the claimant may nonetheless prove by a preponderance of the evidence that the claim is compensable. Id.

SAIF attempted to establish fraud or misrepresentation on the part of claimant by pursuing three basic lines of argument at the hearing: (1) claimant gave different accounts of the mechanism of his injury to different individuals; (2) the account chosen by claimant at the time of the hearing did not occur; and (3) it is medically improbable that the events described by claimant would have resulted in the kind of injury he sustained. SAIF's ultimate design in pursuing these arguments was to create the inference that claimant had injured himself in a nonindustrial setting and had later attempted to pass the injury off as work related.

Claimant is a former police officer and acting Police Chief of the City of Oakridge. He testified that on March 10, 1983 he and a fellow officer, Officer Rosage, responded to a call of a disturbance. Upon arriving at the scene, the officers were confronted by an unruly, intoxicated young man. Officer Rosage subdued the suspect and handcuffed him while claimant conversed with the suspect's mother. Rosage placed the suspect in the rear seat of the patrol car and then got into the right front passenger seat. Claimant got into the driver's seat and drove the car back to the police station.

After stopping the patrol car, claimant exited the driver's door and opened the left rear door of the vehicle. Claimant stepped between the left rear door and the body of the vehicle and reached into the back seat with his head outside the vehicle and his shoulders against the top of the door jamb. Claimant grasped the suspect and attempted to pull him out of the vehicle through the left rear door when the suspect struggled or raised up inside the car, forcing claimant's right shoulder into the door jamb. Claimant cried out in pain and let go of the suspect. In the meantime, Officer Rosage had exited the vehicle and opened the right rear door. Rosage then pulled the suspect out of the vehicle through the right rear door. Claimant opened the outer door of the station house and Rosage escorted the suspect into the station. Once inside the station, claimant removed his shirt and was examined by an emergency medical technician who recommended that he see a doctor.

The Referee accepted SAIF's contention that claimant had given inconsistent accounts of the mechanism of his injury to several individuals. If true, of course, this fact would tend to indicate that claimant's initial account of the injury was fictional and was later changed through forgetfulness or to avoid

conflict with the statements of adverse witnesses. Besides claimant's testimony, the evidence on this point consists of several summary descriptions of the mechanism of injury in a number of claim forms and medical reports, the recorded statement and testimony of the emergency medical technician who examined claimant on the date of the alleged accident and the testimony of an attorney with the SAIF Corporation.

The first mention of the alleged accident in the record is in the 801 form signed by claimant on March 11, 1983. The type-written accident description reads, "making an arrest -- suspect resisted." Claimant testified that this description of the accident was composed and typed by a secretary and that he merely signed the form. In a medical form also signed by claimant on March 11, 1983, claimant described the accident as follows: "Arresting a person last PM - and while struggling with him pulled something in Rt shoulder." In a chart note dated October 20, 1983, an examining physician, Dr. Ammerman, described the accident as "a tussle with a gentleman referable to [claimant's] policeman [sic] work." In a letter dated a few days later, claimant's treating orthopedic surgeon, Dr. Butters, stated that claimant was injured in "a struggle with a prisoner."

Reciting a dictionary definition of a "tussle" as a "rough-and-tumble struggle or a scuffle," the Referee found the terms "tussle" and "struggle" inconsistent with claimant's testimony which, according to the Referee, reflected "fairly minimal physical contact with the suspect." We disagree with the Referee's analysis. We note initially that only one of the accident descriptions recited above came directly from claimant. The term "tussle" from all appearances was chosen by a doctor to summarize undisclosed history given by claimant. Even assuming that claimant chose the term and the doctor merely repeated it, we think that the Referee's analysis is overly technical in view of the necessarily imprecise and casual nature of accident descriptions of this type. We find no conflict between the above-recited descriptions of claimant's accident and claimant's testimony at the hearing.

A more serious argument that claimant gave conflicting accounts of his injury is suggested by the statements of two witnesses who testified at the hearing. The first witness was the emergency medical technician (EMT) who examined claimant on the date of the alleged accident. In a recorded statement taken by a SAIF investigator in August 1984, the EMT stated that from what claimant told her she assumed that claimant had hurt his shoulder in the process of handcuffing the suspect. Claimant and all of the other witnesses to the arrest agree that Officer Rosage and not claimant subdued and handcuffed the suspect. In any event, of course, claimant testified that he injured his shoulder while attempting to remove the suspect from the patrol car at the police station, not while attempting to subdue or handcuff the suspect at the scene of the arrest. At the hearing, the EMT indicated that her statements in the recorded statement were based more upon her own assumptions than upon what claimant had told her. In light of the EMT's concession that she may have misunderstood what claimant told her concerning the mechanism of his injury and the generally uncertain tone of her statements in the recorded statement, we find that claimant did not give an account of his accident to the EMT that conflicted with his testimony at the hearing.

The second witness who indicated that claimant gave inconsistent accounts of his accident was an attorney with the SAIF Corporation. The attorney testified that claimant called him on the phone in late August or early September 1984 asking for claims processing information. In response to something said during the conversation with claimant, the attorney called the current Chief of Police at the department where claimant had worked. During this conversation, the Chief mentioned that claimant had stated that he had injured his shoulder attempting to remove a suspect from a patrol car. The attorney called claimant back and, according to the attorney, claimant at some point stated that he had injured his shoulder either opening or holding open the door to the police station. The attorney confronted claimant with the apparent conflict between what claimant had told the attorney and what he had told the Chief. According to the attorney, claimant reiterated that he had injured his shoulder either opening or holding open the door to the police station and stated that the Chief must have misunderstood what claimant had told him. The attorney stated that he took notes during his conversations with claimant and the Chief of Police, but had since lost them.

Claimant denied that he told the attorney that his injury occurred when he opened the door to the police station. According to claimant, he reiterated to the attorney that he had hurt his shoulder while attempting to remove the suspect from the car. Then, in an effort to verify and emphasize this statement, claimant remarked that his arm had hurt (i.e. that he had experienced pain) just after that when he opened the door to the police station. Claimant also testified that not long before his conversation with the attorney, he had given a recorded statement to a SAIF investigator about the accident which was consistent with his testimony at the hearing. SAIF did not dispute this last assertion.

We accept claimant's account of the conversation between himself and SAIF's attorney. On our de novo review of the record, we think that it is more likely that SAIF's attorney misunderstood what claimant said or selectively perceived or remembered claimant's statement regarding the door to the police station than that claimant gave him a different account of the accident shortly after giving a contrary account to a SAIF investigator in a recorded statement. Claimant's account of the conversation with the attorney was logical and explains to our satisfaction how the subject of the police station door became a part of that conversation. We find that claimant did not give an account of the accident to the SAIF attorney which conflicted with his testimony at the hearing.

Having addressed all of the evidence presented in favor of SAIF's first argument, we conclude that SAIF has failed to prove that claimant gave several inconsistent versions of his accident. The Referee erred, therefore, in relying upon this evidence to conclude that claimant had filed a fraudulent claim.

SAIF's second argument and the major basis for the Referee's decision was that the account of the accident given by claimant simply did not occur. The key evidence presented in favor of this argument was the testimony of claimant's former fellow officer, Mr. Rosage. Rosage testified that after taking

the suspect into custody, he rode back to the station in the right rear passenger seat. After arriving at the station, he exited the right rear door, closed it behind him and walked around the rear of the car to the left rear door of the vehicle. In the meantime, claimant had exited the left front door and opened the left rear door. Rosage then reached into the vehicle through the left rear door and pulled the suspect out. Rosage testified that he did not see or hear anything that caused him to think that claimant had made any attempt to reach into the left rear door of the vehicle and pull the suspect out. Besides Rosage's statement that he did not see claimant attempt to remove the suspect from the vehicle, the major conflict between the testimony of Rosage and that of claimant was that Rosage stated that he rode to the police station in the right rear passenger seat of the patrol car and that claimant stated that Rosage rode in the right front seat.

At the hearing, which was held in two sessions on April 25 and June 11, 1985, the interior rear door handles of the patrol car became the focus of the witnesses' conflicting stories. Claimant contended that the door handles had been removed prior to the date of the alleged accident to hinder the escape of persons riding in the back seat and that Officer Rosage could not have exited the right rear door of the vehicle without assistance. Claimant argued that this proved that Rosage rode to the station in the front seat of the patrol car and that Rosage's account of the incident was wrong. SAIF contended that the door handles were not removed until later and thus that Rosage's account of the incident was correct. Two other police officers and the current Chief of Police testified concerning the presence or absence of the interior rear door handles at the time of the alleged accident. The two officers testified that the door handles were absent. The Chief testified that they were present. The Referee accepted the Chief's testimony and factored this conclusion into his ultimate decision to accept the testimony of Rosage over that of claimant.

After the Referee issued his order, claimant requested that the Referee reopen the record for the receipt of additional evidence on the door handle issue. The Referee denied claimant's request on the ground that the proffered evidence was in existence before the hearing and, with due diligence, could have been produced at the hearing. Claimant renews his argument on Board review in the form of a request for remand.

In his request for remand, claimant concedes that he possessed the proffered evidence prior to the June 11 session of the hearing and states that he decided not to offer it because he thought it would be cumulative given the other evidence he was planning to present. Remand is appropriate only when the record has been improperly, incompletely or otherwise insufficiently developed or heard by the Referee and the party requesting remand shows that the evidence it desires to offer was not obtainable with due diligence prior to the hearing. See ORS 656.295(5); James D. Manzo, 37 Van Natta 1258, 1259 (1985); Delfina P. Lopez, 37 Van Natta 164, 170 (1985). By his own admission, claimant possessed the evidence he now desires to offer prior to the time that the record was closed. He decided not to offer the evidence based upon his own judgment concerning what was needed to prove his case. Remand is not appropriate under these circumstances. See Millie Lowery, 37 Van Natta 687 (1985).

With regard to the Referee's ultimate conclusion on the question of whether the accident which claimant described actually occurred, the Referee considered the testimony of claimant and Mr. Rosage as inconsistent and irreconcilable. In deciding to accept the testimony of Rosage over that of claimant, the Referee emphasized that claimant, as the party seeking compensation, had a substantial interest in the outcome of the case and indicated that claimant's testimony should be mistrusted for this reason. The Referee also discounted a number of facts which tended to indicate that Mr. Rosage felt a good deal of personal animosity for claimant.

Although we agree with the Referee that the testimony of Mr. Rosage and that of claimant cannot be reconciled in all particulars, we are not convinced that the testimony is irreconcilable on the ultimate question of whether claimant attempted to remove the suspect from the patrol car. Claimant testified that he did. Rosage testified that he did not see or hear anything which caused him to think that claimant had made such an attempt. He also testified, however, that once the patrol car got to the police station, he got out of the car, closed the door behind him and walked around the rear of the car. He also stated that when he arrived at the left rear door of the vehicle, claimant had already opened the door and was standing beside it. Rosage indicated on cross-examination that he was not really paying attention to what claimant was doing until he got to the left rear door of the patrol car. The accident that claimant described could have taken place within the few seconds during which Rosage was getting out of the car or walking around it. Rosage, in other words, could truthfully have testified that he did not see claimant reach into the rear seat of the patrol car and yet claimant could have truthfully testified that he did.

Even assuming that the Referee is correct and the testimony of one witness must be chosen over that of the other, we conclude that claimant was the truthful witness. Before proceeding further, we note that the Referee made no express credibility findings based on the demeanor of the witnesses. In commenting on the credibility of Mr. Rosage, the Referee stated: "Mr. Rosage testified in a straightforward manner and there was nothing about his demeanor that would cause me to doubt his credibility as a witness." We do not take this to be a positive credibility finding based upon the demeanor of Mr. Rosage during his testimony at the hearing. The sense of the statement is that demeanor was not a significant factor in the Referee's ultimate credibility determination. We conclude, therefore, that the Referee based his credibility finding on the substance of the testimony and that we are in as good a position to assess the credibility of the witnesses as was the Referee. See Davies v. Hanel Lumber Co., 67 Or App 35, 38 (1984); Robert F. Shuck, 37 Van Natta 160, 162 (1985).

One basis stated by the Referee for his ultimate credibility determination was claimant's status as the party seeking compensation. This factor is present in every case and in the absence of other evidence bearing on the question of credibility would always result in a credibility finding against the claimant. We do not think that this factor should be any part of the basis of a credibility finding. We do not mean to say, of course, that a Referee must unquestionably accept everything that

a claimant says as true; only that credibility determinations must be based upon factors other than the claimant's status as the claimant.

Several facts lead us to mistrust the testimony of Mr. Rosage. Claimant and Rosage shared an apartment for approximately one year while they were working at the police department. In mid June of 1983, claimant asked Rosage to move out of the apartment under less than friendly circumstances. According to claimant, Rosage was taking advantage of the situation by not paying his fair share of expenses. Rosage testified that he moved out because of unspecified "personal problems" that claimant was experiencing. A few days after he moved out, Rosage was instrumental in having a stolen weapons investigation initiated against claimant. Claimant was exonerated of any wrongdoing by the investigation. An officer who had worked with Rosage testified that Rosage harbored "hard feelings" for claimant with regard to certain of claimant's policies as acting Police Chief and the shift assignments made by claimant. Rosage left the police department in August of 1983. He testified that he did not find out that claimant had filed a claim for his right shoulder until April of 1984. Shortly thereafter, Rosage initiated and became the central witness in the investigation by SAIF that resulted in the issuance of the back-up denial.

The Referee discounted the above facts and accepted the testimony of Mr. Rosage over that of claimant. The bases upon which the Referee discounted these facts are, in our view, of questionable validity, but we do not find it necessary to discuss the Referee's reasoning in detail. Perhaps one of the above facts, appearing in isolation, could be explained away. Taken in tandem, however, they are a powerful indication of bias against claimant on the part of Mr. Rosage. We conclude, therefore, that the Referee erred in accepting the testimony of Rosage over that of claimant. It follows that SAIF has failed to establish on this basis that the accident as described by claimant did not occur.

Although not discussed by the Referee, SAIF presented evidence in support of one other line of argument which, for the sake of completeness, we will address briefly. Dr. Norton, SAIF's in-house orthopedic specialist, testified concerning the common mechanisms by which rotator cuff tears occur and stated that claimant's injury was unlikely to have resulted from having his shoulder pressed into the top of a car door jamb. Instead, he opined that claimant's right shoulder condition was the result of the natural degeneration of the rotator cuff. On cross-examination, Dr. Norton conceded that if claimant was actually in the process of tugging on the suspect at the time of his injury, a rotator cuff tear was more likely to have occurred than if his shoulder was merely pressed passively into the door jamb.

If Dr. Norton is correct and claimant's rotator cuff defect was the result of natural degenerative changes unrelated to claimant's work as a police officer, claimant's claim may not have been compensable in the first instance. Until SAIF has established that its back-up denial is procedurally permissible, however, Dr. Norton's opinion on the causation question is irrelevant except to the extent that it tends to prove fraud, misrepresentation or other illegal activity on the part of .

claimant in obtaining acceptance of his claim. See Parker v. D.R. Johnson Lumber Co., supra, 70 Or App at 687; Wilkens v. SAIF, 66 Or App 420, 422-23, rev den 296 Or 712 (1984).

Dr. Norton's conclusion regarding the cause of claimant's injury could be relevant if there was evidence in the record that claimant's right shoulder had been injured or otherwise was symptomatic prior to March 10, 1983 and that claimant had misrepresented or concealed this information during SAIF's initial investigation of the claim. See Skinner v. SAIF, 66 Or App 467, 470 (1984); Robert D. Craig, 37 Van Natta 494, 495 (1985). There is, however, no such evidence in the record. Given the fact that claimant testified that he was attempting to pull the suspect out of the patrol car at the time of his injury and that his shoulder was not merely pressed passively into the top of the car door jamb, the remainder of Dr. Norton's testimony regarding the mechanism of rotator cuff injuries is inconclusive at best.

We conclude that SAIF has failed to prove fraud, misrepresentation or other illegal activity on the part of claimant in causing SAIF to accept his claim. We, therefore, reverse the order of the Referee and set aside SAIF's back-up denial.

ORDER

The Referee's order dated September 9, 1985 as republished in the Order on Reconsideration dated November 5, 1985 is reversed. Claimant's attorney is awarded \$1,800 for services at the hearing and \$700 for services on Board review, to be paid by the SAIF Corporation.

Chairman Ferris, Dissenting:

I would affirm the Referee's order. This entire case hinges on the credibility of the witnesses. The Referee clearly recognized that and addressed his assessment of the witnesses' credibility at length in his order. I specifically disagree with the majority's statement that "the Referee made no express credibility findings based on the demeanor of the witnesses." The Referee stated, "Mr. Rosage testified in a straightforward manner and there was nothing about his demeanor that would cause me to doubt his credibility as a witness." Rosage was the only eyewitness to the alleged incident. The Referee ultimately concluded that Rosage's testimony was more credible than claimant's. The Referee did not make any direct assessment of claimant's credibility based on demeanor, but his ultimate acceptance of Rosage's version of events over claimant's speaks for itself. Admittedly, this is a close case. I would, however, defer to the Referee's ability to observe and assess the credibility of the witnesses in this case, where the whole case turns on such observations. I respectfully dissent.

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MARCELLA SWEARENGEN, Claimant  
Francesconi & Cash, Claimant's Attorneys  
Bottini & Bottini, Defense Attorneys

WCB 85-11771  
December 15, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of that portion of Referee Tuhy's order that set aside its partial denial of claimant's claim for the neck and upper back. The issue is compensability.

Claimant was compensably injured on July 23, 1985 while operating a "cutter saw" at a plastics plant. On the date of injury claimant had been operating the saw for six and a half hours. She felt what she described as a painful pulling sensation that began in the right shoulder and extended to the right hand. Claimant operated the saw the next day for two and a half hours. That evening she noticed swelling in the right hand and pain in the right upper arm. She filed a claim for the arm and hand and the claim was later accepted as disabling.

On July 25, 1985 claimant visited Dr. Scoltock for the aforementioned symptoms. Dr. Scoltock's chart notes make note of right shoulder, arm and hand pain. He diagnosed overuse syndrome, placed limitations on claimant's use of the right hand and prescribed a brace. Claimant was off work for three days and then returned. Her symptoms persisted and she returned to Dr. Scoltock. Carpal tunnel syndrome was suspected and Dr. Scoltock recommended that claimant consider surgical release of the right carpal tunnel. Claimant wanted a second opinion. Rather than visiting a hand specialist, however, she began treating with Dr. McIntosh, a chiropractor.

On August 8, 1985, Dr. McIntosh reported that claimant would be totally incapacitated for at least seven days. He noted complaints not only in the arm and hand, but also in the neck and upper back. He diagnosed cervicobrachial syndrome and neuralgia. He proposed ten weeks of curative chiropractic treatments consisting of spinal manipulation and "hot wax" treatments, whereby claimant dipped her hand in hot wax, wrapped it in cellophane and sat for twenty minutes while her hand heated.

The insurer sent claimant to Independent Chiropractic Consultants, where she was examined by Drs. Berman and Abrams. The doctors found nothing in the way of neck, upper back or shoulder pathology. They found claimant medically stationary and successfully resolved from an overuse syndrome. Drs. Berman and Abrams opined that claimant could return to her regular employment without permanent disability. Based on the Consultants' report, the insurer entered a partial denial of claimant's upper back and neck condition, while affirming its responsibility for the compensable arm injury.

Dr. McIntosh disagreed with the Consultants' report and indicated that his was the only accurate diagnosis presented. He found "all others to be inaccurate and [that they] must be disregarded."

The insurer then sent claimant to a second panel of independent medical examiners. Drs. Barth and Martens found x-rays of claimant's cervical spine to be completely normal. They also found claimant's sensory testing to be inconsistent during

several trials. They concluded that claimant was stationary with no impairment, that no further treatment was necessary and that claimant could return to her regular employment without restriction.

Dr. McIntosh then apparently sent claimant to Dr. Goe, a chiropractor and physiologist, for electrical studies. Dr. Goe concluded that claimant had a rotator cuff strain, epicondylitis and possible early carpal tunnel syndrome. He also noted, however, that when claimant was distracted she apparently had no discomfort. We interpret this finding to be that claimant's pain response was inconsistent during the examination.

After receiving Dr. Goe's report, Dr. McIntosh sent claimant to a third chiropractor, Dr. Skei, who thereafter served as treating chiropractor. Claimant reported to Dr. Skei that she had experienced neck and upper back symptoms as early as the morning after her arm injury. Dr. Skei concluded that claimant had apparently injured her neck and upper back, producing symptoms in the right arm as well as the injured areas. Dr. Skei related claimant's injuries to her work by history.

The insurer asked the initial treating physician, Dr. Scoltock, to review his examination notes in an effort to determine whether claimant had complained of spinal complaints when she first reported to him after the injury. Dr. Scoltock responded that claimant had complained only of symptoms in the hand and arm and that there was no evidence of injury to the upper spine.

Claimant testified that her work on the cutter saw required her to lift her right arm as high over her head as she could, and to place significant force on a lever that brought the saw to and from the product to be cut. Because of her short stature, she stood on a wooden pallet. Claimant estimated that the pallet added only about an inch to her height and that while the saw hit her about three inches above the belt line, the pallet did not increase her ability to reach and pull the saw handle. She testified that she had to push and pull the handle "constantly." She also testified that when she visited Dr. Scoltock, she referred to pain in her neck and upper back as well as her arm. As previously noted, Dr. Scoltock's reports make no mention of back or neck difficulties.

Mr. Smith, claimant's former production supervisor, testified that he had shown claimant how to operate the cutter saw. He produced photographs of the saw and indicated that rather than having to raise her arm high over her head to operate the saw, claimant would merely have to reach straight out from her body, at a bit above eye level. He also explained that the pallet on which claimant stood had to be approximately four inches high in order for a forklift to be able to use it. Finally, Mr. Smith testified that he had given claimant a warning about poor job performance prior to her injury.

Ms. Ellis, another former supervisor, also testified. She agreed that the pallet on which claimant stood was from three to four inches high. She corroborated Mr. Smith's description of the level at which claimant would have to raise her arm in order to operate the cutter saw. She indicated that claimant would never have had to reach straight up in order to pull or push the saw handle. Ms. Ellis indicated her feeling that claimant's claim was fraudulent.

The Referee found the claim for neck and upper back problems to be compensable, relying on the reports of chiropractors McIntosh and Skei because of their treating physician status. He also found claimant to be a credible and reliable witness based on her demeanor at hearing. He apparently questioned claimant's substantive rendition of her work duties, however, stating:

"I further find that the truth lies somewhere between [the testimony] of the Claimant and the Employer's lay witnesses with respect to the extent to which the Claimant was required to reach overhead and in front of her in operation of the cutter saw."

It is claimant's burden to prove that her neck and upper back complaints were materially caused by her July 23, 1984 injury. We find that because claimant did not immediately report neck and upper back complaints to her initial treating physician, but alleged the later onset of those symptoms, this case is medically complex and requires proof by way of expert medical evidence. Cf. Uris v. Compensation Dept., 247 Or 420 (1967). The treating physician's opinion is generally accorded greater weight. See Weiland v. SAIF, 64 Or App 810 (1983). Where the case involves expert analysis, rather than expert external observation, however, we do not give special credit to the evidence from the treating physicians as opposed to that generated by other doctors. Allie v. SAIF, 79 Or App (1986); Hammons v. Perini, 43 Or App 299 (1979). We find the present case to be one involving expert analysis.

Drs. McIntosh and Skei acted as claimant's most recent treating doctors. They feel that she suffered an injury to the neck and upper back on the job and that the injury affected claimant's right arm. Drs. Scoltock, Berman, Abrams, Barth and Martens, on the other hand, have never been able to discern an injury to claimant's spine, nor have they found evidence of permanent disability. Thus, there is a direct and substantial conflict in the medical findings. From what we can discern, the conflict is unexplained.

We find that even when the medical evidence is interpreted in a way most favorable to claimant, it is in equipoise. After considering claimant's delayed report of neck and back symptoms, however, we tend to find more persuasive the opinions of the several doctors who could find no evidence whatsoever of spinal pathology. We conclude that claimant has failed to prove the compensability of her claim. The insurer's partial denial, therefore, shall be reinstated.

#### ORDER

The Referee's order dated January 24, 1986 is reversed in part and affirmed in part. That portion of the order that set aside the insurer's partial denial of claimant's claim for the neck and upper back is reversed and the insurer's partial denial is reinstated. The remainder of the Referee's order is affirmed.

ROBERT F. SYKES, Claimant  
Malagon, et al., Claimant's Attorneys  
Schwabe, et al., Defense Attorneys

WCB 85-04503  
December 15, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The self-insured employer requests review of those portions of Referee Holtan's order, as adhered to on reconsideration, that: (1) set aside its denial of claimant's claim for a psychological condition allegedly related to his compensable myocardial infarction; and (2) awarded claimant temporary total disability compensation beginning as of August 27, 1985 and continuing through claim closure. The issues are compensability and whether claimant is entitled to the temporary total disability compensation awarded by the Referee.

We affirm that portion of the Referee's order that found claimant's psychological condition to be compensable. We find, however, that claimant is not entitled to the temporary total disability compensation awarded by the Referee.

Claimant suffers from the compensable physical and psychological effects of multiple myocardial infarctions. We find that as a result of those effects claimant effectively retired from the workforce several months before his treating psychiatrist found him not medically stationary from a psychiatric standpoint on August 27, 1985. In his Opinion and Order dated April 23, 1986, the Referee awarded temporary total disability compensation beginning on the date claimant was declared not medically stationary. The employer requested reconsideration, asserting that under Cutright v. Weyerhaeuser, 299 Or 290 (1985), a claimant who has voluntarily retired from the workforce is not entitled to receive temporary disability compensation. In his Order on Reconsideration dated May 15, 1986, the Referee adhered to his prior order, finding that claimant had not voluntarily left the workforce, thereby implying that the effects of claimant's compensable conditions had necessitated his leaving work.

One day before the Referee's Order on Reconsideration was published, the Court of Appeals decided Karr v. SAIF, 79 Or App 250 (1986), wherein it held that a retired claimant is not entitled to receive temporary total disability payments, regardless of whether he retires voluntarily or involuntarily. We are bound by the court's decision. The present claimant, who is retired, is not entitled to temporary total disability.

#### ORDER

The Referee's Opinion and Order dated April 23, 1986 is reversed in part and affirmed in part. That portion of the order that awarded claimant temporary total disability compensation beginning on August 27, 1985 is reversed. The remainder of the Opinion and Order is affirmed. The Referee's Order on Reconsideration dated May 15, 1986 is reversed. Claimant's attorney is awarded a reasonable attorney fee of \$550 for services on Board review in connection with the compensability issue, to be paid by the employer.

WILLIAM E. WOOD, Claimant  
Royce, et al., Claimant's Attorneys  
Schwabe, et al., Defense Attorneys  
David O. Horne, Defense Attorney

WCB 84-10010 & 85-02151  
December 16, 1986  
Order on Reconsideration  
(Dismissing)

We issued our Order on Review in this matter on January 13, 1986. A petition for judicial review of the order was thereafter filed by Safeco Insurance Company. The parties have now submitted a disputed claim settlement resolving all contested matters under the provisions of ORS 656.289(4). On December 15, 1986 we withdrew our order from the court for reconsideration under the provisions of ORS 183.482(6) and ORAP 5.35. Having this date approved the disputed claim settlement, our previous Order on Review is vacated and this matter is dismissed in accordance with the terms of the settlement.

IT IS SO ORDERED.

WILLIAM H. BROWN, Claimant  
Ackerman, et al., Claimant's Attorneys  
Garrett, et al., Defense Attorneys

WCB 85-00944  
December 17, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of Referee Michael V. Johnson's order that set aside its denial of claimant's claim for home health care services performed by his spouse and awarded a penalty and employer-paid attorney fee for alleged unreasonable claim processing. The issues are compensability of home health care and penalties and attorney fees.

On September 10, 1980 claimant was severely injured when he was hit by a log. He sustained a crushed pelvis and internal injuries and was hospitalized until November 26, 1980. He was thereafter confined to a hospital bed in his home until December 23, 1980 when he was able to move about the home using a wheelchair and/or walker. Between January 13 and March 30, 1981 claimant could move about only with crutches. Beginning in April 1981 claimant was again ambulatory. The claim was closed with awards of compensation for scheduled and unscheduled disability in February 1984. Claimant requested a hearing and on October 15, 1984 he was awarded compensation for permanent total disability by a Referee. That award was not appealed.

Two days after the Referee published his order awarding permanent total disability, claimant submitted a claim for \$1,492.78 for services provided by his spouse during the time claimant was recuperating at home. The employer denied the claim on January 21, 1985. It is agreed by the parties that claimant's spouse is not a licensed health care provider of any kind. The Referee allowed the claim as a general matter, i.e. he found that many of the services performed were reimbursable as medical services under ORS 656.245. However, he independently calculated the reasonable value of the services and allowed \$353.72 for the period November 26 through December 26, 1980, \$178.26 for the period December 23, 1980 through January 13, 1981 and nothing for any services after January 13, 1981. He also awarded a 25 percent penalty for the employer's action in not accepting or denying the claim within 60 days and an associated attorney fee.

ORS 656.202(2) provides that, "Except as otherwise provided by law, payment of benefits for injuries or deaths under ORS 656.001 to 656.794 shall be continued as authorized, and in the amounts provided for, by the law in force at the time the injury giving rise to the right to compensation occurred." We find that the services for which reimbursement is sought were all performed prior to March 1, 1982. Effective March 1, 1982 the Director of the Workers' Compensation Department published WCD Admin. Order 5-1982 which adopted OAR 436-69-301(2), among other rules. OAR 436-69-301(2) adopted a requirement that medical services performed by unlicensed persons be authorized in advance by the attending physician. The same "prescription" requirement for medical services performed by unlicensed persons has been in effect since 1982 and is now found at OAR 436-10-050(2).

The Director's rules that were in effect at the time of claimant's injury and during the time the services in this case were performed did not contain any such provision regarding who may perform medical services. Specifically, the rules did not address whether services performed by unlicensed persons were reimbursable, whether or not prescribed by the attending physician. See WCD Admin. Order 2-1980, effective January 28, 1980. There were, however, as of the date of claimant's injury and during the time when services were performed in this case three decisions of the Board on the books holding that home health care services performed by an injured worker's spouse were reimbursable if they were services in the nature of "nursing." Thomas Leaton, 28 Van Natta 277 (1979); Lyle Hobwood, 23 Van Natta 496 (1978); Margaret and Merle Johnson, 8 Van Natta 141 (1972). The parties have cited us to no Oregon court decisions dealing with this issue and we have found none through our independent research. We conclude that to apply the "prescription" requirement of the current rules to the facts of this case would "impose additional duties as to past transactions" and would be impermissible. See Futrell v. United Airlines, 59 Or App 571 (1982).

We conclude that the law in force at the time of claimant's injury consisted of silence by the Director and the courts and affirmative decisional law by the Board as to the compensability of the services performed by claimant's spouse, to the extent that those services were in the nature of "nursing." We also note that delay in claiming reimbursement for such services did not bar the compensability of the services but only affected calculation of the rate of reimbursement. Thomas Leaton, supra (five year delay in claiming reimbursement). On the basis of the entire record we find that claimant's spouse was performing reasonable and necessary nursing services during the period November 26, 1980 through January 13, 1981 and that, under the law in effect at that time, the services are compensable as medical services under the provisions of ORS 656.245.

Having found that claimant's claim is compensable, we address the issue of at what rate the services should be paid. We conclude that we are without jurisdiction to decide that question. After the Board's most recent decision as to the compensability of home nursing by an injured worker's spouse, the legislature amended ORS 656.704 to add subsection (2):

"For the purpose of determining the respective authority of the director and the board to conduct hearings,

investigations and other proceedings under ORS 656.001 to 656.794, and for determining the procedure for the conduct and review thereof, matters concerning a claim under ORS 656.001 to 656.794 are those matters in which a worker's right to receive compensation, or the amount thereof, are directly in issue. However, such matters do not include any proceeding under ORS 656.248 or any proceeding resulting therefrom." (Emphasis supplied.)

1979 Or Laws, Ch 839, sec 16. Now ORS 656.704(3).

ORS 656.248 vests in the Director the exclusive jurisdiction to establish and promulgate rules relating to medical service rates. At the time of claimant's injury in this case ORS 656.704 provided that disputes as to medical service rates were not matters concerning a claim, as the statute provides today. Thus we need not consider whether the procedural nature of the statute would mandate our applying the current version over the former. Because claimant's spouse's services can be reimbursed only to the extent they were medical services, a dispute as to the rate of reimbursement may be resolved only by the Director of the Workers' Compensation Department.

Regarding the assessment of a penalty and attorney fees for unreasonable delay in claim processing, we reverse. The employer denied the claim for medical services approximately 30 days late. However, considering that the claim was not made for almost four years after the services claimed were performed, that the only source of documentation for the claim was claimant's spouse, that the employer was so unsure of the legal or factual basis for the claim that it requested a formal opinion from the Medical Director of the Workers' Compensation Department, and that during the interval after the claim was made there was a continuing dialogue between the employer and the claimant's attorney, we conclude that the delay was not unreasonable.

#### ORDER

The Referee's order dated July 12, 1985 is affirmed in part and reversed in part. That portion of the order that found services performed by claimant's spouse during the period November 26, 1980 through January 13, 1981 compensable as medical services is affirmed. The employer's denial dated January 21, 1985 is, therefore, set aside. The Referee's award of \$1,500 as a reasonable attorney fee for services at hearing in setting aside the denial is affirmed. The remainder of the Referee's order is reversed and vacated. This matter is remanded to the self-insured employer for reconsideration of the amounts claimed as reimbursement for medical services during the compensable period. Claimant's attorney is awarded a reasonable attorney fee of \$500 for services on Board review on the issue of the denial of compensability, said fee to be paid by the employer in addition to compensation.

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RICHARD J. CLARKE, Claimant  
Merrill Schneider, Claimant's Attorney  
Mitchell, et al., Defense Attorneys  
Rankin, et al., Defense Attorneys

WCB 85-07495, 85-08086, 85-08843  
& 85-08844  
December 17, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Northwest Transport Service, Inc., a self-insured employer, requests review of those portions of Referee Galton's order which: (1) set aside its denial of claimant's aggravation claim for a low back condition; (2) upheld Transport Indemnity's denial of claimant's "new injury" claim for the aforementioned condition; and (3) awarded an employer-paid attorney fee of \$1,100. On review, the issues are responsibility and attorney fees.

Following our de novo review of the medical and lay evidence, we find that claimant's subsequent lifting incident while working for Transport Indemnity's insured did not independently contribute to the causation of his disabling condition, i.e., to a worsening of the underlying condition. See Hensel Phelps Construction v. Mirich, 81 Or App 290 (1986). Rather, the evidence establishes that the lifting incident aggravated his continuing back problem, which resulted in a second period of disability. See SAIF v. Brewer, 62 Or App 124, 129 (1983); Smith v. Ed's Pancake House, 27 Or App 361, 364 (1976). Accordingly, we affirm that portion of the Referee's order which found Northwest Transport responsible for claimant's aggravation claim.

We modify the Referee's award of attorney fees. In addition to responsibility, the issues at hearing involved penalties and attorney fees for allegedly unreasonable claims processing. Thus, there were no ancillary issues that posed a threat to claimant's entitlement to compensation. See e.g., Nat. Farm Ins. v. Scofield, 56 Or App 130 (1982). Furthermore, claimant did not prevail on the penalty issues. Under these circumstances, he is considered a nominal party. Petshow v. Farm Bureau Ins. Co., 76 Or App 563, 571 (1985); Stanley C. Phipps, 38 Van Natta 13, 16 (1986). As such, we conclude that he has not "actively and meaningfully participate[d]" as that phrase is used in OAR 438-47-090(1). Consequently, claimant is not entitled to an attorney's fee for services at the hearing level or on Board review. Phipps, supra.

Although claimant is not awarded an employer-paid attorney's fee, he is entitled to a fee for services rendered prior to the issuance of a .307 order. Our review of the record indicates that claimant's attorney took substantive and affirmative steps to have a paying agent named pursuant to ORS 656.307. These services entitle claimant to an attorney's fee which is payable out of compensation. OAR 438-47-010(5); Mark L. Queener, 38 Van Natta 882 (1986); Bruce A. Hatleli, 38 Van Natta 1024 (1986).

Attorney fee awards are based on efforts expended and results obtained. OAR 438-47-010(2). In determining the reasonableness of attorney fees, several factors must be considered. These factors include: (1) the time devoted to the case; (2) the complexity of the issues presented; (3) the value of the interest involved; (4) the skill and standing of counsel; (5)

the nature of the proceedings; and (6) the results obtained. Barbara A. Wheeler, 37 Van Natta 122, 123 (1985). After considering the nature of the practice in general and the facts of this case in particular, we conclude that \$500 is a reasonable award for claimant's attorney's services rendered prior to the issuance of the .307 order.

ORDER

The Referee's order dated April 30, 1986 is affirmed in part and modified in part. In lieu of the Referee's award of an employer-paid reasonable attorney's fee, claimant's attorney is awarded 25 percent of claimant's compensation, not to exceed \$500, for services rendered prior to hearing in procuring an order designating a paying agent under ORS 656.307. This fee shall be paid directly to claimant's attorney by Northwest Transport Service, Inc. out of claimant's compensation. The remainder of the Referee's order is affirmed.

CLINTON P. JOHNSON, Claimant  
Carney, et al., Claimant's Attorneys  
Nancy Meserow, Defense Attorney  
Schwabe, et al., Defense Attorneys

WCB 85-06431, 85-07389, 85-09383  
& 85-09384  
December 17, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Unigard Insurance Company requests review of that portion of Referee Knapp's order that found it, rather than Wausau Insurance Company, responsible for claimant's low back condition. Wausau cross-requests review of that portion of the order that awarded claimant 10 percent (32 degrees) unscheduled permanent partial disability for his low back in lieu of a Determination Order which had awarded no permanent disability. Claimant cross-requests review of that portion of the order that declined to award attorney fees in connection with the responsibility issue. The issues are responsibility, extent of disability and attorney fees.

In March 1984, claimant injured his low back lifting sheets of laminated plastic in the course of his employment as a warehouseman. The insurer at the time of this injury was Wausau Insurance Company (Wausau). Claimant received several weeks of conservative treatment from a chiropractor, Dr. Cichoke. Dr. Cichoke's diagnosis was an acute traumatic lumbar sprain. In September 1984, Dr. Cichoke indicated that claimant was medically stationary and stated that claimant's reflexes and ranges of motion were within normal limits. The claim was closed by Determination Order in February 1985 with no award of permanent partial disability.

Claimant continued to work for the same employer and in March 1985 experienced a sudden increase in low back pain after lifting rolls of vinyl. The insurer at this time was Unigard Insurance Company (Unigard). Claimant returned to Dr. Cichoke who again diagnosed an acute traumatic lumbar sprain. Dr. Cichoke also noted radiation of pain into claimant's lower extremities. Claimant quit treating with Dr. Cichoke within a few weeks and began treating with Dr. Eubanks, an osteopath. Dr. Eubanks declared claimant medically stationary as of June 19, 1985 and rated him as without permanent impairment. Claimant missed no work as a result of his increased pain and continued to work in his former position through the time of the hearing in April 1986.

Four medical professionals rendered opinions on the question of whether claimant's March 1985 increase in pain represented an aggravation or a new injury. Both Dr. Cichoke, claimant's former treating chiropractor, and Dr. Rosenbaum, a consulting neurologist, thought that claimant's latest flare-up of pain represented a new injury. Dr. Cichoke emphasized the fact that claimant had not sought treatment for his 1984 injury for nearly a year at the time of the 1985 flare-up. Dr. Rosenbaum emphasized that a slightly larger area of claimant's low back was symptomatic in the 1985 flare-up and that claimant had experienced new symptoms in the form of radicular pain.

Two osteopathic physicians, Drs. Eubanks and Howell, opined that claimant's 1985 flare-up represented an aggravation rather than a new injury. Both emphasized the continuity of claimant's symptoms since the 1984 injury and stated that the work incident in March 1985 did not independently contribute to a worsening of claimant's underlying condition. Dr. Howell diagnosed claimant's original injury as a strain of the left sacroiliac joint and testified convincingly in support of his diagnosis and conclusions at the hearing.

Claimant testified that he had been continuously symptomatic from the time of the 1984 injury through the time of the hearing. He stated that he quit seeking treatment from Dr. Cichoke a few weeks after his 1984 injury because the treatment was not improving his condition. Claimant also testified that he had experienced radicular pain in his legs at the time of the 1984 injury, although the pain was not as severe as that which he experienced in 1985.

In order for Wausau to shift responsibility for claimant's low back injury to Unigard, Wausau must establish that claimant's work activity after Unigard became the insurer independently contributed to a worsening of the claimant's underlying low back condition. See Hensel Phipps Construction Co. v. Mirich, 81 Or App 290, 294 (1986); Eva L. Doner/Staley, 38 Van Natta 1280 (1986). After our de novo review of the record, we conclude that the Referee erred in finding that the work incident in March 1985 independently contributed to a worsening of claimant's underlying low back condition. Dr. Cichoke's opinion that claimant had sustained a new injury was based upon the erroneous premise that claimant was apparently asymptomatic for nearly a year prior to the March 1985 incident. Dr. Rosenbaum's opinion to the same effect was based upon the erroneous premise that claimant experienced symptoms in 1985 which were qualitatively different than those he experienced in 1984. The opinions of Drs. Eubanks and Howell were based upon accurate history and are well-reasoned. We find them more convincing. See Somers v. SAIF, 77 Or App 259, 263 (1986). We conclude that claimant sustained an aggravation and not a new injury in March 1985. We thus reverse that portion of the Referee's order that upheld Wausau's denial and set aside Unigard's denial.

After treating claimant, Dr. Eubanks declared him medically stationary on June 19, 1985. Nothing in the record suggests that claimant has not remained medically stationary since that time. Under these circumstances, we proceed to the issue of extent of disability. See ORS 656.268(1); OAR 438-06-040, 438-08-020; Ronald R. Rust, 38 Van Natta 559, 561 (1986).

After our de novo review of the record, we find no persuasive evidence which establishes that claimant has sustained any permanent impairment. Both Dr. Cichoke and Dr. Eubanks indicated that claimant had no permanent impairment. Claimant has returned to his regular employment without restrictions. We, therefore, reverse that portion of the Referee's order that awarded claimant 10 percent (32 degrees) unscheduled permanent partial disability.

We reject claimant's contention that his attorney is entitled to insurer-paid attorney fees for services at the hearing and on Board review on the responsibility issue. This case falls squarely within the rule of Petshow v. Farm Bureau Insurance Co., 76 Or App 563, 571 (1985), rev den 300 Or 722 (1986).

#### ORDER

The Referee's order dated April 25, 1986 is reversed. The denial issued by Unigard Insurance Company on May 31, 1985 is reinstated and upheld. Wausau Insurance Company's denial of claimant's aggravation claim is set aside.

TONY L. KAUTZ, Claimant	WCB 86-00700
Michael B. Dye, Claimant's Attorney	December 17, 1986
Roberts, et al., Defense Attorneys	Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Howell's order which upheld the insurer's denial of his claim for bilateral carpal tunnel syndrome. On review, claimant asserts that he suffered a compensable occupational injury.

Claimant further contends that the Referee erred in declining to keep the record open after the hearing to allow his treating physician the opportunity to respond to: (1) the testimony of an independent medical examiner; and (2) medical articles upon which the examiner based his opinion. To remedy this allegedly erroneous ruling, claimant requests that this matter be remanded for the taking of additional evidence.

We deny the motion for remand. After conducting our de novo review, we find that the record has not been "improperly, incompletely or otherwise insufficiently developed." ORS 656.295(5). Moreover, it has not been shown that this evidence was unobtainable with due diligence before the hearing. Delfina P. Lopez, 37 Van Natta 164, 170 (1985). Finally, we note that the medical literature was admitted for the limited purpose of further demonstrating the basis of the medical examiner's opinion. The literature was neither offered, admitted, nor considered as direct evidence concerning the compensability issue.

We turn to the merits. Following our de novo review of the medical and lay evidence, we are not persuaded that claimant's bilateral carpal tunnel syndrome is compensable. We would reach this conclusion, regardless of whether this claim is analyzed as an occupational disease or injury. Accordingly, we affirm the Referee's order.

#### ORDER

The Referee's order dated March 17, 1986 is affirmed.

DENNIS L. PRIEST, Claimant  
Thomas O. Carter, Claimant's Attorney  
Schwabe, et al., Defense Attorneys

WCB 85-08762  
December 17, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The insurer requests review of Referee Pferdner's order that: (1) found claimant's claim to have been prematurely closed by the Determination Order dated July 3, 1985; (2) set aside the insurer's denial of claimant's claim for medical services; and (3) denied the insurer's request for an offset of allegedly overpaid temporary total disability compensation. The issues are premature closure, the compensability of medical services and the insurer's entitlement to an offset.

Claimant compensably injured his right knee in March 1985. He had injured the same knee approximately 14 years earlier and the injury had resulted in a medial meniscectomy.

Following the 1985 injury claimant filed a claim for a knee strain and sought medical treatment from Dr. Grossenbacher on March 28, 1985. Dr. Grossenbacher took claimant off work and diagnosed a right knee strain, status post medial meniscectomy. Dr. Grossenbacher did not consider claimant to be a candidate for surgery. By May 9, 1985, claimant exhibited a full range of right knee motion and Dr. Grossenbacher indicated that he could return to work. When claimant was reluctant to return, however, Dr. Grossenbacher recommended a second opinion, finding claimant's claim to present a "confusing picture." Claimant was referred to Dr. Utterback, an orthopedist.

In his June 4, 1985 report, Dr. Utterback opined that the effects of claimant's compensable injury had resolved and that any ongoing knee problem would be consistent with the effects of the prior meniscectomy. Dr. Utterback found claimant medically stationary without permanent impairment. On June 14, 1985 Dr. Grossenbacher agreed with Dr. Utterback's "clinical impression and recommendations." He also suggested that claimant was "nearing medically stationary status" and that no further tests or surgical intervention was needed. Dr. Grossenbacher found claimant capable of employment, modified to reduce the heights at which claimant had regularly worked. Dr. Grossenbacher concluded: "I would strongly recommend direct communication with [claimant] in reference to his ability to perform his usual and customary employment."

A July 3, 1985 Determination Order awarded claimant temporary total disability benefits and found claimant medically stationary as of June 4, 1985, the date of Dr. Utterback's report. On July 17, 1985 Dr. Grossenbacher reiterated his prior statement regarding claimant's ability to be employed. On July 30, 1985, after being asked for his opinion regarding claimant's medically stationary date, Dr. Grossenbacher reviewed his chart notes and interpreted them to read that claimant was stationary on June 26, 1985. He reiterated, however, that claimant had been capable of full-time employment.

Claimant was examined by a panel of Orthopaedic Consultants in August 1985. The Consultants reported that claimant was medically stationary with no impairment, could return to his regular employment without restriction and required no

further medical treatment. The Consultants specifically advised against the performance of an arthroscopy. On September 24, 1985 Dr. Grossenbacher expressed his complete agreement with the Consultants' report.

In October 1985 claimant visited Dr. Zimmerman for another opinion regarding the need for a right knee arthroscopy. Dr. Zimmerman initially found that an arthroscopy was not indicated. In a November 15, 1985 response to an inquiry from the insurer, however, he recommended that claimant be seen by yet another physician, stating:

" . . . I have no way of knowing how much a patient hurts except by asking him. I have no way of evaluating secondary gain by the patient. I must go strictly on what he says. At the present time, this patient states that he has pain which prevents him from working. I am not going to do an arthroscopy because you have asked us not to. But, I have been long enough in the business and so have you, to know that this patient has sought out an attorney, will have the arthroscopy by someone if the surgeon suggests it because he will go to a hearing in which it will be allowed."

Claimant subsequently visited Dr. Vessely and Dr. North for opinions regarding the need for surgery. Dr. Vessely opined that no arthroscopy was indicated and that, even if one were to be performed, it would be to determine the effects of claimant's 14-year-old injury. Dr. Vessely felt that the effects of claimant's March 1985 knee strain were temporary and had resolved. Dr. North requested authorization to perform the arthroscopy, noting that no prior treatment or diagnostic procedure had been effective in determining the cause of claimant's ongoing pain. The insurer denied the authorization on February 11, 1986.

The Referee found claimant to be a credible witness. He believed that claimant has ongoing problems that require medical intervention. It appears that based largely on claimant's testimony, along with the report of Dr. North, the Referee found claimant's requested arthroscopy to be a reasonable and necessary result of the March 1985 compensable injury. He also found claimant's claim to have been prematurely closed on June 4, 1985. The Referee found Dr. Grossenbacher's statement that claimant was stationary on June 26, 1985 to be most persuasive. He therefore awarded claimant temporary total disability benefits for the period of June 4 through June 26, 1985. The Referee's award mooted the issue of an alleged overpayment for that time period.

The insurer argues that claimant was medically stationary on June 4, 1985 and that the Determination Order was correct. We agree. While Dr. Grossenbacher did interpret his chart notes in late July 1985 to indicate that claimant was stationary on June 26, he earlier had indicated his agreement with the "clinical impression" of Dr. Utterback, who had specifically found claimant stationary as of June 4. In addition, Dr. Grossenbacher had consistently stated that claimant was capable of full-time, albeit slightly modified, employment. We interpret the context of Dr. Grossenbacher's reports and

statements to be that he agreed claimant was stationary and ready to resume his regular work as of June 4, 1984. The Determination Order was correct and shall be reinstated. The employer shall be allowed to offset the resulting overpaid temporary total disability from any permanent partial disability compensation to which claimant may become entitled in the future.

The remaining issue is whether the arthroscopy proposed by Dr. North is a reasonable and necessary result of claimant's March 1985 industrial injury. We find that it is not. It is claimant's burden to prove the compensability of proposed medical services. Proof must come by way of a preponderance of the evidence. We generally defer to the the treating physician's opinion regarding the need for medical services, absent persuasive reasons not to do so. Weiland v. SAIF, 64 Or App 810 (1983). The treating physician here is Dr. Grossenbacher. He has consistently opined that arthroscopy is not necessary. He is joined in that opinion by Drs. Utterback, Vessely and a panel of Orthopaedic Consultants. Only Dr. North has definitively stated that arthroscopy is necessary. Dr. North, however, did not see claimant until several months after the controversy arose. Under these circumstances, we find the opinion of the treating physician to be more persuasive. The insurer's denial of the proposed arthroscopy shall be reinstated.

#### ORDER

The Referee's order dated May 30, 1986 is reversed. The Determination Order dated July 3, 1985 is reinstated. The insurer's denial of claimant's proposed arthroscopy is reinstated.

BILLY A. SPRINGS, Claimant  
Roll, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-11633  
December 17, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of Referee Galton's order that awarded claimant a 25 percent penalty for SAIF's unreasonable delay and withholding of temporary disability benefits and awarded claimant's attorney \$1,350 as a reasonable attorney fee. The issues are penalties and attorney fees.

Claimant's claim was reopened pursuant to a stipulation and order of September 21, 1984 and claimant began receiving temporary disability benefits. The claim ledger reflects that claimant's temporary disability benefits were consistently paid late from May 20, 1985 through April 7, 1986. SAIF concedes that many of the payments made during this period were late, but argues that a penalty should only be assessed against payments over seven days late. SAIF asserts that this seven day delay is permitted by OAR 436-60-150(4) in order to facilitate processing and avoid overpayments. Claimant argues that OAR 436-60-150(4) is violative of Worker's Compensation Law and its underlying policies.

We note from the outset that we are without authority to determine the validity of an administrative rule. ORS 183.400; James R. Frank, 37 Van Natta 1555, 1557 (1985). Further, it is entirely reasonable for an insurer to comply with a validly adopted administrative rule. John Keller, 38 Van Natta 1351 (November 11, 1986)

OAR 436-60-150 permitted SAIF to be seven days behind in the payment of temporary disability. Thus, SAIF should be penalized only for each payment which was over seven days late between the period May 20, 1985 through April 7, 1986. We also conclude that the 25 percent penalty assessed by the Referee is warranted as SAIF repeatedly and consistently made late payments for almost a year and provided no excuse for the lateness of these payments.

In determining the reasonableness of attorney fees, the factors considered are: (1) time devoted to the case; (2) complexity of the issues involved; (3) value of the interest involved; (4) skill and standing of counsel; (5) nature of the proceedings and; (6) results secured. Barbara A. Wheeler, 37 Van Natta 122 (1985).

Claimant's attorney provided a fee petition documenting 6.75 hours expended on this case. Based on the above criteria we find that \$650 is a reasonable attorney fee for services at the Hearings level.

ORDER

The Referee's order dated May 16, 1986 is modified. The SAIF Corporation is ordered to pay a 25 percent penalty assessed against the temporary disability benefits paid over seven days late between May 20, 1985 to April 17, 1986. Claimant's attorney is awarded \$650 for services at the Hearings level, to be paid by the SAIF Corporation.

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RICHARD R. BLACKLEDGE, Claimant  
Vick & Associates, Claimant's Attorneys  
Rankin, et al., Defense Attorneys

WCB 85-08336  
December 18, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Knapp's order which upheld the self-insured employer's denials of: (1) his aggravation claim for a back injury; and (2) his chiropractic treatments in excess of two treatments per month. On review, claimant contends that his condition has worsened and that all of his chiropractic treatments are compensable.

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

Following our de novo review of the medical and lay evidence, we are not persuaded that, since the last award of compensation, claimant's symptoms attributable to his compensable injury have increased or that his underlying condition has worsened resulting in a loss of earning capacity. See Smith v. SAIF, 302 Or 109 (October 21, 1986). Furthermore, claimant has not met his burden of proving that more than two chiropractic treatments per month are reasonable and necessary. See James v. Kemper Insurance Co., 81 Or App 80, 84 (1986).

ORDER

The Referee's order dated April 10, 1986 is affirmed.

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MICHAEL J. BORISOFF, Claimant  
Malagon & Moore, Claimant's Attorneys  
Schwabe, et al., Defense Attorneys  
Keith D. Skelton, Defense Attorney  
E. Jay Perry, Defense Attorney  
SAIF Corp Legal, Defense Attorney

WCB 84-13723, 85-06521, 85-07303  
& 85-09718  
December 18, 1986  
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Aetna Insurance Company requests review of Referee Wasley's order that found claimant's aggravation claim compensable and found Aetna responsible for claimant's low back condition. Compensability was expressly raised as an issue in Aetna's request for Board review, but was not argued in its brief. Claimant submitted a two-page brief on Board review. The issues are compensability and responsibility.

The Board affirms and adopts the order of the Referee. Because compensability was technically raised as an issue by Aetna and claimant's attorney submitted a brief on Board review, a nominal insurer-paid attorney fee is in order for services on Board review.

#### ORDER

The Referee's order dated February 7, 1986 is affirmed. Claimant's attorney is awarded \$150 for services on Board review, to be paid by Aetna Insurance Company.

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EUGENE DIAS, Claimant  
Michael B. Dye, Claimant's Attorney  
Davis, et al., Defense Attorneys

WCB 84-07798  
December 18, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Leahy's order which: (1) found that his low back injury claim had not been prematurely closed; (2) upheld the insurer's denial of his aggravation claim; (3) affirmed a September 20, 1983 Determination Order that awarded no permanent disability in addition to the 15 percent (48 degrees) unscheduled permanent disability he had previously received; and (4) upheld a "de facto" denial of medical treatment. On review, the issues are premature closure, aggravation, extent of unscheduled permanent disability, and compensability of medical treatment.

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

Following our de novo review of the medical and lay evidence, we agree with the Referee that: (1) claimant's low back injury claim was not prematurely closed; (2) neither his symptoms nor his compensable condition have worsened since the last award of compensation; (3) his previous award of unscheduled permanent disability is adequate compensation for his compensable injury; and (4) the allegedly unpaid medical services are not compensable. In reaching these conclusions, we do not find Dr. Chester's recent opinion concerning a causal connection between claimant's current diagnosis and his "original" injury to be persuasive. We consider this opinion to be couched in terms of

possibility and, as such, insufficient to sustain claimant's burden of proof. See Gormley v. SAIF, 52 Or App 1055 (1981)..

ORDER

The Referee's order dated March 31, 1986 is affirmed.

LLOYD L. EDDINGS, Claimant  
Welch, et al., Claimant's Attorneys  
Bottini & Bottini, Defense Attorneys

WCB 85-10711  
December 18, 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 insurer's denial of his medical services claim for chiropractic treatments. On review, claimant contends that his treatments are compensable. We agree and reverse.

Claimant was 31 years of age at the time of hearing. In March 1984, he filed a claim for back pain, attributing his problem to his work activities as a route driver for a freight company. Dr. Cowan, claimant's treating chiropractor, diagnosed chronic moderate lumbosacral sprain/strain with associated muscular spasms. Treatment has been conservative, primarily consisting of manipulations and physiotherapy.

In November 1984 Dr. Cowan considered claimant's condition medically stationary. Stating that claimant had shown significant residuals from his injury, Dr. Cowan recommended an avoidance of heavy lifting activities. In December 1984, a Determination Order issued, awarding 10 percent unscheduled permanent disability. This award was subsequently affirmed on appeal.

In April 1985 claimant began his current duties as a truck dispatcher. His work requires "quite a bit of walking and standing," which eventually bothers his back condition. Claimant considered Dr. Cowan's treatments "very" helpful to his condition. These treatments, which occur every two or three weeks, "keep [him] at least at board so [he] can work."

In June 1985 Dr. Thompson, orthopedist, performed an independent medical examination. Claimant's primary complaint was low back pain, prompted by prolonged standing, sitting, or bending. Noting a slight muscle spasm and tightness, Dr. Thompson diagnosed chronic mild lumbosacral strain. Based on claimant's subjective complaints and the muscle spasm, Dr. Thompson rated permanent impairment in the minimal to mild category. Rather than recommending further chiropractic treatments, Dr. Thompson suggested an exercise program with instruction in proper body mechanics.

Also in June 1985 the Independent Chiropractic Consultants performed an independent medical examination. Claimant characterized his low back symptoms as a dull ache with occasional sharp leg pain. According to the Consultants, he stated that he was capable of engaging in several physical activities. These activities included bowling, weight lifting, basketball, mountain climbing, and rappelling. Based on

claimant's capabilities and the lack of objective findings, the Consultants concluded that no further benefit would be derived from continued chiropractic care.

In August 1985 the insurer denied responsibility for claimant's future chiropractic treatment. The insurer considered such treatments "no longer reasonable or necessary to further improve [claimant's] condition."

Dr. Cowan testified that he has been claimant's treating physician since March 1984. Between March 1984 and March 1985, he treated claimant approximately two to three times a week. However, between March 1985 and March 1986, the treatments averaged two per month. As a result of a subsequent March 1986 injury, claimant's medical bills are currently being submitted to another employer.

Dr. Cowan considered the disputed treatments to be both reasonable and necessary to accommodate the residual effects from claimant's March 1984 compensable condition. Moreover, in Dr. Cowan's opinion, the nature and frequency of these treatments were also reasonable and necessary.

Claimant admitted that he had formerly engaged in physical activities. However, he had discontinued these activities by the time of the Chiropractic Consultants' June 1985 examination. Claimant further stated that Dr. Cowan was aware of his past activities. Dr. Cowan considered bowling and rock climbing to be strenuous activities. Yet, it was his recollection that claimant no longer performed these activities.

The Referee reasoned that the insurer could not unilaterally absolve itself from responsibility for claimant's future medical treatment resulting from his compensable injury. Consequently, that portion of the insurer's denial which purported to deny any further chiropractic treatment was set aside. However, the Referee was unpersuaded that Dr. Cowan's treatments between the August 1985 denial and the March 1986 new injury were related to claimant's compensable injury. Therefore, those treatments were found to be noncompensable.

For every compensable injury, the insurer shall provide medical services for conditions resulting from the injury for such period as the nature of the injury or the process of the recovery requires. ORS 656.245(1). Medical expenses for purely palliative purposes are recoverable where they are necessarily and reasonably incurred in the treatment of an injury for which permanent partial disability has been awarded. Wetzel v. Goodwin Brothers, 50 Or App 101, 108 (1981). Treatments can also be compensable when obtained only as needed to relieve pain and to enable a claimant to continue working. West v. SAIF, 74 Or App 317 (1985).

Following our de novo review of the medical and lay evidence, we are persuaded that the disputed medical services were reasonably and necessarily incurred in the treatment of claimant's compensable condition. In reaching this conclusion, we find the opinion of Dr. Cowan most persuasive. As the treating doctor, his opinion is generally entitled to greater weight, absent persuasive reasons to the contrary. Weiland v. SAIF, 64 Or App 810 (1983); Nancy E. Cudaback, 37 Van Natta 1580, withdrawn on other grounds 37 Van Natta 1596 (1985), republished 38 Van Natta 423 (1986).

The insurer asserts that there are several deficiencies in Dr. Cowan's opinions. Specifically, it argues that Dr. Cowan had previously considered claimant's condition resolved without permanent residuals. In addition, it contends that Dr. Cowan was unaware of the physical nature of claimant's recreational activities. We find neither assertion particularly persuasive. Occasionally, Dr. Cowan had offered reports indicating that claimant's condition had resolved without permanent restrictions. However, Dr. Cowan also consistently predicted future exacerbations of claimant's low back condition if he returned to strenuous activities. Furthermore, the gist from Dr. Cowan's opinions was that claimant had suffered permanent impairment as a result of his compensable condition. Finally, Dr. Cowan's understanding that claimant was no longer engaged in rigorous physical activity was consistent with claimant's testimony. Consequently, we do not consider Dr. Cowan's history inaccurate.

Although several consulting physicians did not support further chiropractic treatments, they acknowledged the presence of claimant's subjective complaints. Moreover, Dr. Thompson opined that claimant had sustained minimal to mild permanent impairment. This determination roughly coincides with claimant's 10 percent permanent disability award.

Dr. Cowan's treatments reduced the pain from claimant's permanent residuals and enabled him to continue working. Considering his previous permanent disability award, we do not consider it unreasonable for claimant to periodically require these palliative treatments. Furthermore, these occasional treatments have arguably permitted him to continue working, thereby avoiding additional temporary disability. Accordingly, we conclude that the chiropractic treatments in dispute are compensable.

#### ORDER

The Referee's order dated June 2, 1986 is affirmed in part and reversed in part. The insurer's August 23, 1985 denial is set aside in its entirety. For prevailing on the denial issue, claimant's attorney is awarded \$500 for services at the hearing and \$500 for services on Board review, to be paid by the insurer. The remainder of the Referee's order is affirmed.

HAROLD D. HAVELOCK, Claimant  
Malagon & Moore, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-14448  
December 18, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The SAIF Corporation requests review of Referee T. Lavere Johnson's order that awarded claimant 160 degrees for 50 percent unscheduled permanent partial disability in lieu of a Determination Order award of 80 degrees for 25 percent unscheduled disability for the low back. The issue is extent of unscheduled permanent partial disability. We modify.

Claimant is a former truck driver who compensably injured his low back in April 1984. The injury initially involved conservative treatment and the claim was closed by Determination Order on January 10, 1985 with an award of 25 percent unscheduled disability. It was reopened about three months later, however,

when claimant's injury necessitated a decompression laminectomy for a herniated nucleus pulposus at L4-5. After a period of recovery, claimant was awarded further temporary total disability compensation by way of Determination Order on January 9, 1986. No further permanent disability was awarded, however.

We interpret the medical evidence to be that claimant has mild to mildly moderate permanent impairment as a result of his compensable injury. He is limited in his ability to bend, sit, stand, walk, lift and squat and he suffers from disabling low back pain. He was 50 years of age at the time of the hearing and had completed his GED. He had not returned to his regular truck driving employment due to the disabling effects of his injury.

After his injury, claimant acquired training as a helicopter pilot, logging a total of 51 hours of helicopter flying time and an additional 270 flight hours in fixed-wing aircraft. He has engaged in a search for work as a helicopter pilot, but has been unsuccessful due to what appears to be a combination of a depressed labor market and claimant's potential need for additional training.

The Referee found claimant to be a credible witness and found claimant entitled to twice the award made by the Evaluation Division. While we agree that claimant is entitled to more than that awarded by the Division, we find the Referee's award of 50 percent excessive. Our review of the record, including claimant's impairment, age, education, work history and other pertinent social and vocational factors persuades us that claimant will be adequately compensated by an award of 40 percent unscheduled permanent partial disability. The Referee's award will be modified accordingly.

#### ORDER

The Referee's order dated June 24, 1986 is modified. In lieu of all prior awards, claimant is awarded 128 degrees for 40 percent unscheduled permanent partial disability for the low back. Claimant's attorney's fee shall be modified accordingly.

KENNETH D. LINDAAS, Claimant  
Harper, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-08998  
December 18, 1986  
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The SAIF Corporation requests review of that portion of Referee Fink's order that granted claimant an award of permanent total disability in lieu of an award by Determination Order of 25 percent (80 degrees) unscheduled permanent partial disability for his back. The issue is extent of disability, including permanent total disability.

Claimant injured his neck, upper back and lower back in October 1984 in the course of his employment as a carpenter when he was temporarily pinned between the bucket of a gravel loader and a steel beam. Claimant sought treatment from a chiropractor, Dr. Powers, and continued working for the next month. He then left work complaining of pain throughout his back with some radiation of pain into his right leg.

Claimant was examined by an orthopedist, Dr. Duff, in

January 1985. Dr. Duff diagnosed thoracic and lumbar strain, preexisting degenerative lumbar disc disease and lumbosacral spondylolisthesis. He thought that claimant was medically stationary and rated claimant's impairment as mild. This rating included the impairment associated with claimant's preexisting conditions. Dr. Duff did not think that further chiropractic treatment was warranted.

In May 1985, claimant was examined by Dr. Gatterman, a chiropractor. She diagnosed claimant's back condition as a dorsolumbar strain superimposed on preexisting degenerative spondylosis of the entire spine. She stated that claimant's condition was medically stationary and indicated that claimant could return to regular work without restrictions.

Claimant's claim was closed by Determination Order dated June 27, 1985 with an award of 25 percent (80 degrees) unscheduled permanent partial disability.

In early December 1985, Dr. Powers gave his diagnosis as subluxations of the upper and lower thoracic areas with associated muscle spasms. He rated claimant's impairment at 80 percent.

In mid-December 1985, claimant underwent an extensive vocational assessment which included testing of his standing, walking, sitting, lifting and other work tolerances. The vocational evaluator who performed the assessment concluded that claimant was capable of full-time employment in the medium category and recommended vocational assistance in the form of a direct employment program.

In late December 1985, claimant was examined by Dr. Dietrich, a neurological surgeon. Dr. Dietrich noted preexisting degenerative changes throughout claimant's spine and stated that claimant was unable to perform his previous job or other heavy work. He nonetheless stated that claimant was capable of gainful employment in a lighter category.

Claimant was examined by another orthopedist, Dr. Pasquesi, in February 1986. Dr. Pasquesi diagnosed preexisting degenerative disc disease in the lumbar and thoracic areas and preexisting spondylolisthesis. He rated claimant's overall impairment at 15 percent and indicated that claimant could return to gainful employment as a carpenter if he was able to avoid repetitive bending, stooping and twisting.

In March 1986, claimant's vocational counselor recommended that claimant be placed in an authorized training program. The counselor thought that despite the recommendations made by the vocational evaluator "[claimant's] physical restrictions would negate successful return to work options given his present skills and ability levels."

Later in March 1986, Dr. Powers completed a physical capacities assessment of claimant. The assessment gave a lifting and carrying limitation of 35 pounds on an occasional basis.

At the hearing, claimant testified at length regarding pain in his low back, mid back and neck and some weakness in his left leg. Claimant did not think he was capable of performing any work without some kind of vocational training. When asked whether he had looked for employment since his injury claimant stated that

he had "talked to a couple of guys about a job," but had not done much else because he had not been released for work by Dr. Powers until a few days before the hearing.

Emphasizing claimant's testimony, the Referee concluded that claimant was incapable of regular gainful employment without vocational training and found claimant permanently and totally disabled under the odd-lot doctrine. He excused claimant's minimal efforts at finding employment on the basis that such efforts were, "in all practicality," futile.

Although there is some evidence to support the Referee's conclusions, we conclude that the evidence as a whole preponderates strongly against a finding of permanent total disability. All of the doctors who have examined claimant, including claimant's treating chiropractor, Dr. Powers, have indicated that claimant is not so disabled as to be precluded from regular, gainful employment. The evidence preponderates in favor of the conclusion that claimant retains the ability to engage in gainful employment in the light to medium categories. Claimant has made little, if any, real effort to find employment. Under these circumstances, claimant has failed to carry his burden of proving that he is permanently incapacitated from regularly performing work at a gainful and suitable occupation. See ORS 656.206(1)(a) & (3). We thus turn to an assessment of the extent of claimant's permanent partial disability.

In rating the extent of the unscheduled permanent partial disability for claimant's back, 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 apply these rules as guidelines, not as restrictive mechanical formulas. See Harwell v. Argonaut Insurance Co., 296 Or 505, 510 (1984); Howerton v. SAIF, 70 Or App 99, 102 (1984).

Claimant was 52 years old at the time of the hearing. He is of average intelligence and has a fifth grade formal education. His work experience is almost entirely in the area of carpentry, but includes a broad range of skills in the residential, commercial and bridge building segments of the industry. He has also been employed as an iron worker.

Following our de novo review of the medical and lay evidence, we conclude that claimant's back impairment is in the minimal range. Exercising our independent judgment in light of claimant's level of impairment and the relevant social and vocational factors, we conclude that an award of 160 degrees for 50 percent unscheduled permanent partial disability adequately and appropriately compensates claimant for the permanent loss of earning capacity due to the industrial injury.

No offset for compensation paid pursuant to the Referee's award of permanent total disability will be authorized. See United Medical Laboratories v. Bohnke, 81 Or App 144, 146 (1986).

#### ORDER

The Referee's order dated April 2, 1986 is reversed. Claimant is awarded 160 degrees for 50 percent unscheduled permanent partial disability for his back in lieu of the award by Determination Order of 25 percent (80 degrees). Claimant's attorney's fee shall be adjusted accordingly.

RICHARD L. LUNSFORD, Claimant  
Velure & Bruce, Claimant's Attorneys  
Schwabe, et al., Defense Attorneys

WCB 85-10494  
December 18, 1986  
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The self-insured employer requests review of that portion of Referee Brown's order that awarded claimant an attorney fee of \$1,200 at hearing for defending against the employer's cross-appeal on the issue of extent of unscheduled disability. The employer argues that claimant is entitled to no fee or, in the alternative, that the fee awarded by the Referee was excessive. Claimant cross-requests review of that portion of the order that affirmed a Determination Order award of 128 degrees for 40 percent unscheduled permanent partial disability for the right hip. The issues are attorney fees and extent of unscheduled disability.

We affirm that portion of the Referee's order pertaining to the extent of claimant's unscheduled disability. We reverse that portion of the order that awarded claimant an attorney fee for his defense against the employer's cross-appeal.

Claimant sustained a compensable right hip fracture in July 1983. He ultimately received an award of 40 percent unscheduled disability from an August 1985 Determination Order. Claimant requested a hearing on the Order, asserting entitlement to a greater award of unscheduled disability. The employer cross-appealed on the issue of extent. Claimant did not subsequently withdraw his request for hearing on the extent issue.

The Referee affirmed the Determination Order and awarded claimant an attorney fee for his defense against the employer's cross-appeal, citing Travis v. Liberty Mutual Insurance, 79 Or App 126 (1986). In Travis, the court concluded that an insurer's cross-request on the issue of extent of disability constituted a request "initiated by an employer or insurer." It held, therefore, that a successful defense against such a request would entitle claimant to an attorney fee pursuant to ORS 656.382(2).

Subsequent to the Referee's order, we decided Richard M. Deskins, 38 Van Natta 494, on reconsideration, 38 Van Natta 825 (1986), a case factually similar to the present case. In Deskins, we found OAR 438-47-075 to provide that, barring an appellant's withdrawal of a request for hearing and the cross-appellant's decision to go forward with its cross-appeal, the cross-appellant is not considered an "initiating" party for purposes of awarding attorney fees pursuant to ORS 656.382(2). We also noted that the Travis court had not addressed the application of the administrative rule in reaching its decision. Concluding that we were bound by the clear dictates of our own rules, see Wattenbarger v. Boise Cascade Corp., 301 Or 12, 15 (1986), we followed OAR 438-47-075 and denied claimant's request for an attorney fee for defending against an insurer's cross-appeal. Deskins, 38 Van Natta at 826.

OAR 438-47-075, as interpreted in Deskins, controls the present case. Claimant requested a hearing on the issue of extent of disability. The employer cross-appealed on the same issue. Claimant did not subsequently withdraw his request for hearing. Under the pertinent administrative rule, the employer was not considered an "initiating" party so as to entitle claimant to an attorney fee upon his successful defense against the cross-appeal. The Referee's award of an attorney fee shall be reversed.

ORDER

The Referee's order dated April 28, 1986 is reversed in part and affirmed in part. That portion of the order that awarded claimant an attorney fee for his defense against the self-insured employer's cross-appeal on the issue of extent of disability is reversed. The remainder of the order is affirmed.

ROBIN L. MORGAN, Claimant  
Flaxel, et al., Claimant's Attorneys  
Foss, et al., Defense Attorneys

WCB 85-13676  
December 18, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The self-insured employer requests review of Referee Michael V. Johnson's order that set aside its denial of claimant's occupational disease claim for bilateral foot problems. The issue is compensability. We reverse.

Claimant is a lumber grader who had worked in that capacity for approximately six years at the time of the hearing. He had worked for the present employer for three years when, in December 1984, the employer's mill shut down for a six-month layoff. During the layoff claimant worked as a contractor for the Department of Veterans' Affairs, winterizing and cleaning repossessed houses. With the help of his wife, claimant cleaned approximately 40 houses during the six-month period, working approximately four hours on each house. During the same period, he winterized approximately ten houses, working 16 to 20 hours on each house. In addition, claimant served as a volunteer, assisting elderly people with their household chores.

Claimant returned to the employer's mill in May 1985. He worked eight hours per day for approximately two weeks and then assumed a permanent ten-hour-per-day, four-day-per-week schedule. Claimant testified on direct examination that he had experienced no foot problems before returning to the mill. Upon returning he immediately noticed tiredness and pain that progressively worsened as he continued to work. On cross-examination, however, claimant admitted that he noticed bilateral foot symptoms while performing certain house cleaning chores during his employment with the Department of Veterans' Affairs.

Although claimant never missed time from work as a result of his foot symptoms, he sought medical treatment from Dr. Martin in July 1985. It appears that Dr. Martin is a general practitioner, although the record is unclear. In a July 27, 1985 chart note, Dr. Martin noted that claimant had experienced the onset of tired feet over a period of one and a half years, and that upon returning to work after the layoff, he experienced foot pain. Dr. Martin also took a history that claimant worked thirteen hours per day and had suffered from a thyroid deficiency for "many years." Although Dr. Martin was unable clinically to reproduce the symptoms about which claimant complained, he diagnosed bilateral plantar fasciitis from claimant's description of symptoms.

Claimant submitted a claim for occupational disease on July 17, 1985, alleging that long hours of standing on hard surfaces at work had resulted in his bilateral foot problems. The

employer issued a denial on September 13, 1985. In December 1985, Dr. Martin was asked his opinion regarding the cause of claimant's condition. After noting claimant's history of 13-hour work days and his being asymptomatic prior to his post-layoff return to the mill, Dr. Martin stated:

"Based on the patient's history of having been off work for six months and suddenly resuming standing on his feet all day, it is quite probable that the symptoms were caused by his sudden standing for a long period of time . . . The diagnosis of plantar fasciitis was arrived [at] based on the patient's description of the symptoms, but could not be reproduced during this visit."

Dr. Martin was subsequently asked whether claimant's return to work was the major contributing cause of his condition. Dr. Martin responded: "Probably yes - but he had done the same work before without any adverse effects."

In December 1985, the employer wrote a letter to Dr. Bradley, an endocrinologist, asking for an opinion regarding the possible relationship between claimant's long-standing thyroid condition and his foot problems. The employer's letter asked if it would be correct to assume that there was, in fact, a relationship. Dr. Bradley responded by returning the letter with the words "You are correct" written in at the bottom.

The Referee set aside the employer's denial, concluding that claimant had proven that his work activity was the major cause of a worsening of his underlying condition. The Referee concluded that claimant had no foot problems prior to his post-layoff return to work at the mill. He further concluded that although there was a suggestion that claimant's thyroid condition was a cause of his foot problems, the endocrinologist's statement in that regard was too general to defeat the claim.

It is claimant's burden to prove his claim by a preponderance of the evidence. Because the claim is one for occupational disease, it must be shown that claimant's work activity was the major contributing cause of the development of his foot condition. Dethlefs v. Hyster Co., 295 Or 298 (1983). We find this claim to be of sufficient medical complexity that proof must come by way of expert medical evidence. Kassahn v. Publishers Paper Co., 76 Or App 105 (1985).

The medical evidence in the present case is equivocal. The evidence offered by the employer, while certainly not persuasive in and of itself, does raise an inference that claimant's foot problems may be of a systemic origin, rather than work-related. Claimant has offered no rebuttal evidence to the opinion of the endocrinologist. The evidence favorable to claimant's claim comes from Dr. Martin. Dr. Martin's opinion, however, is based almost exclusively on the history given by claimant. The accuracy of that history, therefore, is critical to a determination of compensability. See Miller v. Granite Const. Co., 28 Or App 478 (1977).

The history given by claimant to Dr. Martin contained two significant errors: 1) that claimant worked 13 hours per day,

when in fact he worked only ten; and 2) that claimant's foot symptoms occurred for the first time after he returned to work following the layoff. As previously noted, claimant's cross-examination testimony was that at least some of his symptoms arose while he was employed by the Department of Veterans' Affairs before he returned to work at the mill. We do not know what Dr. Martin's opinion would have been had he been given an accurate history. We cannot speculate, and we cannot rely on Dr. Martin's opinion, given the inaccurate basis upon which it was rendered.

Claimant's remaining evidence consists of an asserted temporal relationship between his return to work and the return of his foot problems. The existence of a temporal relationship, however, is generally insufficient to sustain a claim, Edwards v. SAIF, 30 Or App 21 (1977), particularly when the claim is not supported by persuasive medical opinion.

We conclude that claimant has failed to prove that his foot problems are compensable. The Referee's order shall be reversed.

ORDER

The Referee's order dated June 5, 1986 is reversed.

STEPHEN VINZANT, Claimant	WCB 85-04009 & 85-09682
Robert Chapman, Claimant's Attorney	December 18, 1986
Mitchell, et al., Defense Attorneys	Order on Review
Black, et al., Defense Attorneys	
Myrick, et al., Defense Attorneys	

Reviewed by Board Members Ferris and McMurdo.

SWF Industries, a self-insured employer, requests review of Referee Mongrain's order that set aside its aggravation denial of claimant's low back condition and upheld Boise Cascade Corporation's denial of claimant's new injury claim for the same condition. The issue is responsibility.

We affirm the Referee's order with the following comment. This is a successive injury case involving an accepted injury during the first employment, followed by a second period of disability occurring during a second employment. Claimant's claims for aggravation and new injury following the second period of disability were denied. Among the Referee's analyses was a reference to a rebuttable presumption created against the last employer. See Industrial Indemnity Co. v. Kearns, 70 Or App 583 (1984).

While we agree with the result reached by the Referee, i.e., that claimant's first employer remains responsible for his low back condition, we disagree with the Referee's reference to Kearns, supra. The Kearns "rebuttable presumption" applies to cases involving multiple accepted claims. In successive injury cases such as the present case, however, where only the original claim has been accepted, Kearns does not apply. Stanley C. Phipps, 38 Van Natta 13 (1986). Rather, the correct standard is set forth in Hensel Phelps Const. Co. v. Mirich, 81 Or App 290 (1986), wherein the court held that in order for liability to shift from the first employer to the last, there must be persuasive evidence that the last employment actually contributed to the worsening of the claimant's underlying condition. There is no such persuasive evidence in the present case.

Although it was not seriously contested, the compensability of claimant's low back condition was an issue preserved by Boise Cascade Corporation on Board review. It was necessary, therefore, for claimant to defend the compensability of his back condition. Claimant has prevailed on Board review. An attorney fee is therefore appropriate. Because Boise Cascade preserved the compensability issue on Board review, it is responsible for claimant's attorney fee. See Ronald. J. Broussard, 38 Van Natta 59 (1986), aff'd mem. 82 Or App 550 (1986).

ORDER

The Referee's order dated April 23, 1986 is affirmed. Claimant's attorney is awarded a fee of \$400 for service on Board review, to be paid by Boise Cascade Corporation.

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JACK D. WHITE, Claimant  
Cash Perrine, Claimant's Attorney  
Roberts, et al., Defense Attorneys

WCB 85-14644  
December 18, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Myers' Order on Reconsideration which: (1) upheld the self-insured employer's denial of his aggravation claim for a low back injury; and (2) declined to assess penalties and attorney fees for allegedly unreasonable claims processing. On review, claimant contends that his condition has worsened and that the employer's conduct was unreasonable.

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

Following our de novo review of the medical and lay evidence, we are neither persuaded that, since the last award of compensation, claimant's symptoms attributable to his compensable injury have increased nor that his underlying condition has worsened resulting in a loss of earning capacity. See Smith v. SAIF, 302 Or 109 (October 21, 1986). Furthermore, we agree with the Referee's conclusion that although the employer's denial was unquestionably late, there are no amounts "then due" either at the time the objectionable conduct occurred or at the time of the hearing, upon which to base a penalty. ORS 656.262(10); Weyerhaeuser Co. v. Bergstrom, 77 Or App 425, 428 (1986); EBI Companies v. Thomas, 66 Or App 105, 111 (1983); Kosanke v. SAIF, 41 Or App 17, 21 (1979); Deloris J. Spores, 37 Van Natta 1169, 1171 (1985); Harold A. Lester, 37 Van Natta 745 (1985). Finally, inasmuch as the employer did not unreasonably resist the payment of compensation, there is also no basis for an attorney fee award. ORS 656.262(10); Miller v. SAIF, 78 Or App 158, 162 (1986).

ORDER

The Referee's Order on Reconsideration dated June 5, 1986 is affirmed.

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

WCB 84-02730  
December 19, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

Claimant requests review of Referee Thye's order which upheld the insurer's partial denial of his current right ankle condition. On review, claimant contends that his current condition is related to his August 1983 compensable right ankle injury.

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

Claimant argues that the insurer's denial is prohibited under the rationale expressed in Bauman v. SAIF, 295 Or 788 (1983). We disagree. Bauman does not preclude the partial denial of compensation for conditions which the insurer has reason to believe are not causally related to the accepted claim. Clyde C. Wyant, 36 Van Natta 1067 (1984).

#### ORDER

The Referee's order dated May 9, 1986 is affirmed.

DANIEL J. BLISS, Claimant  
Patrick K. Mackin, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney  
Rankin, et al., Defense Attorneys

WCB 85-14578, 85-03209 & 85-12391  
December 19, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of those portions of Referee Tuhy's order that set aside its denial of claimant's claim for an injury to the left little finger. SAIF also contests the Referee's admission of Exhibit 112. It asks that the Referee's Interim Order dated January 29, 1986, in which he admitted the exhibit, be reversed. Claimant cross-requests review of those portions of the order that: (1) upheld the Determination Order award of 3.3 degrees for 55 percent scheduled permanent partial disability for the right little finger; (2) denied claimant's request for penalties and attorney fees for SAIF's allegedly late and/or unreasonable denial of the left little finger claim; and (3) awarded claimant's attorney a fee of \$1,200 for services at hearing for overturning SAIF's denial of claimant's finger claim. The issues on review are compensability, extent of scheduled permanent partial disability, whether the Referee erred by admitting Exhibit 112, and penalties and attorney fees.

With regard to the issues of compensability, extent of scheduled disability, the Referee's admission of Exhibit 112 and the Referee's \$1,200 attorney fee award, we affirm. We find, however, that SAIF's late denial of claimant's claim for the left little finger was unreasonable. A penalty and attorney fee are, therefore, appropriate.

We find that claimant's left little finger claim was filed as of April 9, 1985, the date Dr. Carr submitted a report

regarding that finger. On July 31, 1985, Dr. Carr released claimant from work due to the little finger injury. SAIF did not issue its denial until August 20, 1985. SAIF has offered no reasonable explanation for its failure to accept or deny the claim within the 60 days provided by statute. ORS 656.262(6). For its unreasonably late denial SAIF shall be assessed a penalty equal to 25 percent of any unpaid temporary disability compensation to which claimant may be entitled for the period of July 31, 1985 through August 20, 1985. Claimant's attorney shall be awarded a fee for prevailing on the penalty issue. See Spivey v. SAIF, 79 Or App 568 (1986).

#### ORDER

The Referee's order dated March 10, 1986 is reversed in part and affirmed in part. That portion of the order that denied claimant's request for a penalty and attorney fee for SAIF's late denial is reversed. SAIF is assessed a penalty equal to 25 percent of any unpaid temporary disability compensation for the period of July 31, 1985 through August 20, 1985. For prevailing on the penalty issue, claimant's attorney is awarded a fee of \$250, to be paid by the SAIF Corporation. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded \$600 for services on Board review for prevailing on the issue of compensability. The fee shall be paid by the SAIF Corporation.

The Beneficiaries of  
MARTIN CADENA, Claimant (Deceased)  
Scott M. Kelley, Defense Attorney

WCB 83-05546  
Order on Review  
December 19, 1986

Reviewed by Board Members McMurdo and Lewis.

Claimant Maria Ortiz as a beneficiary of the deceased worker requests review of that portion of Referee Knapp's order that denied her claim for survivor's benefits. The insurer cross-requests review of those portions of the Referee's order and Order on Reconsideration that set aside its denial of the death claim for intracerebral hemorrhage and awarded an insurer-paid attorney fee of \$10,000 for services at and before the hearing. The issues are compensability, right to survivor benefits and attorney fees. There is very little, if any, dispute as to the facts underlying the complex medical issue in this case.

At approximately 10:30 a.m. on February 22, 1983 the deceased was working on a ladder with his feet about four to six feet off the ground. At the time he was wearing a hardhat. The ladder slipped and the deceased fell. The actual fall was not seen but was heard by his coworkers, who immediately thereafter observed the deceased on the floor. The deceased signalled that he was unhurt, replaced the ladder and continued working. He completed his shift that day and left work at 4:30 p.m. At some time during the day the deceased complained of some wrist pain which he associated with his fall from the ladder. Claimant testified that the deceased told her of the fall that evening. He appeared to behave normally at dinner. At about 8 p.m. he complained of a headache, took some aspirin and went to bed. The deceased slept normally that night.

The deceased arose at 5 a.m. on February 23, 1983. Claimant testified that he behaved "like a child" that morning in

that he was apparently arguing with one of his children. She replied affirmatively in answer to a question whether the deceased was acting "a bit differently" that morning. She also noted that the deceased had a swollen cheek, which she called to his attention. He said he was all right and left for work. The plant supervisor, Mr. Hart, stated that he saw the deceased that morning and that he looked "fine."

At about 3:45 p.m. on February 23, 1983 Hart encountered the deceased under the sacking bin. He stated the deceased was very talkative and that his cheek was swollen and "drooping" somewhat. He related that the deceased then went into a break area where he complained of a severe headache. He was next seen at about 4 p.m. walking toward his car dragging his leg and staggering. Hart and another coworker went to the deceased and sat him down in his car. He was incoherent and apparently paralyzed on his right side. An ambulance was called and claimant was transported to the emergency room.

Shortly after arrival at the hospital, the deceased suffered a clonic seizure and became comatose. Emergency exploratory neurosurgery was begun by Dr. Nash at 6:30 p.m., consisting of eight burr holes in an attempt to locate a suspected intracerebral bleed. The brain was noted to be "wet and edemaceous" and spontaneously herniated upon exposure. The area of the hemorrhage was established to be on the left at a depth of about six centimeters below the surface of the brain in the posterior parietal area. Approximately 40 cubic centimeters of unclotted blood under "tremendous pressure" was encountered. Dr. Nash noted that prognosis for survival appeared nil. The deceased expired five days later having never regained consciousness.

At issue is whether the intracerebral hemorrhage that resulted in the deceased's death was related to the fall from the ladder the previous day. We fully agree with the Referee that resolution of this question involves highly complex and technical medical issues. After very thorough and complete review of the entire record, we conclude that claimant has failed to establish by a preponderance of the evidence that it is more likely than not that the deceased's death was caused by the fall.

Six medical specialists gave evidence. Drs. O'Halloran and Nash, the pathologist who performed the autopsy and the neurosurgeon who performed the exploratory surgery respectively, initially opined that the hemorrhage was spontaneous and of natural cause. Dr. O'Halloran wrote:

"I performed the autopsy on Mr. Cadena the day after his death, March 1, 1983. I found the cause of death to be a left intracerebral hemorrhage centered in the area of the left corpus striatum. Brain swelling and other small brain hemorrhages were present secondary to this primary hemorrhage. Bronchopneumonia and pulmonary edema were secondary to the coma. No berry aneurysms or arteriovenous malformations were seen. There was no evidence of craniocerebral trauma.

"This cerebral hemorrhage was probably spontaneous, that is, it was due to natural causes. The hemorrhage is in the usual location for a hypertensive hemorrhage or a ruptured microaneurysm. It is unlikely that this cerebral hemorrhage was related to Mr. Cadena's fall for several reasons: First, the fall was inconsequential according to the witness. Second, Mr. Cadena functioned for over 24 hours after the fall without any apparent symptoms. Third, there was no autopsy evidence of head or brain trauma. Fourth, the pathological findings in the brain were typical for spontaneous intracerebral findings."

Drs. Turner and Gill, a pathologist and neuropathologist respectively, opined that claimant's hemorrhage resulted from the entity known as delayed post-traumatic intracerebral hemorrhage. They both acknowledged that the evidence revealed no direct trauma to either the skull or the brain. However, they opined that the force of an abrupt deceleration at the end of a fall would not be allayed by a hard head covering and could be sufficient to cause tearing of blood vessels.

After being made aware of the opinions of Drs. Turner and Gill, both O'Halloran and Nash changed their opinions to state that they were unable to state with any degree of probability whether the hemorrhage was spontaneous or secondary to trauma.

Drs. Smith and Raaf, both experienced neurosurgeons, opined that the hemorrhage was idiopathic and most probably resulted from a congenital arteriovenous malformation that spontaneously ruptured. The lack of arteriovenous malformation being discovered at autopsy was explained by Dr. Smith as: "You have a small venous arterial malformation that leaks, and when the hemorrhage occurs, since a brain hemorrhage is a very destructive thing, the thing that caused the hemorrhage is destroyed and you don't find it." Dr. Raaf specifically questioned Dr. Gill's opinion on the basis of Dr. Gill's previous lack of clinical or other exposure to the delayed post-traumatic intracerebral hemorrhage entity. Dr. Gill acknowledged in his testimony that the deceased was the first alleged case of the entity he had ever encountered.

After his review of this evidence, the Referee's ultimate conclusion was:

"Although there is no objective evidence to determine specifically whether claimant died as a result of spontaneous or delayed post-traumatic intracerebral hemorrhage, I accept as more persuasive the opinions of Drs. Turner and Gill based on their particular medical specialties, the similarity in characteristics of the delayed post-traumatic intracerebral hemorrhage entity with [the deceased's] clinical history and the absence and exclusion of other possible causes of intracerebral hemorrhage in a young [age 27] and healthy individual."

In our review, we conclude that the evidence is equally balanced on every aspect of the conflicting physician opinions. Claimant urges that Somers v. SAIF, 77 Or App 259, 263 (1986), and the other authorities cited therein compel the according of greater weight to the opinions of Drs. Turner and Gill. We do not agree. In Somers the court stated that, "When there is a dispute between medical experts, we give more weight to those medical opinions which are both well-reasoned and based on complete information." Id. We find that all of the medical experts in this case have given well-reasoned and persuasive, albeit different, opinions. We further find that prior to the hearing in this case, all of the medical experts had been completely informed of all of the relevant facts.

On this record, two experts opined that the cause of death was delayed post-traumatic intracerebral hemorrhage, two experts opined that the cause of death was spontaneous, idiopathic intracerebral hemorrhage of natural cause and two experts opined that the cause of death was intracerebral hemorrhage of undetermined cause. Although the experts have acknowledged that, as a general matter, the specialty of pathology is concerned with determining causes of death, there is persuasive evidence that that of neurosurgery is routinely consulted to assist in determining the cause of death in cases involving injury to the brain. We, therefore, find that all experts who gave evidence in this case are equally qualified on the issues and that their opinions are entitled to be weighed equally.

Weighing all of the evidence equally, we are forced to the conclusion that the evidence is in equipoise as to whether the on-the-job fall caused or contributed to the intracerebral hemorrhage that ultimately caused the decedent's death. Claimant has, therefore, failed to sustain her burden of proving that it is more likely than not that decedent's death is compensable under the workers' compensation law. The Referee's order will be reversed. Our reversal of the Referee's order moots the other issues raised on review.

#### ORDER

The Referee's order dated September 23, 1985 is reversed. The insurer's denial of survivor benefits dated April 21, 1983 is reinstated and approved.

DOUGLAS B. DICKENS, Claimant  
Coons & Cole, Claimant's Attorneys  
Brian Pocock, Defense Attorney

WCB 85-04449  
December 19, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Foster's order that upheld the insurer's denial of claimant's claim for bilateral carpal tunnel syndrome. The issue is compensability. The insurer did not file a respondent's brief on Board review.

The basis of the Referee's decision was that claimant had not established a material relationship between his employment as an equipment dismantler and his carpal tunnel syndrome. In reaching this conclusion, the Referee rejected as unreliable electrical nerve conduction studies performed by three physicians. He also concluded that claimant's daily activities

were no different than those performed in a prior employment as a deputy sheriff. After de novo review of the entire record, we conclude that claimant has established the compensability of his claim.

We accept the Referee's findings of fact. We disagree, however, with the Referee's conclusion based upon those findings. Considering the developmental sequence of the medical opinions in this case, we conclude that a preponderance of the medical evidence establishes that between December 1, 1983 and March 22, 1984 claimant had progressively worsening bilateral carpal tunnel syndrome as reflected by motor and sensory latencies confirmed by electrical studies, positive Tinel's and Phalen's signs and clinical symptomatology. While the electrical studies alone may not have established compensability, those studies combined with the other diagnostic results and medical opinions are persuasive. We further conclude that the medical opinions and credible lay testimony establish by a preponderance of the evidence that claimant's work between December 1983 and February 1984 as a heavy equipment dismantler was the major contributing cause of the worsening of the carpal tunnel syndrome and that this work was significantly different than claimant's work as a deputy sheriff. We, therefore, reverse the Referee's order.

ORDER

The Referee's order dated June 20, 1986 is reversed. The insurer's denial dated April 10, 1985 is set aside and this claim is remanded to the insurer for acceptance and processing according to law. Claimant's attorney is awarded reasonable attorney fees of \$1,400 for services at hearing and \$600 for services on Board review, to be paid by the insurer in addition to compensation.

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JEFFREY S. EDENS, Claimant  
Pozzi, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-02939  
December 19, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of that portion of Referee Leahy's order that upheld the SAIF Corporation's denial of surgery on claimant's left lung. The issue is compensability.

The Board affirms the order of the Referee with the following comment. Claimant suffered a spontaneous right pneumothorax in August 1984. Two years earlier he had suffered a spontaneous left pneumothorax, which resolved. Both conditions resulted from blebs. SAIF accepted the right pneumothorax. Claimant has never maintained that the left pneumothorax is compensable. The treating surgeon elected to treat claimant's right pneumothorax surgically. The procedure involved a midline incision (thoracotomy). During the procedure, the surgeon resected blebs in both lungs. We find from the record that, although the right pneumothorax could have been treated without thoracic surgery, the decision to treat the condition surgically was reasonable and was sufficiently related to the nature of the condition and the process of recovery that the procedure is compensable insofar as it involved the right lung. We agree with the Referee that the procedure insofar as it involved the left lung is not compensable. It has been represented by the parties

that SAIF interprets the Referee's order as directing it to accept responsibility for one-half of the outstanding medical bills. That is our interpretation as well and the Referee's order is affirmed on that basis.

ORDER

The Referee's order dated June 24, 1986 is affirmed.

ECHO M. LEIDIGH, Claimant  
Galton, et al., Claimant's Attorneys  
Roberts, et al., Defense Attorneys

WCB 85-15369  
December 19, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of that portion of Referee Shebley's order that set aside its denial of claimant's industrial injury claim for her low back. The issue is compensability.

Claimant allegedly injured her tailbone and low back in October 1985 by slipping and falling on some stairs. Two weeks after the alleged incident, claimant filed a workers' compensation claim and sought treatment from a chiropractor, Dr. VanHee, for low back pain radiating into the lower extremities. Claimant told Dr. VanHee that she had not suffered from any similar complaints prior to the alleged accident. Dr. VanHee diagnosed lumbar intervertebral disc syndrome with right leg sciatica and lumbar strain/sprain. He later opined, based upon the history provided by claimant, that claimant's complaints were related to the alleged industrial accident. Another chiropractor who treated claimant, Dr. Lukken, reached the same conclusion based upon the same history.

At the hearing, claimant testified that she had slipped while descending a flight of metal stairs, had fallen in a seated position and had slid on her buttocks down several steps, stopping at the first step. She testified on direct examination that she had never had any problem with low back discomfort or leg pain or numbness prior to the alleged industrial accident. During cross-examination, the insurer introduced documents showing that claimant had in fact sought treatment for low back and thigh pain since at least late 1982 and had sought emergency room treatment for low back and leg pain in January 1984. Claimant then conceded that she had sought such treatment, but asserted that she had forgotten about it.

Three other witnesses testified on claimant's behalf: her mother, her sister and a former coworker. Claimant's mother and sister testified that claimant had told them that she had fallen at work and hurt her back. They also testified that severe menstrual cramps ran in their family and often resulted in back and leg pain. Claimant's coworker testified that, although she did not see claimant fall, she saw claimant getting up from a seated position at or near the bottom of the steps on or near the date of the alleged industrial accident. She later conceded that her observations were as consistent with claimant arising after resting or tying a shoe as they were with arising after a fall. The insurer also presented evidence indicating that three days before the date of the alleged accident, claimant had received notice that she would be sued in connection with an auto accident in which she had been involved several months earlier.

The Referee rejected claimant's assertion that she had forgotten about her previous medical treatment for her low back and concluded that she had been "less than candid" about her past medical history. He nonetheless found claimant's claim compensable "despite herself" based upon the testimony of claimant's mother, sister and former coworker.

We reverse the Referee's order. In light of claimant's concealment of and false testimony regarding her past medical history, her testimony regarding her alleged industrial accident cannot be trusted. The medical record and the testimony of claimant's mother and sister are likewise tainted because each is based upon claimant's accounts. The testimony of claimant's former coworker is equivocal at best. The employer has presented evidence of a noncompensable alternative for claimant's complaints of low back and leg pain. Under these circumstances, we conclude that the evidence does not preponderate in favor of compensability.

ORDER

The Referee's order dated May 6, 1986 is reversed.

NATASHA D. LENHART, Claimant  
Drakulich & Carlson, Claimant's Attorneys

WCB TP-86012  
December 19, 1986  
Third Party Order

Claimant has petitioned the Board to resolve a dispute as to the reasonableness of a settlement of claimant's civil action against the third party allegedly reasonable for her industrial injury. See ORS 656.154. The Board's jurisdiction arises under ORS 656.587. The paying agency was afforded seven days within which to respond to the petition and did not do so. We conclude that an adequate record exists upon which to render a decision. See Blackman v. SAIF, 60 Or App 446 (1982).

Based upon the uncontroverted assessment of claimant's attorney of the unlikelihood of obtaining a result after trial of the civil action more favorable than that offered in settlement of the action at this time and in the exercise of our independent judgment, we find the settlement reasonable. We further find that claimant's request that the proceeds of the settlement be distributed in accordance with ORS 656.593(1) is just and proper. Claimant's petition is granted. The settlement is approved and shall be distributed in accordance with ORS 656.593(1).

IT IS SO ORDERED.

JANET K. MALLY, Claimant  
Steven C. Yates, Claimant's Attorney  
Beers, et al., Defense Attorneys

WCB 86-02851  
December 19, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Nichols' order that: (1) upheld the Determination Order dated February 20, 1986 which awarded no permanent partial disability for claimant's low back and neck; and (2) authorized an offset requested by the insurer. The issues are extent of disability and offset.

The Board affirms and adopts the order of the Referee with the following comment. Claimant also raised the issue of

premature closure in her brief on Board review. This issue had been raised in her original hearing request, but was withdrawn at the beginning of the hearing. We do not consider this issue as properly raised on Board review and thus do not decide it. See Anderson v. West Union Village Square, 44 Or App 685, 688 (1980); Neely v. SAIF, 43 Or App 319, 323 (1979), rev den 288 Or 493 (1980).

ORDER

The Referee's order dated June 27, 1986 is affirmed.

AGNES J. MATHIS, Claimant  
Bischoff, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 86-01161  
December 19, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Myers' order that awarded claimant 40 percent (128 degrees) unscheduled permanent partial disability for a psychological condition in lieu of a Determination Order that awarded no permanent disability. The issue is extent of disability.

Claimant filed a claim in August 1984 in connection with her employment as a welfare caseworker's aide for an alleged stress-induced mental disorder. Claimant sought treatment with an internist, Dr. Sacks, who diagnosed an acute anxiety reaction and referred claimant to a psychiatrist, Dr. Middlekauf, for treatment. Dr. Middlekauf, in turn, referred claimant to a mental health specialist, Ms. Dieringer-Nelson, for counseling.

In August 1985, Ms. Dieringer-Nelson wrote claimant's employer stating that claimant could return to work if it was possible for her to work in a position that did not require welfare client contact. In a report dated later the same month and in a second report issued in September 1985, Dr. Sacks indicated that claimant was capable of performing work which did not involve potentially stressful contact with the general public. The claim was closed by Determination Order in November 1985 with no award of permanent disability. Claimant requested a hearing on this Determination Order.

After claim closure, claimant began treating with Dr. Aflatooni, a psychiatrist, on referral from claimant's attorney. Dr. Aflatooni diagnosed depression as a result of a delayed stress reaction which he indicated was related to her employment. He recommended several treatment modalities. In June 1986, Dr. Aflatooni reported that claimant had developed an unspecified level of permanent disability as a result of occupational stress. He went on to state that claimant should not return to her former position or to any other occupation with similar duties.

Claimant was examined by a consulting psychiatrist, Dr. Gardner, in June 1986. He noted some vestiges of depression, but concluded that claimant had sustained no permanent impairment.

At the hearing, claimant testified that as a result of her stress-induced mental disorder it was difficult for her to get involved with other people and their problems. She indicated that she did not feel comfortable around other people and that she avoided contact with other people as much as possible.

Based upon this record, the Referee found that claimant was precluded from any employment which required contact with the public. After considering various social and vocational factors, the Referee concluded that claimant should be awarded 40 percent (128 degrees) unscheduled permanent partial disability. We conclude that the Referee overestimated claimant's disability.

In rating the extent of claimant's unscheduled permanent partial disability, we consider her psychological 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 apply these rules as guidelines, not as restrictive mechanical formulas. See Harwell v. Argonaut Insurance Co., 296 Or 505, 510 (1984); Howerton v. SAIF, 70 Or App 99, 102 (1984).

Claimant was 53 years old at the time of the hearing. She is of average intelligence and is a high school graduate. Her work experience includes jobs as a bartender and as a housekeeper and babysitter.

Following our de novo review of the medical and lay evidence, we conclude that claimant's psychological impairment is in the mild range. We do not read the record as saying that claimant must avoid all public contact, only that claimant should avoid potentially stressful or excessive public contact. Exercising our independent judgment in light of claimant's level of impairment and the relevant social and vocational factors, we conclude that an award of 80 degrees for 25 percent unscheduled permanent partial disability adequately and appropriately compensates claimant for the permanent loss of earning capacity due to her compensable condition. We modify the Referee's award accordingly.

#### ORDER

The Referee's order dated July 14, 1986 is modified. Claimant is awarded 25 percent (80 degrees) unscheduled permanent partial disability for her compensable psychological condition in lieu of the 40 percent (128 degrees) awarded by the Referee. The fee awarded claimant's attorney shall be adjusted accordingly.

JACK V. PETERSON, Claimant  
Peter O. Hansen, Claimant's Attorney  
Mitchell, et al., Defense Attorneys

WCB 85-11355  
December 19, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Seifert's order that: (1) upheld the self-insured employer's refusal to pay permanent partial disability benefits awarded in a prior Referee's order while claimant was also receiving temporary disability benefits on an aggravation claim; and (2) refused to award associated penalties and attorney fees. The issues are simultaneous payment of permanent partial and temporary total disability benefits, penalties and attorney fees.

The Board affirms the order of the Referee with the following comment. In Larry L. Schutte, 38 Van Natta 467 (1986), we held that ORS 656.202(2) requires that the timing of the

payment of benefits be governed by the law in effect at the time of a claimant's injury. The claimant in the present case was injured on January 24, 1984. The rule in effect at that time was former OAR 436-54-232(1). Under that rule, the employer's action was permissible. We note that the Referee erroneously stated in his opinion that this rule did not become effective until April 1, 1984. The rule actually became effective on January 1, 1982.

ORDER

The Referee's order dated June 16, 1986 is affirmed.

WILLIAM D. POWELL, Claimant  
Joseph McNaught, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 84-05748  
December 19, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of Referee Danner's order that granted claimant an award of compensation for permanent total disability. The issue is extent of disability.

Claimant, age 60 at the hearing, sustained an injury to his cervical spine in a truck accident in December 1980. His medical treatment since the injury has been conservative. The claim was first closed in September 1981 with an award of compensation for 5 percent (16 degrees) unscheduled permanent partial disability for injury to the neck. In 1983 the claim was reopened for aggravation. Subsequent to the injury, claimant was diagnosed as suffering from a painful condition of the lumbar spine and from bilateral carpal tunnel syndrome. SAIF denied those conditions in May 1983 and the denial was not appealed, thus becoming final. The last arrangement of compensation was the June 1, 1983 Determination Order that awarded an additional 25 percent (80 degrees) unscheduled permanent partial disability for the neck, making claimant's cumulative disability awards 30 percent (96 degrees). Claimant requested a hearing on this determination, resulting in this proceeding.

The Referee relied in large part on the reports and testimony of Mr. Goodwin, a vocational counselor, in determining that claimant was permanently and totally disabled. After review of the entire record, we conclude that Mr. Goodwin's opinion regarding claimant's ability to pursue suitable and gainful employment is primarily based upon his inclusion of the post-injury low back and arm conditions in his analysis. Those conditions are not properly a part of the permanent total disability calculus. Emmons v. SAIF, 34 Or App 603, 605 (1978). Considering only the disability arising out of claimant's cervical spine injury, we find that claimant has not established by a preponderance of the evidence that he is permanently and totally disabled.

On review of the entire record, we find that claimant's disability is greater than that reflected by the cumulative Determination Orders. As stated, claimant is age 60. He has a tenth grade education and has worked at heavy truck driving for most of his working life. The medical evidence is unanimous that claimant may now perform only sedentary work. The preponderate medical opinions are that claimant's physical impairment of his cervical spine is in the mildly moderate category based upon loss of range of motion and chronic pain. Considering all of these

medical, social and vocational factors and weighing them in the exercise of our independent judgment, we conclude that claimant will be appropriately compensated by an award of 60 percent (192 degrees) unscheduled permanent partial disability for injury to his cervical spine. Benefits paid in accordance with the Referee's order shall not be credited against the compensation awarded by this order. United Medical Lab v. Bohnke, 81 Or App 144 (1986).

ORDER

The Referee's order dated March 28, 1985 is reversed. Claimant is awarded compensation for 30 percent (96 degrees) unscheduled permanent partial disability for injury to his cervical spine. This award is in addition to compensation awarded by Determination Orders of September 4, 1981 and June 1, 1983.

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

WCB 84-08169  
December 22, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Pferdner's order that upheld the SAIF Corporation's denial of claimant's cerebrovascular condition. The issue is compensability.

On September 6, 1980, claimant suffered a compensable injury to her left foot after stepping on a nail. At the time of this incident claimant was 52 years old, five foot, three inches tall, and weighed 250 pounds. Claimant's foot became infected and she was hospitalized by her treating physician, Dr. Machlan. Dr. Machlan stated that claimant's left foot infection had caused her diabetes to go out of control. Claimant began taking oral medication to control her diabetes. She had never been required to take medication for her diabetes prior to this hospitalization.

Subsequently, claimant was hospitalized again in November of 1980 for headaches and retinal hemorrhages which had begun at the time of her first hospitalization. Claimant was diagnosed as having essential hypertension.

Claimant's foot claim was originally denied; however, SAIF accepted the claim through stipulation in June of 1981. The stipulation involved only the foot and stated that, "nothing in this agreement shall be construed as an acceptance or denial by SAIF Corporation of claimant's diabetes and the medical condition and bills which flow from that condition." Dr. Horniman examined claimant in October of 1981 and stated that claimant's foot infection temporarily worsened claimant's diabetes, but that it had returned to its pre-injury status. Dr. Machlan concurred with Dr. Horniman's report on December 16, 1981.

A Determination Order was issued on January 14, 1982 which awarded claimant no permanent disability. Claimant went to hearing on August 31, 1982 on the extent of permanent disability and SAIF's refusal to pay medical bills related to treatment for diabetes. The Referee ordered SAIF to pay claimant's medical bills stating that the bills "were reasonably and necessarily incurred to control claimant's diabetes and bring it back to

pre-industrial injury status." Claimant's underlying diabetes condition has never been accepted nor found compensable. Ultimately, claimant received 70 percent scheduled permanent partial disability for loss of use of the left foot and 25 percent unscheduled permanent partial disability for her headache condition. See Bradshaw v. SAIF, 69 Or App 587 (1984); Marie H. Bradshaw, 37 Van Natta 1 (1985).

After claimant's hospitalization in 1980, Dr. Machlan treated claimant regularly for recurring infections of her feet. Claimant has continued to treat for her foot condition consistently through the January 24, 1986 hearing. In December of 1983, Dr Machlan stated that claimant's diabetes "came on with the infection of her feet . . ." and "it started [by] stepping on a nail . . . ." Claimant continued to take oral medication for the control of her diabetes.

On April 17, 1984, claimant was hospitalized after suffering an acute cerebrovascular accident (stroke). Dr. McNeil treated claimant and initially diagnosed the stroke as being secondary to claimant's hypertension and diabetes. In a discharge summary, Dr. McNeil stated that claimant's diabetes had never been adequately controlled as she had consistently refused insulin. On May 22, 1984, Dr. McNeil opined that claimant's diabetes had been more difficult to control because of her puncture wound and the resulting chronic foot ulcers and bone infection. In a second opinion dated September 4, 1984, Dr McNeil stated, "In my opinion, the medical conditions which resulted from and/or were aggravated by [claimant's] foot injury and its aftermath were significant contributing factors of her stroke."

Dr. Loveless examined claimant on April 17, 1984 and noted that claimant's diabetes became acute in 1980. He also noted that claimant had refused insulin therapy and is "very unreceptive to any aggressive antidiabetic therapy." Dr. Reilly reviewed claimant's file on June 4, 1984. Dr. Reilly stated that claimant's diabetes was a risk factor in producing a stroke along with claimant's hypertension and obesity. He felt that claimant had all these risk factors prior to her 1980 foot puncture and that the foot injury was unrelated to her stroke. He further stated that it is claimant's failure to comply with treatment that has continued to produce complications of her diabetes.

Claimant was examined by Dr. Raff on September 17, 1984. Dr. Raff agreed that diabetes and hypertension are risk factors for a stroke. These risk factors increase the incidence of atherosclerosis and Dr. Raff stated that claimant's atherosclerosis was the major contributing cause of her stroke. Dr. Raff noted that claimant showed mild atherosclerotic irregularitis of the proximal internal carotid artery in 1980. He also agreed that claimant had not complied with sound medical treatment for her diabetes.

At hearing, Dr. Grossman, an internist, testified in behalf of claimant. He stated that the arteriogram that was done in 1980 showed very little atherosclerosis. Since that time, Dr. Grossman concluded that changes had occurred in claimant's vessels such that she developed atherosclerotic damage to one of the cerebral vessels. This damage is what caused the stroke. Dr. Grossman stated that claimant's hypertension and aggravated

diabetes condition were both significant factors in producing the arterial damage leading to the stroke. He stated that claimant's inactivity, due to her foot infection, contributed to the aggravation of claimant's diabetes. After reviewing claimant's medical records he disagreed with Dr. Horniman and stated that claimant's diabetes never returned to its pre-injury status. Dr. Grossman was unsure that if claimant had used insulin instead of tolinaise that she would have prevented or reduced the risk of stroke. Dr. Grossman opined that the 1980 foot injury and its consequences were a significant contributing cause of claimant's stroke.

Also at hearing, Dr. Mote testified that he had become claimant's treating physician after assuming part of Dr. Machlan's practice. Dr. Mote stated that claimant's stroke was secondary to her obesity, hypertension, diabetes and infection of the foot. Further, he stated that claimant's foot infection had reduced her activity. Claimant's reduced activity impaired her circulation and resulted in her being prone to develop complications of the vascular system, including stroke. He agreed that claimant's inactivity also aggravated her diabetes and made it difficult for claimant to lose weight. Dr. Mote opined that claimant's inactivity definitely was a significant or material contributing factor to the stroke. Dr. Mote also stated that there is a worsening of a diabetic condition any time there is a skin problem associated with infection. Dr. Mote had recently placed claimant back on oral medication for her diabetes after claimant had been unable to use a syringe for insulin injections.

Claimant has the burden of proving her case by a preponderance of the evidence. Hutcheson v. Weyerhaeuser Co., 288 Or 51 (1979); Gormley v. SAIF, 52 Or App 1055 (1981). Claimant must prove that her original industrial injury was a material contributing cause of her stroke. Jeld Wen Inc. v. Page, 73 Or App 136 (1985). A material contributing cause need not be the sole or principal cause. Coddington v. SAIF, 68 Or App 439 (1984). Further, a material contributing cause must be more than

"When the issue is the extent of disability, the rule stated in Nelson v. EBI Companies, supra, rightly applies, because it allows a measured reduction of the claimant's benefits. Compensability, however, is an all-or-nothing determination. To extend the rule stated in Nelson to that determination would be inconsistent with the policy of construing the Worker's Compensation Act liberally for a worker's benefit, Holden v. Willamette Industries, 28 Or App 613 (1977), because it could deny the worker all of the act's benefits when the claimant's job was a material, but not primary, contributing cause of his disability."

#### ORDER

The Referee's order dated January 31, 1986 is reversed. The insurer's denial is set aside and the claim is remanded to the insurer for processing according to law. For overturning the

denial, claimant's attorney is awarded a fee of \$2,000 for services at hearing and \$700 for services on Board review. Both fees shall be paid by the insurer.

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BETTY J. FRISON, Claimant  
Peter O. Hansen, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 85-00658  
December 22, 1986  
Order on Review

Reviewed by Board Members Lewis and Ferris.

Claimant requests review of Referee Leahy's order that dismissed the request for hearing on the issue of medical services under ORS 656.245 and denied claimant's request for a penalty and attorney fee on account of an unreasonable denial. The issues are compensability of medical services and penalty and attorney fees.

The Board adopts the Referee's findings of fact and affirms the Referee's conclusions that: (1) the claimed services were not related to the compensable 1977 industrial injury; (2) the hearing request was premature; (3) the denial was unreasonable in form; and (4) although a penalty is warranted, none can be assessed because there are no amounts due. We modify the Referee's order in one respect.

On the same day the Referee issued his order, the Court of Appeals issued its decision in Spivey v. SAIF, 79 Or App 568 (1986), in which it held that unreasonable conduct that warranted a penalty under ORS 656.262(10) also warranted an attorney fee under ORS 656.382(2) even if a penalty was not actually awarded because no amounts were due. See also Hutchinson v. Louisiana-Pacific Corp., 81 Or App 162 (1986). But c.f. Anderson v. EBI Companies, 79 Or App 345, 351 (1986). We, therefore, modify the Referee's order to award an insurer-paid attorney fee in connection with the penalty issue. Under the facts and circumstances of this case, we conclude that a reasonable attorney fee for representation on that issue at the hearing is \$250. No attorney fee is due for services on Board review. Dotson v. Bohemia, Inc., 80 Or App 233, 236 (1986).

#### ORDER

The Referee's order dated June 4, 1986 is modified to award claimant's attorney a reasonable attorney fee of \$250, to be paid by the SAIF Corporation, for representation in connection with the penalty issue. As modified, the Referee's order is affirmed.

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

Own Motion 85-0196M  
December 22, 1986  
Own Motion Order on Reconsideration

Claimant and the self-insured employer have requested reconsideration of our November 13, 1986 Own Motion Order and Determination. The employer contends that we erroneously allowed compensation for four days of temporary disability due to claimant's missing work to attend appointments with his physician. Claimant contends that he is entitled to a larger award for unscheduled permanent partial disability.

We conclude that the employer is correct as to three of

the four contested days and that the award of compensation for those days is inconsistent with OAR 436-60-020(7). Our November 13, 1986 order is therefore modified to delete the award of temporary disability compensation for February 27, 1984, July 18, 1984 and September 4, 1984.

Claimant has offered a September 8, 1986 medical report from Dr. Collis and the affidavits of claimant and his spouse in support of his claim for increased compensation for permanent disability. The medical report was included in the employer's claim closure request and was considered in our previous order. The affidavits, however, provide additional evidence as to the extent of claimant's physical and vocational impairment. Based upon this evidence, and considering the relevant medical, social and vocational factors in rating permanent disability, we conclude that claimant is entitled to an award of 128 degrees for 40 percent unscheduled permanent partial disability for injury to his left hip.

#### ORDER

The permanent disability award made by our Own Motion Order and Determination dated November 13, 1986 is modified. In lieu of the former award, claimant is awarded compensation for unscheduled permanent partial disability of 128 degrees for 40 percent loss of earning capacity due to injury to his left hip. Claimant's attorney is allowed 25 percent of the permanent disability awarded by this order not to exceed \$650 as a reasonable attorney fee. Deduction of overpaid temporary disability compensation from the permanent disability compensation made payable by this order is authorized. The award for temporary disability made by our order dated November 13, 1986 is modified to delete the awards of temporary disability compensation for February 27, 1984, July 18, 1984 and September 4, 1984.

MARK DODGE, Claimant  
Leonard C. Parker, Claimant's Attorney  
Cowling & Heysell, Defense Attorneys

WCB 85-16091  
December 23, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Thye's order that set aside its denial of claimant's industrial injury claim for the left middle finger. The issue is whether claimant's injury arose out of and in the course of his employment. We reverse.

Claimant began working as a "knot bumper" for the employer's logging operation in October 1985. According to claimant, a "knot bumper" limbs and otherwise prepares fallen trees for transport to the lumber mill. On the afternoon of November 27, 1985, claimant was approached by Mr. Fagen, owner of the logging operation, and asked if he would like to work on November 29, 1985, the day after Thanksgiving. When asked what he would be doing, claimant was advised by Fagen that Fagen's wife wanted some firewood cut. Claimant agreed on the condition that he be allowed to keep some of the firewood for himself. Fagen agreed.

Claimant went to Fagen's residence on November 29, 1985 and was advised by one of Fagen's employes that the wood to be cut

was behind Fagen's shop. Fagen was away on Thanksgiving holiday. His shop shares land with his personal residence and is used for maintaining and servicing logging equipment. Claimant cut wood for approximately four hours before lacerating his finger with a chain saw. The saw belonged to Fagen. Claimant's injury required medical treatment.

Claimant testified that he had always worked as a "knot bumper" while employed by Fagen. He had not previously been hired to cut firewood, nor had he done so before the day of the injury. He had never before worked at Fagen's shop nor at Fagen's personal residence. The rate of pay for his regular employment was \$8.00 per hour. Although the amount of firewood to be kept by claimant was not discussed prior to the cutting, claimant testified that he ultimately hauled away a bit less than two cords of pine.

Fagen testified that he employed and directly supervised approximately eight employees, and that the business of his company is logging, rather than cutting firewood. The logs claimant cut on the date of his injury were purchased from a nearby sawmill rather than being logged with company equipment. Fagen testified that some of the logs claimant cut would be used to heat the company shop. He further testified that if claimant had wanted payment in cash instead of wood, Fagen would have paid him from his personal account rather than the account of the company.

To be compensable, an injury must arise out of and occur in the course of employment. ORS 656.005(8)(a). It must also result in disability, death or the need for medical services. Id. In order for a claimant to obtain compensation, he must have been a "subject worker" employed by a "subject employer" at the time of the injury. A subject worker is any person who engages to furnish services for a remuneration, subject to the direction and control of an employer. ORS 656.005(27). A subject employer is any person who contracts to pay a remuneration for and secures the right to direct and control the services of any person. ORS 656.005(14).

All workers are "subject" workers except those specifically excluded by ORS 656.027. Among those excluded are workers whose employments are "casual" and the employments are either not in the course of the trades, businesses or professions of their employers, or are in the course of the trades, businesses or professions of employers who are nonsubject. ORS 656.027(3). For purposes of the statute, "casual" employment is that where in any 30-day period, without regard to the number of employees, the total labor cost involved is less than \$200.

It is claimant's burden to prove that the injury he sustained is compensable under the aforementioned statutory provisions. In our view, claimant may sustain his burden of proof in one of two ways: (1) he may prove that there was a compensable work connection between his regular employment as a "knot bumper" and the injury sustained at Fagen's residence, see Rogers v. SAIF, 289 Or 633 (1980); or (2) he may prove that on the date of his injury he had entered into a contract separate from that of his regular employment with Fagen, that he was injured in performance of that contract, and that he was a "subject" worker at the time of his injury.

The Referee found that claimant's employment on the date

of injury occurred in direct pursuit of the employer's regular business. Citing Jordan v. Western Electric, 1 Or App 441 (1970), the Referee apparently felt that because some of the wood cut by claimant would be used to heat the shop used by the employer's business, the injury occurred on the employer's premises, and the employer supplied the tools claimant used to cut the wood, there was sufficient connection to make the injury compensable. The Referee further held that even if claimant's injury did not occur in the course of the employer's regular business, the employer had failed to prove that claimant's employment was "casual," as that phrase is defined in the statute.

We disagree with the Referee's analysis. First, we find that the work claimant was performing at the time of his injury was not sufficiently connected with the employer's regular business to support a finding of compensability. Claimant was cutting firewood for the employer's wife, although some was to be used to heat the company shop. The employer's business had nothing to do with firewood cutting. Neither did claimant's regular "knot bumping" job. Claimant was not working on a scheduled workday, and the location of the work was the employer's personal residence, where claimant had never previously worked. Claimant was remunerated with firewood purchased for the employer's personal use and obtained through the employer's personal, rather than business, efforts. Had claimant been remunerated in cash, payment would not have come from company coffers. We find from these facts that on the date of his injury, claimant was performing work in pursuit of a one-time, personal services contract unrelated to his regular employment. The fact that this contract was made with claimant's regular employer is simply coincidental and has little bearing on the compensability of this injury.

Claimant's remaining avenue is to prove that his injury arose out of and in the course of the personal services contract. As noted above, in order to prove compensability claimant must prove that at the time of his injury, he was a subject worker employed by a subject employer. If claimant's employment was "casual," by definition, he was not a subject worker and the claim is not compensable.

The Referee held that the employer failed to prove the "casual" nature of claimant's employment. The Referee reversed the burden of proof; it is claimant's burden to prove the compensability of his claim. Hutcheson v. Weyerhaeuser, 288 Or 51 (1979). Our review of the record persuades us that claimant's employment on the date of injury was "casual," so as to make him a nonsubject worker for purposes of this injury. We have found that claimant was injured during employment not in the trade, business of profession of the employer. Further, we find that there is no persuasive evidence regarding the "total labor cost" involved in claimant's employment on the date of injury. There was no evidence as to the value of the wood cut by claimant. The only evidence that might suggest the cost of labor was claimant's testimony that he was normally paid \$8.00 for his work, and that the firewood cutting work took approximately four hours. Thus, using the only evidence we have, we find that the total labor cost involved in claimant's contract with the employer was approximately \$32, which is far below the \$200 minimum required to

overcome the "casual" employment exception. Because claimant's employment was "casual," he was not a subject worker at the time he was injured. His injury is, therefore, not compensable.

ORDER

The Referee's order dated June 30, 1986 is reversed.

FRED J. FISCHER, Claimant  
Robert L. Burns, Claimant's Attorney  
Foss, et al., Defense Attorneys

WCB 85-09342  
December 23, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of that portion of Referee Seifert's order that upheld the self-insured employer's denial of claimant's aggravation claim for the low back. The issue is compensability. We reverse.

Claimant compensably injured his low back in October 1983. The injury resulted in a herniated L5-S1 disk that ultimately required surgery. Dr. Bert found claimant medically stationary in March 1985 and suggested that he be retrained for lighter employment. A March 27, 1985 Determination Order awarded 25 percent unscheduled permanent partial disability. Although he remained symptomatic, claimant testified that he was doing fairly well when, on June 8, 1985, he reinjured his back in a slip and fall incident at home. The new incident required hospitalization.

Dr. Bert diagnosed a "recurrent disk syndrome" and issued a short statement in which he opined that claimant's need for hospitalization was "related to the back problem and industrially related surgery." He did not specifically comment on whether claimant's off-the-job injury superceded the effects of the industrial accident, so as to relieve the employer of further responsibility. Dr. Bert's note is the only medical evidence of substance regarding the cause of claimant's hospitalization.

Claimant's claim for aggravation was denied by the employer on July 23, 1985. According to the employer's claims processor, the denial was based on assurances from Dr. Bert's office that claimant's hospitalization was not work-related and that billings would not be charged to the employer. The documentary evidence suggests, however, that Dr. Bert's billings were in fact sent to the employer's claims processor for payment.

The Referee upheld the employer's denial, finding that claimant was released for and ready to return to work and had "no particular back problems" on the date of his off-the-job fall. The Referee found from these facts that the original injury was no longer a material cause of claimant's need for hospitalization.

In Grable v Weyerhaeuser Co., 291 Or 387 (1981), the court held that where a compensable on-the-job injury is followed by a contributory injury off the job, claimant may be compensated for the effects of the most recent injury so long as the original injury remains a material contributing cause of the new disability or need for treatment. Thus, in the present case, claimant must prove that his October 1983 compensable injury remained a material cause of his most recent disability, despite the obvious effects of his off-the-job fall.

We find that claimant has sustained his burden of proof. While we agree with the Referee that claimant had made a significant recovery from the effects of his original injury at the time he fell at home, we cannot ignore the statement of claimant's treating doctor that the hospitalization was related to claimant's prior compensable surgery. That statement is the only persuasive medical evidence regarding causation. There is no report from an independent medical examiner or other physician that tends to refute the asserted material causal connection. Based on this sparse record, we find that claimant's original injury was a material cause of his June 1985 hospitalization. The Referee's order shall be reversed.

ORDER

The Referee's order dated June 17, 1986 is reversed in part and affirmed in part. That portion of the order that upheld the self-insured employer's denial of claimant's aggravation claim is reversed. The remainder of the order is affirmed. Claimant's attorney is awarded a fee of \$1,250 for services at hearing and \$650 for services on Board review. Both fees shall be paid by the self-insured employer.

BARBARA A. LEWIS, Claimant  
Royce, et al., Claimant's Attorneys  
Rankin, et al., Defense Attorneys

WCB 85-03594  
November 12, 1986  
Order of Abatement

The insurer has requested reconsideration of our order on review dated October 31, 1986. The request for reconsideration is allowed. The request for oral argument is denied. See OAR 438-11-010(2). The Order on Review is withdrawn pending reconsideration. The Order on Review is hereby abated, and claimant is allowed 14 days from the date of this order within which to file a response.

IT IS SO ORDERED.

BARBARA A. LEWIS, Claimant  
Royce, et al., Claimant's Attorneys  
Rankin, et al., Defense Attorneys

WCB 85-03594  
December 23, 1986  
Order on Reconsideration

The insurer requested reconsideration and moved for abatement of the Board's Order on Review dated October 31, 1986. The insurer also requested oral argument. The Board granted the request to reconsider the Order on Review and issued an Order of Abatement dated November 12, 1986. The Board denied the request for oral argument and allowed 14 days to receive a response from claimant. The Board has received a response from claimant and we have reconsidered the Order on Review dated October 31, 1986.

On review the Board considered the arguments of the parties and reviewed the record. The Board was persuaded by the evidence that claimant's asthma condition is related to exposure to the smoke produced in a soldering process to which claimant was exposed at work. The insurer presents the same arguments to the Board which it originally presented in its response brief on review with the exception that it now concedes that claimant's treating doctor is a specialist in the medical specialty of lung diseases. It now argues that claimant's treating doctor is not a "specialist in colophony-induced asthma."

The Board found that the opinions of claimant's treating doctor, who is a specialist in lung diseases and who had observed claimant over a period of several months, and a consulting doctor were persuasive that claimant's asthma condition was caused or aggravated by exposure to smoke from the soldering process to which claimant was exposed at the work place. The consulting doctors disagreed about the conclusiveness of a particular medical test to establish the causal connection of a particular component used in the soldering process. However, they agreed that claimant should be removed from the work place because exposure to smoke from the soldering process aggravated claimant's asthma. All of the doctors also agreed that cigarette smoking did not cause nor aggravate claimant's asthma. The insurer does not challenge these findings.

On reconsideration, the Board adheres to and republishes its Order on Review dated October 31, 1986. Reasonable attorney fees are awarded to claimant for services performed in response to the insurer's request for reconsideration in the amount of \$450 in addition to fees previously awarded.

IT IS SO ORDERED.

DAVID E. NOBLE, Claimant  
Bloom, et al., Claimant's Attorneys  
Roberts, et al., Defense Attorneys  
Davis, et al., Defense Attorneys

WCB 85-13826 & 85-14815  
December 23, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The Aetna Casualty Company requests review of Referee Neal's order that set aside its November 19, 1985 denial of claimant's industrial injury claim for his right knee injury and affirmed Truck Insurance Exchange's aggravation denial of October 28, 1985. The issues are compensability and responsibility.

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

Since the Referee's decision, the Court of Appeals decided Hensel Phelps Construction Co. v. Mirich, 81 Or App 290 (1986). The court stated that in order to shift responsibility in successive injury cases, the second incident must, "...independently contribute to the causation of the disabling condition, i.e., to a worsening of the underlying condition."

After de novo review, we conclude that the evidence does establish that claimant's subsequent work injuries did independently contribute to the causation and a worsening of claimant's right knee condition.

We find this case to have been of average difficulty with an ordinary likelihood of success for claimant on Board review. A reasonable attorney fee for services on Board review is therefore awarded.

ORDER

The Referee's order dated May 23, 1986 is affirmed. Claimant's attorney is awarded \$500 for services on Board review, to be paid by the Aetna Casualty Company.

VINCENTE M. TAISACAN, Claimant  
Leistner, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 86-02899  
December 23, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The SAIF Corporation requests review of that portion of Referee McCullough's order which awarded claimant 60 percent (192 degrees) unscheduled permanent disability for a respiratory condition, whereas a February 13, 1986 Determination Order had awarded no permanent disability. On review, SAIF contends that the award should be reduced. In his respondent's brief, claimant argues that he is entitled to additional temporary disability compensation.

We affirm that portion of the Referee's order which declined to award additional temporary disability. However, we find that claimant's award of permanent disability should be reduced. Consequently, we modify that portion of the Referee's order.

Claimant was 33 years of age at the time of hearing. Over the course of some 12 years as an automobile transmission repairman, he developed an asthmatic condition. Dr. Rohr, claimant's treating allergist, has diagnosed the condition as bronchospasm secondary to the inhalation of a solvent, "Shell Sol." This solvent or similar cleaning solvents are used throughout the automotive repair industry.

In Dr. Rohr's opinion, claimant has a permanent sensitivity to "Shell Sol." Therefore, Dr. Rohr concludes that claimant should avoid the aforementioned solvent or similar chemicals. In addition, Dr. Rohr recommends that claimant's work environment be maintained relatively free from smoke and pollution. Finally, Dr. Rohr suggests that claimant may wish to restrict his work duties to mild or moderate physical activity.

Vocational assistance was briefly instituted. Yet, soon after the February 1986 Determination Order issued without a permanent disability award, these services were terminated. See OAR 436-120-090(14). Subsequently, a vocational evaluation was conducted by Mr. Rees, rehabilitation consultant. Based on claimant's transferable skills, Mr. Rees concluded that claimant was qualified for most automotive and heavy equipment occupations which involved mechanical repair and service. However, most of these occupations required exposure to the solvents claimant had been advised to avoid. Furthermore, Mr. Rees opined that to achieve ready employment in these areas, claimant would need additional education and/or training.

Claimant is a high school graduate. Because of his permanent sensitivity, he cannot return to work in the automotive repair industry. He has applied for work as a bartender, sales clerk, hotel desk clerk, "deli" counter person, roofer, millworker, grocery clerk, and auto parts clerk. However, primarily due to his lack of experience, these efforts have been unsuccessful. Claimant is currently enrolled in a seven month correspondence course as a travel agent.

Because of claimant's permanent sensitivity and his lack

of readily transferable skills, the Referee was persuaded that he had suffered a "very substantial" loss of earning capacity. After considering the applicable law regarding the rating of unscheduled permanent disability, the Referee awarded 60 percent permanent disability.

We agree that claimant's sensitization and resulting physical limitations have culminated in a permanent loss of earning capacity. ORS 656.214(5). However, we consider the Referee's award to be excessive.

In rating the extent of claimant's permanent disability, we consider his physical impairment, which includes lay testimony concerning his disabling pain and permanent limitations, and all of the relevant social and vocational factors set forth in OAR 436-30-380 et seq. We apply these rules as guidelines, not as restrictive mechanical formulas. Harwell v. Argonaut Insurance Co., 296 Or 505, 510 (1984); 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 his compensable respiratory condition.

#### ORDER

The Referee's order dated May 23, 1986 is affirmed in part and modified in part. In lieu of the Referee's award of unscheduled permanent disability, claimant is awarded 20 percent (64 degrees) unscheduled permanent disability for his compensable respiratory condition, which is his total award to date. Claimant's attorney's fee shall be adjusted accordingly. The remainder of the Referee's order is affirmed.

ANITA R. JENSEN, Claimant  
James P. O'Neal, Claimant's Attorney  
Rankin, et al., Defense Attorneys  
Cowling, et al., Defense Attorneys

WCB 84-06245 & 84-06246  
December 24, 1986  
Order on Remand

This matter is before the Board on remand from the Court of Appeals. Roseburg Lumber Co. v. Louisiana-Pacific, 81 Or App 454 (1986). Our order affirming the Referee's finding that Roseburg Lumber Company and its insured were responsible for claimant's bilateral hand dermatitis was reversed by the court and the matter remanded for further proceedings. In its opinion, the court found from the medical evidence that claimant suffered from "nothing more than a recurrence of symptoms" of the disease previously contracted while claimant was employed by Louisiana-Pacific and accepted by that employer. As we are bound by that finding, we conclude that claimant sustained an aggravation of her previously accepted occupational disease. See SAIF v. Baer, 60 Or App 133 (1982).

Accordingly, the Referee's order dated May 31, 1985 is reversed. Industrial Indemnity Company's denial dated June 25, 1984 is reinstated and affirmed. Louisiana-Pacific Corporation's denial dated May 9, 1984 is set aside and this claim is remanded to Louisiana-Pacific for acceptance and processing according to law. Louisiana-Pacific shall reimburse Industrial Indemnity for claim costs paid in accordance with the previous orders by the Referee and the Board.

IT IS SO ORDERED.

TERRY D. QUEENER, Claimant  
Malagon & Moore, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney  
Cowling & Heysell, Defense Attorneys

WCB 86-01585 & 85-13348  
December 24, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

Loggers Assurance Company requests review of that portion of Referee Holtan's order that set aside its denial of claimant's claim for a low back condition and upheld denials of the SAIF Corporation. It also requests that the Board take "judicial notice" of certain records of the Corporation Division of the Oregon Department of Commerce or remand the case for additional testimony. The issues are administrative notice, remand and responsibility.

Loggers Assurance Company's request that the Board take administrative notice of the records of the Corporation Division of the Department of Commerce is denied. The Board has no authority to supplement the record in this case with factual matters contained in the records of other governmental agencies. See ORS 656.295(3) & (5); Groshong v. Montgomery Ward Co., 73 Or App 403, 407-09 (1985); Dennis Fraser, 35 Van Natta 271, 274 (1985).

Loggers Assurance Company's request that the Board remand the case for additional testimony is also denied. At the beginning of the hearing, counsel for Loggers Assurance requested that the hearing be postponed for the testimony of an absent witness. Counsel indicated that he had attempted to reach this witness by telephone, but had been unsuccessful. The record in this case does not support the conclusion that due diligence was exercised in obtaining the testimony of the absent witness. Remand is not appropriate under these circumstances. See Kathy D. Owens, 37 Van Natta 767 (1985).

On the merits, the Board affirms the order of the Referee.

#### ORDER

The Referee's order dated June 5, 1986 is affirmed.

DONALD G. ZIMMERMAN, Claimant  
Imperati, et al., Claimant's Attorneys  
Schwabe, et al., Defense Attorneys

WCB 83-08168  
December 24, 1986  
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of Referee St. Martin's order that awarded increased compensation for unscheduled permanent partial disability but denied claimant's request for compensation for permanent total disability. The Referee increased claimant's award from 112 degrees (35 percent) to 240 degrees (75 percent) unscheduled permanent partial disability for injury to the lumbar spine. The issue is extent of disability, claimant asserting that he is permanently and totally disabled.

The parties do not significantly dispute the background facts. Claimant, an oiler on a rock crusher, was injured in April 1976 when the conveyor was activated pulling claimant partially into the feeder. In addition to contusions and lacerations,

claimant sustained a fracture of the left seventh rib, a compression fracture of the L2 vertebra, fractures of the transverse processes of the L1 and L2 vertebrae and strain at L4-5-S1. Claimant's claim was closed in March 1977 with a permanent disability award of 16 degrees (five percent) for injury to the low back. Claimant returned to work at his regular employment the same month. The disability award was later increased to 64 degrees (20 percent) after a hearing.

Claimant continued to experience low back pain. In December 1977 the claim was reopened and claimant underwent surgery consisting of a diskectomy at L4-5 and laminectomy at L5-S1. With minor exceptions discussed below, claimant has not worked since. A November 1980 assessment at the Callahan Center resulted in an opinion that claimant had multiple psychological problems that would have to be addressed before vocational assistance could be effective in returning him to work. Shortly thereafter claimant's attending physician, Dr. Duris, opined that claimant was permanently and totally disabled. Claimant's aggravation claim was closed in April 1981 with an additional award of 48 degrees (15 percent) unscheduled permanent partial disability, bringing the total award to 112 degrees (35 percent). We find based upon the entire record that claimant's physical impairment is in the mildly moderate range. We further find that the 35 percent permanent disability compensation awarded claimant prior to the hearing is inadequate because it does not compensate claimant for lost earning capacity due to relevant factors in addition to physical impairment.

The major dispute in this case is whether claimant's failure to participate in and complete several attempts at vocational assistance amounts to a lack of motivation and failure to make reasonable efforts to obtain employment. See ORS 656.206(3). Based upon the entire record, we conclude that it does not.

We are persuaded by the evidence that claimant suffers from a marked functional overlay that seriously impairs his ability to participate in vocational assistance. Dr. Colistro, clinical psychologist, opined that claimant is of below average intellect and is severely depressed having had underlying feelings of inadequacy aggravated by his injury to the extent that he is unable to participate in vocational assistance. Mr. Miller, a mental health therapist, fully agreed with Dr. Colistro. We do not find Mr. Lipniki's lay opinion arguably to the contrary persuasive. We conclude that claimant's failure to follow through with vocational assistance and seeking of employment opportunities is based in his functional and psychological difficulties, which are nonvolitional. See Barrett v. Coast Range Plywood, 294 Or 641, 644 (1983).

Further, the evidence is uncontroverted that claimant cannot return to his former employment and that his transferable skills are virtually nil. Although claimant has been able to work very intermittently as a construction site elevator operator, the vocational experts agree that that job is not a bona fide occupation in this state. Even Mr. Lipniki has acknowledged that claimant is not currently employable, although he opined that future job placement was possible. We rate disability based on current conditions, not speculation as to future events. See Gettman v. SAIF, 289 Or 609 (1980).

Based upon our review of the entire record, we conclude that claimant is currently unable to regularly perform work at a gainful and suitable occupation. He is, therefore, awarded compensation for permanent total disability, effective March 5, 1985, the date it became apparent that the combination of claimant's physical, functional and psychological disabilities combined to prevent further vocational assistance. The insurer is authorized to offset permanent partial disability compensation paid pursuant to the Referee's order against the compensation payable by this order subsequent to March 5, 1985.

#### ORDER

The Referee's order dated June 19, 1985 is modified. In lieu of the compensation ordered by the Referee, claimant is awarded compensation for permanent total disability effective March 5, 1985. Claimant's attorney fee agreement is approved. Claimant's attorney is allowed 25 percent of the increased compensation granted by this order, not to exceed \$3,000, as an attorney fee. The insurer is authorized to offset permanent partial disability compensation paid pursuant to the Referee's order against the compensation ordered herein.

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STANLEY V. GILBERTSON, Claimant  
Steven C. Yates, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney  
Beers, et al., Defense Attorneys

WCB 86-01345 & 86-02910  
December 29, 1986  
Order on Review

Reviewed by Board Members Lewis and Ferris.

EBI Companies requests review of Referee Nichols's order that set aside its denial of claimant's aggravation claim for the low back and upheld the SAIF Corporation's denial of claimant's new injury claim for the same condition. The issue on review is responsibility.

Claimant suffered a compensable low back strain in August 1984 while employed by EBI's insured. The injury necessitated surgery, after which claimant received vocational rehabilitation assistance and was placed in a wage-subsidy position with a private employer. While working for the second employer, claimant suffered a new injury. The parties have stipulated that the new injury materially contributed to claimant's condition and need for treatment.

The issue before the Referee was whether the insurer responsible for claimant's original injury remained responsible when claimant was materially injured a second time while employed by a private employer in a wage-subsidy program. Relying on John P. Keeble, 37 Van Natta 480 (1985), the Referee determined that EBI remained responsible for claimant's condition.

In Keeble, supra, the issue was whether the rate of the claimant's temporary total disability compensation should be based on wages he received at the time of his original injury or those received at the time of a subsequent injury arising out of a wage-subsidy job. The Referee had held that the claimant's compensation should be based on his original wages. We affirmed, noting that there was no substantive distinction between an injury suffered while in wage-subsidy employment and an injury arising out of a nonremunerative authorized training program. Id. at 481.

Subsequent to the Referee's order, we decided Nancy A. Fowler, 38 Van Natta 1291 (1986), in which we considered the question squarely before us now. In Fowler, the claimant sustained an initial injury while working for a private employer. She subsequently received vocational assistance and obtained a new job under a wage-subsidy agreement with a second private employer insured by a second insurer. Vocational assistance ended 60 days later and the claimant's claim was closed. A few months later, the claimant filed a claim for a new injury arising out of the new employment. She also filed an aggravation claim with the first insurer. Both insurers denied. The Referee found that the claimant had sustained a contributory injury on the second job, but because the second injury occurred during wage-subsidy employment, he assigned responsibility to the first insurer. The Referee felt bound by Firkus v. Alder Creek Lumber Co., 48 Or App 251 (1980), Wood v. SAIF, 30 Or App 1103 (1978) and Keeble, supra.

We found the court cases cited by the Referee to be distinguishable. In Firkus, for example, the claimant was injured first while employed by a private employer and second while enrolled in authorized vocational training program developed by the Vocational Rehabilitation Division. The issue became whether the original employer or the Division was responsible for the later injury. The court ruled that the Division was not an "employer" for purposes of ORS 656.005 (14) while providing services to claimants. The court therefore assigned responsibility to the original employer under the rule that an injury incurred during a vocational training program was a direct consequence of the original injury. Because the Division was not an employer and, thus, was not required to provide workers' compensation coverage to claimants receiving vocational assistance, the only alternative would have been to find that the claimant's injury was uninsured. Firkus, 48 Or App at 1110.

We found the Firkus rule to be inapplicable in Fowler because at the time of her wage-subsidy injury, Fowler was employed by a business that, unlike the Vocational Rehabilitation Division, was an "employer" within the meaning of ORS 656.005 (14) and was required to provide workers' compensation coverage for its employees. That being the case, we found Fowler's situation to be substantially the same as that of any other claimant involved in a responsibility case. Fowler, 38 Van Natta 1292.

Fowler is factually similar to the present case, in which claimant's second injury occurred while he was employed by an "employer," as that term is defined in ORS 656.005(14). Because claimant's employer was required to provide workers' compensation coverage to its employees, there was no danger that claimant's injury would go uncompensated. Thus, this case is like any other involving the issue of responsibility, and the material contribution of the second employment shifted liability to the later employer. See Hensel Phelps Construction Co. v. Mirich, 81 Or App 290 (1986).

#### ORDER

The Referee's order dated April 29, 1986 is reversed. Claimant's claim is remanded to the SAIF Corporation for payment of compensation according to law.

RONALD K. GOAD, Claimant  
Allen, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-04616  
December 29, 1986  
Order on Review

Reviewed by the Board en banc.

The SAIF Corporation requests review of that portion of Referee McCullough's order that awarded claimant permanent total disability. The issue is permanent total disability.

Claimant suffered a compensable injury to his low back on April 20, 1983 as a result of his employment with Lucas Plywood. Dr. Auerbach, a family practitioner, treated claimant conservatively, but he continued to have symptoms. As a result, Dr. Auerbach referred claimant to Dr. Buza, a neurosurgeon. Dr. Buza had a CT Scan performed which demonstrated a midline ruptured disc at the L5-S1 with more of a right component than the left. On June 10, 1983, Dr. Buza performed a decompressive laminectomy and removal of soft ruptured disc at L5-S1 on the right.

Dr. Buza reported on September 6, 1983 that the leg pain claimant experienced prior to surgery was now gone. He noted that claimant still had significant back pain, but felt it would resolve with conservative treatment. Vocational assistance was begun which led to the development of an authorized training program in electronic assembly. Dr. Buza approved the job analysis for the program, believing it to be within claimant's limitations. Claimant began the program on November 14, 1983, but was unable to continue after a few days due to a flare-up of his back symptoms. Claimant received no further vocational assistance, nor had he sought work prior to the January 31, 1986 hearing.

Claimant returned to the care of Dr. Auerbach who on December 9, 1983 indicated that claimant could not participate in training because of low back and leg pain. He recommended extensive physical therapy. At SAIF's request, claimant was seen by BBV medical examiners on January 5, 1984. They found no neurological abnormalities outside of a straight leg raising test on the right suggestive of a radicular component. They recommended additional tests be performed including an EMG to document denervation at a specific level and an MMPI to sort out psychological factors that might be compounding claimant's symptoms. Evaluation at the Portland Pain Center was also recommended. Both Dr. Buza and Dr. Auerbach concurred in the report.

On April 17, 1984, claimant was seen at the Northwest Pain Center. Dr. Cramer, an orthopedic surgeon, stated that he felt the amount of pain claimant was experiencing was rather remarkable. Claimant had a psychological screening evaluation performed by Dr. Yospe, a clinical psychologist. He concluded that claimant's psychological picture was that of a passive-dependent and somatically preoccupied individual who had a tendency toward the somatization of stress and tension. Claimant demonstrated poor incentive for reduction in pain behavior due to secondary gain in the areas of relief from work pressures and the meeting of dependency needs. Specifically, Dr. Yospe stated that claimant's financial security rested on maintaining his disability

status. Claimant was found to have questionable motivation for the Pain Center or for vocational rehabilitation.

Claimant was admitted to the Pain Center on April 18, 1984 and remained there until discharge on May 9, 1984. In the Discharge Summary, Dr. Cramer felt it was unlikely that claimant would significantly improve with additional treatment and that he could be considered medically stationary. The Occupational Therapy Discharge Summary concluded that claimant had set himself up for failure and appeared to have little motivation to assume responsibility for managing his pain problem. The Psychological Discharge Summary stated that, although positive on a verbal level, claimant did not seem motivated to change and was simply going through the motions. Dr. Yospe's diagnostic impressions remained unchanged from his initial evaluation and his prognosis for vocational rehabilitation and return to work was extremely guarded.

On June 14, 1984, Dr. Auerbach concurred in the medical report of the Northwest Pain Center and stated that claimant was medically stationary, but had pain and psychological overlay.

Claimant was seen at the Northwest Pain Center on July 30, 1984 for a Medical Reinforcement Evaluation and Psychological Recheck Evaluation. The Medical Reinforcement report written by Dr. Seres recommended that claimant increase the frequency of his exercises, maintain the use of biofeedback and relaxation techniques and be evaluated for the proper use of the pelvic tilt and exercise performance. The Psychological Recheck noted that claimant continued to be somatically preoccupied exhibiting significant passive-dependent and passive-aggressive personality features. The report, written by Drs. Labs and Newman, also concluded that "at the present time, Mr. Goad appears to lack motivation for work return and instead, has reached a satisfactory decision to remain occupied with household activities."

At SAIF's request, claimant was examined by Dr. Murphy on October 16, 1984. Dr. Murphy stated that if the myelogram scheduled for October 25, 1984 revealed no new abnormalities of the lumbar spine that his claim could be closed. In attempting to rate impairment, Dr. Murphy noted that there was an element of functional overlay exhibited which made objective evaluation difficult except in the tests not requiring patient participation. Based on the tests not requiring participation, he rated claimant's impairment as mild. From the overall perspective he concluded claimant's impairment was in the mild to moderate category.

Dr. Buza performed a myelogram on October 25, 1984 which he found not significantly abnormal except for an anular bulge posteriorly at L3-4 and faint lucency on the anterior metrizamide column at L4-5.

After the myelogram claimant returned to the Northwest Pain Center on February 21, 1985 at the recommendation of Dr. Buza. The Psychological Evaluation performed by Dr. Wicher again noted that claimant was somatically preoccupied and appeared to have a tendency toward somatization of stress and tension. She suspected claimant suffered from psychogenic magnification of his pain and appeared to be deriving some secondary gain with regard

to financial compensation and the meeting of underlying dependency needs. The Multidisciplinary Summary signed by all the examining doctors concluded that claimant probably did have some adhesive arachnoiditis involving his left L5 nerve root. They felt that he continued to show poor abdominal muscle tone, poor understanding of posture and body mechanics and demonstrated poor execution of his exercises. They stated that "it is our feeling that this man sees himself as permanently and totally disabled, although objective findings certainly wouldn't support this." Claim closure was recommended.

On March 18, 1985, Dr. Buza indicated that he concurred in the report of the Northwest Pain Center. On April 10, 1985, a Determination Order was issued that awarded claimant 25 percent unscheduled permanent partial disability.

Dr. Auerbach referred claimant to Dr. Blosser, an orthopedist. He stated that claimant suffered from joint dysfunction both in the lumbosacral and lumbodorsal areas. Dr. Blosser was unable to loosen claimant up through manipulation of the spine.

In a report dated October 7, 1985, Dr. Buza stated that claimant was medically stationary. Dr. Buza noted that claimant "will not flex the lumbar spine more than 10-15 degrees, will not hyperextend more than 10-15, will not laterally bend more than 10 degrees; although there seems to be fairly good lumbar lordosis." He felt that "on the basis of his examination, I believe he is totally disabled at this point". His limitations were that claimant "could not lift, twist or turn." No significant neurological abnormalities were reported and Dr. Buza felt that claimant would benefit from an independent medical evaluation.

On October, 18, 1985, Dr. Auerbach reported that he did not feel that claimant was medically stationary. He continued to give claimant injections in the painful trigger points surrounding the scar on his lower back. In addition, Dr. Auerbach was also giving claimant psychological support and aiding his ability to relax and reduce his perception of pain through imagery. Dr. Auerbach was hopeful that Dr. Blosser would improve the alignment of claimant's back through manipulation under anesthesia. Claimant's physical limitations were "fairly self-regulated, since he cannot sit or walk or even lie still for prolonged periods of time". He felt claimant was unable to bend fully from the waist, and should not be lifting objects which put strain on his low back. On October 23, 1985, Dr. Blosser reported that he was hopeful that his continued treatment would relieve claimant's symptoms, but currently he was totally disabled.

On December 9, 1985 claimant was examined by BBV Medical Services. The examiners, Drs. Erkkila, Fry and Mead, noted that claimant had psychophysiological musculoskeletal reaction with strong suggestion of malingering and/or hysterical behavior. Claimant's subjective complaints were far out of proportion to the objective physical findings and they felt that there appeared to be some suggestion of secondary gain by prolongation of his physical symptoms. They noted that "there appeared to be voluntary tightness in the lumbar paraspinous muscles but no visible or palpable muscle spasm." They felt claimant could participate in vocational rehabilitation efforts, but should avoid heavy lifting, repetitive bending or stooping. Claimant was found to have calluses on his hands, as well as numerous nicks and

cuts. In addition, claimant had calluses on his knees and a normal callus pattern on both feet. The presence of the calluses suggested to the examiners that claimant was more active than he claimed. Claimant was felt to be medically stationary.

At the time of hearing claimant was 44 years old with a 10th grade education. In the past claimant has done heavy labor including working on the green chain, resaw and planer. He also worked in a cannery doing clean-up work and lifting totes. Claimant worked for about nine years as a warehouseman for a carpet/floor covering business handling and distributing stock. This occupation included the installation of carpet and vinyl and was heavy labor. In addition, claimant has also done automotive repair work and has worked for several years in the building construction industry.

At hearing claimant testified that he has sharp pains down his back and into his left leg. The left leg periodically gives out on him. He stated that he can stand for about five to ten minutes and can currently walk about a block. On occasion, he can bend at the waist, but prefers to squat because of the pain. He felt he could not lift or carry more than 10 to 12 pounds. On a good day he does some of the housework around his house. Claimant's wife, son and sister all supported claimant's description of his limitations. Robert Sayer, claimant's former employer of nine years at Floor Masters, also testified in his behalf. Mr. Sayer had only seen claimant four or five times in the last couple of years, but testified that he had dramatically changed. The last time he observed him he was severely bent over when he walked and was in obvious pain.

Byron McNaught, a vocational rehabilitation expert, testified that based on the reports of Drs. Auerbach and Buza claimant's limitations placed him in a sedentary work category. This work category combined with his education and work history resulted in claimant being unemployable. Mr. McNaught stated that if claimant's limitations were no heavy lifting or repetitive bending or stooping that there would be occupations claimant could perform. These were the same limitations suggested by BBV Medical examiners on December 9, 1985.

Leonard Angerman, a private investigator for SAIF, testified and presented movies of the claimant. The movies showed claimant bending over the engine compartment of a light pick-up truck working on the engine. At one point claimant's weight was entirely on his left leg with his right foot raised. Claimant was also depicted carrying a ladder and doing a good deal of walking and standing. Claimant did not appear to have difficulty with these activities, but did walk with a slight limp.

In order to establish permanent total disability, claimant has the burden of establishing that he is unable to perform any work at a gainful and suitable occupation. Wilson v. Weyerhaeuser, 34 Or App 403 (1977). Claimant can meet this burden either by showing that his physical incapacity precludes him from any gainful employment; or (2), if less than physically incapacitated, by showing that his physical impairment combined with unfavorable vocational factors effectively prohibits him from being employed. Clark v. Boise Cascade Corp., 72 Or App 397, 399 (1985); Wilson, 30 Or App at 409.

As the Referee correctly stated the key to claimant's

entitlement to permanent total disability rests on the extent of his physical impairment resulting from his 1983 back injury. However, after de novo review we conclude that claimant's impairment is not sufficient to warrant the award of permanent total disability.

In concluding that claimant is permanently totally disabled, Dr. Buza relied heavily on claimant's unwillingness to perform various tests during his examination. Dr. Buza stated that claimant "will not" perform certain tests as opposed to "cannot." As the Referee noted, the report of October 7, 1985 suggested that claimant can do more than he is willing to do. This conclusion is further supported by Dr. Buza's concurrence in the February 21, 1985 report of the Northwest Pain Center. The Pain Center's report stated that claimant was "deriving some secondary gain with regard to financial compensation and the meeting of underlying dependency needs" and that claimant "sees himself as permanently and totally disabled" without the objective findings to support this.

Dr. Auerbach concurred in the May 9, 1984 report of the Northwest Pain Center which questioned claimant's motivation for rehabilitation or return to work. In his concurrence Dr. Auerbach specifically agreed that claimant had psychological overlay and was medically stationary. His opinion changed on October 18, 1985 when he stated that claimant was not medically stationary and that he continued to provide treatment and psychological support. Despite claimant's psychological component, Dr. Auebach felt that his limitations were "self-regulated," indicating a reliance on claimant's subjective complaints. Similarly, Dr. Blosser also apparently relied on claimant's subjective complaints in concluding he was totally disabled and offered no explanation for the severity of his symptoms.

All of the reports of the Northwest Pain Center and BBV Medical Examiners indicate that claimant's subjective complaints were far out of proportion to the objective findings. Dr. Murphy's October 16, 1984 report stated that because of the functional overlay he could not trust the tests requiring patient participation. A similar finding was made by Drs. Mead, Fry and Erkkila on December 9, 1985 who felt that there was a strong suggestion of malingering and secondary gain by prolongation of claimant's symptoms. These reports all indicate that claimant is not as physically impaired as suggested by Dr. Buza or his testimony.

We also find that the movies do impeach claimant at least to some extent. He was viewed in activities performed with an ease that contradicted his testimony regarding the severity of his limitations. He was seen bending and carrying items with no apparent difficulty. His walk showed only a mild limp. That claimant is more active than he claimed is further indicated by the normal formation of calluses on his hands, knees and feet noted by BBV Medical Services. Despite claimant's and the witnesses' testimony we cannot reconcile claimant's subjective complaints with the medical reports or impeachment evidence.

We do not doubt that claimant has incurred significant impairment from his injury, but find that his actual impairment is not sufficient for a finding of permanent total disability based solely on physical impairment or on an "odd lot" theory.

We do find that claimant is entitled to compensation for permanent disability greater than that awarded by the April 10, 1985 Determination Order. Following our de novo review of the vocational, medical and lay evidence we conclude that claimant is entitled to an additional 25 percent unscheduled permanent partial disability for a total of 50 percent (160 degrees) permanent partial disability.

ORDER

The Referee's order dated February 28, 1986 finding claimant permanently totally disabled is reversed. In addition to the Determination Order's award of 25 percent (80 degrees) unscheduled permanent disability, claimant is awarded 25 percent for a total award of 50 percent (160 degrees) unscheduled permanent disability for his back condition. 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.

Board Member Lewis Dissenting:

In determining that claimant is not permanently totally disabled, the majority has relied heavily on the medical reports of the Northwest Pain Center and the independent medical examiners. I feel this reliance is misplaced.

Dr. Auerbach had been claimant's primary physician since April 21, 1983. Dr. Buza performed the surgery on claimant and had seen him for follow-up on several occasions. Both of these physicians have had the opportunity to examine and treat claimant for an extensive period of time. They are in the best position to determine claimant's limitations as a result of his industrial injury and their opinions should be given deference. See Weiland v. SAIF, 64 Or App 810 (1983).

Further, the lay testimony presented at hearing was consistent with the limitations placed on claimant by Drs. Auerbach and Buza. In addition to claimant, testimony was heard from his sister, wife, son and employer of nine years. All the testimony substantiated claimant's ongoing pain and severe physical limitations. Notably, the Referee found claimant and the witnesses credible. Generally, the Board defers to the Referee's determination of credibility because of his ability to observe the witnesses. Humphrey v. SAIF, 58 Or App 360 (1982). I find no reason to doubt the credibility of the witnesses which the majority implicitly disbelieves.

Lastly, I do not feel that the movies presented at hearing impeach the claimant. As the Referee noted, they demonstrate no significant physical activity. Further, claimant's rebuttal testimony describing his activities in the movies placed them well within his physical limitations.

I would affirm and adopt the well reasoned opinion of the Referee. Accordingly, I respectfully dissent.

ROBERT F. HILEMAN, Claimant  
Malagon & Moore, Claimant's Attorneys  
J.W. McCracken, Jr., Defense Attorney

WCB 85-12698  
December 29, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The self-insured employer requests review of Referee Daughtry's order that awarded claimant permanent total disability as of the date of the hearing. Claimant cross-requests review of that portion of the order regarding the effective date of the award. Claimant asserts that he had proven entitlement to the award prior to the hearing. The issues are whether claimant is entitled to an award of permanent total disability and, if so, the effective date of the award.

We affirm the Referee's order with the following comment regarding the effective date of claimant's award. The standard for determining the effective date of a retroactive award of permanent total disability is the earliest date that claimant's permanent total disability is proved to have existed. Morris v. Denny's, 53 Or App 863 (1981); Jephtha Orriggio, 38 Van Natta 559 (1986). Claimant asserts that his disability was proved as of the date he became medically stationary months before the hearing. The effective date of a permanent total disability award, however, may not necessarily coincide with a claimant's medically stationary date. Deborah L. Jones, 37 Van Natta 1573 (1985). Rather, the effective date is determined upon consideration of all relevant medical, social and vocational factors. Id. at 1575.

An important factor in the present case was whether claimant had satisfied the seek-work requirement of ORS 656.206(3). We find that although there was pre-hearing evidence regarding claimant's job search efforts, it was claimant's testimony that proved that his efforts had been sufficient to satisfy the statutory requirement. The testimony, of course, did not occur until the time of the hearing. The hearing date was thus the earliest claimant proved his entitlement to an award of permanent total disability.

#### ORDER

The Referee's order dated June 17, 1986 is affirmed. Claimant's attorney is awarded a fee of \$750 for services on Board review, to be paid by the self-insured employer.

HOWARD J. HUNT, Claimant  
Doblie & Associates, Claimant's Attorneys  
Cummins, et al., Defense Attorneys  
Roberts, et al., Defense Attorneys

WCB 83-06115 & 83-06552  
December 29, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

Transport Insurance Company requests review of Referee St. Martin's order that found it rather than Farmers Insurance Company responsible for claimant's low back condition and awarded claimant's attorney an insurer-paid fee of \$3,000. The issues are responsibility and attorney fees.

The Board affirms the order of the Referee on the responsibility issue. On the issue of attorney fees, we reverse.

This is a case under ORS 656.307. Compensability was

conceded. There are no special circumstances present which take this case outside the rule of Petshow v. Farm Bureau Insurance Co., 76 Or App 563, 570-71 (1985), rev den 300 Or 722 (1986) and Stanley C. Phipps, 38 Van Natta 13, 15-16 (1986). Claimant's attorney, therefore, is not entitled to an insurer-paid fee.

ORDER

The Referee's order dated November 19, 1985 is affirmed in part and reversed in part. That portion of the order that awarded claimant's attorney an insurer-paid fee of \$3,000 is reversed. The remainder of the order is affirmed.

JAMES C. INGRAM, Claimant  
Roll, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 86-11024  
December 29, 1986  
Order Denying Motion to Dismiss

Reviewed by Board Members McMurdo and Ferris.

Claimant has moved for an order dismissing the SAIF Corporation's request for Board review on the grounds that the request was: (1) not timely filed within 30 days of the Referee's order; and (2) not simultaneously mailed to claimant's attorney.

The 30-day time period expired November 29, 1986, a Saturday. SAIF's request for review was physically received by the Board on November 26, 1986 and was timely. The requests bears a certificate of mailing to all other parties to the review and claimant's attorney on November 26, 1986, which was also timely. The four days following November 26 constituted the Thanksgiving weekend. Claimant's attorney acknowledges that he received a copy of the request on the following Monday, which we find to be in the ordinary course of the mails. We conclude that SAIF complied with ORS 656.289(3) and 656.295(1) and (2) and that the request is valid to confer jurisdiction on the Board. The motion to dismiss is denied.

IT IS SO ORDERED.

VASILIKI MOURELATOS, Claimant  
Bloom, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-11800  
December 29, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of those portions of Referee Pferdner's order that found claimant's low back claim not prematurely closed, upheld the SAIF Corporation's denial of claimant's aggravation claim for her low back and awarded claimant 7 1/2 percent (24 degrees) unscheduled permanent partial disability for her low back. The issues are premature closure, aggravation and extent of disability.

The Board affirms the order of the Referee on the premature closure and aggravation issues. On the issue of extent of disability, we modify the award granted by the Referee.

Claimant injured her low back in April 1984 in the course of her employment as a garment folder. All treatment for the condition has been conservative. Claimant's treating orthopedist, Dr. Tilson, declared claimant medically stationary in February 1985 and rated her impairment as minimal. The claim was

closed by Determination Order in April 1985 with no award of permanent disability.

In rating the extent of unscheduled permanent partial disability for claimant's low back, we consider her 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 apply these rules as guidelines, not as restrictive mechanical formulas. See Harwell v. Argonaut Insurance Co., 296 Cr 505, 510 (1984); Howerton v. SAIF, 70 Or App 99, 102 (1984).

Claimant was 44 years old at the time of the hearing. She moved to the United States from Greece in 1981 and speaks very little English. She received six years of schooling in Greece as a child and then worked as a housewife until she moved to America. She has worked for a single employer since arriving in this country, first as a sewing machine operator and then as a garment folder.

Following our de novo review of the medical and lay evidence, we conclude that claimant's low back impairment is in the minimal range. Exercising our independent judgment in light of claimant's level of impairment and the relevant social and vocational factors, we conclude that an award of 20 percent (64 degrees) unscheduled permanent partial disability adequately and appropriately compensates claimant for the permanent loss of earning capacity due to the industrial injury. We substitute this award for that granted by the Referee.

#### ORDER

The Referee's order dated June 23, 1986 is modified in part. Claimant is granted 20 percent (64 degrees) unscheduled permanent partial disability in lieu of the 7 1/2 percent (24 degrees) awarded by the Referee. In accordance with the attorney fee agreement between claimant and her attorney, claimant's attorney is awarded 25 percent of the additional compensation granted by this order, not to exceed \$3,000. The remainder of the Referee's order is affirmed.

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PAMELA R. RARD, Claimant  
Gatti, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-10652  
December 29, 1986  
Order on Review (Remanding)

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Seymour's order which dismissed her request for hearing for lack of jurisdiction. On review, claimant contends that the Referee had jurisdiction to consider the issues of premature claim closure and extent of permanent disability. We agree and reverse.

In June 1984, claimant filed two back injury claims. The claims were initially accepted by the SAIF Corporation as nondisabling. However, claimant was eventually taken off work by Dr. Wilson, her treating chiropractor. In February 1985, SAIF began paying temporary disability. Shortly thereafter, Dr. Wilson released claimant to light duty.

In March 1985, SAIF issued a partial denial of

claimant's current back treatment. Claimant promptly requested a hearing concerning this denial.

In April 1985, a Determination Order issued, awarding temporary disability only. Claimant also requested a hearing regarding this order. However, this hearing request was filed on August 29, 1985, which was the day of her scheduled hearing on the partial denial. Included with the request was a letter from claimant's attorney that stated as follows:

"There is a pending Request for Hearing on separate issues. I am, therefore, kindly requesting that this Request for Hearing be assigned a new WCB case number."

The hearing concerning the partial denial and related penalty issues was held as scheduled. Apparently, claimant's appeal from the Determination Order was not discussed. Thereafter, a Referee's order issued. SAIF's partial denial was set aside, additional temporary partial disability was awarded, and a penalty was assessed.

In May 1986 a hearing was held regarding claimant's appeal from the April 1985 Determination Order. Claimant contended that either her claim was prematurely closed or that she was entitled to an award of unscheduled permanent disability. SAIF questioned the Referee's jurisdiction to consider these issues, asserting that these matters were either raised or raisable at the prior hearing.

The Referee found that the issues of premature claim closure and extent of disability were ripe for consideration at the time of the August 1985 hearing. Since these issues were not raised at the prior hearing, the Referee concluded that claimant was now barred under the doctrine of res judicata from raising them.

The court has recently discussed the applicability of res judicata and collateral estoppel in workers' compensation cases. Res judicata bars claims which were or could have been litigated in the prior proceeding. Collateral estoppel precludes relitigation of issues actually litigated and determined, if their determination was essential to the prior order. Consolidated Freightways v. Poelwijk, 81 Or App 311 (1986); Carr v. Allied Plating Co., 81 Or App 306 (1986).

Inasmuch as the issues of premature closure and extent of permanent disability were not actually litigated nor determined at the prior hearing, collateral estoppel does not apply. However, to consider whether the doctrine of res judicata is applicable, we must determine if the aforementioned issues were or could have litigated in the August 1985 proceeding. In order to do so, we must first investigate whether the prior Referee had jurisdiction to consider the premature closure and extent of disability issues.

A request for hearing may be made by any writing, signed by or on behalf of the party and including the address of the party, requesting the hearing, stating that a hearing is desired, and mailed to the Board. ORS 656.283(3). At least ten days' prior notice of the time and place of hearing shall be given to

all parties in interest by mail. ORS 656.283(5). The request for hearing has two basic purposes: (1) to invoke the jurisdiction of the Hearings Division; and (2) to inform the parties and the Referee that some aspect of a particular claim is being contested, thus allowing them to prepare for the hearing. See Culver v. Sheets, 13 Or App 405, 409, rev den (1973).

We recently discussed the question of whether the hearing requirements of ORS 656.283 are jurisdictional. In Thomas E. Harlow, 38 Van Natta 1406 (December 4, 1986), we concluded that fulfillment of the two basic purposes of a request for hearing is central to the orderly, efficient and fair operation of the workers' compensation system. We further found that the certainty and permanence of a writing and the preparation allowed by ten days advance notice are essential to the fulfillment of these purposes. Finally, we reasoned that permitting anything less than strict compliance with these basic requirements is an invitation to confusion, unfair surprise, inefficiency, and needless delay. Accordingly, we held that the following two requirements are jurisdictional: (1) a written request for hearing; and (2) ten days advance notice of the hearing on that request.

In accordance with the Harlow holding, we conclude that the prior Referee lacked jurisdiction to consider the issues of premature closure and extent of permanent disability. Claimant's August 1985 hearing request satisfies the writing requirement of ORS 656.283(3). Yet, since the request was filed on August 29, 1985, the very day of the hearing concerning the partial denial, there was no advance notice, ten days or otherwise, of a hearing regarding the premature closure and extent issues. Consequently, this lack of advance notice prevented the prior Referee from attaining jurisdiction to consider the aforementioned issues. Moreover, had the prior Referee attained jurisdiction, the partial denial issue presented at that time did not involve the same set of operative facts as those introduced by the issues contested in the May 1986 hearing. See Dean v. Exotic Veneers, Inc., 271 Or 188, 191-92 (1975); Carr v. Allied Plating Co., supra. Thus, in either case, the doctrine of res judicata would be inapplicable.

This controversy could likely have been avoided had the parties orally preserved the premature closure and extent of disability issues during the August 1985 hearing. To further clarify any potential future misunderstandings, we consider it a much preferable policy to preserve issues on the record. However, this preferred policy has no application to this situation because the premature closure and extent of disability issues could not have been properly presented to the prior Referee.

Inasmuch as claimant timely appealed the April 1985 Determination Order and since the prior Referee lacked jurisdiction, we conclude that the present Referee had jurisdiction to consider the issues of premature closure and extent of permanent disability. Therefore, claimant is entitled to receive a decision on the merits of these issues. Accordingly, this matter shall be remanded for that decision. The Referee is instructed to render his decision based on the record, which was closed as of the May 13, 1986 hearing.

ORDER

The Referee's order dated May 28, 1986 is reversed. This matter is remanded to the Referee for action consistent with this order.

VERNON G. SEBASTIAN, Claimant  
Malagon & Moore, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-13067  
December 29, 1986  
Order on Reconsideration

The SAIF Corporation has requested reconsideration of the Board's Order on Review dated December 2, 1986. In our order, we affirmed the Referee's finding that claimant's psychiatric condition was compensable. Although no briefs were filed by either party, we also awarded an insurer-paid attorney fee of \$100.

SAIF contends that it withdrew its request for Board review in May 1986, long before we conducted our review and issued our order. In support of its contention, SAIF has enclosed a copy of a May 30, 1986 letter from its counsel. The letter, which is addressed to the Board, states that it should be accepted by the Board as a withdrawal of SAIF's request for review. The letter indicates that copies have been sent to claimant and his attorney. The Board has no record of ever receiving SAIF's letter of withdrawal.

Because it withdrew its request for review and since claimant made no appearance before the Board, SAIF argues that the attorney fee award is inappropriate. We disagree.

Timely request for Board review is a jurisdictional prerequisite for our review. ORS 656.289(3); 656.295(2); Argonaut Insurance v. King, 63 Or App 847, 852 (1983). Once the time for filing a request for review has expired, the only party who has a right to review is one who has timely requested review. John K. Eder, 38 Van Natta 1372 (November 18, 1986). Once the request is withdrawn for whatever reason, where no other party has requested review in a timely manner, we no longer have jurisdiction to proceed. Id.

We attained jurisdiction to review this matter through SAIF's timely filing of its request for review. Since our jurisdiction would continue until SAIF's request for review was withdrawn, the pivotal question is when was SAIF's withdrawal filed. If the withdrawal was filed before issuance of our Order on Review, we lacked jurisdiction. If the withdrawal was filed after we issued our order, we had jurisdiction to consider this matter.

"Filing" means the receipt of a document by the Board at any office of the Board or the date of mailing. OAR 438-05-040(4). 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. OAR 438-05-040(4)(b). 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. id.

There is no record that SAIF's withdrawal letter was received prior to its inclusion with SAIF's request for reconsideration. Furthermore, there is no acceptable proof of mailing, as required by the aforementioned administrative rule. Accordingly, the record establishes that the withdrawal of SAIF's request for Board review was not filed until after we had conducted our de novo review. Consequently, we had jurisdiction to consider the matters raised by SAIF's request for review, as well as to issue our Order on Review.

Since we had jurisdiction to issue our order, we also had authority to award an attorney's fee. When the insurer has not filed an appellant's brief to which claimant may respond and if claimant's compensation is not disallowed or reduced, claimant is entitled to a reasonable attorney's fee. ORS 656.382(2); Betty J. McMullen, 38 Van Natta 117, 118 (1986). Considering the facts of this case as detailed herein, claimant's fee should unquestionably be minimal. However, under these circumstances, we conclude that our prior award was reasonable.

Accordingly, SAIF's request for reconsideration is granted. Our previous order is withdrawn. On reconsideration, we adhere to and republish our former order as supplemented herein, effective this date.

IT IS SO ORDERED.

JANET J. ALFORD, Claimant  
Emmons, et al., Claimant's Attorneys  
Roberts, et al., Defense Attorneys

WCB 85-15702  
December 30, 1986  
Order on Reconsideration

The insurer has requested reconsideration of that portion of our Order on Review dated December 2, 1986 that awarded claimant's attorney a fee of \$450 for services on Board review. The insurer's request is allowed. We withdraw our prior order for reconsideration. We have received and considered claimant's response to the insurer's request for reconsideration. After considering the arguments of both parties, we modify our prior order to eliminate claimant's attorney's fee on review.

On March 18, 1986 Referee Myers issued an Opinion and Order upholding the insurer's denial of claimant's industrial injury claim and awarded claimant 10 percent scheduled permanent partial disability for each forearm. Claimant requested review of the Referee's order in its entirety. The insurer cross-requested review of that portion of the order dealing with extent of disability, seeking a reduction in the scheduled awards. We affirmed the Referee's order without opinion and awarded claimant's attorney a fee for services on review.

In its request for reconsideration, the insurer asserts that, pursuant to our recent order in Richard M. Deskins, 38 Van Natta 825 (1986), an attorney fee should not have been awarded under the present facts. Claimant responds with an assertion that a fee is awardable pursuant to Travis v. Liberty Mutual Insurance, 79 Or App 126 (1986).

In Travis, the claimant requested that the Board award additional permanent disability. The insurer filed a cross-request, contending that the Referee's permanent partial disability award should be reduced. The Board affirmed the Referee's order and declined to award an attorney fee. Relying on ORS 656.382(2), the Travis court held that claimant was entitled to an attorney fee, concluding that the insurer's cross-request constituted a request for review "initiated by an employer or insurer." In Deskins, under similar facts, we noted that the Travis decision did not address OAR 438-47-075. That rule provides that an attorney fee is not awardable on an insurer's

cross-request unless the claimant withdraws his or her request and the insurer thereafter pursues its cross-request and receives an adverse decision. We noted that while Travis supported the Deskins claimant's request for an attorney fee, we were bound to follow "the clear and unambiguous dictates of our own administrative rules.

Deskins is essentially indistinguishable from the present case. As in Deskins, we acknowledge that Travis supports the present claimant's contention for an award of attorney fees. We remain convinced, however, that we must follow our own rules regarding attorney fees and in this case, under OAR 438-47-075, an attorney fee was not appropriate.

Now, therefore, having granted the insurer's request for reconsideration, we withdraw and modify our order dated December 2, 1986 to eliminate the attorney fee awarded in that order. Except as modified herein, we adhere to and republish our prior order.

IT IS SO ORDERED.

BRIAN V. BALCUNS, Claimant  
Robert E. Nelson, Claimant's Attorney  
Mitchell, et al., Defense Attorneys  
Moscato & Byerly, Defense Attorneys

WCB 85-12999 & 85-15711  
December 30, 1986  
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of that portion of Referee Lipton's order which awarded a \$600 insurer-paid attorney fee for his attorney's services in setting aside Liberty Northwest Insurance's denial of responsibility for his "new injury" claim for a low back condition. On review, claimant contends that his attorney fee award should be increased.

Before turning to claimant's contention, we wish to address a flaw in the Referee's analysis concerning the responsibility issue. Although this issue has not been raised on Board review, we deem it appropriate to discuss this matter. Miller v. SAIF, 78 Or App 158, 161 (1986); Russell v. A & D Terminals, 50 Or App 27, 31 (1981).

In finding Liberty responsible as a "new injury" insurer, the Referee suggested that an increase of pain, which required a period of disability and a return for medical treatment, was sufficient to shift responsibility. This statement is incorrect. A worsening of symptoms alone, which results in disability, is insufficient to shift responsibility. Hensel Phelps Construction v. Mirich, 81 Or App 290, 294 (1986). In order to shift responsibility to a subsequent insurer, there must be a worsening of the underlying condition. Hensel Phelps Construction, supra; Crowe v. Jeld-Wen, 77 Or App 81, 87 (1985), rev den 301 Or 76 (1986); SAIF v. Brewer, 62 Or App 124, 128-29 (1983).

Following our de novo review of the medical and lay evidence, we conclude that claimant's lifting incident while working for Liberty's insured caused more than an increase of symptoms and a need for additional treatment. Had the incident

merely exacerbated claimant's pain, resulting in a second period of disability, responsibility would remain with Transamerica Insurance Co., the "aggravation" insurer. See SAIF v. Brewer, supra; Smith v. Ed's Pancake House, 27 Or App 361, 364 (1976). However, we are persuaded that the lifting incident independently contributed to the causation of claimant's disabling condition, i.e., to a worsening of the underlying condition. See Hensel Phelps Construction, supra. Consequently, we affirm that portion of the Referee's order which found Liberty responsible for claimant's "new injury" claim.

Finally, we modify the Referee's award of attorney fees. Since there were no ancillary issues at the hearing level that posed a threat to his entitlement to compensation, claimant is considered a nominal party. Petshow v. Farm Bureau Ins. Co., 76 Or App 563, 571 (1985); Stanley C. Phipps, 38 Van Natta 13, 16 (1986). As such, we conclude that he has not "actively and meaningfully participate[d]" as that phrase is used in OAR 438-47-090(1). Thus, claimant is not entitled to an attorney's fee for services at the hearing level. Phipps, supra.

Although claimant does not receive an insurer-paid attorney's fee, we find that he is entitled to a fee for services rendered prior to the issuance of an order designating a paying agent pursuant to ORS 656.307. Our review of the record and the materials submitted by claimant's attorney suggests that his attorney contributed to the issuance of a .307 order. Accordingly, claimant is entitled to an attorney's fee which shall be payable out of compensation. Mark L. Queener, 38 Van Natta 882 (1986); Bruce A. Hatleli, 38 Van Natta 1024 (1986).

The amount of a reasonable attorney fee is based on the efforts of the attorney and the results obtained. OAR 438-47-010(2). In determining the reasonableness of attorney fees, several factors must be considered. These factors include: (1) the time devoted to the case; (2) the complexity of the issues presented; (3) the value of the interest involved; (4) the skill and standing of counsel; (5) the nature of the proceedings; and (6) the results secured. Barbara A. Wheeler, 37 Van Natta 122, 123 (1985).

In reaching our conclusion, we have considered all of the matters offered by claimant in support of his request for an increased attorney fee. These matters also include arguments which would have been raised in defense of claimant's attorney fee award as initially awarded by the Referee. After considering the nature of the practice in general and the facts of this case in particular, we conclude that \$600 is a reasonable attorney's fee for claimant's attorney's services rendered prior to the issuance of the .307 order.

#### ORDER

The Referee's order dated April 7, 1986, as reconsidered April 17, 1986, is modified in part. In lieu of the Referee's award of an insurer-paid reasonable attorney's fee, claimant's attorney is awarded 25 percent of claimant's compensation, not to exceed \$600, for services rendered prior to hearing in procuring an order designating a paying agent under ORS 656.307. This fee shall be paid by Liberty Northwest Insurance Company. The remainder of the Referee's order is affirmed.

CHARLES L. BUTTREY, Claimant  
Francesconi & Cash, Claimant's Attorneys  
Ann Kelley, Ass't. Attorney General

WCB 86-07787  
December 30, 1986  
Order on Review

Reviewed by Board Members Ferris and McMurdo.

The Inmate Injury Fund requests review of Referee Podnar's order that awarded a \$400 attorney fee for services rendered in rescinding the denial. The issue is attorney fees.

Claimant filed a report of injury on March 27, 1986 for low back strain. The claim was denied on April 7, 1986 based on claimant not having a condition requiring medical treatment. Claimant sought medical treatment on May 19, 1986 from Dr. Shipp, a chiropractor. He saw an attorney on June 3, 1986 who requested a hearing on the denial and filed an application to schedule. Claimant's attorney also sent a letter to Dr. Shipp requesting information concerning the injury and all medical records. A copy of the letter requesting a hearing was also forwarded to the Inmate Injury Fund and received on June 4, 1986. The denial was rescinded on June 9, 1986 and claimant's claim was accepted.

OAR 438-47-015 states:

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

The definition of "compensation" as defined in ORS 656.005(9) does not include attorney fees. Dotson v. Bohemia Inc., 80 Or App 233 (1986). Therefore, claimant's attorney is only entitled to an attorney fee for his services up to the time of the rescission of the denial.

After de novo review of the record, we conclude that claimant's attorney was instrumental in obtaining compensation for claimant within the meaning of OAR 438-47-015. However, we feel the amount of the attorney fee to be excessive. In determining the reasonableness of the attorney fees, the factors considered are: (1) time devoted to the case; (2) complexity of the issues involved; (3) value of the interest involved; (4) skill and standing of counsel; (5) nature of the proceedings; and (6) results secured. Barbara A. Wheeler, 37 Van Natta 122 (1985). Based on these factors we conclude that claimant's attorney is entitled to \$200 as a reasonable attorney fee.

#### ORDER

The Referee's order dated August 15, 1986, as modified, is affirmed.

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TRINIDAD V. ENCISO, Claimant  
Gatti, et al., Claimant's Attorneys  
Davis, et al., Defense Attorneys

WCB 85-11430  
December 30, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

The insurer requests review of that portion of Referee Nichols' order which affirmed a September 13, 1985 Determination Order's award of temporary total disability. Claimant cross-requests review of that portion of the Referee's order which affirmed the Determination Order's award of 10 percent (15 degrees) scheduled permanent disability for loss of use or function of the left leg (knee). On review, the issues are claimant's entitlement to temporary disability and the extent of his scheduled permanent disability.

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

Among other contentions, the insurer argues that claimant was not entitled to a specific portion of the temporary disability benefits he was awarded because he was working during this period. Thus, the insurer requests that the Determination Order be amended to disallow temporary disability benefits pertaining to this period and that it be granted an offset for this alleged overpayment.

We decline the insurer's requests. The Determination Order awarded temporary total disability compensation, less time worked. Consequently, the order need not be amended. Furthermore, although an inference can be drawn from the record to support the insurer's allegation of an overpayment, the evidence fails to establish that claimant received temporary total disability benefits during the period in question.

Finally, we find that the temporary disability issue was of ordinary difficulty with the usual probability of success for claimant. Accordingly, a reasonable attorney fee is awarded concerning claimant's defense of this issue.

#### ORDER

The Referee's order dated July 11, 1986 is affirmed. Claimant's attorney is awarded \$400 for services on Board review concerning the temporary disability issue, to be paid by the insurer.

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MICHAEL R. GIRD, Claimant  
Welch, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 84-00613  
December 30, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of Referee Michael Johnson's order which: (1) set aside its partial denial of claimant's multiple sclerosis condition; and (2) granted permanent total disability, whereas previous Determination Orders had awarded a total of 15 percent (48 degrees) unscheduled permanent disability for a low back injury. On review, SAIF contends that: (1) the multiple sclerosis condition is not compensable; and (2) claimant is not entitled to an award of permanent total disability. We agree and reverse.

Claimant was 40 years of age at the time of hearing. In 1982, while working as a logger, he was struck by a falling log in the low back and left leg. A February 1983 myelogram demonstrated no definite abnormality. However, a CT scan revealed a mild central disc protrusion in the low back. Dr. Tsai, neurosurgeon, diagnosed bilateral radicular irritation due to the midline herniation.

Dr. Drost, claimant's then treating osteopath, felt that surgery was not indicated. In April 1983, following an attempt to become more physically active, claimant noted a return of the "weakness and wobbliness" of his legs. Despite these problems, Dr. Drost encouraged him to return to work, subject to light-duty restrictions.

In June 1983 Dr. Martens, orthopedist, performed an independent medical examination. Claimant complained of an occasional aching in the right leg, as well as a "wobbly" sensation. He experienced "very little" back pain. Diagnosing improving bilateral radicular irritation, Dr. Martens recommended a return to work, subject to light-duty restrictions. Permanent impairment was rated as minimal to mild.

A June 1983 Determination Order issued. Claimant was awarded approximately six months of temporary disability and five percent unscheduled permanent disability.

In July 1983 claimant was referred to the Callahan Center. In addition to modest low back pain and an occasional aching in the right leg, claimant complained that he had recently experienced spells of numbness involving the left side of his upper lip/tongue and his right arm. He had also experienced eye problems, which had previously prompted medical treatment. As his stay at the Center progressed, claimant developed a "slightly spastic" gait. He related this problem to his February 1983 myelogram. Because of this continuing problem, claimant was discharged from the Center and referred to Dr. Lafrance, neurologist.

In September 1983 claimant was examined by Dr. Lafrance, who arranged for a battery of diagnostic tests, including an additional myelogram. Following a review of the test results, Dr. Lafrance opined that claimant had two active problems. One was chronic back pain, directly related to his industrial injury. The other was multiple sclerosis. This condition had been symptomatic prior to claimant's injury as manifested by his eye difficulties, but was currently associated with a slowly progressive paresis. While the first myelogram may have been temporarily associated with the acceleration of the multiple sclerosis symptoms, Dr. Lafrance opined that it did not cause the condition. Dr. Lafrance noted that the second myelogram had not significantly altered claimant's neurological picture. In Dr. Lafrance's opinion, claimant's work accident and his multiple sclerosis should be viewed as two essentially unrelated episodes.

Claimant's medical record was reviewed by Dr. Reilly, neurological consultant. Dr. Reilly stated that multiple sclerosis was an immunological disease, which was not related to trauma. Inasmuch as claimant had experienced signs and symptoms of multiple sclerosis prior to the myelogram, Dr. Reilly concluded that the condition was not related to the industrial injury.

In December 1983 Dr. Lafrance concluded that claimant's low back condition was medically stationary. Diagnosing a chronic musculoligamentous injury, Dr. Lafrance recommended that claimant limit his lifting from 20 to 25 pounds and modify his repetitive bending and twisting activities. Dr. Lafrance also suggested that claimant restrict any prolonged posture positions to between two to three hours. Concerning the onset of claimant's multiple sclerosis, Dr. Lafrance noted that no physical abnormalities consistent with the condition had been detected prior to the first myelogram. However, Dr. Lafrance acknowledged that it was "very difficult" to determine the exact course of claimant's multiple sclerosis.

Thereafter, Dr. Dow, neurologist, conducted an independent medical examination. Dr. Dow noted some difference of opinion regarding the effect of trauma, and even a spinal puncture, on multiple sclerosis. However, in Dr. Dow's judgment, no relationship was justified on the basis of any scientific evidence. Consequently, Dr. Dow concluded that neither claimant's work injury nor the myelograms played any significant role in the progression of his multiple sclerosis. Diagnosing claimant's work injury as a low back strain, Dr. Dow rated the residual impairment as minimal.

In January 1984 a second Determination Order issued. Claimant's previous five percent award of unscheduled permanent disability was increased to 15 percent.

Vocational assistance was initiated in January 1984. Claimant was a high school graduate, with three years of military service. While in the service, he had worked as a store keeper. In addition to his years in the lumber industry, claimant had worked as a repairman for a cycle shop. A vocational goal of computer programmer trainee was identified. Thereafter, claimant enrolled in a one year community college program in computer programming. Claimant's attitude, participation and cooperation were considered excellent. However, primarily due to his deteriorating physical condition, he encountered increasing difficulties with his training program. Eventually, Dr. Lafrance recommended that he withdraw from the program.

In April 1984 Dr. Grimm, neurologist, reviewed claimant's medical record. In Dr. Grimm's opinion, claimant had probably had multiple sclerosis since 1976, when he had first experienced some eye problems. Dr. Grimm stated that the neurological findings, prior to the first myelogram, had clearly implicated problems beyond those attributable to a low back injury. After researching the available medical literature, Dr. Grimm found no solid evidence to support a causal relationship between a physical injury, or myelogram, and the onset, or aggravation, of multiple sclerosis. Dr. Grimm noted that there were "prominent students of multiple sclerosis who essentially forbid their patients" from myelograms. However, concluding that there was "no good clinical information on this point," Dr. Grimm regarded the relationship as a distinct possibility, rather than a probability.

Dr. Dow interpreted Dr. Grimm's opinion to mean that it was not medically probable that either trauma or a myelogram caused a worsening of claimant's disease process. Dr. Dow described multiple sclerosis as a disease, the cause of which, at

the present time, is unknown. Dr. Dow acknowledged that pain might increase certain symptoms of multiple sclerosis temporarily. However, Dr. Dow concluded that pain per se neither causes nor aggravates preexisting multiple sclerosis.

In October 1985 Dr. Swank, a neurologist for the Oregon Health Sciences University, submitted a medical report. Dr. Swank concluded that claimant's multiple sclerosis was probably aggravated or worsened by the industrial injury and by the myelograms, especially the September 1983 procedure. Dr. Swank offered no explanation or mechanism for these relationships. Furthermore, he acknowledged that there was no scientific evidence that either physical trauma or spinal punctures aggravated the symptoms of multiple sclerosis. Yet, Dr. Swank was so "sufficiently impressed" by the relationship that he did not recommend spinal procedures, unless the diagnosis of multiple sclerosis seemed unlikely.

Dr. Dow agreed with Dr. Swank that there was no scientific evidence supporting a relationship between physical trauma or spinal punctures and the aggravation of symptoms of multiple sclerosis. However, Dr. Dow disagreed with the remainder of Dr. Swank's opinion. Specifically, Dr. Dow stated that it was not generally accepted among neurologists that either trauma, punctures, or myelograms were capable of aggravating multiple sclerosis. Moreover, Dr. Dow had not personally observed a relationship between spinal procedures and a worsening of multiple sclerosis.

Claimant credibly testified that he did not experience any problems with his gait until after his first myelogram. Thereafter, his ability to walk steadily decreased, prompting him to enlist his wife's services to steady himself. Following the second myelogram, his problems further increased.

The Referee found claimant's multiple sclerosis condition compensable. Although he conceded that the medical evidence was not overwhelming, the Referee concluded that the two myelograms had worsened the preexisting condition. Including the multiple sclerosis in rating the extent of disability, the Referee granted permanent total disability.

To establish the compensability of his multiple sclerosis, claimant must establish that either his industrial injury, or one of the subsequent myelograms, was a material contributing cause of his current disability. 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 claimant's testimony concerning causation is probative, it may not be persuasive when the issue involves a complex medical question. See Kassahn v. Publishers Paper Co., 76 Or App 105 (1985); Hoke v. Libby, McNeil and Libby, 73 Cr App 44 (1985).

Following our de novo review of the medical and lay evidence, we are neither persuaded that claimant's compensable injury nor his myelograms materially contributed to a worsening of his preexisting multiple sclerosis. Consequently, we conclude that claimant's multiple sclerosis is not compensable.

Considering the complexity of claimant's condition, we have determined that the resolution of the causal relationship issue can best be achieved through an appraisal of the medical opinions. Although the credible lay testimony is by no means rejected, the medical opinions are accorded significant probative value.

In finding claimant's multiple sclerosis compensable, the Referee was persuaded by Dr. Swank. We do not find Dr. Swank's opinion persuasive, particularly when considered with the medical evidence to the contrary. Dr. Swank concluded that there was a causal relationship between claimant's injury/myelograms and the aggravation of the multiple sclerosis. However, Dr. Swank also acknowledged that the mechanics of the relationship could not be explained. Furthermore, Dr. Swank conceded that there was no scientific evidence to support his theory. The vast majority of the medical evidence echoed this latter point.

Dr. Grimm also supported a causal relationship. Yet, as with Dr. Swank, Dr. Grimm acknowledged that there was no persuasive clinical evidence to support his opinion. Moreover, Dr. Grimm couched his opinion in terms of possibility, not probability. The mere possibility of a causal connection is insufficient to sustain claimant's burden of proof. Gormley v. SAIF, 52 Cr App 1055 (1981).

The onset of claimant's lower extremity symptoms certainly suggests a relationship, at least temporarily, between the myelogram and his multiple sclerosis. Dr. LaFrance appears to support a causal connection based on this temporary relationship. However, unless all other explanations have been excluded, the inference of causation from chronological sequence is generally discouraged. Bradshaw v. SAIF, 69 Or App 587 (1984). Considering the existence of other possible reasons for claimant's condition, we do not find this chronological sequence to be persuasive evidence of a compensable relationship.

We find the opinion offered by Dr. Dow persuasive. Dr. Dow admitted that there was a possibility that additional symptoms such as pain might temporarily increase symptoms of multiple sclerosis. Yet, Dr. Dow concluded that it was not medically probable that either trauma or a myelogram caused claimant's current condition or aggravated a preexisting condition. As with Dr. Swank, Dr. Dow's opinion was based on his personal experience. However, unlike Dr. Swank, Dr. Dow's opinion was also consistent with current scientific evidence and generally accepted medical thought.

We turn to a determination of the extent of claimant's permanent disability.

To establish entitlement to permanent total disability, claimant must prove that he is permanently incapacitated from performing work at a gainful and suitable occupation. ORS 656.206(1)(a); Wilson v. Weyerhaeuser, 30 Or App 403 (1977). Preexisting disability is included within this determination. ORS 656.206(1)(a). Since we have found that claimant's multiple sclerosis was not worsened by the compensable injury, we have not considered the post-injury progression of the condition in our

determination. Emmons v. SAIF, 34 Or App 603 (1978). Furthermore, because the evidence does not establish that claimant's multiple sclerosis was disabling at the time of his compensable injury, it has not been included in determining his entitlement to an award of permanent total disability.

After conducting our de novo review of the medical and lay evidence, including claimant's credible testimony, we find that he has failed to establish that, as a result of his compensable injury, he is permanently incapacitated from performing work at a gainful and suitable occupation. Accordingly, we conclude that claimant is not entitled to an award of permanent total disability.

Although we do not consider claimant permanently and totally disabled, we find that his prior permanent disability award is inadequate. We are persuaded that as a result of his compensable low back injury and residuals, he has sustained permanent impairment which has reduced his earning capacity to a greater extent than his previous awards of permanent disability.

In rating the extent of claimant's permanent disability, we consider his physical impairment attributable to his compensable injury, which includes lay testimony concerning his disabling pain and physical limitations, and all of the relevant social and vocational factors set forth in OAR 436-30-380 et seq. We apply these rules as guidelines, not as restrictive mechanical formulas. Harwell v. Argonaut Insurance Co., 296 Or 505, 510 (1984); Fraijo v. Fred N. Bay News Co., 59 Or App 260 (1982). Following our de novo review of the medical and lay evidence, and considering the aforementioned guidelines, we conclude that a 30 percent unscheduled permanent disability adequately compensates claimant for his compensable low back injury.

#### ORDER

The Referee's amended order dated February 19, 1986 is reversed. The SAIF Corporation's partial denial issued January 13, 1984 is reinstated and upheld. In lieu of the Referee's award of permanent total disability and in addition to previous awards of unscheduled permanent disability, claimant is awarded 15 percent (48 degrees), which gives him a total award to date of 30 percent (96 degrees) unscheduled permanent disability for his compensable low back injury. Claimant's attorney fee shall be adjusted accordingly.

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WAYNE A. HAWKE, Claimant  
Emmons, et al., Claimant's Attorneys  
G. Howard Cliff, Defense Attorney  
John E. Snarskis, Defense Attorney  
Mitchell, et al., Defense Attorneys  
Roberts, et al., Defense Attorneys  
SAIF Corp Legal, Defense Attorney  
Acker, et al., Defense Attorney  
Breathhouwer, et al., Defense Attorneys  
Moscato, et al., Defense Attorneys

WCB 83-04843, 83-04210, 83-03016,  
83-03382, 83-03319, 83-03318,  
83-03317, 83-03316, 83-03321,  
83-12004 & 83-07043  
December 30, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

Industrial Indemnity requests review of Referee Baker's order which set aside its denial of claimant's occupational disease claim for asbestosis-related conditions. Claimant cross-requests review, contending that the Referee erred in granting motions dismissing several employers/insurers. On review, Industrial Indemnity contends that Mission Insurance Company, a subsequent insurer, should be assigned responsibility. We agree and reverse.

Claimant was 46 years of age at the time of hearing. Over the course of some 25 years, while working as a plumber and pipe fitter for a variety of employers, he has been exposed to asbestos fibers. No off-the-job contributing factors or influences have been detected. Claimant's asbestos-related lung condition was diagnosed in late 1982. Thereafter, he timely filed his occupational disease claims.

The most significant asbestos exposure occurred while claimant was working as a plumbing apprentice for Arnett Plumbing/Linn-Pacific Mechanical Contractors. This exposure took place between 1958 and 1963. However, claimant also experienced exposures to asbestos between 1977 and 1981, while he was employed by Pipe Tech, Inc. From 1974 through December 31, 1977, Pipe Tech was insured by SAIF. Industrial Indemnity was on the risk from January 1978 to January 1, 1981. Between January 1981 and January 1, 1982, Mission Insurance was on the risk.

The key period of exposure concerns the "Gilbert Hall" remodeling project. Claimant's participation in this project ran from June 1980 through June 1981. Demolition on the project had begun prior to his arrival. As a result of the demolition, asbestos debris and dust were present throughout the environment. Claimant credibly testified that he was exposed to asbestos "quite a bit" through the first six months of the project, while the demolition progressed. However, much of his work during the project involved the installation of new heating pipe, which did not require exposure to asbestos. Nonetheless, he was exposed to asbestos whenever he made a "tie-in," connecting a new pipe to an existing asbestos-insulated pipe. Claimant described this exposure as minimal.

Claimant stated that he did not generally work in a confined or "restricted area" while working on the "Gilbert Hall" project. He also considered the ventilation adequate. In early February 1981, the job site was inspected by the Accident Prevention Department. A Citation and Notice of Penalty was subsequently issued. Thereafter, the piles of debris were removed and dust masks were distributed to the workers.

Dr. Edwards, cardiopulmonary specialist, concluded that claimant's impairment was primarily the result of his industrial exposure between 1958 and 1963. However, Dr. Edwards acknowledged "perhaps only slight added impairment due to exposures" during a 1977 - 78 "Senator Hotel" project and the 1980 - 81 "Gilbert Hall" project. Dr. Mulkey, claimant's treating internist, entirely agreed with Dr. Edwards' assessment.

Dr. Rudin, pulmonary specialist, reviewed the medical record and examined claimant. Dr. Rudin stated that it takes a minimum of six years from inhalation before the presence of an asbestos related disease can be clinically documented. By history, Dr. Rudin opined that claimant's 1958 to 1963 industrial exposure was responsible for the vast majority of his disease. Yet, Dr. Rudin conceded that claimant's subsequent exposures during the "Senator Hotel" and "Gilbert Hall" projects could have contributed slightly to the present disease.

Dr. Keppel, heart and lung specialist, performed an independent medical examination. Dr. Keppel agreed that the exposures during the "Senator Hotel" and "Gilbert Hall" projects "would increase the absolute load of asbestos in the lung and to that extent also increase the restrictive impairment and potential for asbestosis in the future."

Dr. Bardana, Director of the Occupational and Environmental Allergy Laboratory for the Oregon Health Sciences University, also performed an independent medical examination. Dr. Bardana opined that the major contribution to claimant's current asbestosis status was his extensive exposure between 1958 and 1963. Dr. Bardana did not feel that the subsequent exposures which claimant may have had during the "Senator Hotel" and "Gilbert Hall" projects contributed to the radiological and physiological asbestosis disease as presently evaluated. Dr. Bardana reasoned that there was insufficient time for any recent exposure to have been translated into a definable physiologic or radiologic change.

Dr. Lawyer, heart and lung specialist, agreed that claimant's late 1950's exposure was the cause of the disease. Dr. Lawyer considered the January 1981 exposure "de minimus or nil" when compared with the extensive prior exposure. However, Dr. Lawyer acknowledged that there would not have been sufficient time to produce any contribution to claimant's present condition. Parenthetically, we note that Dr. Lawyer's opinion was based on the inaccurate premise that claimant's January 1981 exposure to asbestos was limited to a single six-hour period.

The Referee concluded that Pipe Tech was the last potentially responsible employer and that Mission, the insurer on the risk from January 1981 to January 1982, was the last potentially responsible insurer. However, the Referee found that the working conditions while Mission was on the risk were not of a kind that could have caused the disease. The Referee reasoned that claimant's exposure to asbestos during Mission's coverage was isolated and with adequate ventilation. Moreover, the Referee noted that claimant had begun wearing inhalation protection in February 1981. Accordingly, applying the last injurious exposure rule, the Referee held that Industrial Indemnity, the insurer on the risk from January 1978 to January 1981, was responsible for claimant's condition as the last insurer where the working conditions could have caused the disease.

In an occupational disease context, the last injurious exposure rule provides that, if a worker proves that the disease could have been caused by work conditions that existed at more than one place of employment, the last employment providing potentially causal conditions is deemed to have caused the disease. Boise Cascade Corp. v. Starbuck, 296 Or 238, 241 (1984); Meyer v. SAIF, 71 Or App 371 (1984). The application of the rule is the same in cases involving successive insurers. FMC Corp. v. Liberty Mutual Ins. Co., 70 Or App 370 (1984), clarified 73 Or App 223 (1985).

The appropriate inquiry under the last injurious exposure rule is not whether the conditions of the last employment actually caused the disease, but whether those conditions were of a kind which could have caused the disease over some indefinite period of time. Fossum v. SAIF, 293 Or 252, 256, n 1 (1982); Meyer, supra. In order to shift responsibility to an earlier employer/insurer, the last potentially responsible employer/insurer must establish that the conditions at the earlier employment exposure were the sole cause of the disease or that it was impossible for its work conditions to have caused the disease. FMC Corp., supra.

Following our de novo review of the medical and lay evidence, we agree with the Referee that the last potentially responsible employer was Pipe Tech. However, we are persuaded that Mission, as the last insurer on the risk where conditions existed that could have caused the disease, is responsible for claimant's disease.

Mission can shift responsibility to an earlier employer/insurer if it can establish that the conditions during the earlier exposure were the sole cause of the disease or that it was impossible for conditions while Mission was on the risk to have caused the disease. FMC Corp., supra. Although we concede that Mission came very close to doing so, we are not persuaded that it was impossible for claimant's January 1981 exposure to have contributed to the disease. The evidence establishes that claimant's exposure to asbestos while Mission was on the risk was indeed minimal. However, we are persuaded that he was exposed. Moreover, the evidence preponderates that this exposure, albeit slight, was of a type and duration which could have caused or contributed to the disease over some indefinite period of time.

Accordingly, we find that claimant was exposed to conditions, while Mission was on the risk, that could have caused his disease. Therefore, actual causation was not impossible. Consequently, because the work conditions during the period Mission was on the risk were of a kind which could have caused claimant's disease over some period of time, Mission is deemed to have caused the disease. FMC Corp., supra; Meyer, supra.

We affirm that portion of the Referee's order which granted motions to dismiss requests for hearing concerning several allegedly responsible employers/insurers. We agree with the Referee that the preponderance of the persuasive evidence does not establish any relevant or material injurious exposure while these parties were on the risk. Furthermore, we note that claimant raised no objections to the dismissal of several of these parties.

Inasmuch as responsibility was the sole issue on Board review, claimant is considered a nominal party. Petshow v. Farm Bureau Ins. Co., 76 Or App 563, 571 (1985); Stanley C. Phipps, 38 Van Natta 13, 16 (1986). As such, we conclude that he has not "actively and meaningfully participate[d]" as that phrase is used in OAR 438-47-090(1). Accordingly, claimant is not entitled to an attorney's fee for services on Board review. Phipps, supra.

ORDER

The Referee's order dated October 25, 1985 is affirmed in part and reversed in part. Industrial Indemnity's denial is reinstated and upheld. Mission Insurance Company's denial is set aside and Mission is directed to process this claim according to law. Mission shall reimburse Industrial Indemnity for its costs incurred to date. The remainder of the Referee's order is affirmed.

KAREN L. HAYS, Claimant  
Marilyn K. Odell, Claimant's Attorney  
Roberts, et al., Defense Attorneys

WCB 84-08586  
December 30, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

Claimant requests review of Referee Holtan's order that upheld the insurer's backup denial of claimant's claim for injury to her low back, neck and left shoulder, approved the partial denial of claimant's left arm numbness, loss of breath, chest pain, cardiac disorder, asthma, bronchitis, fainting, hyperventilation and hypertension, and denied penalties and attorney fees. The issues are compensability and penalties and attorney fees. Claimant has also requested that we remand this case to the Referee to consider evidence obtained subsequent to the hearing.

Claimant was allegedly injured on or about December 15, 1982. She completed Form 801 and made her claim for workers' compensation benefits ten months later, on October 12, 1983. The insurer accepted the claim as one for a nondisabling industrial injury on October 28, 1983. Over one year later, on December 20, 1984, the insurer denied the claim on the ground that its acceptance had been based upon "fraud, misrepresentation or other illegal activity . . . ." Once an insurer has notified a claimant that a claim had been accepted, and after the passage of 60 days from notice of the acceptance, the insurer may not later deny the compensability of the claim unless it can show that the acceptance was based upon fraud, misrepresentation or other illegal activity. Wheeler v. Boise Cascade, 298 Or 452, 456 (1985); Bauman v. SAIF, 295 Or 788, 794 (1983).

At the outset, we conclude that the Referee incompletely stated the applicable burden of proof. The Referee stated:

"The insurer has the burden of establishing a prima facie case to support the non-compensability of a previously accepted claim. To determine whether the employer has met this burden, I have analyzed the employer's evidence in a light most favorable to the employer."

A "prima facie case" is, "A case which has proceeded upon sufficient proof to that stage where it will support [the] finding if evidence to [the] contrary is disregarded." Black's Law Dictionary at 1353 (4th Ed 1951). Under the standard enunciated by the Referee, the insurer would meet its burden of proof by merely introducing sufficient evidence such that the claimant would be called upon to answer it.

We conclude that the correct statement of the burden of proof is that the insurer has the ultimate burden of establishing by a preponderance of the evidence that it has grounds for issuing the backup denial. Parker v. North Pacific Ins. Co., 73 Or App 790, 793 (1985); Parker v. D.R. Johnson Lumber Co., 70 Or App 683, 687 (1984). Rather than disregarding claimant's evidence against a finding that there was fraud, misrepresentation or other illegal activity, the fact finder must consider all of the evidence and determine if the party seeking relief, in this case the insurer, has tipped the scales in its direction. We have reviewed the case under this standard. Accepting the Referee's findings of fact, including his assessment of the credibility of the witnesses, we conclude that the insurer has not established by a preponderance of the evidence that its acceptance was based upon fraud, misrepresentation or other illegal activity. The inconsistencies relied upon by the insurer to make its case arose in large part after the acceptance and could not have formed a basis for acceptance. See Carolle J. Tucker, 36 Van Natta 1374, 1376 (1984). The backup denial will, therefore, be set aside.

On the issue of the partial denial, claimant has the burden of establishing by a preponderance of the evidence that the conditions named in the denial are materially related to her compensable condition. We find that the question is a complex one requiring expert medical evidence to answer. There is no persuasive medical opinion that supports the compensability of the denied conditions.

In addition to specifying conditions that were denied, the insurer also specified conditions that remained accepted (although all conditions were later denied by the backup denial). These accepted conditions were the neck, upper back and left shoulder. Claimant's low back condition was neither specifically accepted nor specifically denied. Claimant's current treating physician believes that the low back condition, diagnosed as "a rather spectacular abnormality . . . at the L4-5 level . . .," is directly related to the injury described by claimant. We conclude that the conditions accepted by the insurer on October 28, 1983 include the low back condition.

Although the insurer's backup denial was wrong, we conclude that the case was sufficiently close that it was not unreasonable. We, therefore, deny claimant's request for a penalty and associated attorney fee. Claimant is, however, entitled to a reasonable attorney fee pursuant to ORS 656.386(1). After de novo review, we find that this was a case of ordinary difficulty and usual probability of success for claimant. A reasonable attorney fee is awarded accordingly.

ORDER

The Referee's order dated April 17, 1985 is affirmed in part and reversed in part. Those portions of the Referee's order

that approved the insurer's December 20, 1984 backup denial and approved the denial of elective surgery to the low back are reversed, the denials are set aside and the insurer is ordered to accept claimant's claim and process it according to law. The remaining portions of the Referee's order are affirmed. The motion to remand is denied. Claimant's attorneys are awarded reasonable attorney fees of \$1,350 for services at hearing and \$550 for services on Board review, to be paid by the insurer in addition to compensation.

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DIANNA LAWTON, Applicant  
Ann Kelley, Ass't. Attorney General

WCB CV-86008  
December 30, 1986  
Findings of Fact, Conclusions  
and Proposed Order (Crime Victim  
Act)

Pursuant to notice, a hearing was conducted and concluded by Roger C. Pearson, special hearings officer, on December 5, 1986 at Salem, Oregon. Applicant, Dianna Lawton, was present and not represented by counsel. The Department of Justice Crime Victim Compensation Fund ("Department") was represented by Ann Kelley, Assistant Attorney General. Diane May, an investigator for the Department, was also present. The court recorder was Heather Gillette. The record was closed December 5, 1986.

Applicant has requested review by the Workers' Compensation Board of the Department's Findings of Fact, Conclusions and Order on Reconsideration dated August 18, 1986. By its order, the Department denied applicant's claim for compensation as a victim of a crime under ORS 147.005 to 147.365. The Department based its denial on its finding that applicant was not the victim of a compensable crime.

#### FINDINGS OF FACT

On December 6, 1985, applicant was struck by a motor vehicle while attempting to cross a street. Just before the accident, applicant looked to her left, toward the vehicle which was waiting at a red light to turn right. A misty rain was falling and the morning "rush hour" traffic was heavy. In applicant's opinion, the driver of the vehicle seemed concerned about oncoming traffic. When the light changed, applicant proceeded into the crosswalk. As she stepped from the curb, she was struck by the vehicle's right front bumper.

Applicant was struck on the left hip and fell to the street. On striking the pavement, she suffered a laceration to the right upper portion of her head. Against applicant's wishes, she was transported to the emergency room. Ten stitches were required to close the laceration. Following a brief period of observation, applicant was released. However, she was instructed to temporarily refrain from working and restricted to bedrest.

At the accident scene, the driver stopped and came to applicant's assistance. Stating that "I didn't see you," the driver assured her that her expenses would be covered. Applicant subsequently learned that the driver was an uninsured motorist. Following an "on-site" investigation, police officials concluded

that the primary cause of the accident was the driver's failure to yield the right of way to a pedestrian. Accordingly, a citation was issued for this traffic infraction. Further investigation revealed that the driver was operating her vehicle while her operator's license was suspended. Consequently, she was cited for this offense as well.

Applicant timely filed her claim for benefits under the Compensation of Crime Victims Act. As a result of her injuries, she has incurred medical expenses in excess of \$500 and one week of lost wages, totalling \$127.35 (net).

Applicant testified in an honest and forthright manner. Therefore, based upon my personal observation, I find that she is an entirely credible witness.

#### CONCLUSIONS

Pursuant to ORS 147.015, applicant is entitled to an award under the Compensation of Crime Victims Act (Act), if, among other requirements:

"(1) [She] 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" means an intentional, knowing or reckless act that results in serious bodily injury or death of another person and which, if committed by a person of full legal capacity, would be punishable as a crime in this state. ORS 147.005(4). ORS 161.085(7) defines "intentional" as an act with a conscious objective to cause the result or to engage in the conduct described. "Knowing" means that a person acts with an awareness that his/her conduct is of a nature so described or that a circumstance so described exists. ORS 161.085(8). "Reckless" is defined as an act where the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. ORS 161.085(9). The risk must be of such nature and degree that the disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation. id.

The standard of review for cases appealed to the Board under the 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 applicant was not the victim of a compensable crime. Accordingly, I conclude that the Department's Order on Reconsideration should be affirmed.

The preponderance of the evidence establishes that the direct cause of applicant's injuries was the driver's failure to yield the right of way. Such an offense is a Class B traffic infraction. ORS 811.040(2). As such, it is not a crime in this state as required by ORS 147.015(1). Moreover, the evidence does not support the argument that the driver's conduct in striking applicant was either intentional, knowing or reckless. Rather, I

am persuaded that the driver's conduct amounted to a failure to exercise reasonable care. This conduct is certainly objectionable and, by no means, condoned. However, under the strict requirements for eligibility under the Act, it does not constitute a "compensable crime."

Applicant contends that the driver's operation of her vehicle, with full knowledge that her license was suspended, constituted the knowing, intentional, or reckless act as required by the statute. The record supports applicant's contention that the driver knew that her license was suspended at the time of the accident. Thus, the question becomes, is this the knowing, intentional, or reckless act which resulted in applicant's injuries? I conclude that it is not.

The offense of driving while suspended was committed as soon as the driver operated her vehicle. The commission of the offense was not contingent on the subsequent causation of "serious bodily injury or death of another person." See ORS 147.005(4). The driver's conscious decision to drive while unlicensed, although illegal conduct, was not the act which resulted in applicant's injury. Rather, the act which resulted in applicant's injury was the driver's failure to yield the right of way while applicant was in the crosswalk. This is the conduct which caused applicant's injury, prompted her need for medical treatment, and resulted in her personal damages. Since failing to yield the right of way to a pedestrian is not "an intentional, knowing or reckless act" that would be "punishable as a crime in this state," it follows that applicant was not the victim of a "compensable crime." See ORS 147.005(4); 147.015.

Applicant movingly presented her frustrations with a system that, in her opinion, has denied her benefits to which she feels rightfully entitled. Although I empathize with her predicament, I do not agree with her conclusion. The Act provides for benefits to injured victims, subject to very specific requirements. Applicant is undeniably an injured victim of an unlawful act. Yet, she is not a victim of a "compensable crime" as statutorily defined. Thus, her remedy lies elsewhere.

I am certain that it is the hope of all interested parties that restitution for applicant's medical expenses and lost wages will eventually be achieved. However, the avenue to realize her desired result lies somewhere other than the coffers of the Compensation of Crime Victims Fund. Instead, the means to remedy her current situation, might be found through either civil action against the perpetrator of this objectionable conduct, other governmental agencies, or the charity of private institutions.

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LAWRENCE A. NORTHRUP, Claimant  
Hayner, et al., Claimant's Attorneys  
Cummins, et al., Defense Attorneys

WCB 85-10876  
December 30, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The self-insured employer requests review of those portions of Referee Foster's order that assessed penalties and attorney fees for improper claim closure and underpayment of compensation for temporary disability. The only issues on review are penalties and attorney fees.

On the improper closure issue, we find as follows. On

March 5, 1984 claimant injured his right elbow by striking it against the edge of a shear on the resaw. This injury was accepted as nondisabling and medical costs were paid. The elbow injury flared up in June 1984 but claimant lost no time from work. On September 27, 1984 Dr. Smith advised claimant to stop working. The employer did not receive Dr. Smith's chart note until October 8, 1984. In the interim, on October 1, 1984, the employer issued a notice of claim closure under the provisions of ORS 656.268(3). The notice incorrectly stated the date of injury as March 8, 1984. After receiving Dr. Smith's chart note, the employer filed a Form 1502 on October 22, 1984 reclassifying the claim as disabling and began payment of temporary disability compensation. On October 25, 1984 the employer issued a second notice of claim closure which corrected the error as to the injury date. On November 14, 1984 the employer issued a third notice of closure identical except for date of mailing to the one issued October 22, 1984. The 1502 and all of the closures were signed by the same claim representative. All of the closures referenced an aggravation date of October 1, 1984, the date of the first closure.

The Referee found the October 1, 1984 closure notice to be supported by substantial evidence on the basis of information then available to the employer. We agree. He found the second and third closure notices not based upon substantial evidence and assessed the minimum \$500 penalty under the provisions of ORS 656.268(3). It is this finding with which we disagree.

We conclude that the record adequately establishes that the second closure notice was issued for the purpose of correcting an error in the first. The second notice quite clearly, in our view, related back to and amended the first notice. Although the third notice presents a closer question, we conclude that it, also, related back to the first notice. We reach this conclusion because: (1) the same person who issued all three closure notices also reopened claimant's claim and reclassified it as disabling; (2) claimant was paid temporary disability compensation continuously at all relevant times; (3) there is no indication that there was any intent or effort to close claimant's nondisabling injury claim as of any time other than October 1, 1984; (4) there is no indication that there was any attempt or intent to close claimant's disabling injury claim at all; and (5) all closure notices specified claimant's aggravation period as beginning October 1, 1984. Because the last two closure notices related back to the first closure notice, and because the first closure notice was supported by substantial evidence, it follows that all three closure notices were supported by substantial evidence. Therefore, we conclude that none of the closure notices were issued in violation of ORS 656.268(3). No penalty is appropriate.

On the issue of underpayment of temporary disability compensation, we find that the employer miscalculated claimant's rate of compensation and underpaid at approximately \$10 per week. This error was discovered by the employer on August 26, 1985. The entire underpayment was paid in a lump sum two days later. In Richard N. Couturier, 36 Van Natta 59 (1984), we stated the rule that, upon being notified of an error in the rate at which temporary disability benefits are being paid, an employer or insurer is obligated to immediately correct the problem. See also Michael L. McKinney, 37 Van Natta 688 (1985). In this case, the employer was never notified by claimant or anyone on claimant's behalf that the rate of compensation was not correct. The

employer discovered the error itself. It then immediately corrected the error. Penalties are mandated only for unreasonable behavior. ORS 656.262(10). We find that the employer's conduct was not unreasonable.

ORDER

The Referee's order dated July 3, 1986 is affirmed in part and reversed in part. Those portions of the Referee's order that awarded penalties and employer-paid attorney fees are reversed. The remainder of the order is affirmed.

LAURA J. PEMBERTON, Claimant  
Vick & Gutzler, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-12342  
December 30, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee St. Martin's order that upheld the SAIF Corporation's denial of claimant's claim for a low back injury. The issue is compensability.

The Referee found that claimant had not sustained her burden of proving that her low back surgery for a ruptured L4-5 disc was the result of an April 1, 1985 on-the-job slipping and twisting incident. The Referee concluded that "claimant has an iatrogenic induced belief that she sustained an on-the-job injury which necessitated her eventual surgery." After de novo review of the entire record, we conclude that the claim is compensable.

Claimant, age 19 at the time of the alleged injury, worked as a cashier at a recycling plant. She testified that she slipped in some oil on April 1, 1985 while returning to her work station after delivering a telephone message to her foreman. She grabbed a metal beam to keep from falling and twisted to the right. Although claimant felt "twisted up," she did not experience any immediate pain. The incident was unwitnessed and claimant did not report it at the time to her employer.

Claimant testified that two days later she began experiencing low back pain. She continued to work and the pain gradually increased. On April 18, 1985 claimant went to Dr. Kabacy, a gynecologist. Dr. Kabacy diagnosed a mild urinary tract infection, which he treated conservatively. By May 6, 1985 all diagnostic tests involving claimant's urinary tract were normal but claimant continued to complain of low back pain and tenderness. Claimant continued seeing Dr. Kabacy through May 22, 1985 with all tests continuing as normal. Claimant never mentioned the oil slip incident to Dr. Kabacy and the doctor never inquired about injuries.

In June 1985 claimant's pain worsened and began radiating into her leg. On June 28, 1985 claimant saw Dr. Shaw, a chiropractor. Dr. Shaw and another chiropractor in his office questioned claimant extensively about what had happened in her past. Claimant told the chiropractors of the oil slip incident and was advised to file a claim. When she did so, she inserted "June \_\_\_\_, 1985" as the date of injury. Claimant testified that she indicated the date of injury in that manner because she was unsure how to complete the 801 form and used the date of diagnosis. In September when claimant saw Dr. Goe and October when claimant saw Dr. Tsai she included the oil slip incident in

her history. Dr. Tsai performed surgery on October 23, 1985 after a myelogram revealed an extruded L4-5 disc. It was Dr. Tsai's opinion that the extruded disc was related solely to the April 1, 1985 oil slip incident. He concluded that the progressive deterioration of the disc and progressively severe pain was normal for this type of injury.

Claimant's employer testified that claimant had told her of a sledding accident in her past. Claimant testified that there had been such an accident in approximately 1983 but that it involved only her shoulder and had resolved. The employer also related that claimant had complained of stomach pains on at least one earlier occasion and may have complained of back pain prior to April of 1985. Claimant related that this employment was her first job and that she was apprehensive about filing a workers' compensation claim and unsure of how to do so. Claimant acknowledged that her employer had never threatened her with job loss, although both claimant and the employer acknowledged that the employer emphasized regular job attendance. The Referee found that the employer "appeared to be an honest and credible witness" and that claimant "appeared to be an honest person." In view of these positive credibility findings, we conclude that the Referee's reference to an "iatrogenic induced belief" means that the Referee found that claimant's belief that the oil slip incident caused the disc extrusion was honestly held but induced solely through autosuggestion by Dr. Shaw. See Dorland's Illustrated Medical Dictionary 758 (25th Ed, 1974). The Referee did not make a finding as to whether the oil slip incident actually occurred.

On the basis of the entire record we find that the oil slip incident did occur as described by claimant. We accept claimant's explanation that she initially believed that her back pain was related to a urinary tract problem. We also find Dr. Tsai's opinion persuasive that the gradual progression of claimant's extruding disc was normal given the mechanism of injury. Dr. Tsai's medical opinion as to the relationship between the oil slip incident and claimant's eventual need for surgery is uncontroverted. We find that Dr. Shaw's intensive history-taking caused claimant to focus on details that she may have dismissed as insignificant rather than having induced her into a belief that she had been injured. Considering the Referee's positive credibility finding and claimant's relative youth and inexperience, we are persuaded that claimant's version of events is accurate. We conclude that claimant's claim is compensable.

#### ORDER

The Referee's order dated May 29, 1986 is reversed. The SAIF Corporation's denial dated October 1, 1985 is set aside and the claim is remanded to the SAIF Corporation for acceptance and processing according to law. Claimant's attorney is awarded a reasonable attorney fee of \$1,400 for services at hearing and \$600 for services on Board review, to be paid by the SAIF Corporation in addition to compensation.

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LOIS E. ST. AUBIN, Claimant  
Gatti, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-03648  
December 30, 1986  
Order on Review

Reviewed by Board Members Ferris and McMurdo.

Claimant requests review of Referee Quillinan's order that upheld the SAIF Corporation's denial of "spa" treatments and chiropractic treatments in excess of two per month. The issue is compensability of medical services.

After de novo review of the entire record, we conclude that SAIF's denial should be upheld in all respects. Claimant's concern, as we perceive it, is that the Referee's orders taken together may be subject to an interpretation that all chiropractic treatments after June 1985 are denied. We agree that the current state of the record is somewhat confusing in that regard.

We conclude that SAIF's denial intended to and did deny only chiropractic treatments in excess of two per month. The issue of claimant's entitlement to future medical services under ORS 656.245 was not before the Referee and is not before us. Claimant remains entitled to all medical services that are necessary and reasonably related to the industrial injury. We conclude that the "spa" therapy and chiropractic treatments in excess of two per month were not necessary or reasonably related to the injury as of the date of the hearing. The scope of our decision does not extend beyond that conclusion. Because the denial was at all times upheld by the Referee, claimant's attorney was not entitled to an award of attorney fees.

#### ORDER

The Referee's order dated June 24, 1986 is set aside. The Referee's order dated June 12, 1986 is modified. The SAIF Corporation's formal denial dated May 16, 1985 is approved. The Referee's award of insurer-paid attorney fees is set aside.

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JOSE L. SAMANO, Claimant  
Coons & Cole, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 85-05872  
December 30, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of those portions of Referee Quillinan's order that held a consultation with a neurosurgeon compensable under ORS 656.245 and awarded a penalty and attorney fee for improper denial of the medical services. The issues are compensability of medical consultation, penalties and attorney fees.

On the issue of compensability of the neurosurgical consultation, we conclude that this case is factually indistinguishable from Welch v. Banister Pipe Line, 82 Or App 23 (1986), in which identical services were held compensable under ORS 656.245. The Referee's order is, therefore, affirmed on this issue. We also affirm the Referee's findings that the denial of medical services was procedurally improper and that penalties and attorney fees are appropriate. We modify the amount of the penalty, however.

The Referee awarded a penalty of \$300 and an associated attorney fee of \$350. The amount denied, and therefore due, was \$199. Pursuant to ORS 656.262(10), a penalty may not exceed 25 percent of the amount due. Attorney fees are awarded under the provisions of ORS 656.382, which provides for a "reasonable" attorney fee. The penalty of \$300 on an amount due of \$199 is clearly excessive and will be modified accordingly. We conclude that the \$350 attorney fee is reasonable. See Barbara A. Wheeler, 37 Van Natta 122 (1985). Claimant is not entitled to an attorney fee on Board review for defending the penalty-associated attorney fee. Dotson v. Bohemia, Inc., 80 Or App 233, 236 (1986).

ORDER

The Referee's order dated July 17, 1986 is modified. Claimant is awarded a penalty of 25 percent of Dr. Berkeley's charges for the December 13, 1985 consultation and report. The remainder of the Referee's order is affirmed. Claimant's attorney is awarded a reasonable attorney fee of \$250 for services on Board review in connection with the compensability of medical services issue, to be paid by the SAIF Corporation.

MARK J. SCHWEITZER, Claimant  
Callahan, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney  
Cowling & Heysell, Defense Attorneys

WCB 85-02140 & 85-05305  
December 30, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

Claimant requests review of Referee Daron's order that affirmed the self-insured employer's denial of claimant's occupational disease claim for his low back. The issues are compensability and timeliness.

The Board affirms the Referee's order with the following comments.

Claimant began working for Southwest Forest Industries (SWF) in 1977. He worked as a dryer feeder for six months and then worked as a dryer grader separating and stacking dried sheets of veneer for about two years. In January of 1979, claimant had his first incident of back pain at home after getting up from his couch. He was seen at the Albany General Hospital Emergency Room where x-rays revealed a narrowing of his lumbar disc spaces. The back pain was not the result of any specific stress or strain and claimant did not report an injury at his work.

Claimant testified that after this incident he continued to have problems with his low back and that he discussed these problems with his supervisor, Eugene Hayden. In his deposition, Mr. Hayden acknowledged that he had spoken to claimant about his low back problem and as a result had allowed claimant to switch jobs to reduce the strain on his back. On February 23, 1979 claimant became a veneer patcher which involved the patching and filling of knot holes.

Claimant had another episode of back problems in November of 1980. On November 19, 1980 he was hospitalized by Dr. Tsai and diagnosed as having S1 radicular irritation. Dr. Tsai released claimant to return to his former occupation as a veneer patcher on December 9, 1980. A copy of the release by

Dr. Tsai was in claimant's personnel file and Mr. Hayden was aware of the release and the reason for claimant's hospitalization. Dr. Tsai made no mention of the etiology of claimant's low back condition.

Claimant returned to his employment as a veneer patcher, but in February of 1981 he switched jobs to that of a router operator. Subsequently, claimant developed a colitis problem and in July of 1981 he terminated his employment. He testified that he had informed another supervisor, Mr. Garret, about the problems he was having with his back and colitis condition. He stated he eventually quit due to physical problems from both conditions.

Mr. Hayden stated that he was responsible for worker's compensation claims filed against the company during the time claimant worked at the mill. It was his policy not to provide claim forms unless asked or unless he knew of a specific injury that had occurred at the mill. He knew that claimant had a back problem, but was unaware that it might be related to his work at the mill. Claimant testified that he did not actually file a claim prior to his termination because he did not think his back problems were permanent.

Claimant experienced additional back problems in November of 1984 while working for another employer. As a result of these problems claimant saw Dr. McGee who diagnosed "degenerative bulging intervertebral disc, L4-5." Claimant filed a claim against his current employer which was eventually accepted just prior to the start of hearing on August 12, 1985. In December 1984 claimant filed a claim against SWF. On February 6, 1985, SWF issued a denial of the claim on compensability and timeliness grounds.

After de novo review, we do not find, as the self-insured employer asserts, that claimant's claim is barred as untimely.

Occupational disease claims must be made within 180 days from the date a claimant becomes disabled or is informed by a physician that he is suffering from an occupational disease, whichever is later. ORS 656.807(1). However, if the employer has knowledge of the injury or death, the claim is not barred for late filing. Further, "in order to establish employer knowledge a claimant need not establish that the employer knew of the claim, but only that the employer knew of the injury, even if the employer had good reason to believe that no claim would ever be filed." Hayes Godt V. Scott Wetzel Services, 71 Or App 175 (1984); See also Baldwin v. Thatcher Construction, 49 Or App 421 (1980).

Claimant worked for SWF for two years before he had any difficulty with back pain. After his initial episode of back problems in January of 1979, claimant returned to work and requested that he be allowed to switch jobs. Mr. Hayden, claimant's supervisor, stated that he knew claimant was having back problems and he tried to accommodate him in a more suitable job. During a second episode of back problems in November of 1980, claimant was hospitalized for six days by Dr. Tsai. Dr. Tsai's report releasing him back to his old job as a veneer patcher was contained in claimant's personnel file of which Mr. Hayden testified he was aware. For the purpose of notice, we

find the employer had notice of an injury sufficient to prevent the claim from being barred as untimely. See Henry L. Mischel, 38 Van Natta 1274 (1986).

However, we agree with the Referee that claimant has failed to establish by a preponderance of the evidence that his current back problems are related to his work at SWF. The Referee's order is modified to reflect that the self-insured employer's denial of February 6, 1985 is affirmed.

ORDER

The Referee's order dated March 27, 1986, as supplements herein affirms.

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DARREL W. SIMMONS, Claimant  
Welch, et al., Claimant's Attorneys  
Yturri, et al., Defense Attorneys

WCB 85-10436  
December 30, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

The insurer requests review of Referee Fink's order that set aside its denial of claimant's nondisabling occupational disease claim for the low back. The issue is compensability. We reverse.

Claimant is a cat skinner who, at the time of the hearing, had worked in that capacity for several years. He had worked for the present employer between October 1983 and March 1985. According to claimant, his work involved rough and bouncy riding in heavy equipment.

Claimant first sought medical treatment on November 20, 1984. He visited Dr. White for lower back pain, initially attributing it to a return of prostate problems. Dr. White found nothing abnormal about claimant's prostate, but noted that he suffered from hypertension and obesity. Dr. White prescribed a two-week supply of Meclomen and advised claimant to "cut down on his groceries." X-rays revealed early osteoarthritis. Noting claimant's "long history of back trouble," Dr. White advised claimant that tree falling employment would be more compatible with his back condition. Claimant did not immediately file a claim.

On May 17, 1985, Dr. White advised the employer that tree falling would be more beneficial than cat skinning in that it would give claimant more exercise, promote weight loss and reduce the bouncing around involved in heavy equipment operation. On November 8, 1985, Dr. White issued another report in which he noted that claimant's pain had been of gradual onset with no evidence of acute trauma. He felt that claimant's operation of a cat "undoubtedly aggravated his degenerative disease and in all probability created more symptoms . . ." Claimant's attorney sought clarification of Dr. White's opinion and on December 31, 1985, Dr. White issued a third report, reiterating that claimant's employment was "an aggravating factor in regard to the degenerative disease of [claimant's] back." Dr. White's reports are the only substantial medical evidence in the record.

Claimant testified that he never missed time from work because of back problems, despite the fact that he had operated a

cat for a number of years for other employers. After working for the present employer, claimant applied for work as a cat skinner at another company. In the interim, he approached the present employer, seeking work as a timber faller. Because no faller positions were available, however, claimant was not reemployed. Immediately after being laid off, claimant filed a claim, alleging that constant jarring while operating heavy equipment had resulted in "wear and tear arthritis in the back." The insurer thereafter issued a denial, asserting that claimant's symptoms did not arise out of his employment and that, even if they did, the employment was not a "significant" causal factor.

The Referee found claimant's claim compensable, despite his finding that the medical evidence was "skinny." We disagree with the Referee's conclusion. Claimant's claim is one for occupational disease. It also involves a condition that apparently preexisted claimant's employment. In order to establish his claim, therefore, claimant must prove that his employment was the major contributing factor in the worsening of his preexisting, underlying condition. Weller v. Union Carbide, 288 Or 27 (1979); Dethlefs v. Hyster Co., 295 Or 298 (1983).

Our review of Dr. White's reports leaves us unpersuaded that claimant's employment was the major cause of his current condition. Rather, it appears from the reports that the major cause of claimant's back condition is his underlying degenerative arthritis. While Dr. White does state that the employment was "an aggravating factor in regard to the degenerative disease," he does not indicate that claimant's employment was the major cause of the development or worsening of that underlying condition. In fact, Dr. White's reports, in context, suggest that claimant's employment did no more than cause increased symptoms. Increased symptoms alone are not compensable, unless accompanied by a worsening of the underlying condition. Weller, supra.

#### ORDER

The Referee's order dated June 4, 1986 is reversed and the insurer's denial is reinstated.

STANLEY W. TALLEY, Claimant  
Roberts, et al., Attorneys

WCB 84-02457, 84-07923 & 85-00747  
December 30, 1986  
Order on Review

Reviewed by Board Members Lewis and Ferris.

The insurer requests review of those portions of Referee Shebley's Second Amended Opinion and Order that set aside the Determination Orders dated January 26, 1984 and March 6, 1984 as premature and set aside the insurer's denial of claimant's ongoing chemical dependency. Claimant, pro se, cross-requests review of that portion of the order that denied his request for penalties for improper claim closure and also asks that he be awarded attorney fees for representing himself on Board review. In addition, claimant has submitted two "appeal exhibits" with his brief on Board review, one of which does not appear elsewhere in the record. We treat the submission of this previously unadmitted document, claimant's appeal exhibit number two, as a request for remand. See Judy A. Britton, 37 Van Natta 1262 (1985). The issues are remand, premature closure of claimant's low back claim, compensability of claimant's chemical dependency claim, penalties and attorney fees.

Claimant's request for remand for the admission of appeal exhibit number two is denied. The document is dated several years before the date of the hearing in this case and could have been introduced at the hearing through the exercise of due diligence. See ORS 656.295(5); Delfina P. Lopez, 37 Van Natta 164, 170 (1985).

On the merits of the premature closure, compensability and penalty issues, the Board affirms the order of the Referee. On the attorney fee issue, claimant is not an attorney and thus is not entitled to attorney fees for legal representation on Board review. See ORS 656.382(2).

ORDER

The Referee's order dated December 27, 1985 is affirmed.

SYLVIA E. VANN, Claimant  
Sharp & Durr, Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 84-06352  
December 30, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Neal's order that upheld the SAIF Corporation's denial of claimant's claim for asthma. The issue is compensability.

At the time of the hearing, claimant had been a cook for approximately 20 years. She had worked 11 years for the present employer. She had smoked for over 40 years. On March 3, 1984 the sewers in the kitchen in which claimant worked backed up, leaving water on the floor. The kitchen was hot and the air conditioning was not working. Claimant was bothered by the sewer fumes. During the morning claimant entered the kitchen's freezer to get food. On emerging, she experienced a sudden shortness of breath. She took a break and returned to the kitchen. She then reentered the freezer and had a recurrence of symptoms. Claimant left work and visited her family physician, Dr. Edmundson. Dr. Edmundson diagnosed asthma, precipitated by claimant's entry in and out of the freezer. He took claimant off work and prescribed medication. Claimant filed a claim for asthma a week later.

SAIF sent claimant to Dr. Bardana, an allergist and immunology specialist. Dr. Bardana concluded that claimant's difficulty resulted from moderately severe emphysema secondary to cigarette smoking. He also noted claimant's onset of intrinsic asthma following a case of influenza approximately one month before the work incident. Dr. Bardana opined that claimant suffered from preexisting asthma that was neither initially caused nor worsened by her work environment. He also noted, however, that bronchial asthma may be "triggered" by numerous irritants, including cold air. He concluded that claimant's work incident resulted in a temporary onset of asthma symptoms.

In July 1984 claimant sought treatment from Dr. Driesen, who diagnosed chronic bronchitis related to smoking and claimant's intrinsic asthma. He agreed that claimant's work incident did not actually worsen her underlying condition, but that it triggered an acute bronchospasm that resulted in claimant's leaving work and seeking medical treatment.

Claimant asserted at hearing that her claim was one for

industrial injury. Although the Referee made no specific finding, she apparently concluded that claimant's claim was one for occupational disease, for she held that in order for claimant to establish her claim, proof of a work-related worsening of the underlying disease would be required. Finding that claimant's work incident caused no more than a symptomatic worsening, the Referee upheld SAIF's denial.

We disagree with the Referee's finding that claimant's claim is one for occupational disease. We also find SAIF to be liable for the temporary symptomatic worsening of claimant's condition. An accidental injury is generally unexpected and sudden in onset. An occupational disease, on the other hand, is of gradual onset and cannot be said to be an unanticipated result of an inherently hazardous work environment. James. v. SAIF, 290 Or 343, 348 (1981). In the present case, claimant's onset of symptoms was nearly instantaneous. It was also unexpected, for claimant had been asymptomatic before the work incident. Considering these facts, claimant's claim is properly characterized as one for accidental injury.

Because the claim is one for injury, claimant must prove that her work was a material contributing cause of her need for medical treatment and/or time lost from work. Summit v. Weyerhaeuser Co., 25 Cr App 851 (1976); Raymond K. Addleman, 38 Van Natta 249 (1986). Even if claimant proves the requisite causal connection, however, the insurer's liability may be limited to the effects of the temporary symptomatic increase if the work exposure did not cause or worsen the underlying disease. Sharon L. Novak, 38 Van Natta 601 (1986); David F. Brainerd, 37 Van Natta 276 (1985); Roy L. Bier, 35 Van Natta 1825 (1983).

The medical record persuades us that claimant's March 3, 1984 work exposure resulted in the temporary symptomatic worsening of her preexisting, underlying disease. The work exposure did not cause nor worsen the disease, however. SAIF's liability is, therefore, limited to the effects of claimant's temporary worsening. It has no liability for the underlying asthma condition. The Referee's order upholding SAIF's denial shall be modified.

#### ORDER

The Referee's order dated April 10, 1986 is modified. The SAIF Corporation's denial of claimant's claim for asthma is set aside insofar as it denies responsibility for claimant's March 1984 temporary symptomatic worsening. The denial is upheld insofar as it denies responsibility for claimant's underlying condition. Claimant's attorney is awarded \$750 for services at hearing and \$250 for services on Board review. Both fees shall be paid by the SAIF Corporation.

RICHARD S. COSNER, Claimant  
Malagon, et al., Claimant's Attorneys  
Marcus K. Ward, Defense Attorney  
Ackerman, et al., Defense Attorneys

WCB 83-03288 & 84-00923  
December 31, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation, on behalf of two employers, requests review of Referee Baker's order that: (1) set aside its denial of claimant's psychological aggravation claim relating to his 1974 abdominal injury; (2) set aside its denial of claimant's

psychological claim relating to his 1980 right arm injury; (3) awarded 40 percent (128 degrees) unscheduled permanent partial disability for claimant's psychological condition; (4) awarded 40 percent (76.8 degrees) scheduled permanent partial disability for his right arm in lieu of an award by Determination Order of 15 percent (22.5 degrees) for his right forearm; and (5) awarded separate attorney fees on each of the aforementioned denials and a penalty in connection with the latter denial. SAIF also contends that the amounts of the attorney fees assessed are excessive. The issues are aggravation, compensability, extent of scheduled and unscheduled permanent partial disability, penalties and attorney fees.

The Board affirms those portions of the Referee's order that set aside the May 10, 1984 and November 29, 1983 denials of claimant's psychological claims, that found the most recent employer presently responsible for claimant's condition and that assessed a separate attorney fee in connection with each denial. With regard to the last of these issues, we note that each denial related to a separate injury and required some degree of separate factual workup. Claimant's attorney is entitled to a fee in connection with each denial for services on Board review as well. See ORS 656.382(2); Shoulders v. SAIF, 300 Or 606, 609-10 (1986).

As for the amount of the fees awarded by the Referee, we requested additional argument on the question of whether we had jurisdiction to review this issue in light of a statement recently made by the Supreme Court in Farmers Insurance Group v. SAIF, 301 Or 612 (1986). In that case, the Court stated:

"[A]ny 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)." 301 Or at 619 (footnote omitted).

After considering the additional arguments submitted by the parties, we conclude that the above-quoted statement has no application to the facts of this case. We find the Referee's awards of insurer-paid attorney fees reasonable and affirm those awards.

We reverse that portion of the Referee's order that awarded a penalty in connection with the denial of November 29, 1983. In light of the complicated nature of the case and the presence of a number of nonindustrial events and factors bearing on claimant's psychological condition, SAIF had a reasonable doubt concerning the compensability of claimant's psychological condition. See Craig A. Erickson, 38 Van Natta 420, 38 Van Natta 428 (1986).

In rating the extent of claimant's unscheduled permanent partial disability for his psychological condition, we consider his permanent psychological 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 apply these rules as guidelines, not as restrictive mechanical formulas. See Harwell v. Argonaut Insurance Co., 296 Or 505, 510 (1984); Howerton v. SAIF, 70 Or App 99, 102 (1984).

Claimant is 39 years old, is above average in intelligence, is a high school graduate and has also received a number of years of training in the machinist trade at a community college. He has experience as a chipping machine operator, a farm worker, a truck driver and a logger.

Following our de novo review of the medical and lay evidence, we conclude that claimant's psychological impairment is in the mild range. Exercising our independent judgment in light of claimant's level of impairment and the relevant social and vocational factors, we conclude that an award of 48 degrees for 15 percent unscheduled permanent partial disability adequately and appropriately compensates claimant for the permanent loss of earning capacity due to his compensable psychological condition. We modify the Referee's order accordingly.

With regard to the extent of claimant's scheduled disability, claimant injured his right arm in September 1980 when the upper portion of the arm was caught in the wheels of a conveyor belt. The accident caused a severe laceration two inches above the elbow which damaged two of the major nerves servicing the arm. The wound was surgically treated by Dr. Carter, an orthopedist. As a result of the injury to the nerves of claimant's arm, the muscles of his forearm and hand were materially weakened. Dr. Carter declared claimant medically stationary in July 1982 and noted mild impairments in forearm supination, volar flexion and dorsiflexion of the wrist and grip strength. He could document no sensory loss. He noted full range of motion in the right shoulder and elbow. The claim was closed by Determination Order in March 1983 with a scheduled award of 15 percent (22.5 degrees) for the right forearm.

Claimant testified at the hearing that he had lost the ability to perform fine manipulation with his right hand for such things as work as a machinist and typing. He also described some nonspecific sensory loss and further stated that he was unable to do "real heavy" lifting anymore. He estimated that the functional loss of use of his arm was in the range of 60 to 70 percent. Emphasizing claimant's testimony and commenting that it was unfortunate that scheduled disability measured loss of use or function rather than loss of earning capacity, the Referee increased claimant's scheduled award from 15 percent (22.5 degrees) for the right forearm to 40 percent (76.8 degrees) for the right arm.

We conclude, first of all, that the Referee erred in granting claimant an award for his arm as opposed to his forearm. According to OAR 436-30-130(4), "[t]he arm begins with the elbow joint and includes all structures of the upper extremity proximal thereto, including the humerus and those muscles which have as their primary function movement of the arm." Subsection (3) of the same section defines "forearm" as "not includ[ing] the elbow joint, but extend[ing] distally therefrom to the distal surfaces of the distal row of carpal bones." Although claimant's injury clearly was to the arm as opposed to the forearm under the above definitions, there is no evidence indicating that claimant sustained any loss of use or function of his arm. Instead, all of the evidence indicates that the loss of use or function was confined to the forearm, wrist and hand. Permanent partial disability in the scheduled area is a measure of loss of use or function, see ORS 656.214(2), and does not necessarily correspond with the site of injury if the loss of use or function occurs elsewhere. See Walker v. Compensation Dept., 248 Or 195, 196-97 (1967); Julia I. Hicks, 33 Van Natta 497, 498 (1983).

In rating the extent of scheduled permanent partial disability for claimant's right forearm, we seek to determine the loss of use or function of the injured member due to the industrial injury. ORS 656.214(2). In determining loss of use or function, we consider the medical and lay evidence in light of the rules set forth in OAR 436-65-500 through 436-65-575, although, again, we apply the rules as guidelines, not as restrictive mechanical formulas. See SAIF v. Baer, 61 Or App 335, 337-38, rev den 294 Or 749 (1983); Isabel Aparicio, 38 Van Natta 421, 421-22 (1986). We recognize that loss of use or function does not necessarily correlate with mechanical impairment, although the latter is usually a relevant consideration. Boyce v. Sambo's Restaurant, 44 Or App 305, 308 (1980).

Following our de novo review of the medical and lay evidence and exercising our independent judgment in light of this evidence and the aforementioned guidelines, we conclude that claimant is adequately and appropriately compensated for the loss of use or function of his right forearm due to the industrial injury by an award of 22.5 degrees for 15 percent scheduled permanent partial disability. We, therefore, reverse that portion of the Referee's order that awarded claimant 76.8 degrees for 40 percent scheduled permanent partial disability for his right arm and reinstate the award granted by the Determination Order of March 15, 1983.

#### ORDER

The Referee's order dated September 13, 1985 is affirmed in part, modified in part and reversed in part. Those portions of the order that set aside the denials dated May 10, 1984 and November 29, 1983 of claimant's psychological condition, that found the most recent employer presently responsible for claimant's condition and that awarded separate attorney fees in connection with each denial are affirmed. That portion of the Referee's order that awarded a penalty is reversed. In lieu of the Referee's disability awards, claimant is awarded 48 degrees for 15 percent unscheduled permanent partial disability for his psychological condition and 22.5 degrees for 15 percent scheduled permanent partial disability for the right forearm. For services on Board review, claimant's attorney is awarded \$300 in connection with the denial of May 10, 1984 and \$350 in connection with the denial of November 29, 1983 for a total attorney fee on Board review of \$650, to be paid by the SAIF Corporation.

BERLE DETER, Claimant  
Pozzi, et al., Claimant's Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 84-12030  
December 31, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Brown's order that affirmed the April 3, 1984 Determination Order and declined to award additional unscheduled permanent disability or permanent total disability. The issue is extent of unscheduled permanent disability including permanent total disability.

Claimant sustained a compensable injury on February 4, 1983 when the horse he was riding fell and pinned him to the ground. Claimant was diagnosed as having grade II spondylolisthesis, L4-5; degenerative disc disease, L5-S1, with acute traumatic aggravation. Conservative treatment failed to

alleviate claimant's symptoms and on July 6, 1983 claimant's treating physician, Dr. Gilsdorf, performed a decompressive laminectomy at L4 and posterolateral fusion from L4 to the sacrum.

On March 6, 1984 Dr. Gilsdorf found claimant medically stationary. He recommended that claimant only stand and walk one to one and a half hours at a time, and no more than four hours in an eight hour day. He further recommended that claimant should never lift 50 pounds, but could, on occasion, lift 30 pounds. The loss of function in his lumbar spine was moderate and permanent. Claimant was not to return to his former occupation of ranch foreman, which he had done for 14 years, nor to truck driving which, he had done for 7 years. He was capable of light work with unrestricted use of his upper extremities. A Determination Order was issued on April 3, 1984 that awarded claimant 50 percent unscheduled permanent disability.

In May 1984 claimant underwent an appendectomy and in October 1984 he had a total hip replacement. Both the surgeries were unrelated to his compensable injury. After these surgeries, claimant's restrictions remained unchanged from Dr. Gilsdorf's March 6, 1984 assessment.

At the time of hearing claimant was 62 years old with an 11th grade education. Claimant has worked as a ranch foreman, driven log truck, operated heavy equipment and worked as a mechanic. Vocational rehabilitation services had initially begun in January 1984 and were terminated in August 1984. Little had been accomplished as claimant had been recovering from his appendectomy and hip surgery. Vocational services were attempted again in August 1985, but were terminated in September after a dispute arose with claimant's attorney over the conditions under which claimant could be interviewed. Claimant testified that he had made significant efforts to find employment on his own, but had been unable to find any suitable work. He had worked one day bailing hay and had spent seven days helping a friend build a patio. Neither of these jobs was for pay.

Permanent total disability may be established through medical evidence of physical incapacity or through the "odd lot" doctrine under which a disabled person may remain capable of performing work of some kind, but still be permanently disabled due to a combination of medical and non-medical disabilities which effectively foreclose him from gainful employment. Welch v. Banister Pipeline, 70 Or App 699 (1984). In addition, claimant has the 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); Laymon v. SAIF, 65 Or App 146 (1983).

After de novo review of the record, we agree with the Referee that claimant has failed to establish he is permanently totally disabled. However, we recognize that claimant has suffered a significant loss of earning capacity and conclude he is entitled to unscheduled permanent partial disability in addition to that awarded by the April 3, 1984 Determination Order.

In rating the extent of claimant's permanent disability, we consider his physical impairment, which includes his credible testimony concerning his pain, physical limitations and 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 claimant is entitled to an additional 25 percent permanent partial disability for a total of 75 percent (240 degrees) unscheduled permanent partial disability.

ORDER

The Referee's order dated April 17, 1986 is modified. In addition to the Determination Order's award of 50 percent unscheduled permanent disability, claimant is awarded 25 percent for a total award of 75 percent (240 degrees) unscheduled permanent disability for his back injury. Claimant's attorney is allowed 25 percent of the additional compensation granted by this order, not to exceed \$3000 as a reasonable attorney fee.

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STEPHEN L. DOKEY, Claimant  
DOUGLAS A. DERRYBERRY & SHELLEY M. DERRYBERRY,  
Alleged Employer, dba Double A. Trucking, and  
dba The Woodseller  
Victor Calzaretta, Claimant's Attorney  
Schwabe, et al., Employer's Attorney  
SAIF Corp Legal, Defense Attorney  
Carl M. Davis, Ass't. Attorney General

WCB 83-11194  
December 31, 1986  
Order on Review

Reviewed by the Board en banc.

The alleged noncomplying employer requests review of Referee Leahy's order that: (1) found claimant's accidental injury claim involving the low back to be compensable; and (2) approved the Compliance Division's Proposed and Final Order, thereby finding the employer to be noncomplying. The issues on review are whether claimant's claim is compensable and, if so, whether the employer is noncomplying.

Claimant contends that he sustained a compensable low back injury in August 1983 while in the employ of Douglas and Shelley Derryberry, the alleged noncomplying employer in this case. The Derryberrys assert that the claim is not compensable in the first instance. In the alternative, they argue that the SAIF Corporation, which was ordered to process claimant's claim by the Workers' Compensation Department pursuant to ORS 656.054, should be estopped from denying that it insured the employer at the time of claimant's alleged injury.

The Referee found claimant's claim compensable despite his implicit holding that claimant is not credible. The Referee apparently felt bound by a physician's report generated at the time of claimant's alleged work incident. The report noted objective evidence of injury, and the physician authoring the report opined that the injury was related to the accident described by claimant.

After reviewing the record, we disagree with the Referee's compensability finding. We find inconsistencies in claimant's testimony, unexplained discrepancies of fact and other elements that cast considerable doubt on claimant's credibility. Under these circumstances, we do not find a medical report generated from and dependent upon the history given by claimant to be persuasive. A physician's report is only as persuasive as the accuracy and veracity of the history from which it was generated.

See e. g., Miller v. Granite Construction Co., 28 Or App 473 (1977). Neither do we find claimant's testimony regarding the alleged incident persuasive. We find on the facts that claimant's claim is not compensable.

Claimant argues that even if his claim is found on the facts to be noncompensable, the claim is compensable by operation of law as a result of SAIF's prior acceptance of the claim. We agree. ORS 656.054(1) provides that a claim for compensation made by a worker employed by an alleged noncomplying employer is to be processed by the SAIF Corporation in essentially the same manner as a claim made by a worker employed by a complying employer. Thus, when such a claim is received by SAIF, the insurer has the option of denying it. In the present case, SAIF accepted claimant's claim and paid benefits thereon. SAIF may not now deny its compensability. Bauman v. SAIF, 295 Or 788 (1983). None of relevant exceptions to the Bauman rule are present in this case. As a result, even though we find that the claim should not have been compensable, SAIF must pay claimant benefits according to law. SAIF may then seek reimbursement from the Workers' Compensation Department. ORS 656.054(3).

We recognize that the ultimate effect of this order is to impose liability on the Workers' Compensation Department, even though liability has arisen through another agency's actions. We are also mindful that in a noncomplying employer situation, certain due process considerations arise when the Bauman ruling is applied to estop SAIF from issuing a retroactive denial. When, as in this case, the noncomplying employer is assigned an insurer by operation of law and the insurer takes action effectively detrimental to the interests of the employer, the employer may be without recourse against the insurer.

Despite our recognition of these considerations, we find nothing in the Supreme Court's Bauman decision to guide us in that regard. Rather, we read Bauman to preclude all retroactive denials, except those specifically enumerated therein. Bauman does not distinguish between retroactive denials made by private insurers and those made by insurers assigned by operation of law. The policy of Bauman is to protect the interests of the injured worker and to preserve the stability of the workers' compensation system. We find we must apply Bauman to the present case as we would any other.

On review, the employer argues that it was insured by SAIF at the time of claimant's injury and that, therefore, it was complying at times pertinent to the claim. It argues that a SAIF representative orally bound the Corporation to coverage in a telephonic communication, and that SAIF is now estopped. We disagree for three reasons. First, insurance coverage cannot arise by operation of estoppel where no coverage exists in the first instance. Wyoming Sawmills v. Transportation Insurance Co., 282 Or 401, 410 (1978); Mary G. Mischke, 37 Van Natta 1155, 1159 (1985). Second, to invoke promissory estoppel, it is fundamental that the employer must adduce facts sufficient to prove that a promise was in fact made by the party against whom the estoppel is sought to be enforced. The employer has failed to meet its burden in that regard. Finally, there is no persuasive evidence that the employer actually submitted an application for coverage or the premium deposit required as a condition precedent to coverage. See ORS 656.419(3).

ORDER

The Referee's order dated February 22, 1985 is affirmed. Claimant's attorney is awarded \$550 for services on Board review, to be paid by the SAIF Corporation as processing agent for the noncomplying employer.

Board Chairman Ferris Dissenting

The majority have applied Bauman v. SAIF, 295 Or 788 (1983), to make a noncompensable claim compensable and to attach ultimate liability for the claim to a party that has consistently and timely denied it. In so doing, they have stretched the Bauman decision to, I believe, a denial of due process. I respectfully dissent.

The rule of Bauman v. SAIF, supra, is that, "If . . . the insurer officially notifies the claimant that the claim has been accepted, the insurer may not, after the 60 days [specified in ORS 656.262(6)] have elapsed, deny the compensability of the claim unless there is a showing of fraud, misrepresentation or other illegal activity." 295 Or at 794. See also Wheeler v. Boise Cascade Corp., 298 Or 452, 456 (1985). As I read Bauman in the context of the facts of this case, official acceptance of the claim by the party who is ultimately liable for the payment of compensation is necessary before the Bauman rule can be invoked. That did not happen in this case; therefore, Bauman does not apply.

In this case the employer maintains that, by telephone, the employer was assured coverage by SAIF. Since "binders" are acceptable in other areas of insurance, it was not unreasonable for an unsophisticated employer to believe this to be the case in workers' compensation law as well. However, ORS 656.419(3) clearly states that coverage is effective only when the application and the required fees are received and accepted by the insurer. Although I am persuaded that the employer honestly believed coverage had been secured, I accept the fact that coverage had not been secured and thus the employer was noncomplying.

As SAIF succinctly stated in its brief to the Referee:

"In a non-complying employer situation, SAIF Corporation accepts and processes claims under the authority of the Workers' Compensation Department, not that of the non-complying employer. The Director may later levy penalty charges against the non-complying employer under ORS 656.054(2), and institute civil proceedings against the non-complying employer under ORS 656.054(3). Under these circumstances, the non-complying employer cannot be said to have an opportunity to review SAIF's actions or direct SAIF in any way.

"The non-complying employer must retain its own counsel to advocate for its interests in this case. To deny the non-complying employer the opportunity to litigate the compensability of claimant's injury raises

a serious question of due process [of law], notwithstanding Bauman. The non-complying employer did not accept claimant's claim, and has not accepted its compensability.

. . . . .

"Even assuming, without conceding, that Bauman applies to this case, the employer's request for hearing in a timely fashion placed this claim technically in a denied status, and the time limits dictated by Bauman are complied with." (Emphasis in original.)

The majority characterize SAIF as an "insurer by operation of law." I respectfully disagree. Nowhere in ORS 656.054(1) is SAIF referred to or designated as an "insurer." Its duty is to process claims "in the same manner as a claim made by a worker employed by a carrier-insured employer . . . ." The statute does not provide that SAIF shall, "assume, without monetary limit, the liability of the employer . . . ." ORS 656.419(1), as an insurer under the Act must. The majority's holding allows SAIF to step into the shoes of an innocent employer and foreclose for all time the employer's right to contest the claim, according the employer neither notice nor an opportunity to be heard, all without SAIF ever facing any liability.

Even the most ardent adherent to the Bauman decision would have to agree that it can make a noncompensable claim compensable as a matter of law. The majority finds that the claim in this case is not compensable as a matter of fact. I wholeheartedly agree. I would go farther, however, and also find that the claim is not compensable as a matter of law, because the responsible party did not, ever, accept the claim and, in fact, timely denied it. SAIF in this case was simply a conduit for the payment of interim compensation, and had a direct conflict of interest with the employer. SAIF bears no ultimate liability in this case, unlike the guaranty contract insurer in Bauman, which bore all ultimate liability. Because the claim in this case was never accepted by the employer, the Bauman case does not fit the facts of this case and its application has no merit. I would reverse the order of the Referee.

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LONNIE J. HITESHEW, Claimant  
Roland W. Johnson, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 85-05332  
December 31, 1986  
Order on Review

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of those portions of Referee Menashe's order that disallowed an offset of allegedly overpaid temporary disability compensation and awarded penalties and attorney fees based upon that portion of the permanent partial disability award which the Referee concluded was unreasonably withheld by SAIF. Claimant cross-requests review of that portion of the order that affirmed an award by Determination Order of 15 percent (48 degrees) unscheduled permanent partial disability for his low back. The issues are offset, penalties, attorney fees and extent of disability.

The Board affirms the order of the Referee on the issues of attorney fees and extent of disability. On the issues of offset and penalties, the Board modifies the Referee's order.

Claimant compensably injured his low back in January 1984. The claim was accepted and was closed by Determination Order in April 1985 with an award of 15 percent unscheduled permanent partial disability. The Determination Order was later amended to authorize SAIF to offset overpaid temporary disability compensation against the permanent partial disability award. SAIF claimed an offset that exceeded the value of the permanent partial disability award. Claimant requested a hearing.

The offset claimed by SAIF concerns the question of what wage rate should be employed to calculate claimant's temporary disability benefits. According to a stipulation entered into by the parties at the end of the hearing, claimant received temporary disability compensation based upon a wage rate of \$1,400. Of this amount, claimant received \$700 per month in cash and the other \$700 per month in other forms of compensation including free housing, electricity, health insurance, gasoline, beef, and firewood.

Claimant received temporary disability compensation from April 13 through April 30, 1984 and from September 28, 1984 through April 19, 1985. Both claimant and the employer (whom the Referee found credible) testified that claimant's employment ended on September 30, 1984 when it became clear that claimant would no longer be able to perform his job. The employer allowed claimant to continue living rent free in the house that claimant had occupied during the employment relationship for the remainder of the time that claimant was receiving temporary disability benefits. It is unclear from the record whether the other non-cash forms of compensation continued beyond September 30, 1984.

SAIF contends that claimant should not have been paid temporary disability compensation based upon a wage rate of \$1,400 per month when he was living rent free throughout the entire period during which he was receiving such compensation. SAIF's argument is based upon former OAR 436-54-212(4)(e) (renumbered OAR 436-60-020(4)(e), effective May 1, 1985). That rule stated:

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

". . . .

"(e) Employed salary plus considerations (rent, utilities, food, etc.): Use only salary if considerations continue; use salary plus reasonable value of considerations if lost."

We accept SAIF's argument to the extent that temporary disability compensation for the periods prior to the termination of the employment relationship on September 30, 1984 should have been calculated on the basis of claimant's \$700 per month cash salary only pursuant to the administrative rule. These periods were April 13 through April 30, 1984 and September 28 through September 30, 1984, a total of 21 days.

We reject SAIF's argument to the extent that it calls for application of the administrative rule beyond the time that the employment relationship was terminated on September 30, 1984. Once the employment relationship ended, claimant was no longer a "worker" within the meaning of the administrative rule, see ORS 656.005(27), and the administrative rule did not apply to exclude non-cash benefits from claimant's wages. Temporary disability compensation paid after September 30, 1984, therefore, was properly calculated based upon claimant's total "wages" of \$1,400 per month. See ORS 656.005(26).

SAIF also presents an argument regarding the "reasonable value" of the free housing claimant received that we do not find persuasive given the record as developed in this case.

We modify the Referee's order to the extent that it is inconsistent with the above analysis. SAIF will be authorized to offset overpaid temporary disability compensation computed in accordance with this analysis against any future awards of permanent partial disability relative to this claim. See Forney v. Western States Plywood, 66 Or App 155, 159-60 (1983), aff'd, 297 Or 628 (1984); Donald D. Mills, 37 Van Natta 219, 220 (1985). The penalty assessed by the Referee shall also be recalculated in accordance with the above analysis. We accept the Referee's conclusion that the adjustments made by SAIF in the value assigned to the non-cash elements of claimant's wages other than housing were unreasonable.

#### ORDER

The Referee's order dated March 21, 1986 is modified in part. SAIF is authorized to offset temporary disability compensation based upon a wage rate in excess of \$700 per month for the periods from April 13 through April 30, 1984 and from September 28 through September 30, 1984 against any future award of permanent partial disability relative to this claim. The penalty assessed by the Referee shall be recalculated in accordance with the analysis outlined in this order. The remainder of the Referee's order is affirmed.

JAMES H. KLEFFNER, Claimant  
Welch, et al., Claimant's Attorneys  
Beers, et al., Defense Attorneys  
Roberts, et al., Defense Attorneys  
SAIF Corp Legal, Defense Attorney

WCB 86-06012, 85-10340 & 85-11469  
December 31, 1986  
Order on Review

Reviewed by Board Members Ferris and Lewis.

The SAIF Corporation requests review of that portion of Referee Pferdner's order that awarded claimant's attorney an insurer-paid attorney fee. The issue is attorney fees.

This claim involved three insurers and came before the Referee solely as a responsibility issue. Prior to hearing, claimant's attorney was instrumental in obtaining an order pursuant to ORS 656.307 designating a paying agent.

Inasmuch as responsibility was the sole issue at hearing, claimant was a nominal party and not entitled to an attorney fee. Petshow v. Farm Bureau Ins. Co., 76 Or App 563, 571 (1985). However, claimant's attorney took affirmative and

substantive steps to have a paying agent named pursuant to ORS 656.307. Claimant's attorney is entitled to an attorney fee for his services in obtaining the .307 order to be paid out of claimant's compensation. See Mark L. Queener, 38 Van Natta 882 (1986); Bruce A. Hatelli, 38 Van Natta 1024 (1986). After de novo review of the record, we conclude that the attorney fee awarded by the Referee was reasonable. However, the Referee's order is modified to reflect that the attorney fee is to be paid out of claimant's compensation.

#### ORDER

The Referee's order dated July 7, 1986, is affirmed in part and modified in part. In lieu of the Referee's award of an insurer-paid reasonable attorney fee, claimant's attorney is awarded 25 percent of claimant's compensation, not to exceed \$1,000 for services rendered prior to hearing in procuring an order designating a paying agent under ORS 656.307. This fee shall be paid by the SAIF Corporation from compensation due to claimant. The remainder of the Referee's order is affirmed.

JAMES E. MAREK, Claimant  
Malagon & Moore, Claimant's Attorneys  
Cummins, et al., Defense Attorneys

WCB 85-09772  
December 31, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The self-insured employer requests review of Referee McCullough's order on reconsideration which set aside its denial of claimant's aggravation claim for a head injury. On review, the employer contends that claimant has failed to prove that he is more disabled since the last award of compensation.

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

In Smith v. SAIF, 302 Or 396 (December 23, 1986), the Supreme Court withdrew its previous opinion, 302 Or 109 (1986), and agreed with the following analysis by the Court of Appeals:

"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. See Stapp v. SAIF, 78 Or App 438, 717 P2d 216 (decided this date); Miller v. SAIF, 78 Or App 158, 714 P2d 1105 (1986). 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." 78 Or App at 448 (emphasis in original).

The Supreme Court in Smith reasoned that a worker may be able to continue to work at a present job but still suffer a loss of earning capacity to carry on other work in the broad field of general occupations because of a worsened condition. Accordingly, the Supreme Court concluded that, in a claim for increased compensation for unscheduled disability under ORS 656.273, the worker need not show that he is less able to work in his present employment, but must prove that his symptoms have increased or otherwise demonstrate that his underlying condition has worsened so that he is less able to work in the broad field of general occupations resulting in a loss of earning capacity.

Following our de novo review of the medical and lay evidence, including claimant's credible testimony, we are persuaded that since the last award of compensation, claimant's symptoms have increased rendering him less able to work in the broad field of general occupations resulting in a loss of earning capacity. We also find that these increased symptoms are beyond those to be expected as a "waxing and waning" of the compensable condition. Clemmer v. Boise Cascade Corp., 75 Or App 404 (1985); Hoke v. Libby, McNeil & Libby, 73 Or App 44 (1985); Billy Joe Jones, 36 Van Natta 1230, 1233 (1984), aff'd mem., 76 Or App 402 (1985).

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 on reconsideration dated July 23, 1986 is affirmed. Claimant's attorney is awarded \$600 for services on Board review, to be paid by the self-insured employer.

JODI A. SCHREMM, Claimant  
Starr & Vinson, Claimant's Attorneys  
E. Jay Perry, Defense Attorney

WCB 86-01124  
December 31, 1986  
Order Denying Motion to Dismiss

Claimant has moved the Board for an order dismissing the insurer's request for Board review on the ground that a copy of the request was not served upon all parties. The request was initiated by the the attorney for the insurer and was served upon the attorney for claimant. Claimant does not assert that she has been prejudiced by lack of personal notice of the request for review. In the absence of a showing of prejudice to a party, timely service of a request for Board review on the attorney for a party is adequate 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); Karen J. Bates, 38 Van Natta 964 (1986). The motion to dismiss is denied.

IT IS SO ORDERED.

substantive steps to have a paying agent named pursuant to ORS 656.307. Claimant's attorney is entitled to an attorney fee for his services in obtaining the .307 order to be paid out of claimant's compensation. See Mark L. Queener, 38 Van Natta 882 (1986); Bruce A. Hatelli, 38 Van Natta 1024 (1986). After de novo review of the record, we conclude that the attorney fee awarded by the Referee was reasonable. However, the Referee's order is modified to reflect that the attorney fee is to be paid out of claimant's compensation.

#### ORDER

The Referee's order dated July 7, 1986, is affirmed in part and modified in part. In lieu of the Referee's award of an insurer-paid reasonable attorney fee, claimant's attorney is awarded 25 percent of claimant's compensation, not to exceed \$1,000 for services rendered prior to hearing in procuring an order designating a paying agent under ORS 656.307. This fee shall be paid by the SAIF Corporation from compensation due to claimant. The remainder of the Referee's order is affirmed.

JAMES E. MAREK, Claimant  
Malagon & Moore, Claimant's Attorneys  
Cummins, et al., Defense Attorneys

WCB 85-09772  
December 31, 1986  
Order on Review

Reviewed by Board Members Lewis and McMurdo.

The self-insured employer requests review of Referee McCullough's order on reconsideration which set aside its denial of claimant's aggravation claim for a head injury. On review, the employer contends that claimant has failed to prove that he is more disabled since the last award of compensation.

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

In Smith v. SAIF, 302 Or 396 (December 23, 1986), the Supreme Court withdrew its previous opinion, 302 Or 109 (1986), and agreed with the following analysis by the Court of Appeals:

"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. See Stapp v. SAIF, 78 Or App 438, 717 P2d 216 (decided this date); Miller v. SAIF, 78 Or App 158, 714 P2d 1105 (1986). 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." 78 Or App at 448 (emphasis in original).

compliance with OAR 438-07-005(3)(b). That rule provides that document submission by a claimant is timely if done within seven days of receipt of the insurer's or employer's exhibit index. The Referee concluded that claimant's submission was timely under the "seven day rule." He excluded the several exhibits objected to by claimant and admitted the remaining exhibits as claimant's exhibits. The Referee declined to admit the excluded exhibits under his discretion under OAR 438-07-005(4), concluding that the reason for late submission of the employer's exhibits did not establish good cause. In his order, however, the Referee referred to one of the excluded exhibits, which indicates that it was at least considered, if not relied upon, by the Referee in deciding the case.

After review, we conclude that neither party complied with the letter of the exhibit submission requirements of OAR 438-07-005(3). The employer admittedly did not comply with the "20 day rule." Claimant did not strictly comply with the "seven day rule" because he did not submit a supplemental exhibit index listing the several documents included on the insurer's index to which he did not object. We conclude that the employer's failure to comply with the "20 day rule" was due to its attorney not having received actual notice of the hearing until the twenty-first day before the hearing. It was, thus, a practical impossibility for the employer to comply with the rule.

Although the late notice of hearing was largely of the employer's making due to the reference to the wrong case in the representation letter, we conclude that this is the kind of "excusable neglect" that should be considered in a "good cause" calculus. See Anderson v. Publishers Paper Co., 78 Or App 513 (1986). Under the circumstances present in this case, we conclude that the employer's approach to the problem of late notice was reasonable and that all exhibits should have been admitted for the sake of the completeness of the record and to achieve substantial justice. The excluded exhibits are a part of the record and have been considered on Board review. See Robert A. Leppla, 37 Van Natta 1698 (1985).

After de novo review of the entire record, the Board affirms the order of the Referee.

ORDER

The Referee's order dated August 7, 1986 is affirmed.

PERCY W. WALTERS, Claimant  
Peter O. Hansen, Claimant's Attorney  
SAIF Corp Legal, Defense Attorney

WCB 85-13371  
December 31, 1986  
Order on Review

Reviewed by Board Members McMurdo and Lewis.

Claimant requests review of Referee Podnar's order that upheld the SAIF Corporation's denial of claimant's aggravation claim for the low back. The issue is compensability.

We affirm the Referee's order with the following comment. Among the Referee's findings was that claimant had failed to establish his aggravation claim because there was "no persuasive evidence that claimant has experienced a medically verified inability to work due to a worsened condition resulting

from his industrial injury." In order to establish an aggravation claim, claimant need not necessarily establish that he has experienced a medically verified inability to work. He need only show that he is less able to obtain and hold employment in the broad field of general occupations than he was prior to the worsening. Smith v. SAIF, 302 Or 396 (filed December 23, 1986). Because we find that claimant has failed to adduce sufficient proof of a compensable worsening, we affirm.

ORDER

The Referee's order dated June 26, 1986 is affirmed.

GIORDANO ZORICH, Claimant	WCB 85-00696 & 85-01291
Galton, et al., Claimant's Attorneys	December 31, 1986
SAIF Corp Legal, Defense Attorney	Order on Review
Merrily McCabe, Defense Attorney	
Scott M. Kelley, Defense Attorney	

Reviewed by Board Members McMurdo and Ferris.

The SAIF Corporation requests review of that portion of Referee Knapp's order that denied its request for an offset of overpaid temporary disability compensation. Claimant cross-requests review of that portion of the Referee's order that: (1) awarded claimant 15 percent additional unscheduled permanent disability related to his October 9, 1978 industrial injury and affirmed the May 29, 1984 Determination Order's award of five percent unscheduled permanent disability related to his October 13, 1982 industrial injury; (2) awarded a \$500 attorney fee for SAIF's failure to pay compensation due under the November 26, 1984 Order on Review and a \$250 attorney fee for SAIF's failure to pay the difference in value of the permanent disability awarded by the May 29, 1985 Determination Order; and (3) denied claimant's request for temporary disability from November 18, 1985 to December 2, 1985. In his brief claimant also requests interim compensation and an associated penalty for the period November 18, 1985 to December 2, 1985 and; attorney fees for prevailing at hearing on SAIF's cross-appeal. In its brief, the Safeco Insurance Company requests the award of 15 percent unscheduled permanent disability be reduced. The issues are extent of unscheduled permanent disability, penalties, attorney fees, temporary disability, interim compensation and SAIF's entitlement to offset or repayment.

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

On March 18, 1986, claimant's treating physician, Dr. Duncan, sent a report to SAIF at claimant's request that stated:

"I have been asked to notify you officially of a medical leave which was recommended from November 18 to December 2 of 1985. Mr. Zorich was suffering from depression related to chronic pain and required this period of treatment and convalescence in order to return to work."

SAIF received this report on March 23, 1986. On April 7, 1986 claimant's attorney wrote a letter requesting temporary disability for the period November 18, 1985 to December 2, 1985. As of

hearing on April 15, 1986, SAIF had made no response to the request. Claimant asserts entitlement to interim compensation for the period and a penalty and attorney fee for SAIF's failure to begin the payment of benefits or deny the claim within 14 days of receipt of Dr. Duncan's report.

In order to be entitled to interim compensation, claimant must file a claim and establish that as a result he has lost time from work or has diminished earning capacity. Bono v. SAIF, 298 Or 405 (1984). Interim compensation must be paid whether or not the claim is compensable. For aggravation claims, interim compensation must be paid within 14 days of the date the employer has notice of the claim and medical verification that claimant is unable to work as a result of the worsened condition. ORS 656.273(6).

The purpose of interim compensation is to avoid the withholding of a worker's benefits pending acceptance or denial of the claim by an employer. Jones v. Emanuel Hospital, 280 Or 147 (1977).

In the present situation, the March 18, 1986 report issued by Dr. Duncan does establish a claim and provide medical verification that claimant was unable to work due to an alleged worsening of his condition. However, the evidence establishes that at the time the claim was made claimant had returned to work and had been working for over three months. The primary purpose of interim compensation is to provide an injured worker immediate benefits when he is unable to work as a result of his injury. Jones, Supra. This purpose no longer exists when the worker has returned to work and the period of disability has passed. Claimant is not entitled to interim compensation for the period November 18, 1985 to December 2, 1985.

At hearing and in his brief, claimant asserts that he is entitled to temporary disability over the period November 18, 1985 to December 2, 1985 as claimant had suffered an aggravation. We note that at the time of hearing 60 days had not passed from the time SAIF received Dr. Duncan's March 18, 1986 report. SAIF was entitled to 60 days in which to accept or deny the claim. ORS 656.262(6); Syphers v. K-W Logging Inc., 51 Or App 769 (1981). However, the parties were prepared to litigate the issue and the Referee concluded that in light of all the evidence claimant had not sustained his burden of showing that his time away from work was due to a worsened condition. Since neither SAIF nor the claimant made an objection to proceeding on the merits of the aggravation claim, we do not disturb the Referee's finding.

Also in his brief, claimant asserts that he is entitled to reasonable attorney fees for prevailing on SAIF's cross-appeal at hearing. We have previously held, however, that unless an initial appeal is withdrawn a cross appellant is not considered the initiating party for purposes of awarding attorney fees pursuant to ORS 656.382(2). OAR 438-47-075; Richard M. Deskins, 38 Van Natta 825 (1986). Claimant is not entitled to an additional attorney fee for services at hearing on the cross-appeal issue.

We find this case to have been of average difficulty with an ordinary likelihood of success for claimant on Board

review. A reasonable attorney fee for services on Board review is therefore awarded.

ORDER

The Referee's order dated May 15, 1986 is affirmed. Claimant's attorney is awarded \$500 for services on Board review, to be paid by the SAIF Corporation.

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JERRY F. FOSTER, Claimant  
Malagon & Moore, Claimant's Attorneys  
Constance L. Wold, Defense Attorney  
Cummins, et al., Defense Attorneys

WCB 84-11283 & 84-12837  
December 11, 1986  
Order of Abatement

The Board has received motions for abatement of our Order on Reconsideration dated November 18, 1986 from claimant and Wausau Insurance Company.

In order to allow sufficient time to consider the motion, the above noted Board order is abated and the parties are requested to file a response to the motion within 21 days.

IT IS SO ORDERED.

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WORKERS' COMPENSATION CASES

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<u>Davidson v. SAIF (10/28/86)</u> -----	1641
<u>Smith v. SAIF (10/21/86)</u> -----	1637
<u>Smith v. SAIF (12/23/86)</u> -----	1642
<u>Stepp v. SAIF (10/28/86)</u> -----	1640

Decided in the Oregon Court of Appeals:

<u>Bendix Home Systems v. Alonzo (10/8/86)</u> -----	1575
<u>Bowlin v. SAIF (10/15/86)</u> -----	1589
<u>Boyer v. Armstrong Buick (10/8/86)</u> -----	1585
<u>Britton v. Squires Electronics (10/8/86)</u> -----	1588
<u>Cain v. Woolley Enterprises (12/31/86)</u> -----	1635
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IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Charles L. Gregg, Claimant.

GREGG,  
Petitioner,

v.

STATE ACCIDENT INSURANCE FUND  
CORPORATION et al,  
Respondents.

(WCB 84-10197; CA A36642)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 24, 1986.

Philip H. Garrow, Bend, argued the cause and filed the brief for petitioner.

Douglas F. Zier, Assistant Attorney General, Salem, argued the cause for respondents. With him on the brief were Dave Frohnmayr, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

Affirmed.

Cite as 81 Or App 395 (1986)

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WARREN, J.

Claimant seeks reversal of a Workers' Compensation Board order which upheld SAIF's denial of compensation for symptoms known as Raynaud's phenomenon, a blanching, numbness and tingling of the hands. We affirm the Board and write only to correct what we perceive to be a persistent misconception of the scope of the Supreme Court's decision in *Bauman v. SAIF*, 295 Or 788, 670 P2d 1027 (1983).

Claimant suffered a back injury on October 8, 1982, when he was struck in the back at chest level with a swinging log. SAIF expressly accepted the claim for the back injury on October 25, 1982, and began paying benefits. Claimant's hand symptoms were first mentioned in a medical report on January 13, 1983. Treatment for the back had virtually ceased by that time, but SAIF continued to pay benefits for medical treatment and time loss for the hand condition. The worker's compensation department issued a determination order on September 13, 1984, awarding temporary total disability. On November 28, 1984, SAIF issued a partial denial, rejecting the compensability of the Raynaud's phenomenon hand symptoms.

Initially, we note that the parties have never treated the Raynaud's phenomenon as a separate claim. They have regarded it from the outset as an aspect of the injury claim, as indicated by SAIF's "partial denial." At the time when SAIF

accepted the claim, however, it had no notice of claimant's hand symptoms, which we have concluded are not medically related to the back condition, and its acceptance, therefore, did not encompass the Raynaud's phenomenon. *Destael v. Nicolai Company*, 80 Or App 596, \_\_\_ P2d \_\_\_ (1986).<sup>1</sup> Claimant does not seriously contend otherwise.

Claimant asserts, rather, that SAIF, having paid benefits after it learned of the hand symptoms, is deemed, under *Bauman*, to have accepted responsibility. The Supreme Court held in *Bauman* that, when an insurer expressly accepts a claim, it may not reverse that decision after the 60 days provided under ORS 656.262(6) for acceptance or denial of a

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Gregg v. SAIF

claim. If the insurer has not expressly accepted the claim, however, a different rule applies. See *Frasure v. Agripac*, 290 Or 99, 619 P2d 274 (1980). ORS 656.262(9) provides, in part:

"Merely paying or providing compensation shall not be considered acceptance of a claim or an admission of liability  
\* \* \*"

In *Bauman* the court stated that that provision protects an insurer which begins payments under ORS 656.262(4) without accepting the claim from having the payments interpreted as acceptance. That insurer is not subsequently barred from denying the claim. The payment of benefits does not constitute constructive acceptance.

SAIF's payment of benefits for the hand condition did not preclude it from denying that the condition was a result of the accident.

Affirmed.

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<sup>1</sup> Compare *Johnson v. Spectra Physics*, 77 Or App 1, 5, 712 P2d 125 (1985), *rev allowed* 301 Or 165 (1986), where the insurer had knowledge of the second condition at the time when it expressly accepted the claim.

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October 8, 1986

No. 570

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Juan Alonzo, Claimant.

BENDIX HOME SYSTEMS, Employer,  
through Underwriters Adjusting  
Company, Administering Agent,  
*Petitioner,*

*v.*

ALONZO,  
*Respondent.*

(81-09123; CA A35933)

Judicial Review from Workers' Compensation Board.

Argued February 10, 1986.

Patric J. Doherty, Portland, argued the cause for petitioner. With him on the brief were E. Kimbark MacColl, Jr., and Rankin, McMurry, VavRosky & Doherty, Portland.

Lynda D. St. Jean, Salem, argued the cause for respondent. With her on the brief was Allen, Stortz, Fox & Susee, Salem.

Before Joseph, Chief Judge, and Van Hoomissen and Young, Judges.

JOSEPH, C. J.

Reversed; determination order of September, 1981, as amended November, 1981, reinstated.

**JOSEPH, C. J.**

Petitioner seeks review of a Workers' Compensation Board order which affirmed the referee's order granting claimant permanent total disability (PTD). Claimant's injury occurred in 1974; the claim was closed in 1976 with an award of 75 percent for an unscheduled back disability and 15 percent for a scheduled right leg disability. The claim was reopened and closed again in February, 1980, with no additional award of permanent disability. In October, 1980, the parties stipulated to awards of 90 percent unscheduled disability and 45 percent scheduled disability. Claimant had also filed an aggravation claim, which petitioner had denied. Pursuant to another stipulation, that denial was withdrawn and the claim was closed by a determination order pursuant to ORS 656.268 in September, 1981 (which was amended in November, 1981). That order made no award of disability in excess of the percentages agreed to in the 1980 stipulation, and claimant requested a hearing. The referee granted PTD, and the Board affirmed. On *de novo* review, we reverse.

Petitioner argues that the PTD award was erroneous, because claimant did not prove a permanent worsening of his condition since the last arrangement of compensation. In *Stepp v. SAIF*, 78 Or App 438, 717 P2d 216, *rev den* 301 Or 445 (1986), we stated that a determination of the extent of permanent disability cannot be relitigated in the guise of an aggravation claim and that additional permanent disability cannot be awarded unless the claimant proves a permanent worsening of the condition. *See also Davidson v. SAIF*, 79 Or App 448, 719 P2d 75 (1986). The determination order closing this aggravation claim did not grant any disability in addition to the amount stipulated to in 1980. Rather than determining whether a permanent worsening had occurred, the referee concluded that, "[w]hile claimant's condition has not worsened objectively, it is apparent claimant has attempted to work at two jobs and is unable to do so. Therefore, the determination issued on September 24, 1981, should have awarded claimant permanent total disability."

Claimant argues that he has suffered increased disability since the 1980 stipulation. In September, 1981, he told his doctor that his condition was really no different from what it had been, but at the October, 1982, hearing he testified that

his pain had increased during the year before the hearing. He also urges as evidence of increased pain that he had been forced to quit two jobs since the 1980 stipulation. However, his most recent job as an aide in a child care center was specifically designed to allow him to work within his limits. His vocational rehabilitation counselor reported that he quit that job when, on his first attempt, he could not get his pain medication prescription refilled. After the doctor approved the refill, claimant would not purchase the prescription, because he did not believe that he would be reimbursed. He refused to return to work, or to keep appointments with the counselor assisting him, even though his doctor had approved his return to work. The fact that claimant suffered pain while he worked does not prove that his condition had worsened.

The medical evidence since the 1980 stipulation comes from the treating physician, Dr. Fax. He reported that the aggravation was a "flare-up" of the old back injury, that claimant did not suffer further permanent problems but continued to have considerable symptomatology, that he should be able to continue his job indefinitely and that his physical condition is unchanged since earlier reports. We are satisfied that claimant has not suffered a permanent worsening of his condition and that his temporary flare-up did not leave him with any additional permanent impairment. The referee and Board erred in redetermining the extent of disability when claimant had failed to prove a permanent worsening of his compensable condition.

Reversed; the determination order of September, 1981, as amended November, 1981, is reinstated.

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October 8, 1986

No. 571

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Anita R. Jensen, Claimant.

ROSEBURG LUMBER CO.,  
*Petitioner,*

*v.*

LOUISIANA-PACIFIC et al,  
*Respondents.*

(84-06246, 84-06245; CA A36251)

Judicial Review from Workers' Compensation Board.

Argued and submitted February 10, 1986.

H. Scott Plouse, Medford, argued the cause and filed the brief for petitioner.

Patric J. Doherty, Portland, argued the cause for respondent Louisiana-Pacific, a foreign corporation. With him on the brief were Dennis R. VavRosky, and Rankin, McMurry, VavRosky & Doherty, Portland.

Jerome F. Bischoff, and Bischoff & Strooband, P.C., Eugene, waived appearance for respondent Anita R. Jensen.

Before Joseph, Chief Judge, and Van Hoomissen and Young, Judges.

JOSEPH, C. J.

Reversed and remanded for further proceedings.

**JOSEPH, C. J.**

Petitioner seeks review of a Workers' Compensation Board order which affirmed a referee's order that it is responsible for claimant's bilateral hand dermatitis. Petitioner argues that Louisiana-Pacific (L-P), claimant's former employer, is responsible, because she was employed there when she first contracted the dermatitis. On *de novo* review, we reverse.

In early February, 1983, claimant developed blisters, cracking and swelling of her hands while working as a stacker operator for L-P. She filed an occupational disease claim against L-P in April, 1983, and it accepted the claim. She remained off work until her condition cleared up in October, 1983. She did not return to work at that time, however, because of a strike.

In February, 1984, she went to work for petitioner, performing essentially the same job as at L-P. After about one week, the hand blisters and swelling reappeared. She filed an aggravation claim with L-P, which it denied. She then filed an occupational disease claim with petitioner, which denied it.

Claimant's treating physician, Dr. Weiss, reported that the dermatitis she contracted at Roseburg Lumber was "merely a re-exacerbation [*sic*] of a previously acquired condition relating to her employment with Louisiana-Pacific." Dr. Montanaro, who evaluated claimant on behalf of L-P, reported that her underlying condition became manifest at L-P and that the condition which she developed at Roseburg Lumber was a material worsening of the underlying condition. He also concluded that she had not developed any new condition after leaving L-P.<sup>1</sup>

In *SAIF v. Baer*, 60 Or App 133, 652 P2d 873 (1982), a factually similar case, we held that, when the first employer accepted the occupational disease claim for the claimant's dermatitis, when there was no uncertainty as to the date of the onset of the disease and when the evidence showed that chemical exposure at the second place of employment only caused a recurrence of symptoms, the last injurious exposure  
Cite as 81 Or App 454 (1986) 457

rule did not apply and the first employer remained responsible. The general rule articulated by the Supreme Court is that the employer at the time when the condition becomes disabling, is responsible if subsequent exposures merely reactivate symptoms but do not independently contribute to the claimant's condition or disability. *Boise Cascade Corp. v. Starbuck*, 296 Or 238, 244, 675 P2d 1044 (1984); *Bracke v. Baza'r*, 293 Or 239, 646 P2d 1330 (1982).

<sup>1</sup> Montanaro also explained that the nomenclature involved in chronic hand dermatitis can be very confusing. We agree.

The referee in this case explained that he understood Montanaro's opinion of causation to be that work conditions at both L-P and petitioner caused a material worsening of an underlying dermatitis condition. We disagree with the referee's perception of the medical testimony. The gist of both Weiss' and Montanaro's reports is that claimant suffered a recurrence of the same dermatitis which she had originally contracted while employed at L-P. Even though Montanaro stated that the condition she developed in petitioner's employment was a material worsening of the underlying condition, he also stated that she did not develop any new condition after leaving L-P. We read his testimony to mean only that the symptoms of the disease which she acquired at L-P became worse at the later employment. Weiss' statements that claimant suffered a "re-exacerbation" or "simply an exacerbation of a previously acquired condition" also say that her condition, which she developed while doing petitioner's work, was nothing more than a recurrence of symptoms from a previously contracted disabling disease.

Reversed and remanded for further proceedings.

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No. 574

October 8, 1986

469

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Bradley D. Saiville, Claimant.

SAIVILLE,  
*Petitioner - Cross-Respondent,*

*v.*

EBI COMPANIES et al,  
*Respondents - Cross-Petitioners.*

(WCB 83-11737; CA A36422)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 2, 1986.

Mark R. Malco, Newport, argued the cause and filed the briefs for petitioner - cross-respondent.

Craig A. Staples, Portland, argued the cause for respondents - cross-petitioners. With him on the brief was Roberts, Reinisch & Klor, Portland.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

WARDEN, P. J.

Award of attorney fees on Board review reversed on cross-petition; otherwise affirmed.

Cite as 81 Or App 469 (1986)

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WARDEN, P. J.

Claimant sustained injuries on June 15, 1983, while working as a truck driver. He had been hired on June 10 on an "on call" basis to work irregular hours as needed and was paid at the rate of 20 cents per mile. He contends that he was also to receive \$5 per hour for time spent waiting for his truck to be loaded.

The Workers' Compensation Board affirmed the referee's decision awarding compensation for temporary total disability (TTD) and penalties and attorney fees, because insurer unreasonably failed to pay TTD at the proper rate and unreasonably delayed paying compensation. The Board also awarded claimant attorney fees for services pertaining to Board review. In his petition for judicial review, claimant contends that the referee and the Board erred in determining his weekly earnings used to calculate his TTD rate and in failing to award the total amount of penalties and attorney fees that he had requested. Employer and insurer cross-petition, contending that the Board erred in finding that claimant was "regularly employed," and that insurer's conduct was unreasonable in failing to pay TTD at the proper rate, in delaying compensatory payments to claimant and in awarding attorney fees for Board review. On *de novo* review, we affirm the Board's order, except for the award of attorney fees for Board review.

Claimant claims error in the calculation of his TTD rate, because the referee and the Board failed to include earnings due him for an alleged round trip between Newport and Gold Beach and for hourly wages earned as waiting time in Astoria. Those two issues are purely factual, and we agree with the Board's findings. See *Bowman v. Oregon Transfer Company*, 33 Or App 241, 576 P2d 17 (1978).

Both claimant and insurer seek review of the award of penalties and attorney fees made pursuant to ORS 656.262(10).<sup>1</sup> Insurer contends that its conduct in failing to  
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pay the proper TTD rate and in initially delaying payment of any compensation to claimant was reasonable. We reject that contention, because insurer failed to explain its conduct reasonably. Claimant asks us to award more than the 25 percent maximum penalty allowed by ORS 656.262(10). The wording of the statute is unambiguous, and we are not authorized to award penalties in excess of 25 percent of the amount due. Claimant also seeks review of the award of less than the amount requested for attorney fees pursuant to ORS 656.262(10) and 656.382(1).<sup>2</sup> Attorney fees are awarded on the basis of the efforts of the attorney, the results obtained and the degree of risk that the attorney's efforts will go entirely uncompensated. *Wattenbarger v. Boise Cascade Corp.*, 301 Or 12, 717 P2d 1175 (1986); OAR 438-47-010(2). No additional attorney fees are justified, and we therefore affirm the Board's order in that respect.

Insurer challenges the finding that claimant was "regularly employed" within the meaning of ORS 656.210(2).<sup>3</sup>

<sup>1</sup> ORS 656.262(10) provides:

"(10) If the insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amounts then due plus any attorney fees which may be assessed under ORS 656.382."

<sup>2</sup> ORS 656.382(1) provides, in pertinent part:

"(1) If an insurer or self-insured employer \*\*\* unreasonably resists the payment of compensation, the employer or insurer shall pay to the claimant or the attorney of the claimant a reasonable attorney fee \*\*\*."

<sup>3</sup> ORS 656.210(2) provides, in pertinent part:

"As used in this subsection, 'regularly employed' means actual employment or availability for such employment."

Although claimant was employed on an "on call" basis, we conclude that, in the context of this case, the term means only that claimant did not work regular hours for an hourly wage. He had worked five of the six days between the date when he was hired and the date on which he was injured. We therefore hold that he was "regularly employed" within the meaning of ORS 656.210(2).

Finally, insurer seeks review of the Board's award of attorney fees "for services pertaining to the insurer's contentions on Board review." The relevant statutory provision is ORS 656.382(2),<sup>4</sup> under which a claimant is not entitled to

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attorney fees for Board review unless the employer or insurer initiates it. The Supreme Court has stated

"that the word 'initiated' [in ORS 656.382(2)] encompasses raising issues that would otherwise not be dealt with by the reviewing body, and thus an initiation may take the form of a cross-appeal." *Teel v. Weyerhaeuser Co.*, 294 Or 588, 590, 660 P2d 155 (1983).

Claimant contends that insurer raised issues on its cross-appeal that required consideration beyond those raised by claimant. We do not agree. Claimant initiated Board review of TTD compensation and the assessment of penalties and attorney fees. Insurer's contentions were made in defense on the issues raised in claimant's request for Board review, and it in fact took no cross-appeal to the Board from the referee. Insurer initiated no issues not already raised by claimant. We therefore reverse the award.

Award of attorney fees on Board review reversed on cross-petition; otherwise affirmed.

<sup>4</sup> ORS 656.382(2) provides, in pertinent part:

"(2) If a \*\*\* request for review \*\*\* is initiated by an employer or insurer, and the \*\*\* board \*\*\* finds that the compensation awarded to a claimant should not be disallowed or reduced, the employer or insurer shall be required to pay the claimant or the attorney of the claimant a reasonable attorney fee in an amount set by the \*\*\* board \*\*\* for legal representation by an attorney for the claimant, at and prior to the \*\*\* review on appeal or cross-appeal."

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Sylvia A. Weaver, Claimant.  
INDUSTRIAL INDEMNITY COMPANY,  
*Petitioner - Cross-Respondent,*

*v.*

WEAVER,  
*Respondent - Cross-Petitioner,*  
*and*

EBI COMPANIES, et al,  
*Respondents.*

(WCB No. 84-01115, 84-04251 & 84-04252; CA A36260)

Judicial Review from Workers' Compensation Board.

Argued and submitted June 2, 1986.

John E. Snarskis, Portland, argued the cause and filed the briefs for petitioner - cross-respondent.

Marianne Bottini, Portland, argued the cause and filed the brief for respondent - cross-petitioner.

Nancy J. Meserow, Beaverton, filed the brief for respondent Wausau Insurance Company.

R. G. Rice, Portland, argued the cause for respondent EBI Companies. With him on the brief was Beers, Zimmerman & Rice, Portland.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

VAN HOOMISSEN, J.

Reversed on petition and cross-petition; referee's order reinstated.

Cite as 81 Or App 493 (1986)

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**VAN HOOMISSEN, J.**

Industrial Indemnity, employer's present insurer, seeks review of a Workers' Compensation Board order holding it responsible for claimant's left foot condition. Claimant cross-petitions from that portion of the order which reversed the referee's award of penalties and attorney fees for Industrial Indemnity's unreasonable denial of compensability.<sup>1</sup> We reverse on the petition and on the cross-petition.

Claimant worked for the Greenwood Inn as a waitress from 1975 through the time of the hearing. In 1977, she filed a claim for an occupational disease known as Morton's neuroma. Employee Benefits Insurance (EBI), employer's insurer at that time, accepted the claim. Claimant's treating podiatrist, Dr. Fraser, prescribed orthotics, which relieved the pain in her right foot. The problems with her left foot

<sup>1</sup> We note that the Board reversed the referee's award of penalties and attorney fees with respect to both Industrial Indemnity and Wausau, but claimant's cross-petition addresses only Industrial Indemnity.

continued. In November, 1977, Fraser performed a neurectomy on the second and third intermetatarsal spaces of claimant's left foot. Following the surgery, claimant consulted Dr. Livingston, who noted that it is not unusual following neuroma surgery for a patient to have chronic pain in the area. Claimant experienced some relief following the surgery, but her pain gradually increased.

In July, 1978, Fraser performed a second neurectomy. Claimant again experienced some relief, but pain returned again after several months. Two other doctors concluded that her condition was stationary but that she could not return to her previous work without limitations. In November, 1978, Fraser reported that he had detected a palpable mass at the base of claimant's second toe. He noted that further intervention might be necessary.

In January, 1979, claimant's claim was closed by a determination order which awarded her temporary disability benefits and 10 percent scheduled disability for loss of the use of her left foot. Her foot problem continued. In April, 1980, Fraser treated her with injections. Her claim was reopened and then closed again with an additional award of time loss benefits. EBI continued to insure the Greenwood Inn through

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February, 1982. Wausau Insurance Co. was Greenwood's insurer from March 1, 1982, through February, 1983. Industrial Indemnity assumed the risk on March 1, 1983.

Claimant did not seek further medical treatment until February 22, 1983. In the intervening years, her foot pain continued to increase. Claimant described herself as able to tolerate a great deal of pain, but she finally sought treatment again, because she was having pain every day, all day, and could no longer tolerate the pain. Fraser treated her with a different kind of orthotic and later recommended further surgery.

In November, 1983, Dr. Wilson, a neurologist, examined claimant. He agreed that surgery was necessary and stated: "This surgery was probably the result of her continued work at the Greenwood Inn." In April, 1984, Dr. Thomas, an orthopedist, examined claimant. He diagnosed "metatarsalgia, status post neurectomy." He reported:

"[T]he present problem is a natural progression of her initial injury and, although there is an increase in pain, it is at the same location and the same type of pain as she initially had. The patient's work since 1978 increased her symptoms but did not affect her condition. The initial problem relates back to 1976 and 1977."

The referee found that claimant's continued work activity increased her symptoms but did not affect the underlying disease process. He concluded that "there is nearly medical consensus [that] claimant's situation in 1983 and '84 was an aggravation of the occupational disease claim of 1976." He remanded the claim to EBI for processing.

The Board modified the referee's order with regard to carrier responsibility, concluding that Industrial Indemnity was responsible for claimant's current condition. It found that the underlying disease had worsened due to her employment after EBI was no longer responsible and that her condition

continued to worsen between February, 1983, and the hearing. The Board concluded that, because the worsening could have occurred during Industrial Indemnity's coverage, and because Industrial Indemnity did not prove that claimant's activities during EBI's and Wausau's coverage were the sole cause of her problem, Industrial Indemnity was the responsible carrier.

Cite as 81 Or App 493 (1986)

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We must determine whether claimant's work during the period when the later insurers were responsible worsened claimant's underlying condition, not just her symptoms. See *Bracke v. Baza'r*, 293 Or 239, 646 P2d 1330 (1982); *Fred Meyer v. Benjamin Franklin Savings & Loan*, 73 Or App 795, 700 P2d 257, rev den 300 Or 162 (1985). We find that claimant's underlying condition did not worsen. From a time shortly after her second surgery until the hearing, she has suffered the same kind of pain, although it became worse. She has also had a clinically palpable mass between her toes, which was detected while EBI was still the responsible carrier. The medical evidence indicates that, although claimant may now have more pain and the mass may be larger, her underlying condition, Morton's neuroma, has not worsened. Liability for the disability caused by the underlying disease was fixed when the disability arose, *Bracke v. Baza'r*, supra, 293 Or at 250, and when EBI was the responsible carrier and accepted the occupational disease claim. Her work while Wausau and Industrial Indemnity were the responsible carriers merely aggravated the symptoms but did not contribute to the underlying disease. EBI is responsible.

Claimant seeks review of that portion of the Board's order reversing the referee's imposition of penalties and carrier-paid attorney fees for Industrial Indemnity's denial of the compensability of her claim. On January 20, 1984, EBI denied responsibility for claimant's condition. On February 29, Industrial Indemnity denied both the compensability of and responsibility for the claim. On April 19, Industrial Indemnity notified the Workers' Compensation Department that it had clarified the medical status of claimant's claim and that it no longer questioned compensability. On May 25, a ".307" order, ORS 656.307, was issued, designating Industrial Indemnity as the paying agent. Claimant sought penalties and attorney fees for the unreasonable denial of compensability. The referee awarded them after finding that the denial was unreasonable and that it had forced claimant to delay her surgery. The Board reversed that portion of the referee's order, finding that the denial was timely and that the referee was without authority to impose the penalties and attorney fees.

A penalty may be imposed if an insurer's denial of compensation was unreasonable. *Price v. SAIF*, 73 Or App 498

*Industrial Indemnity Co. v. Weaver*

123, 126-27, 698 P2d 54 (1985); *Norgard v. Rawlinsons*, 30 Or App 999, 1003-04, 569 P2d 49 (1977). Industrial Indemnity denied compensability, claiming that it had not had an opportunity to conduct an independent medical evaluation. However, the Compliance Division had ordered the three carriers to share file information. Industrial Indemnity had available to it sufficient information to indicate whether claimant's foot

problem was a continuation of the occupational disease and was associated with her work, and nothing indicated anything to the contrary. We agree with the referee that Industrial Indemnity should have had no question that one of the three carriers was responsible for the new episode and the need for surgery. The Board erred in determining that the referee was without authority to impose a penalty against Industrial Indemnity.

Reversed on petition and cross-petition; referee's order reinstated.

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No. 581

October 8, 1986

505

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Steven G. Boyer, Claimant.

BOYER,  
*Petitioner,*

*v.*

ARMSTRONG BUICK, INC. et al,  
*Respondents.*

(84-05820 and 84-04491; CA A36881)

Judicial Review from the Workers' Compensation Board.

Argued and submitted May 14, 1986.

Robert D. Herndon, Gladstone, argued the cause for petitioner. With him on the brief was Ringle & Herndon, P.C., Gladstone.

Patric J. Doherty, Portland, argued the cause for respondents Nelson & Nelson Custom Body & Paint and Argonaut Insurance Co. With him on the brief were Ronald W. Atwood and Rankin, McMurry, VavRosky & Doherty, Portland.

John Casey Mills, Portland, waived appearance for respondents Armstrong Buick and Comstock Insurance Co.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

YOUNG, J.

Affirmed.

Cite as 81 Or App 505 (1986)

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YOUNG, J.

Claimant seeks review of a Workers' Compensation Board order which affirmed a referee's order denying claimant's request for attorney fees. The issue is whether claimant is entitled to attorney fees when the sole issue at the hearing was which employer is responsible for claimant's worsened condition. We affirm.

The relevant facts are not in dispute. Up to November, 1982, claimant had no back difficulties. On November 24, 1982, and January 13, 1983, he suffered injuries to his low back while employed by Nelson & Nelson Custom

Body & Paint. Those claims were closed without an award of permanent disability compensation.

In April, 1983, claimant started working for Armstrong Buick. On December 22, 1983, he was polishing the door of a car with an electric polisher when he felt a sharp pain in the same area of his back that was previously injured. Nelson & Nelson's insurer denied responsibility on the ground that claimant had suffered a new injury at Armstrong. Claimant requested a hearing on the denial. Armstrong's insurer denied responsibility on the ground that claimant had actually suffered an aggravation and requested a ".307" order. See ORS 656.307. Claimant also requested a hearing on Armstrong's denial. On May 25, 1984, a .307 order issued, designating Nelson & Nelson's insurer as the paying agent pending determination of responsibility.

The referee held Nelson & Nelson responsible for claimant's worsened condition but refused to award claimant attorney fees. The Board affirmed. As to the attorney fees issue, the Board stated:

"In a responsibility case claimant is entitled to attorney fees if the attorney actively and meaningfully participated. OAR 438-47-090(1). Active and meaningful participation has been interpreted to mean that claimant advocated a position adverse to one of the employers/insurers and has prevailed. *Irwin L. Bacon*, 37 Van Natta 205, 208 (1985); *Robert Heilman*, 34 Van Natta 1487 (1982). Inasmuch as claimant did not advocate a position adverse to one of the employers/insurers he is not entitled to an attorney fee."

Claimant argues that the Board erred in applying  
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OAR 438-47-090(1) to this case, because claimant hired his attorney before the issuance of the .307 order.<sup>1</sup> Because the rule does not apply, claimant continues, and because ORS 656.386(1) mandates an award of attorney fees when a claimant has prevailed on a denied claim, the Board erred in denying claimant attorney fees. We conclude that, regardless of whether the Board incorrectly applied OAR 438-47-090(1) to this case, claimant is not entitled to attorney fees.

In *Petshow v. Farm Bureau Ins. Co.*, 06 Or App 563, 710 P2d 781 (1985), *rev den* 300 Or 722 (1986), the Board decided that the claimant was not entitled to an award of attorney fees, because his attorney had not taken a position adverse to one of the potentially responsible insurers, citing OAR 438-47-090. The claimant sought review of that decision,

<sup>1</sup> OAR 438-47-090(1) provides:

"If a claimant hires an attorney after being advised by both carriers that:

"(a) the sole issue before the referee at a hearing is which of two carriers is responsible for the payment of compensation to claimant; and

"(b) an order has been issued pursuant to the provisions of ORS 656.307 designating one as the paying agent pending determination of the responsible party; and

"(c) the dispute is solely between them, that there is no question of the compensability of claimant's injury or illness, that any involvement of claimant would be solely as a witness, and that therefore it is not necessary that claimant be represented by an attorney,

then the attorney will receive no fee unless he/she actively and meaningfully participates at the hearing in behalf and in defense of claimant's rights."

contending that he was entitled to attorney fees under ORS 656.386(1), because he finally prevailed on Farm Bureau's denied claim. We stated:

"An award of attorney fees in a workers' compensation case is proper only when expressly authorized by statute. *Forney v. Western States Plywood*, 297 Or 628, 686 P2d 1027 (1984) \* \* \*.

"Ordinarily a proceeding pursuant to ORS 656.307 to determine which of two or more insurers is responsible for an otherwise compensable injury does not involve a denied claim entitling the claimant to attorney fees. *Nat. Farm Ins. v. Scofield*, 56 Or App 130, 132, 641 P2d 1131 (1982). The rationale for an award of attorney fees is to compensate the claimant partially for the expense of obtaining compensation, *Bentley v. SAIF*, 38 Or App 473, 481-82, 590 P2d 746 (1979),

Cite as 81 Or App 505 (1986)

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especially when the claimant must overcome the insurer's wrongful denial of compensability. That rationale does not apply in the simple '.307 hearing,' when the insurers concede that the claim is compensable. There is no question but that the claimant will receive compensation; the only issue is which insurer will pay. Although the claimant is a necessary party, he may elect to be, and usually is, merely a nominal party. See ORS 656.307(3). Unless the claimant takes a position concerning which of the insurers is responsible and actively litigates that point, his role in the hearing is merely that of a witness. An award of attorney fees in such a case would generally be inappropriate.

\* \* \* \* \*

"Although it is literally true that claimant ultimately prevailed on a denied claim, he is not entitled to attorney fees for overcoming that denial. When, as here, the insurers concede compensability and only deny the claim on the basis of responsibility, the claimant will always prevail on one of the denied claims. We doubt that the legislature intended claimants to receive attorney fees in every .307 hearing, regardless of their attorneys' efforts on the responsibility issue. We conclude that claimant's participation at the hearing with respect to the responsibility issue was nominal and that he is therefore not entitled to any additional attorney fees against Farm Bureau under ORS 656.386(1). Instead, this is one of the 'all other cases' under ORS 656.386(2) in which a claimant must pay the attorney from the award of compensation.

"Because we hold that claimant is not entitled to additional attorney fees under any statute, we need not address the issue of whether the Board incorrectly applied OAR 438-47-090(1) to the facts of this case."

As in *Petshow*, claimant did not take a position concerning which of the insurers was responsible and actively litigate that point; his participation at the hearing with respect to the responsibility issue was nominal. The Board did not err in denying attorney fees.

Affirmed.

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Judy A. Britton, Claimant.

BRITTON,  
*Petitioner,*

*v.*

SQUIRES ELECTRONICS et al,  
*Respondents.*

(WCB Nos. 84-06935 and 84-04723; CA A37634)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 15, 1986.

James L. Edmunson, Eugene, argued the cause for petitioner. With him on the brief was Malagon & Moore, Eugene.

Nancy J. Meserow, Beaverton, argued the cause and filed the brief for respondents.

Before Joseph, Chief Judge, and Newman and Deits, Judges.

PER CURIAM

Affirmed.

Cite as 81 Or App 512 (1986)

513

PER CURIAM

In this workers' compensation case, claimant asserts that her work for employer caused the condition that necessitated her back surgery in 1983. The referee and the Board both found against her on that issue, and we agree. The more difficult aspect of the case is her claim that she has suffered post-surgical physical deterioration because of her return to work and that it is compensable.

Although the record suggests that her physician allowed her to return to work too early and that that impeded her recovery, the record persuades us on *de novo* review that the claimed deterioration is only the natural course of both her degenerative spinal disease, which is not work-related, and the post-surgical recovery process.

Affirmed.

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IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Nancy Bowlin, a Beneficiary of  
Cordis E. Bowlin, (Deceased), Claimant.

**BOWLIN,**  
*Petitioner,*

v.

STATE ACCIDENT INSURANCE FUND  
CORPORATION et al,  
*Respondents.*

(84-05982; CA A36672)

Judicial Review from Workers' Compensation Board.

Argued and submitted February 19, 1986.

Edward J. Harri, Albany, argued the cause for petitioner. With him on the brief were J. David Kryger, and Emmons, Kyle, Kropp, Kryger & Alexander, P.C., Albany.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondents. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Richardson, Presiding Judge, and Joseph, Chief Judge, and Warden, Judge.

JOSEPH, C. J.

Reversed; referee's order reinstated.

Cite as 81 Or App 527 (1986)

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**JOSEPH, C. J.**

Claimant filed a claim for death benefits under ORS 656.226, asserting that she and decedent, a farm worker, had cohabited as husband and wife for at least one year before and were doing so at the time of the compensable accident. SAIF denied her claim, because it believed the evidence was insufficient to establish the claim. The referee reversed the denial, but the Workers' Compensation Board reversed the referee, holding that claimant had failed to carry her burden of proof. On *de novo* review, we reverse.

ORS 656.226 provides:

"In case an unmarried man and an unmarried woman have cohabited in this state as husband and wife for over one year prior to the date of an accidental injury received by one or the other as a subject worker, and children are living as a result of that relation, the surviving cohabitant and the children are entitled to compensation under ORS 656.001 to 656.794 the same as if the man and woman had been legally married."

Claimant and decedent were never married to each other but had lived together and held themselves out as husband and wife since 1961. Claimant adopted decedent's last name, and they have three children, who were given decedent's last name. The youngest was 17 at the time of decedent's death in

1983. Before claimant and decedent began living together in 1961, he had lived with another woman, Ramo, for 10 years; they had eight children. Ramo also filed a claim for benefits under ORS 656.226, but it was denied and she did not appeal.

As a witness for respondents, Ramo surprised them by testifying that she had only filed her claim because she was mad at claimant. She said that, since 1961, she and decedent had only maintained a relationship as friends, not as husband and wife, and that claimant was the woman that decedent considered his wife. Apparently, claimant, decedent, Ramo and all of decedent's children maintained close relationships. For example, they had all spent every Christmas together as one big family, and Ramo had helped to support decedent when he was out of work. Claimant and decedent had even lived with Ramo on occasion.

Respondents argue that claimant and decedent did not live together during the year immediately before his death or at the time of death.<sup>1</sup> Claimant and her daughter testified that for more than 22 years decedent had always lived with claimant, unless he was out of town seeking work as a farmworker, babysitting for a daughter, McBride, who worked night shifts, or visiting relatives in Tennessee or Washington. About five months before decedent's accident, claimant was accepted as a tenant in subsidized housing. Apparently, she was entitled to live there only if her household was limited to her and only one child. She had signed a statement that decedent was not living with her but that he only occasionally visited her. She had also signed statements for Adult and Family Services Division listing decedent as a member of her household for purposes of receiving food stamps.

Ramo testified that, while claimant was living at the housing project, decedent would stay at her house to avoid detection by the housing authority staff. She stated that claimant would often spend the night at her house with decedent or he would wait until late at night and then walk over to claimant's, a few blocks away, to spend the night. On the morning of the day of the accident, decedent walked from claimant's to Ramo's home so that he could get transportation to his farm work from a place other than claimant's home.

McBride, decedent's daughter, was also called as a witness by respondents because, in filling out the death certificate, she had used her address as his permanent address. She explained that decedent had no personal belongings at her home but frequently babysat for her children. Apparently, decedent had no personal belongings anywhere except a few clothes kept at the three women's homes. McBride also said that claimant and decedent always referred to each other as husband and wife and that the need for housing forced decedent to spend his days at Ramo's so that the housing project staff would not catch him at claimant's.

The Board concluded that it had no confidence in the veracity of the four principal witnesses in this case. It then reasoned that claimant had failed to prove that she and decedent had cohabited during the year before the accident and at the time of the accident. The Board noted, however,

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<sup>1</sup> Claimant and decedent must have been "cohabiting" at the time of the accidental death for her to receive the benefits of ORS 656.226.

that the term "cohabitation" in the statute has not been construed.

Claimant argues that the Board erred in failing to give appropriate weight to the findings of the referee regarding credibility. The referee, however, made no express credibility findings. From the nature of the referee's order, we assume that he believed the four witnesses' testimony, see *Hedlund v. SAIF*, 55 Or App 313, 317, 637 P2d 1329 (1981), but, on *de novo* review, the Board neither must nor should give special weight to implied findings. Neither are we bound by the Board's refusal to accept the testimony of the four witnesses. All of their testimony was consistent, and their use of subterfuge to cheat the housing authority does not persuade us that their testimony should be disbelieved.

Claimant next argues that "cohabitation" under the statute should not be measured by the number of days spent at a particular location each month but by the nature of the relationship as intended by the couple and as characterized by knowledgeable others. Neither the parties nor the Board cited any authority construing the term "cohabitation" under the statute, and we have not found any. In *Wadsworth v. Brigham*, 125 Or 428, 259 P 299, 266 P 875 (1928), the Supreme Court construed the term "cohabitation" in the context of a then new statute (Or Laws 1925, ch 269), which provided:

"In case a man and a woman, not otherwise married heretofore, shall have cohabited in the state of Oregon as husband and wife, for over one year, and children shall be living as result of said relation, said cohabitation, if children are living, is hereby declared to constitute a valid marriage and the children born after the beginning of said cohabitation are hereby declared to be the legitimate offspring of said marriage." 125 Or at 459.

The court explained that the fact that, during the required period of cohabitation, the father had rooms elsewhere did not prevent him from cohabiting with the mother, because

"cohabitation does not mean that the parties must live together in the same room continually or occupy one room, as the essence of cohabitation is the living together and the sexual relations, and there may be some degree of living apart and an occasional trip away without destroying the relation, so that it was not a part of the plaintiff's case to prove that the three of them were huddled in one room all the time and never departed therefrom." 125 Or at 482.

We hold that definition to be applicable under ORS 656.226. The nature of the relationship and not the number of days spent in the same location determines whether cohabitation exists.

Decedent and claimant lived together for 22 years, and they held themselves out as husband and wife. For whatever reasons, they were not always together every day and every night, but there is no evidence that they ever intended to terminate their long term relationship. For the purposes of ORS 656.226, we hold that they cohabited for at least one year before decedent's death and were doing so at the time of his death. *Amos v. SAIF*, 72 Or App 145, 152, 694 P2d 998 (1985).

Reversed; referee's order reinstated.

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

DINGELL,  
*Appellant,*

*v.*

DOWNING-GILBERT, INC. et al,  
*Defendants,*  
INTERMOUNTAIN WHOLESALE COMPANY,  
*Respondent.*

(A8303-01752; CA A35656)

Appeal from Circuit Court, Multnomah County.

Douglass M. Hamilton, Judge Pro Tempore.

Argued and submitted April 16, 1986.

Stephen V. Pucci, Portland, argued the cause for appellant. With him on the brief was Lawrence Wobbrock, Portland.

David Bartz, Portland, argued the cause for respondent. With him on the brief was Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Richardson, Presiding Judge, and Newman and Deits, Judges.

RICHARDSON, P. J.

Affirmed.

Cite as 81 Or App 545 (1986)

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**RICHARDSON, P. J.**

Plaintiff's employer, American Weatherization Company, was engaged as a subcontractor to install insulation in a house that was being built by a general contractor. On February 9, 1982, pursuant to the general contractor's order, defendant Intermountain Wholesale Company delivered a supply of sheetrock wallboard to the jobsite. Intermountain had no responsibility to install the wallboard or to do anything else at the site after completing the delivery. Plaintiff was injured later in the day when the wallboard fell on his foot while he was attempting to insulate the window against which the wallboard had been propped by Intermountain's employees.<sup>1</sup> Plaintiff brought this action, contending that Intermountain is liable to him under the Employer's Liability Act, ORS 654.305 to 654.335 (ELA).<sup>2</sup> The trial court granted

<sup>1</sup> It appears that the fall of the wallboard may have been precipitated by plaintiff's attempt to move it out of the way. It also appears that Intermountain's delivery of wallboard to the site was not necessarily restricted to one occasion. Neither fact is relevant to our disposition.

<sup>2</sup> ORS 654.305 provides:

"Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

Intermountain's motion for summary judgment, holding that Intermountain has no duty to plaintiff for which the ELA provides redress.<sup>3</sup> Plaintiff appeals, and we affirm.

Intermountain relies principally on *Miller v. Georgia-Pacific Corp.*, 294 Or 750, 662 P2d 718 (1983), where the court said:

"This court has repeatedly construed the ELA 'to apply to employees of a person other than the defendant, if their work requires them to come within the risk of injury from the defendant's instrumentalities.' \* \* \*

"Before the ELA can be made the basis of a claim for relief by an injured worker suing a defendant other than an employer of the worker, however, the defendant must be in charge of or have responsibility for work involving risk or

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danger in either (a) a situation where defendant and plaintiff's employer are simultaneously engaged in carrying out work on a common enterprise, or (b) a situation in which the defendant retains a right to control or actually exercises control as to the manner or method in which the risk-producing activity is performed. \* \* \*" 294 Or at 754.

Intermountain argues:

"The EL[A] does not create a duty on the part of a material supplier to another's employee who is injured while working at the other's direction when the supplier exercised no control over the work site or over the manner or method of the employee's work. The EL[A] applies only to 'employers' who have control over the manner or method of work causing the injury. Intermountain delivered material to the work site and left. Intermountain did not have any control whatsoever over the installation of insulation or the movement of the wallboard after its delivery. \* \* \*

Plaintiff relies principally on *Thomas v. Foglio*, 225 Or 540, 358 P2d 1066 (1961), and on the special concurrence in *Browning v. Terminal Ice Co.*, 227 Or 36, 360 P2d 630 (1961), where the author of *Thomas* summarized it as having made

"\* \* \* clear that a third party defendant may be liable under the Employers' Liability Law where his participation in the work causing the injury consists only in bringing to the work project a dangerous instrumentality which exposes the plaintiff workman to danger. \* \* \*" 227 Or at 44.

Plaintiff contends:

"\* \* \* A direct analogy can be made to the instant case: Defendant Intermountain's interest in complying with its duties under the Employer's Liability Law extended beyond merely furnishing materials to the jobsite. Clearly, a duty by defendant Intermountain was owed to Stephen Dingell and other employees of American Weatherization; that of delivering and storing wallboard to the jobsite in a safe manner and in a manner which would not create a hazardous situation."<sup>4</sup>

<sup>3</sup> The court entered a final judgment pursuant to ORCP 67B.

<sup>4</sup> Plaintiff also argues that, independently of Intermountain's participation in the events resulting in injury, the ELA applies because his employer and Intermountain were participants in a common enterprise. We disagree. The court stated in *Thomas v. Foglio, supra*, 225 Or at 547, that, for a common enterprise within the contemplation of the ELA and of ORS 656.154 to exist, there must be an "intermingling of duties and responsibility" between the participants and "this participation must be more than a common interest in an economic benefit which might accrue from the accomplishment of the task."

In *Thomas v. Foglio, supra*, the plaintiff worker was injured because of the unsafe condition of a truck on which he was loading logs. The defendant was the owner of the truck and was not the plaintiff's actual employer. The plaintiff was the employe of Elk Creek Logging Company, and it was undisputed that the defendant had and exercised no control over the work activity which led to the injury, although his driver remained on the scene. The threshold question was whether, by bringing the unsafe truck onto the worksite, the defendant could be deemed to be the plaintiff's indirect employer for purposes of the ELA.

The court's answer is somewhat perplexing. It first stated:

"\* \* \* To draw the defendant into the employer-employee relationship in this sense, it must be shown that the defendant was one 'having charge of, or responsible for the work.' ORS 654.305.

"It would seem clear that one who merely sells equipment which is intended for use and is used by workmen and who, after the sale, is not involved in the use to which the equipment is put, is not an employer under the Act. \* \* \* At this point we simply wish to note that one who merely supplies equipment which is to be used in the course of plaintiff's employment is not an employer under the Employers' Liability Law. This is also true where the equipment is leased rather than sold. The Act cannot apply unless in some sense the defendant has 'charge of' or is 'responsible for' the work out of which the injury arose. \* \* \*" 225 Or at 545-46.

The court then reasoned:

"The narrower question presented to us in the case at bar (assuming that defendant was not a lessor of the trucks[]) is whether an employer can be regarded as 'having charge of' work where the component part of the general undertaking for which he is responsible does not involve any risk-creating activity on the part of his employee but does call for the use of equipment over which he has control and which, if not maintained with proper safeguards, necessarily exposes the employees of the other employer to an unreasonable risk in the course of carrying on the common enterprise. In a narrow sense, it could be said that in such a case the defendant employer does not have charge of work but has charge only of equipment. But the word 'work' in ORS 654.305 means more than the actual physical movement of the employees hired to

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perform a job; it means the entire enterprise with all of the component parts necessary to the completion of the enterprise in which both employers have joined to accomplish. Thus in the instant case the defendant had 'charge of' and was 'responsible for' that part of the job or 'work' which consisted of furnishing safe equipment to be used in a loading operation. And defendant's interest in the loading operation extended beyond the mere furnishing of adequate equipment; he was, as we shall develop more fully later, liable for all overloading fines, and consequently the manner in which the truck was loaded could affect him quite substantially.

"What we have said here does not mean that a manufacturer, vendor, or a similar supplier, including a lessor of equipment is within the Act. The defendant must participate in the activity out of which the injury arose. \* \* \*" 225 Or at 549-50. (Emphasis in original.)

It is unclear whether the activity-instrumentality analysis in *Thomas* survives later Supreme Court decisions. See *Miller v. Georgia-Pacific Corp.*, *supra*; *Wilson v. P.G.E. Company*, 252 Or 385, 448 P2d 562 (1968). We are also uncertain where the court intended to draw the line between mere vendors or suppliers, who are not subject to the ELA, and providers of equipment, who remain responsible under the statute for the safety of equipment. It would make little sense for the provider's presence or continued presence at the scene to be the point of distinction, because that distinction has no necessary correlation with either the condition of the instrumentality or the control over its condition, as opposed to control over its use.

Those questions about the *Thomas* opinion do not have to be answered here, because *Thomas* has been distinguished by the Supreme Court in a manner which suffices to resolve the immediate controversy. In *Parks v. Edward Hines Lbr. Co. et al*, 231 Or 334, 372 P2d 978 (1962), the plaintiff was employed by Hines and was injured while moving a piece of steel with a lift truck. For purposes of that activity, he was under Hines' sole control. He was struck by a railroad car operated by Southern Pacific Company, which was apparently on the Hines premises to deliver equipment which was related to Hines' business in general but not to the plaintiff's work activity in particular. The court stated:

"In *Thomas v. Foglio*, 225 Or 540, 358 P2d 1066 (1961), a  
Cite as 81 Or App 545 (1986) 551

divided court held that a jury could find that a person not employing workmen was subject to the Employers' Liability Act if he had charge of, or was responsible for, equipment in the use of which the workmen of another employer were so intimately concerned as to be subjected to risk. The case involved an employment of the defendant's defective equipment in the plaintiff's work. Nothing in that decision requires us to hold that the railroad, in merely delivering cars to a shipper, assumes the statutory burdens of an employer with respect to all the workmen of the shipper.<sup>2</sup> The record before us reveals no relationship between the plaintiff and any railroad workmen, nor between the plaintiff and the railroad cars as equipment brought to his work. \* \* \*

<sup>2</sup>

"A specially concurring opinion in *Browning v. Terminal Ice Co.*, 227 Or 38, 43, 44, 360 P2d 630, summarizes *Thomas v. Foglio* as holding that 'a third party defendant may be liable [under ORS 654.305] where his participation in the work causing the injury consists only in bringing to the work project a dangerous instrumentality which exposes the plaintiff workman to danger \* \* \*'. The dangerous equipment in *Thomas v. Foglio* was related to the work in which the workman was engaged when he suffered the injury. There is no policy expressed in ORS 654.305 to justify extending the rule of *Thomas v. Foglio* to equipment in general which may come upon the *situs* of work through the instrumentality of some stranger to the work being done." 231 Or at 339. (Emphasis in original.)

Although the line was not sharply defined in either *Thomas* or *Parks*, we think that this case falls on the *Parks* side of the line.<sup>5</sup> Neither the wallboard nor Intermountain

<sup>5</sup> In other contexts, the Supreme Court has admonished against a decisional approach that turns on "case matching." See, e.g., *Miller v. Grants Pass Irrigation*, 297 Or 312, 318, n 4, 686 P2d 324 (1984). That admonition is difficult to follow in the ELA "indirect employer" context, where the principles the Supreme Court has developed have sometimes not survived beyond the cases in which they were first articulated, but have sometimes been resurrected for sporadic application. The discussion and the authority cited in the text are illustrative.

bore a cognizably closer relationship to plaintiff or to plaintiff's work activity here than the train and its operators bore to the plaintiff and the work activity in *Parks*. It may well be that, under the facts alleged, Intermountain's handling of the wallboard was the cause of plaintiff's injury. However, the dispositive question is one of statutory duty, not one of causation. As the court said in *Parks*:

“\* \* \* Any case the plaintiff may have against the railroad is \* \* \* a common-law negligence case. The fact that the collision occurred on private property instead of upon a public

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highway does not bring the action under ORS 654.305 to 654.335.” 231 Or at 339.

Affirmed.

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October 15, 1986

No. 605

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Joseph N. Thomas, Claimant.

CITY OF PORTLAND,  
*Petitioner,*

*v.*

THOMAS,  
*Respondent.*

(WCB 84-00523; CA A36063)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 21, 1986.

Barry F. Shanks, Portland, argued the cause for petitioner. With him on the briefs were Michael A. Lehner and Mitchell, Lang & Smith, Portland.

James L. Edmunson, Eugene, argued the cause for respondent. With him on the brief was Malagon & Associates, Eugene.

Dave Frohnmayer, Attorney General, James E. Mountain, Jr., Solicitor General, and John A. Reuling, Jr., Assistant Attorney General, Salem, filed a brief *amicus curiae* for the State of Oregon.

Jerald P. Keene and Roberts, Reinsch & Klor, P.C., Portland, filed a brief *amicus curiae* for Oregon Self Insurers' Association.

Before Richardson, Presiding Judge, and Newman and Deits, Judges.

NEWMAN, J.

Reversed; denial reinstated.

**NEWMAN, J.**

The City of Portland (City) petitions for review of an order of the Workers' Compensation Board which awarded claimant benefits for injuries which he incurred while providing farrier services. City argues that the Board erred in holding that ORS 656.029,<sup>1</sup> which governs the filing of declarations of independent contractor status, applies to municipalities and, therefore, erroneously deemed claimant to be an employe of City for purposes of the Workers' Compensation Law. We agree, reverse and reinstate the denial.

The facts are undisputed. In 1979, claimant verbally contracted with City to provide farrier service to its mounted police division on an "as-needed" basis. City paid him thirty dollars for each horse shod, and he worked whatever number of days was necessary to shoe all the police horses. He supplied his own tools, materials and transportation. He also performed similar services for other horse owners in the area. On November 25, 1983, a horse kicked claimant in the side while he was providing services to City and fractured his arm and ribs.

Claimant filed a claim, which City denied on the ground that he was not a covered employe. Claimant sought a hearing to contest the denial; he argued that he was a City employe and that, even if he were an independent contractor, he should be deemed a covered employe because of City's failure to file a joint declaration with him of independent contractor status, as required by ORS 656.029. The referee held that claimant was an independent contractor but that City was responsible for the claim under ORS 656.029. City petitioned for review by the Board, where it argued that it is not a "person" within the meaning of ORS 656.029 and, therefore, is not subject to the requirements of that statute. The Board rejected the argument and affirmed the referee's order setting aside City's denial.

ORS 656.029 provided, in part:

"(1) If any person engaged in a business and subject to this chapter as an employer lets a contract involving the

performance of labor and such labor is performed by the person to whom the contract was let, with assistance of others, all persons engaged in the performance of the contract are deemed subject workers of the person letting the contract unless the person to whom the contract is let has qualified either as a carrier-insured employer or a self-insured employer.

"(2) If the person to whom the contract is let performs the work without the assistance of others, that person is subject to this chapter as a subject worker of the person letting the contract:

"(a) Unless that person and the person letting the contract jointly file with the insurer or self-insured employer a declaration stating that the services rendered under the con-

<sup>1</sup> ORS 656.029 was amended in 1985. We refer throughout this opinion to the statute before the amendment. It was initially enacted as Or Laws 1979, ch 865, §2.

tract are rendered as those of an independent contractor. If the insurer or self-insured employer determines that special circumstances exist because of the type of work to be performed that preclude filing of the joint declaration prior to the commencement of work, the joint declaration is valid and effective if it is signed prior to commencement of work under the contract. In such cases, the joint declaration shall be mailed to or filed with the insurer or self-insured employer within 15 days thereafter \* \* \*."

City's two assignments of error challenge the correctness of the Board's decision holding that it was subject to the statute.<sup>2</sup>

ORS 656.029(2) is the section relevant to this claim. Therefore, the issue is whether City is a "person letting the contract" within the meaning of that section. It is apparent, however, that the legislature intended that language to be synonymous with the phrase "person engaged in a business and subject to this chapter as an employer" in section (1). It is, therefore, on that phrase that we focus our inquiry. Moreover, even if the word "person," as defined in ORS 656.005(21),<sup>3</sup>

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includes municipalities, we must still focus our inquiry on the specific provisions of ORS 656.029 at issue here.

ORS 656.029 applies to "any person engaged in a business and subject to [ORS chapter 656] as an employer." Claimant argues that we should construe that language to include "any subject employer who could be subject to compensate injured subject workers, including public employers." We note, however, that, had the legislature intended to give ORS 656.029 that scope, it could have done so by omitting the qualifying phrase "engaged in a business." Because we usually must assume that none of the language in a statute is superfluous, it is reasonable to infer that the legislature intended ORS 656.029 to apply to some class of entities smaller than that proposed by claimant. Because the word "business" generally connotes activity of a "commercial or mercantile" nature, see *Webster's Third International Dictionary*, it would certainly be reasonable to construe the legislature's use of the phrase as evidence that, even if "person" includes municipalities, it did not intend them to be within the scope of ORS 656.029.

That reading of the statute is at least arguably consistent with the legislative purpose behind ORS 656.029. The impetus behind the introduction and passage of that statute was the desire to eliminate "phony partnerships" and other business entities organized to exclude responsibility under the Workers' Compensation Law. *E. W. Eldridge, Inc. v. Becker*, 73 Or App 631, 635, 700 P2d 301, rev den 300 Or 162 (1985). Although we agree with claimant's assertion that the proposition is not self-evident, the legislature might reasona-

<sup>2</sup> Although City did not advance this argument before the referee, it did so before the Board. *Destael v. Nicolai Co.*, 80 Or App 596, 723 P2d 348 (1986). Accordingly, we can consider it here.

<sup>3</sup> ORS 656.005(21) provides:

"'Person' includes partnership, joint venture, association and corporation."

ORS 656.003 provides:

"Except where the context otherwise requires, the definitions given in this chapter govern its construction."

bly have believed that municipalities and other governmental entities are less likely to engage in such activities than are "commercial and mercantile" enterprises and excluded them from the requirements of ORS 656.029 for that reason.

In reaching its conclusion that City should be included within the scope of ORS 656.029, the Board focused its analysis more broadly. It reasoned:

**"The Workers' Compensation Law universally applies to the State and its political subdivisions in their capacity as subject employers. ORS 656.005(14). ORS 656.029 is intended to provide a simple means for defining the relationship between contracting parties. It is also intended to encourage**

Cite as 81 Or App 642 (1986)

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the purchase of workers' compensation insurance by entities that might otherwise attempt to avoid this business cost. \* \* \* [A] conclusion [that City was not subject to ORS 656.029], would be entirely inconsistent with the policies and goals that are apparent from our review of the legislative history of the statute, as well as the general policies of the Workers' Compensation Law. Considering the statute in this context, we believe that the State and its political subdivisions fall within the ambit of the statute by 'necessary implication.'"

We do not, however, agree with the Board's contention that excluding City from the ambit of ORS 656.029 is "entirely inconsistent" with the Workers' Compensation statutes generally. Although it is true that treating municipalities and other governmental entities differently from other employers for the purpose of ORS 656.029 may be inconsistent with the many statutes that treat them similarly, doing so in the narrow context of ORS 656.029 does not significantly undermine the general purposes of the Workers' Compensation Law.

We construe the phrase "person engaged in a business" in ORS 656.029 not to include municipalities. Accordingly, City is not responsible for claimant's injury. Claimant does not assert that there is any other basis to uphold the Board's order. The Board's order was in error.

Reversed; denial reinstated.

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IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
James B. Welch, Claimant.

WELCH,  
*Petitioner,*

*v.*

BANISTER PIPE LINE et al,  
*Respondents.*

(WCB 84-03571; CA A37035)

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.

Brian Pocock, Eugene, argued the cause and filed the brief for respondents.

Before Richardson, Presiding Judge, and Newman and Deits, Judges.

RICHARDSON, P. J.

Reversed; referee's order reinstated.

Cite as 82 Or App 23 (1986)

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**RICHARDSON, P. J.**

Claimant petitions for judicial review of a Worker's Compensation Board Order which denied him payments after he sought a second opinion regarding further treatment and his disability status. The Board reversed a referee's order which had awarded claimant the disputed benefits.

On October 20, 1980, claimant was involved in an industrial explosion in Union County which injured his lower back, eyesight and hearing. He was referred to Dr. Sulkosky, who treated him for the back injuries with an exercise and weight loss regimen until September 4, 1981. He was awarded permanent total disability benefits on August 6, 1982.<sup>1</sup> Claimant saw Sulkosky once again on October 10, 1983. The purpose of the appointment, which had been scheduled by the Oregon Field Services Division in Bend, was to determine claimant's then existing physical capabilities.

After the Board had reduced claimant's disability award, he consulted his attorney, stating that he was dissatisfied with Sulkosky and wanted to see another doctor. The attorney suggested at least four doctors, and the name of Dr. Berkeley, a Portland neurologist, was "drawn out of a hat." Berkeley examined claimant on March 15, 1984, and concluded that future treatment should be primarily "supportive and also preventative."

Berkeley's bill for consultation and the related lab and radiology bills were sent to the insurer, who denied

payment on the basis that claimant had been referred by his attorney and that Berkeley's services should be billed to claimant's attorney as "a litigation report."

Payment of medical expenses, whether palliative or curative, are to be paid by the carrier or employer under ORS 656.245.<sup>2</sup> As we concluded in *Smith v. Chase Bag Company*, 54 26 *Welch v. Banister Pipe Line*

Or App 261, 634 P2d 809, *rev den* 292 Or 334 (1981), a claimant's right to choose a physician under the language of ORS 656.245(2) includes the right to change doctors. We do not agree with the Board's finding that claimant's consultation with Berkeley was solely for purposes of litigation rather than treatment. Although Berkeley was recommended by claimant's attorney, the recommendation was in response to his dissatisfaction with his previous medical treatment. Claimant was entitled to a second opinion and, in the absence of a showing that the appointment with Berkeley was for a purpose other than medical treatment, the expenses should be paid.

**Reversed; referee's order reinstated.**

<sup>1</sup>The referee's finding of total disability was later reversed by the Worker's Compensation Board. On appeal, we reversed the Board's order and reinstated the referee's award of total disability. *Welch v. Banister Pipeline*, 70 Or App 699, 690 P2d 1080 (1984), *rev den* 298 Or 470 (1985).

<sup>2</sup>ORS 656.245 provides, in part:

"(1) For every compensable injury the insurer or the self-insured employer shall cause to be provided medical services for conditions resulting from the injury for such period as the nature of the injury or the process of the recovery requires, including such medical services as may be required after a determination of permanent disability. 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. \* \* \*

"\* \* \* \* \*

"(3) The worker may choose an attending doctor or physician within the State of Oregon. The worker may choose the initial attending physician and may subsequently change attending physician four times without approval from the director. \* \* \*"

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IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Paul Rogers, Claimant.

ROGERS,  
*Petitioner,*

*v.*

WEYERHAEUSER COMPANY,  
*Respondent.*

(85-00270; CA A38302)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 25, 1986.

David C. Force, Eugene, argued the cause and filed the brief for petitioner.

Paul L. Roess, Coos Bay, argued the cause for respondent. With him on the brief was Foss, Whitty & Roess, Coos Bay.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

WARDEN, P. J.

Reversed; referee's order reinstated.

Cite as 82 Or App 43 (1986)

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**WARDEN, P. J.**

Claimant seeks review of a decision of the Workers' Compensation Board that reversed the referee's order setting aside employer's denial of a claim. We reverse.

On August 29, 1984, the referee set aside employer's denial of a claim for an injury suffered on February 13, 1984, and ordered employer to pay compensation. On August 30, while on a picnic with friends, claimant slipped and fell, striking the site of the incision for back surgery that had been performed after the February 13 injury. On December 28, 1984, before claim closure, employer again denied compensation and stopped paying temporary total disability benefits, claiming that claimant's lower back problems experienced on and after August 30 were solely the result of his off-the-job fall. On May 2, 1985, another referee set aside the December denial and awarded claimant a 25 percent penalty for employer's unilateral termination of the compensation. On July 23, 1985, the Board reversed the first referee's order on the ground that "claimant did not prove by a preponderance of the evidence that he suffered an accident at work on February 13, 1984, that caused the injuries that contributed to his need for medical treatment and disability after that date." That order formed the basis of the Board's subsequent order, at issue here, reversing the compensability finding of the second referee.

In *Rogers v. Weyerhaeuser Co.*, 82 Or App 46, \_\_\_ P2d \_\_\_, we held claimant's February 13, 1984, injury compensable. The only remaining issue is whether employer's unilateral

termination of benefits was proper under ORS 656.268. In issuing its December denial, employer attempted to terminate its future responsibility for claimant's condition. The claim had not been closed, and there was no finding that claimant was medically stationary. An employer may not circumvent the orderly procedure of claim closure and terminate its future responsibility before the extent of claimant's disability has been examined. *Roller v. Weyerhaeuser Co.*, 67 Or App 583, 679 P2d 341, amplified 68 Or App 743, 683 P2d 554, rev den 297 Or 601 (1984).

Reversed; referee's order reinstated.

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IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Paul Rogers, Claimant.

ROGERS,  
*Petitioner,*

v.

WEYERHAEUSER COMPANY,  
*Respondent.*

(WCB 84-04530; CA A37408)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 25, 1986.

David C. Force, Eugene, argued the cause and filed the brief for petitioner.

Paul L. Roess, Coos Bay, argued the cause for respondent. With him on the brief was Foss, Whitty & Roess, Coos Bay.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

WARDEN, P. J.

Reversed; referee's order reinstated.

**WARDEN, P. J.**

Claimant seeks judicial review of an order on reconsideration of the Workers' Compensation Board. He contends that the Board erred in reversing the referee's order, which had set aside employer's denial of the claim.

On February 13, 1984, claimant filed a claim that, on his way to the lunchroom in employer's North Bend plywood plant, he had slipped and fallen on a puddle of water and oil, injuring his lower back and left leg. On February 22, employer accepted the claim as disabling and began paying compensation for temporary total disability. On March 8, employer notified the Workers' Compensation Department and claimant that its acceptance had been in error. Employer reclassified the claim as "deferred" on that date and continued to pay compensation. On April 16, 1984, 63 days after receiving notice of the claim, employer issued a denial on the ground

that claimant's back problem did not arise out of or in the scope of employment.

Claimant's first assignment is that the Board erred in reinstating the denial, which was entered after formal acceptance and more than 60 days after employer's notice and knowledge of the claim. He relies on *Bauman v. SAIF*, 295 Or 788, 794, 670 P2d 1027 (1983):

"If \* \* \* the insurer officially notifies the claimant that the claim has been accepted, the insurer may not, after the 60 days have elapsed, deny the compensability of the claim unless there is a showing of fraud, misrepresentation or other illegal activity."

The case before us is distinguishable, because here, unlike in *Bauman*, employer notified claimant within the 60-day time period that its acceptance had been in error and in effect withdrew its acceptance, although it did not then deny the claim within that time period. The policy of *Bauman* would not be served by extending it to this case.<sup>1</sup> However, although  
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we hold that employer could properly deny the claim, we conclude that the referee properly imposed a penalty for the untimely denial. ORS 656.262(10).

Claimant also assigns error to the Board's holding that he had failed to sustain his burden of proving by a preponderance of the evidence that his disability and need for medical services are work-related. On *de novo* review we find that claimant has met his burden. He testified that he suffered a fall while at work and was taken to Dr. Whitney, an orthopedic surgeon. Whitney diagnosed acute back spasm with possible recurrent disc herniation. Evaluation and treatment by several physicians took place during the following weeks and, on April 9, 1984, Dr. Campagna, a neurosurgeon, performed low back surgery. Employer offered no evidence that the accident had not occurred. Rather, it relied solely on inconsistencies in claimant's testimony. We agree with the referee that those inconsistencies do not refute the credible testimony that claimant slipped, fell and was injured at work. Employer argues that claimant's disability and medical treatment after February, 1984, were due solely to a July 15, 1982, motor vehicle accident. The evidence supports claimant's position that the medical treatment received after February 14 was the result of his industrial injury.

Reversed; referee's order reinstated.

<sup>1</sup> In *Bauman*, the employer had accepted the claim as compensable and had subsequently paid benefits for a three year period.

"It was only after claimant attempted to reopen his claim for aggravation that [the employer] suddenly reversed its decision and denied compensability for the original claim. \* \* \* The insurer \* \* \* is not at liberty to accept a claim, make payments over an extended period of time, place the compensability in a holding pattern and then, as an afterthought, decide to litigate the issue of compensability. We need not list all of the possible ramifications of such conduct but it is readily evident that problems involving lapsed memories, missing witnesses, missing medical reports, and a host of other difficulties would arise from the delayed litigation of the compensability of a claim." *Bauman v. SAIF*, *supra*, 295 Or at 793.

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Roy W. Hammett, Claimant.

GOLDEN WEST HOMES,  
*Petitioner,*

*v.*

HAMMETT et al,  
*Respondents.*

(WCB 84-06239; 83-09271; CA A37646)

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.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondent SAIF Corporation. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Milo Pope, Mt. Vernon, filed the brief for respondent Roy W. Hammett.

Before Warden, Presiding Judge, and Van Hoomissen and Young, Judges.

YOUNG, J.

Reversed and remanded with instructions to determine whether claimant suffered a new injury or an aggravation and to enter an order holding SAIF responsible.

Cite as 82 Or App 63 (1986)

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**YOUNG, J.**

Golden West Homes seeks review of a Workers' Compensation Board order holding it responsible for a worsening of claimant's back condition. The issue is which of two employers is responsible. We reverse and remand.

In 1966, claimant had low back surgery at L5/S1 to free the L5 nerve root. In March, 1979, he sustained a compensable injury to his low back in a lifting incident while employed at Golden West. In June, 1979, he had surgery to remove bone and scar tissue caused by the 1966 surgery. The claim was closed on April 1, 1980, with an award of 10 percent unscheduled permanent partial disability.

In August, 1979, claimant began working at Eastern Oregon State Hospital (EOSH), SAIF's insured. In August, 1980, he sustained another compensable injury to his low back when he was tackled from behind by a patient. He was off work for four days, responded to conservative care and returned to work. The claim was closed on October 1, 1980, with an award of time loss only.

In December, 1982,<sup>1</sup> claimant fell from a scaffold at EOSH. He notified his supervisor of the incident but lost no time from work, sought no medical care and did not file a claim. In June, 1983, increasing pain in his back and right leg began to interfere with his ability to do his job. He was hospitalized for conservative treatment and diagnostic procedures. Dr. Weeks thought that CT scan findings were equivocal. Dr. Gehling examined claimant and recommended EMG/NCV testing to define claimant's condition further. Dr. Isaacs reported that nerve conduction tests revealed sensory

S/1 root radiculopathy. On July 19, 1983, Gehling stated that "there is likelihood that the majority of his CT findings are related to scar tissue."

On July 20, 1983, claimant went to an emergency room complaining of low back pain. On July 25, Gehling stated that the major contributing causes of claimant's then current condition were (1) the fall off the scaffolding in 1981 or 1982, and (2) scarring as a result of the 1966 and 1979 surgeries. He also stated:

"In regards to the patient's 1980 work injury, I do not think that this relates significantly to his current complaints since the patient describes an injury a year later that precipitated the new onset of discomfort."

However, Gehling later stated:

"As to [claimant's] back injury in 1980, I have no opinion as regards how this contributes to his present complaints since he stated this resolved, and I do not have any indications as to its severity, etc."

Both petitioner and SAIF denied responsibility for claimant's worsened condition.

The referee found that neither petitioner nor EOSH was responsible. The Board affirmed as to EOSH but held petitioner responsible. We do not discuss the Board's reasoning, because the Board (as well as the referee and the parties) made an assumption which caused it to miss the point here.

No one disputes that claimant's condition has worsened. The parties frame the issue as which employer, if any, is responsible for the worsened condition when it followed an on-the-job but unclaimed injury (the fall from the scaffold) which was preceded by two prior accepted injuries (the 1980 tackling incident and the 1979 lifting incident), all to the same body part. As a preliminary matter, we do not agree that the December, 1982, fall from the scaffold was an unclaimed injury. As we view the record, the "claim" giving rise to this appeal is the claim for that fall.

<sup>1</sup> The Board stated that claimant fell from the scaffold in "December of 1981 or 1982, claimant cannot be sure which year \* \* \*." (Emphasis supplied.) The referee stated that "[i]t appears the scaffolding incident occurred sometime in 1981 or 1982. There is some evidence it may have occurred in December." We do not understand their equivocation. Claimant testified:

"Q: What was the date of the scaffolding incident?

"A: Sir, I do not recall the date.

"Q: Is it approximately December 14, '82? Sound about right?

"A: It was somewhere in there. I do not — recall because at the time I did not think that it would present itself where I had to have the date."

We understand claimant to be uncertain of the *day*, not the *year*.

The "claim" here is a set of doctors' reports. On June 6, 1983, a doctor reported that claimant came "in with pain in his right leg. He is tender in his back and he has had 2 surgeries in his back. \* \* \* He is started on Indomethacin 75 mg. of the SR and is to continue this for a period of time." On

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June 16, Weeks saw claimant "for complaints referable to low back and right lower extremity. He knows of no recent injury, just rather gradual onset of pain in the low back and radiating discomfort into the right lower extremity \* \* \*." On July 14, Gehling reported:

"The patient states he developed back pain in 1980 after being tackled by a patient at the State Hospital. He states this resolved slowly. Again, approximately one year ago the patient fell when a scaffolding collapsed at work, injuring his back. Since that time his pain has been increasing in severity such that he has chronic low back discomfort with a radicular pain \* \* \*.

\* \* \* \* \*

"The patient had back surgery in 1966 and in 1979. \* \* \*

"Because of his annoying, tingling discomfort that quite likely is related to the S-1 distribution, I feel EMG/NCV's are appropriate to ensure there is no evidence of chronic neuropathy. I will obtain these EMG/NCV studies and have the patient return. We will discuss further therapy at that time."

Those reports are plainly sufficient to constitute a claim for an aggravation within the meaning of ORS 656.273(3). See *Haret v. SAIF*, 72 Or App 668, 672, 697 P2d 201, *rev den* 299 Or 313 (1985).

For an accidental injury claim, ORS 656.265 provides:

"(1) Notice of an accident resulting in an injury or death shall be given immediately by the worker or a dependent of the worker to the employer, but not later than 30 days after the accident. \* \* \*

"(2) The notice need not be in any particular form. However, it shall be in writing and shall apprise the employer when and where and how an injury has occurred to a worker. \* \* \*

\* \* \* \* \*

"(4) 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 \* \* \*."

We conclude that claimant is excused from the written notice

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requirement. First, EOSH had knowledge of the fall within the meaning of subsection (4)(a), because claimant reported the fall to his supervisor. See *Colvin v. Industrial Indemnity*, 301 Or 743, \_\_\_ P2d \_\_\_ (1986). Second, we fail to see how the insurer can argue that it was prejudiced by claimant's failure to file a written claim. There is no dispute but that the fall occurred and that it occurred on the job, and SAIF knew of claimant's medical problems before August 8, 1983, when it denied the claim. We turn to the responsibility question.

The parties frame the responsibility issue as which employer is responsible for an aggravation. When this claim is treated as a claim for the fall from the scaffold, however, there is also a question whether claimant suffered an aggravation or a new injury. See e.g., *Hensel Phelps Const. v. Mirich*, 81 Or App 290, \_\_\_ P2d \_\_\_ (1986). SAIF is responsible in either event. If claimant suffered a new injury, SAIF is responsible, because it was on the risk when claimant fell from the scaffold. If claimant suffered an aggravation, SAIF is responsible under the rule of *Industrial Indemnity Co. v. Kearns*, 70 Or App 583, 690 P2d 1068 (1984):

“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. (Quoting the Board.)

In *Hallmark Furniture v. SAIF*, 81 Or App 316, \_\_\_ P2d \_\_\_ (1986), we held that SAIF had failed to rebut the *Kearns* presumption, because the evidence did not address the likely possibility that the injury at SAIF’s insured concurred with a prior injury to cause the worsened condition. 81 Or App at 320. The evidence here likewise does not address the possibility that the 1980 injury concurred with the surgeries and the fall to cause the disability.<sup>2</sup> Thus, SAIF would be responsible if

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claimant suffered an aggravation, because it failed to rebut the *Kearns* presumption. In either event, SAIF, as EOSH’s insurer, not petitioner, is responsible.

Although SAIF is responsible either way, we must remand this case for a determination of whether claimant suffered an aggravation or a new injury, because the duration of claimant’s future aggravation rights depends on that determination. See ORS 656.273(4).

Reversed and remanded with instructions to determine whether claimant suffered a new injury or an aggravation and to enter an order holding SAIF responsible.

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<sup>2</sup> Although Gehling first stated that the 1980 injury did not contribute, we accept his later statement that he has no opinion on that issue.

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IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Lona L. Emery, Claimant.

EMERY,  
*Petitioner,*

*v.*

ADJUSTCO et al,  
*Respondents.*

(WCB 84-03674; CA A36960)

Judicial Review from Workers' Compensation Board.

Argued and submitted May 12, 1986.

Edward J. Harri, Albany, argued the cause for petitioner. On the brief were J. David Kryger, and Emmons, Kyle, Kropp, Kryger & Alexander, P.C., Albany.

Craig A. Staples, Portland, argued the cause for respondents. With him on the brief was Roberts, Reinisch & Klor, P.C., Portland.

Before Richardson, Presiding Judge, and Newman and Deits, Judges.

DEITS, J.

Affirmed and remanded to Board for determination of extent of permanent disability.

Cite as 82 Or App 101 (1986)

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**DEITS, J.**

Claimant petitions for review of an order of the Workers' Compensation Board, claiming that the Board erred in (1) reinstating determination orders of March 14, 1984, and April 3, 1984; (2) denying her aggravation claim; (3) denying additional temporary disability benefits; and (4) denying penalties and attorney fees. In addition, she requests a remand to the referee for a determination of the extent of permanent disability.

On October 5, 1982, claimant was injured while employed as a laborer on a food processing production line at Stayton Canning Company. She suffered a shoulder strain and experienced bilateral arm and shoulder pain and hand numbness. Her physician, Dr. Lawton, treated her conservatively and authorized her return to light work on November 18, 1982. She did not return to work because of continuing pain and sought the services of another physician, Dr. Tiley, who began treating her on March 2, 1983. On June 27, 1983, after ordering myelography, he stated that claimant was "free to pursue any occupational endeavors she desires." On August 26, 1983, he reported that claimant had reached a stable plateau and recommended closure of her claim. However, he also recommended that another orthopedist perform a closing evaluation.

That evaluation was done by Dr. Duff. On December 13, 1983, Duff diagnosed her condition as degenerative disc disease exacerbated by work activities. He recommended neurosurgical evaluation, because it had been previously recommended and never performed and also because claimant felt that her medical work-up was incomplete. He believed that little could be accomplished by further treatment but would not consider claimant medically stationary until the neurosurgical evaluation had occurred.

Because she continued to suffer pain which did not permit her to return to her previous occupations, claimant opened a clothing consignment store in November, 1983. She initially worked there four days per week but, because of the recommendations of her doctors and her continuing discomfort, eventually cut back to three days per week. She worked that schedule through the date of the hearing.

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Dr. Collada, a neurosurgeon, next evaluated claimant. On January 12, 1984, he diagnosed her condition as chronic cervical strain syndrome and concluded that her subjective complaints overrode the objective findings. He recommended further diagnostic studies and authorized time-loss benefits. On January 16, 1984, Duff released claimant for modified work.

Claimant was next examined by Dr. Rosenbaum, a neurosurgeon, on referral from Adjustco. On January 23, 1984, he diagnosed a chronic cervical strain and unrelated mild degenerative arthritis of the cervical spine, concluded that she was medically stationary and had reached maximum improvement and recommended closing her claim. He believed that she could return to her previous occupation without significant limitations. On January 30, 1984, Tiley authorized time-loss benefits, beginning January 3, 1984.

On February 21, 1984, claimant changed her attending physician to a chiropractor, Dr. Boyer. On February 22, 1984, Collada indicated that claimant was medically stationary but would experience waxing and waning of symptoms. On March 7, 1984, Boyer diagnosed a chronic moderate cervical strain and noted that claimant had suffered a flare-up in symptomatology. He initiated chiropractic adjustment and physical therapy and recommended that this course of treatment continue for 30 days, at which time he would reevaluate her.

On March 14, 1984, a determination order issued. On March 15, 1984, Boyer's March 7, 1984, report was received by Adjustco. In response to a petition for reconsideration by claimant, ORS 656.268(4), a second determination order issued on April 3, 1984. That order slightly amended the first order by granting temporary total disability benefits less time worked from October 6, 1982, to November 17, 1982, temporary partial disability benefits from November 18, 1982, to December 21, 1982, temporary total disability benefits from April 26, 1983, to June 26, 1983, and temporary total disability benefits from January 3, 1984, to January 23, 1984. It determined that claimant was medically stationary as of February 22, 1984.

On April 4, 1984, Boyer again concluded that claimant was not medically stationary. On referral from Boyer, Dr.

Altrocchi, a neurologist, examined her and, in a May 7, 1984, report, diagnosed her condition as chronic muscular neck pain. He did not consider her to be medically stationary. On May 15, 1984, claimant sent a copy of Altrocchi's report to Adjustco. On May 24, 1984, claimant again sent the May 7, 1984, report to Adjustco and also specifically requested, by copy of a May 24, 1984, letter to the Board, that her claim be reopened. On July 10, 1984, Boyer again examined claimant and noted general improvement in her condition. On July 20, 1984, Adjustco, noting that "the information now on file does not support a reopening of your claim," denied claimant's aggravation claim.

Before we can decide whether the Evaluation Division properly found claimant medically stationary as of February 22, 1984, we must determine whether we may consider the medical reports of Boyer. Adjustco asserts that they must be excluded, because none of his reports were received by the employer or Evaluation Division before the issuance of the March 14, 1984, determination order. In support of that position Adjustco cites several of our decisions.<sup>1</sup> They do not support that proposition. We conclude that the relevant date is April 3, 1984—when the second order issued—rather than March 14, 1984. Adjustco received Boyer's March 7 report well before the second determination order issued and had a duty to forward it to the division. ORS 656.268(2); *Brown v. Jeld-Wen, Inc.*, *supra* n 1. In *Brown*, the attending physician had directed medical reports to the employer before closure, which apparently were not forwarded to the division. We were convinced, in part by the reports, that there had been a premature closure. As in *Brown*, the pre-order report is part of the record for our consideration. ORS 656.268(2); *Brown v. Jeld-Wen, Inc.*, *supra* n 1, 52 Or App at 194 n 1.

Before a claim may be closed, the claimant must be "medically stationary," ORS 656.268, which "means that no further material improvement would reasonably be expected from medical treatment, or the passage of time." ORS 656.005(17). In this case, the referee held that the claim had

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been prematurely closed. On review, the Board reversed. We affirm.

The preponderance of the medical evidence indicates that claimant was medically stationary on February 22, 1984. Apart from the specific opinions of Tiley, Rosenbaum and Collada that she was medically stationary, the record is replete with indications that, although she was suffering pain and would experience waxing and waning of symptoms, continued medical treatment could produce little benefit. Boyer's report does not contradict these conclusions. To the contrary, he initiated treatment on a short-term trial basis and indicated that he would evaluate the efficacy of treatment in 30 days. Thus, his report does not indicate that he "expected" "material improvement" but merely that he was hopeful of improvement. ORS 656.005(17). All the examining physicians

<sup>1</sup> *Martin v. SAIF*, 77 Or App 640, 713 P2d 1083, *rev den* 301 Or 240 (1986); *Alvarez v. GAB Business Services*, 72 Or App 524, 696 P2d 1131 (1985); *Maarefi v. SAIF*, 69 Or App 527, 686 P2d 1055 (1984); *Brown v. Jeld-Wen, Inc.*, 52 Or App 191, 627 P2d 1291 (1981).

agreed that claimant was suffering physical problems. However, the preponderance of the evidence indicates that "no further material improvement would reasonably be expected" from treatment or the passage of time.

We also believe that claimant failed to prove an aggravation. To establish a compensable aggravation under ORS 656.273, a claimant must demonstrate that, since claim closure, "his symptoms have increased or \* \* \* that his underlying condition has worsened, resulting in a loss of earning capacity." *Smith v. SAIF*, 302 Or 109, \_\_\_ P2d \_\_\_ (1986). Claimant's own testimony indicates that she worked three full days per week from before the date of closure through the date of the hearing, September 27, 1984. Thus, she failed to prove that she experienced any loss in earning capacity after closure.

The Board's denial of time loss benefits from June 27, 1983, to January 3, 1984, is affirmed. Time loss benefits ordinarily continue until a claimant returns to work, is released by her doctor to return to work or has been found medically stationary. ORS 656.268; *Austin v. Consolidated Freightways*, 74 Or App 680, 704 P2d 525, rev den 300 Or 332 (1985); *Jackson v. SAIF*, 7 Or App 109, 490 P2d 507 (1971). On June 22, 1983, Tiley, then claimant's treating physician, released her to return to regular duties. Therefore, denial of time loss benefits was correct.

The next issue is whether claimant is entitled to interim compensation from May 16 or May 25, 1984, until

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July 20, 1984. On May 16 she forwarded a copy of Altrocchi's May 7 report. On May 24 she formally requested a reopening. This request was received by Adjustco on May 25. It was not until July 20, 1984, that Adjustco refused to reopen the claim. On an aggravation claim, the insurer is obligated to begin paying compensation not later than the 14th day after notice of a "medically verified inability to work resulting from the worsened condition." ORS 656.273(6). The claim must be accepted or denied within 60 days. ORS 656.263(6). As we understand Adjustco's argument, it asserts that Altrocchi's report fails to satisfy the statutory requirement of a medically verified inability to work resulting from a worsened condition, ORS 656.273(6), and so it need not have paid compensation within 14 days of receipt of that letter. We agree. Altrocchi never stated that claimant was unable to work. We also agree that his report did not constitute an aggravation claim, because it did not indicate "a need for further medical services or additional compensation." ORS 656.273(3). However, claimant's May 24 request for reopening was an aggravation claim. ORS 656.273(2); *Stevens v. Champion International*, 44 Or App 587, 606 P2d 674 (1980). Adjustco was obligated to accept or deny the claim within 60 days, ORS 656.263(6), and it did so. The claim was properly denied.

The next issue is whether claimant is entitled to penalties and attorney fees for Adjustco's refusal to reopen or to pay interim compensation. The evidence indicates a reasonable doubt as to whether claimant was entitled to compensation; thus the denials were not unreasonable. Accordingly, penalties and fees were properly denied.

The final issue is whether remand to the Board, or to

the Hearings Division, is appropriate for a determination of permanent partial disability. Although the issue of permanent disability was raised by claimant at the hearing, the referee properly did not rule on it, having found a premature closure. See *Kociemba v. SAIF*, 63 Or App 557, 665 P2d 375 (1983). On appeal, the Board reversed the referee on the issue of premature closure but failed to make findings as to the extent of permanent disability. We believe it appropriate to remand this issue to the Board. ORS 656.295(5)(6).

Affirmed and remanded to the Board for determination of the extent of permanent disability.

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IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Dale H. Marshall, Claimant.

MARSHALL,  
*Petitioner,*

*v.*

BOISE CASCADE CORPORATION,  
*Respondent.*

(WCB 84-09242; CA A37914)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 18, 1986.

Robert Wollheim, Portland, argued the cause for Petitioner. With him on the brief was Welch, Bruun & Green, Portland.

Allan M. Muir, Portland, argued the cause for respondent. With him on the brief were William H. Replogle and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Richardson, Presiding Judge, and Warren and Deits, Judges.

RICHARDSON, P. J.

Affirmed.

**RICHARDSON, P. J.**

Claimant seeks review of a Workers' Compensation Board order that reverses the referee and holds that claimant failed to prove that his hearing loss was caused by his employment. We review *de novo* and affirm.

Claimant began working for Boise Cascade in 1955 and testified that he had no problems with his hearing at that time. Within two years, he was transferred to a large machine that makes toilet paper and napkins. He described the sound it makes as a "high screaming noise" and stated that it was difficult to have a conversation when close to the machine. In approximately 1963, Boise Cascade began providing earplugs, and earmuffs were made available the following year. He did not use either of them consistently, because they were uncomfortable. Boise Cascade tested his hearing for the first time in

1963, and the test indicated normal low tone hearing acuity and a high tone hearing loss. A 1971 test revealed a low tone loss and further loss in the high tones. The loss increased in all frequencies throughout the 1970's and early 1980's. In 1975, claimant began wearing a hearing aid, and Boise Cascade installed a soundproof booth, where claimant spent approximately five hours each day, but he spent three hours outside the booth checking the machine. He was diagnosed as having hypertension and acromegaly<sup>1</sup> the same year and received radiation treatment for the acromegaly. His pituitary gland was removed in 1976, and he remains on medication.

The referee concluded that claimant's testimony was credible, that noise on the job was the major contributing cause of the hearing loss and that, therefore, it was compensable. The Board reversed, holding that claimant had failed to carry his burden of proof. The only issue on review is whether the noise at work was the major contributing cause of his hearing loss.

Evidence from three doctors was presented, although none of them testified at the hearing. Claimant relies on the opinion of Dr. Wilson, who specializes in otology and neuro-otology and examined claimant in August, 1984. He noted that

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claimant had worked in a noisy environment for 27 years and had had a gradual hearing loss over the last 20 years. He concluded that the major portion of claimant's hearing loss was produced by noise exposure. Wilson did not think that acromegaly was a contributing factor.

Boise Cascade bases its arguments on the opinions of Dr. Bookin and Dr. Myers. Bookin, an internist and endocrinologist, treated claimant for acromegaly from 1975 to 1983 and observed that it was "far advanced" when he first examined him. He stated that, in 1975, claimant had a bony and connective tissue overgrowth, which has been documented as causing hearing losses in other cases. He concluded that acromegaly may have been the sole cause but stated that he could not rule out other factors, such as noise.

Myers is an otolaryngologist; he examined claimant in February, 1982, and July, 1984. He concluded that claimant's hearing loss was due to hypertension and vascular insufficiency in the cochlea. He based his opinion on the fact that acoustic trauma affects high frequency levels but not lower ones. Claimant suffers a hearing loss at all levels, but it is more significant at lower ranges. Therefore, the doctor concluded that the hearing loss could not have been caused by excessive noise.<sup>2</sup> He also ruled out the pituitary tumor, radiation treatment and surgery as causes of claimant's hearing

<sup>1</sup> Acromegaly is "a condition caused by hypersecretion of the pituitary growth hormone after maturity and characterized by enlargement of the extremities of the skeleton—the nose, jaws, fingers, and toes \* \* \*." *Dorland's Illustrated Medical Dictionary* 30 (25th ed 1974).

<sup>2</sup> Myers explained in a letter to claimant:

"Your audiograms obtained in my office on February 16, 1982 and July 16, 1984 as well as the ten audiograms contained in your claim file, are all of the same configuration revealing a sensori neural hearing impairment involving all frequencies. Acoustic trauma to the cochlea impairs 3,000, 4,000, and 6,000 Hz., it does not impair the low frequencies. You have impairment of all frequencies with no hearing above the 60 dB level. There is no recovery at 8,000 Hz., as is found with acoustic trauma to the cochlea. Your hearing loss is consistent with a vascular impairment and is not consistent with hearing impairment produced by prolonged excessive noise exposure." (Emphasis in original.)

loss. We find Myers' opinion more persuasive. When medical experts disagree, we tend to place more emphasis on opinions that are well-reasoned and based on the most complete information. *Somers v. SAIF*, 77 Or App 259, 712 P2d 179 (1986). Only Myers' opinion meets those criteria. Bookin was not an ear specialist, and both other doctors disagreed with his conclusion that acromegaly caused the hearing loss. Wilson's opinion was conclusory and not thoroughly explained. He

merely noted that claimant had been exposed to noise for some 27 years and had acromegaly, then concluded:

"Aside from the possibility of some contributing loss of hearing from a hereditary standpoint, as well as a change related to his age, in all medical probability the major portion of his hearing loss is related to noise exposure."

Although he included copies of an audiogram and hearing loss computation, he made no observation about the fact that noise affects only high frequency levels.

Generally, we too tend to give greater weight to the conclusions of a claimant's treating physician when the medical evidence is divided. *Weiland v. SAIF*, 64 Or App 810, 669 P2d 1163 (1983). However, claimant visited Wilson only once and Myers only twice; therefore both doctors had similar opportunities to evaluate his condition. Myers presented a comprehensive report which documents exposure to noise in jobs that claimant had before Boise Cascade, head or ear injuries during childhood, past surgeries and medications and recreational activities that may have had a high noise level. He contacted the physicians who performed the radiation therapy and surgeries to obtain their opinions on whether pituitary tumors cause hearing loss. He calculated claimant's hearing acuity based on audiograms over a 21-year period and reached this conclusion:

"From the foregoing table it is obvious Mr. Marshall's hearing impairment has been progressive. In my opinion it is not consistent with acoustic trauma, although with his inconsistent use of ear protection, this may have contributed to his loss. Acoustic trauma does not produce impairment of the low frequencies, none of his being better than a 60 dB acuity and with a progressive impairment with no response at 8,000 Hz. It is also my opinion that Mr. Marshall's hearing impairment is not related to his pituitary tumor, his radiation therapy, or his surgery. It is my opinion that his hearing impairment with his hypertension and from his audiometric curve that his impairment is on a vascular basis."

Myers also observed that it is not possible to document which factors contributed a given percentage of the hearing impairment. Although noise may have contributed to claimant's loss, we conclude that the work noise was not the major contributing cause of his hearing loss.

Affirmed.

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IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Erwin L. Bacon, Claimant.  
WESTERN PACIFIC CONSTRUCTION CO. et al,  
*Petitioners - Cross-Respondents,*

v.

BACON,  
*Respondent - Cross-Petitioner,*  
RIEDEL INTERNATIONAL,  
*Respondent - Cross-Respondent.*

(WCB 83-11667, 83-08519; CA A35263)

Judicial Review from Workers' Compensation Board.

Argued and submitted January 27, 1986.

Patric J. Doherty, Portland, argued the cause for petitioners - cross-respondents. With him on the briefs were E. Kimbark MacColl, Jr. and Rankin, McMurry, VavRosky & Doherty, Portland.

Jill Backes, Portland, argued the cause for respondent - cross-petitioner. With her on the brief were Charles D. Colett and Galton, Popick & Scott, Portland.

LaVonne Reimer, Portland, argued the cause for respondent - cross-respondent. With her on the brief was Lindsay, Hart, Neil & Weigler, Portland.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Affirmed on petition; on cross-petition, referee's award of attorney fees reinstated but modified to require payment by Providence Washington Insurance Company; order affirmed as modified.

Cite as 82 Or App 135, (1986)

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BUTTLER, P. J.

Providence Washington Insurance Co., insurer for Western Pacific Construction Company, later acquired by Riedel, seeks review of a Workers' Compensation Board order which held that it, and not Riedel, a self-insured employer, is responsible for claimant's knee condition. The referee had held that the condition was compensable and that Riedel was responsible. Claimant cross-petitions, seeking review of that portion of the Board's order reversing the referee's award of attorney fees.

Claimant suffered a compensable worsening of an arthritic knee condition in 1978, at which time he was working for Western, which was insured by Providence. Later, while working for Riedel, claimant's condition worsened to the point that he needed a total knee replacement. We have reviewed the record *de novo* and conclude that the Board correctly held

that Providence's insured was responsible for claimant's present condition and the knee replacement.

Claimant seeks reinstatement of the referee's award of attorney fees. On Board review, the only issues were responsibility and attorney fees. Apparently believing that responsibility had been the only issue from the beginning, the Board held that claimant was not entitled to attorney fees, because he had not "actively and meaningfully participated" in the proceedings. However, Riedel and Western had denied responsibility and compensability, and neither had paid temporary total disability or had sought the designation of a paying agent. ORS 656.307. Although claimant has always contended that the only question should be responsibility, he was forced to, and did, prove the compensability of his claim. The claim was not an uncomplicated one. If he had not actively participated before the referee, the denials might have been upheld on the theory that his compensable condition had not worsened, as contended by Riedel, or on the theory that his present condition is the result of the natural progression of his non-compensable degenerative arthritis, as contended by Western, rather than an aggravation of his compensable 1978 injury or a new injury. He was more than a nominal party in the dispute and is entitled to attorney fees under ORS 656.386(1).

The referee, having assigned responsibility for the

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Western Pacific Construction v. Bacon

claim to Riedel, ordered that claimant's attorney fees be paid by Riedel. Because we affirm the Board's decision that Providence is the responsible carrier, we hold that claimant's attorney fees in the amount awarded by the referee are also payable by Providence.

Affirmed on petition; on cross-petition, referee's award of attorney fees reinstated but modified to require payment by Providence Washington Insurance Company; order affirmed as modified.

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IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Earl H. Norby, Claimant.

NORBY,  
*Petitioner,*

*v.*

SAIF CORPORATION et al,  
*Respondents.*

(WCB 84-06365; CA A36929)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 24, 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 Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Affirmed.

Cite as 82 Or App 157 (1986)

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**BUTTLER, P. J.**

Claimant seeks review of an order of the Workers' Compensation Board which reversed the referee and held that he is not entitled to an award of permanent partial disability in excess of that provided by a prior stipulation and that he is not entitled to reimbursement for his moving expenses. We affirm.

Claimant suffered compensable back injuries in 1981, 1982 and 1983. He apparently received no award of permanent partial disability until after the 1983 injury, when he received a stipulated award of 10 percent uncheduled permanent partial disability as a result of the 1982 injury only. The Board, in reviewing the extent of claimant's disability as a result of the 1983 injury, determined that claimant's total disability was minimal and that he had been adequately compensated for the 1983 injury by the 10 percent stipulated award.

Claimant argues that the Board erred in considering the stipulated award. ORS 656.222 provides:

"Should a further accident occur to a worker who is receiving compensation for a temporary disability, or who has been paid or awarded compensation for a permanent disability, the award of compensation for such further accident shall be made with regard to the combined effect of the

injuries of the worker and past receipt of money for such disabilities.”

At the time of the 1983 injury, claimant was not receiving temporary total disability and had not yet been paid an award of permanent partial disability. Although the stipulated award for the 1982 injury was not made until after the 1983 injury, it was an award of compensation that had been made before the closing of his claim for the 1983 injury. Claimant argues, however, that the Board could not consider the stipulated award in making an award for the 1983 injury, because that award was not made by determination order and because his 1983 injury did not occur while he was receiving or after he had been awarded compensation. Therefore, he contends that ORS 656.222 is not applicable and that he is entitled to an

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award for the 1983 injury that is based only on the increased disability caused by that injury. ORS 656.214(5).<sup>1</sup>

ORS 656.222 is not as clear as it might be, and we should attempt to apply it in the sense in which the legislature intended that it apply. We believe that it is intended to apply to a worker who suffers successive injuries and who “has been paid or awarded compensation for a permanent disability” before closure of his latest injury. In such a case, the compensation to which the worker is entitled must take into account “the combined effect of the injuries” and “the past receipt of money for such disabilities.”<sup>2</sup> The Board made its determination in that manner and concluded that the combined effect of claimant’s injuries was a minimal impairment of earning capacity, for which he was entitled to an award of 10 percent unscheduled disability. Because he had already been awarded that amount, he was not entitled to additional compensation.

After the 1983 injury, claimant was unable to return to his former employment and received vocational assistance in the form of direct employment services. He received an offer of employment from his brother in Seattle, which he accepted. His request for reimbursement for his moving expenses was denied by SAIF. At the time of the hearing, OAR 436-61-161(2)(e)<sup>3</sup> provided, in part:

“*Moving Expenses.* Reimbursement requires that the worker has obtained employment outside commuting distance

<sup>1</sup> ORS 656.214(5) provides:

“In all cases of injury resulting in permanent partial disability, other than those described in subsections (2) and (4) of this section, the criteria for rating of disability shall be the permanent loss of earning capacity due to the compensable injury. Earning capacity is the ability to obtain and hold gainful employment in the broad field of general occupations, taking into consideration such factors as age, education, training, skills and work experience. The number of degrees of disability shall be a maximum of 320 degrees determined by the extent of the disability compared to the worker before such injury and without such disability. For the purpose of this subsection, the value of each degree of disability is \$100.”

Claimant contends only that the Board misapplied the statute and not that, if it applied the statute correctly, he is entitled to a greater disability award.

<sup>2</sup> But see *Pacific Motor Trucking Co. v. Yeager*, 64 Or App 28, 666 P2d 1366 (1983), in which we indicated *in dictum*, that the statute does not apply unless, at the time of the most recent injury, the claimant had been paid or awarded compensation on account of the earlier injury.

<sup>3</sup> OAR 436-61-161 was amended and renumbered on May 1, 1985, as OAR 436-120-150.

\*\*\*. In determining the necessity of reimbursing moving expenses, the vocational assistance server shall consider the possible availability of employment which does not require moving, or which requires less than the proposed moving distance."

OAR 436-61-161(1) provided, in part:

"A direct worker purchase requires a determination by the vocational assistance server that the purchase is necessary, and requires prior approval by the server."

SAIF does not dispute that claimant's moving expenses are of the type which would be reimbursable under OAR 436-61-161 as a direct worker purchase. As SAIF asserts, however, the record does not establish that claimant sought approval of the expenses prior to the move. The denial is therefore affirmed.

Affirmed.

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IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
John A. Graham, Claimant.

GRAHAM,  
*Petitioner,*

*v.*

SCHNITZER STEEL PRODUCTS et al,  
*Respondents.*

(WCB 84-01383, 84-03399; CA A36845)

Judicial Review from Workers' Compensation Board.

Argued and submitted March 24, 1986.

Noreen K. Saltveit, Portland, argued the cause for petitioner. With her on the brief was Noreen K. Saltveit and Associates, Portland.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondents Schnitzer Steel Products and SAIF Corporation. With him on the brief were Dave Frohnmayr, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Catherine Riffe, Portland, argued the cause and filed the brief for respondents United Pacific Insurance Company and Bernice's Maintenance Service.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Reversed and remanded to Board for consideration of aggravation claim.

**BUTTLER, P. J.**

Claimant seeks review of an order of the Workers' Compensation Board affirming the referee's decision that he is not entitled to compensation for a back condition that he claims is related to his employment.

Claimant presents his claim under three theories. He asserts first that his back condition is compensable as an occupational disease. We agree with the Board that there is no evidence of an occupational disease. He also asserts that he suffered an injury while employed by the most recent employer, Bernice's Maintenance Service. We defer to the referee's credibility findings and conclude that claimant has not established a new compensable injury. His third theory is that his present condition is an aggravation of a compensable injury that he suffered in 1980. The referee held that, because claimant had received no permanent partial disability award on that injury claim, he could not claim an aggravation of that injury; the Board affirmed without comment. That proposition is not necessarily correct, and we have held to the contrary in at least one case. *Kienow's Food Stores v. Lyster*, 79 Or App 416, 719 P2d 890 (1986).

That a compensable injury may not be disabling after the worker becomes medically stationary does not preclude the condition, as a matter of law, from getting worse at a later time. Whether a claimant is able to prove an aggravation is a question of fact, but that is no reason why he should not be entitled to have his aggravation claim considered.<sup>1</sup> We understand the referee and the Board to have refused to consider the aggravation claim for the reason stated by the referee. We remand for consideration of that part of the claim.

Reversed and remanded to Board for consideration of aggravation claim.

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<sup>1</sup> ORS 656.273(4)(b) recognizes that an aggravation claim may be made for a nondisabling injury:

"If the injury was nondisabling and no determination was made, the claim for aggravation must be filed within five years after the date of injury."

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IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Frank R. Roberts, Claimant.

ROBERTS,  
*Petitioner,*

*v.*

WILLAMETTE INDUSTRIES et al,  
*Respondents.*

(WCB 83-04813; CA A36437)

Judicial Review from Workers' Compensation Board.

Argued and submitted April 23, 1986.

James L. Francesconi, Portland, argued the cause for petitioner. With him on the brief was Francesconi & Cash, P.C., Portland.

Allan M. Muir, Portland, argued the cause for respondents. With him on the brief were Delbert J. Brenneman, Ridgway K. Foley, Jr., P.C., and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

BUTTLER, P. J.

Affirmed.

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Roberts v. Willamette Industries

**BUTTLER, P. J.**

Claimant seeks review of a Workers' Compensation Board order which affirmed the referee's determination that a disputed claim settlement executed by claimant and the insurer should not be set aside. ORS 656.289(4)<sup>1</sup> allows the resolution of a claim by way of a disputed claim settlement when there is a bona fide dispute as to compensability. Claimant contends that there was no bona fide dispute as to the compensability of his claim and that the settlement should therefore be set aside.

Claimant sustained a back injury in November, 1977, when he slipped and fell while working for employer as a watchman. He suffers from many other serious ailments that are not related to his employment. Insurer did not accept or

<sup>1</sup> ORS 656.289(4) provides:

"Notwithstanding ORS 656.236, in any case where there is a bona fide dispute over compensability of a claim, the parties may, with the approval of a referee, the board or the court, by agreement make such disposition of the claim as is considered reasonable. If disposition of a claim referred to in ORS 656.313(3) is made pursuant to this subsection and the insurer or self-insured employer and the affected medical service and health insurance providers are unable to agree on the issues of liability or the amount of reimbursement to the medical service and health insurance providers, and the amount in dispute is \$2,000 or more, those matters shall be settled among the parties by arbitration in proceedings conducted independent of the provisions of this chapter. If the amount in dispute is less than \$2,000, the insurer or self-insured employer shall pay to the medical service and health insurance provider one-half the disputed amount. As used in this subsection 'health insurance' has the meaning for that term provided in ORS 731.162."

deny the claim, but began paying benefits. It requested claim closure on September 9, 1980, anticipating that claimant would be found permanently and totally disabled. In October, 1980, a determination order awarded permanent total disability. The record shows that insurer intended to challenge the award by requesting a hearing. However, in December, 1980, before a request for hearing was made, claimant's attorney initiated discussions with insurer with the hope of obtaining a lump sum payment. Insurer declined to consider a lump sum payment but agreed to negotiate a disputed claim settlement. Insurer's internal communications indicate that it regarded an early settlement as highly desirable.

Negotiations proceeded, and on January 27, 1981, claimant agreed to and signed a settlement for \$40,000 as

Cite as 82 Or App 188 (1986)

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"full, complete, and final settlement for all time for all claims which the Claimant has made or may hereafter make involving the contentions herein, medically described and alleged to have arisen out of and in the course and scope of Claimants [sic] employment. This Settlement should not and will not in any way be construed as a compromise or release of any rights that Claimant may have to file a claim for aggravation under the Workers' Compensation Laws of Oregon for that portion of his accepted Claim which, according to the medical evidence, required no more than six months of medical care and treatment and temporary total disability but did not result in any permanent disability of any kind."

In the meantime, on January 23, 1981, insurer had denied compensability of the claim.

The referee refused initially to approve the settlement on the ground that there was no evidence of a bona fide dispute as to compensability. There appears to be no doubt that, at that time, claimant was permanently and totally disabled. The medical evidence so indicated, but one report, which found that claimant was medically stationary, indicated that he had only moderate impairment as a result of the injury. The insurer then requested an opinion from Dr. Edward Rosenbaum<sup>2</sup> concerning the compensability of claimant's disability. Rosenbaum reviewed the medical file but did not examine claimant. On February 24, 1981, he reported that claimant's compensable back injury was a sprain that had resolved within six months, that it had caused no permanent disability and that claimant's current disability was not related to the injury. The referee then approved the revised settlement agreement.

Claimant asserts that the "dispute" as to compensability was manufactured by insurer for the purpose of the disputed claim settlement and that, therefore, there was no bona fide dispute. That conclusion is supported, he argues, by insurer's general denial of the compensability of the claim after it had paid benefits and had implicitly admitted compensability for three years. *But see Gregg v. SAIF*, 81 Or App 395, 725 P2d 930 (1986). Although it is true that there has never been a dispute concerning the compensability of the initial

<sup>2</sup> There were two doctors Rosenbaum in the same office, the other of whom had been one of claimant's treating physicians.

injury, that is not the issue. The record shows that insurer had intended to challenge the award of permanent total disability and that its attorney had recommended that it request a hearing after current medical reports were obtained. Rosenbaum's report dealt specifically with the question of the continuing compensability of claimant's symptoms.<sup>3</sup>

In a challenge to the determination order, insurer could have raised the question of the permanency of claimant's compensable disability; its general denial of the claim was not a requisite to an argument that claimant's continuing disability was not causally related to his compensable injury and therefore was not compensable.<sup>4</sup> Claimant has not sustained his burden to prove that the dispute as to compensability was not bona fide.

Claimant also contends that the agreement itself is unconscionable and should be set aside for that reason. Four workers' compensation attorneys, including at least one claimant's attorney, testified that there was a bona fide dispute and that the settlement was reasonable under the circumstances. Claimant has also failed to sustain his burden to prove unconscionability.

Affirmed.

<sup>3</sup> Claimant asserts that the report contains many deficiencies. None of the alleged deficiencies casts doubt on its genuineness.

<sup>4</sup> Claimant asserts that insurer should not have been permitted to deny the claim. *see Bauman v. SAIF*, 295 Or 788, 670 P2d 1027 (1983); however, that denial was not challenged by claimant and is not material to our decision.

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November 12, 1986

No. 658

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Cheryl K. Oliver, Claimant.

OLIVER,  
*Petitioner,*

*v.*

SAIF CORPORATION et al,  
*Respondents.*

(WCB 82-00732; CA A37527)

Judicial Review from Worker's Compensation Board.

Argued and submitted June 19, 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 Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

Reversed; referee's order reinstated.

**WARREN, J.**

Claimant petitions for review of a Workers' Compensation Board order which held that the referee improperly remanded her claim to the Evaluation Division (Division) for further processing. We reverse the Board and reinstate the referee's order.

Claimant filed a stress claim in April, 1981, contending that she suffered an "anxiety stress reaction" and related fatigue as a result of her employment by Adult and Family Services Division from 1977 through April, 1981. Employer characterized the claim as nondisabling and denied it. A week before the hearing was held on the denial, claimant resigned from her job. On January 7, 1982, she filed a second claim form, alleging that she could no longer work as a result of continued stress in her employment.

A hearing was held on the first claim on January 14, 1982. The second was not considered at that time, because the 14 days SAIF had to accept or deny the claim had not expired, and SAIF had not acted on it. SAIF denied the second claim on January 21, 1982, and claimant filed a request for hearing on that denial. On May 18, 1982, the referee issued an order on the first claim, finding the "anxiety stress reaction" compensable. On September 15, 1982, the Division closed the first claim "pursuant to" the referee's order and granted claimant temporary partial disability from September 12, 1980, through March 4, 1981.

Claimant did not seek a hearing on the determination order. In September, 1982, sometime after that order, claimant and SAIF agreed that the second stress claim would stand or fall on the ultimate resolution of the first. Claimant requested that the second claim be placed on inactive status. Subsequently, the Board and we upheld the compensability of the "anxiety stress reaction." *Oliver v. SAIF*, 66 Or App 972, 675 P2d 620 (1984).

After our decision, claimant requested that the second claim be set for hearing. The referee set aside SAIF's denial, held that claimant was entitled to have the second claim processed through closing and remanded the claim to the Division for processing and payment of any benefits due. SAIF sought review, contending that the first determination

Cite as 82 Or App 270 (1986)

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order had already resolved all issues pertaining to the second claim. The Board agreed.

Part of the difficulty with this case is that the parties' agreement to have the resolution of the second claim determined by the first is not in writing in the record. It has been paraphrased by them many times. SAIF asserts that the parties had agreed that, on final determination of the first claim, the second would be "subsumed" by the first and would no longer exist. Claimant asserts that the parties had agreed that, if the first claim was determined to be compensable, the second would be accepted. The other difficulty with this case is that the parties have mischaracterized the second "claim" from the outset. At the hearing on the first claim, the referee, later affirmed by the Board and by this court, determined that

claimant's *condition*, the "anxiety stress reaction," is compensable. The second "claim" was for the same condition for a subsequent period of exposure and disability. Claimant did not assert that her condition had worsened or that she had suffered an aggravation. Although claimant and SAIF have treated the second document as a separate claim, in fact it is nothing more than a request for continued treatment and benefits on the original claim. Claimant herself characterized it as a claim for "continued job stress."

Ordinarily, when the Division reviews a claimant's compensable condition, it evaluates the entire period of disability. See OAR 436-30-010; OAR 436-30-030(3); OAR 436-30-040. It could have done that here, because it had claimant's full medical file. However, because of the parties' mischaracterization of the second "claim" and treatment of it as if it were a separate claim, the evidence concerning the second period of disability was not presented to the referee or considered by the Division. As the referee found, SAIF agreed that what it now calls the "second claim" would be compensable if the first one were. The amount of the benefits is for the Division to determine in the first instance.

Reversed; referee's order reinstated.

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November 12, 1986

No. 659

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Thomas E. Woodward, Claimant.

WOODWARD,  
*Petitioner,*

*v.*

C & B LOGGING et al,  
*Respondents.*

(WCB 84-08962; CA A37561)

Judicial Review from Workers' Compensation Board.

Argued and submitted July 18, 1986.

James L. Edmunson, Eugene, argued the cause for the petitioner. With him on the brief was Malagon & Moore, Eugene.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for the respondents. With him on the brief were Dave Frohnmayer, Attorney General and James E. Mountain, Jr., Solicitor General, Salem.

Before Richardson, Presiding Judge, and Warren and Deits, Judges.

WARREN, J.

Reversed and remanded to Board for further proceedings not inconsistent with this opinion.

**WARREN, J.**

Claimant seeks review of a Workers' Compensation Board order holding that he is not permanently and totally disabled, setting the period of time loss and holding that a June, 1979, stipulation establishes the commencement date for making future aggravation claims. The primary issue is whether the Board had the authority in 1979 to close a claim before the issuance of a determination order from the Evaluation Division (Division). We conclude that, in 1979, a determination order by the Division was a condition precedent to claim closure and, therefore, reverse.

In order to resolve the issue raised by this appeal, it is necessary to set forth the procedural history at some length. Claimant suffered a back injury in July, 1977. On February 2, 1979, a determination order was issued, granting him 35 percent unscheduled disability and temporary total disability through January 23, 1979. On February 8, 1979, SAIF requested that the Division "cancel" that determination order. On February 9, 1979, claimant requested a hearing, claiming, *inter alia*, that he was not medically stationary. On March 2, 1979, the Division set aside its February order.

In June, 1979, claimant and SAIF entered into a stipulation, which was approved by a referee. It provided that claimant was entitled to 40 percent unscheduled disability and time loss from July 19, 1977, through May 2, 1979. It recited that the parties wished to avoid the necessity of having the claim closed and evaluated by the Division and that the stipulation would serve as the first determination order within the meaning of ORS chapter 656.

The claim was reopened on June 1, 1981, and closed by a determination order on July 17, 1984, which awarded claimant further permanent partial disability and time loss. In so doing, the Division refused to recognize the 1979 stipulation as providing the correct aggravation date and period of time loss.<sup>1</sup>

Cite as 82 Or App 274 (1986)

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After a hearing requested by SAIF, the referee concluded that the 1979 stipulation was the first award of compensation, that the February, 1979, determination order was never validly rescinded and that the stipulation, therefore, operated as an amendment to that order. He affirmed the July, 1984, determination order as to the extent of permanent disability but amended the award of temporary total disability to run from June 29, 1981, to June 21, 1984. As a consequence, the date commencing the running of the period for aggravation claims was the date of the 1979 stipulation. The Board affirmed.

At the time the stipulation was signed, ORS 656.268(2) provided:

"When the injured worker's condition resulting from a disabling injury has become medically stationary \*\*\* the State Accident Insurance Fund or direct responsibility

<sup>1</sup> The Division amended its July, 1984, determination order on August 16, 1984, to change the stated aggravation date from February 2, 1979, to July 17, 1984. This change was based on the Division's belief that it had validly rescinded its February 2, 1979, order. We do not reach the issue of whether the Division may rescind an order after a request for a hearing has been made, because the parties agreed in their 1979 stipulation that the February, 1979, order had been validly rescinded.

employer shall so notify the Evaluation Division, the worker, and contributing employer, if any, and request the claim be examined and further compensation, if any, be determined. \* \* \* If the attending physician has not approved the worker's return to his regular employment, the fund or direct responsibility employer must continue to make temporary total disability payments until termination of such payments is authorized following examination of the medical reports submitted to the Evaluation Division under this section."

Similarly, ORS 656.708(2) provided:

"The Evaluation Division is created within the department. The division has the responsibility for initially evaluating claims for compensable injuries, determining the extent of disability resulting therefrom and prescribing the amount of benefits awarded therefor."

The law in effect at the time of the stipulation clearly delegated the initial responsibility of evaluating claims and determining compensation awards to the Division. SAIF contends, however, that we should apply the law as it was at the time of the injury, which provided for claim closure by the Board.<sup>2</sup> We disagree.

SAIF primarily relies on *SAIF v. Mathews*, 55 Or App 608, 612, 639 P2d 668, *rev den* 292 Or 825 (1982), where we held that a 1979 statutory amendment should not be applied retroactively so as to control the resolution of a 1973 claim. We relied on ORS 656.202(2), which provides:

"Except as otherwise provided by law, payment of benefits for injuries or deaths under ORS 656.001 to 656.794 shall be continued as authorized, and in the amounts provided for, by the law in force at the time the injury giving rise to the right to compensation occurred."

We have held repeatedly, however, that ORS 656.202(2) only applies to statutory changes which affect a claimant's substantive rights to and the amount of compensation. See *Argonaut Insurance Companies v. Eder*, 72 Or App 54, 56, 695 P2d 72 (1985); *Barrett v. Union Oil Distributors*, 60 Or App 483, 486, 654 P2d 668 (1982), *rev den* 294 Or 569 (1983). The amendment to ORS 656.268(2) placing responsibility for claim closure in the Evaluation Division does not affect those rights, and ORS 654.202(2) is, therefore, inapplicable.

We conclude that the procedure for claim closure that existed when the stipulation was made should have been followed. Accordingly, the stipulated determination order was invalid. The claim was not properly closed until July 17, 1984.<sup>3</sup>

Reversed and remanded to the Board for further proceedings not inconsistent with this opinion.

<sup>2</sup> At the time of the injury, ORS 656.268(2) provided:

"When the injured workman's condition resulting from a disabling injury has become medically stationary, and he has completed any authorized program of vocational rehabilitation, or has failed or refused to cooperate in an authorized vocational rehabilitation program, the State Accident Insurance Fund or direct responsibility employer shall so notify the board, the workman, and contributing employer, if any, and request the claim be examined and further compensation, if any, be determined. \* \* \* If the attending physician has not approved the workman's return to his regular employment, the fund or direct responsibility employer must continue to make temporary total disability payments until termination of such payments is authorized following examination of the medical reports submitted to the board under this section." (Emphasis supplied.)

<sup>3</sup> Claimant also contends that he is totally and permanently disabled or, at least, more disabled than the 60% unscheduled disability he received. On *de novo* review we conclude that the award of compensation is appropriate.

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.

On respondent's motion for reconsideration filed September 16, 1986. Former opinion filed August 6, 1986, 80 Or App 541, 723 P2d 331 (1986).

John A. Reuling, Jr., Assistant Attorney General, and Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, for motion.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

PER CURIAM

Reconsideration allowed; former opinion modified and adhered to as modified.

Cite as 82 Or App 546 (1986)

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PER CURIAM

SAIF has filed a motion seeking reconsideration of our former opinion, 80 Or App 541, 723 P2d 331 (1986), for the purpose of modifying note 1 so that it refers to the version of ORS 656.268(3) which existed at the time of the injury rather than the current version.<sup>1</sup> We allow the motion and modify the opinion accordingly.

Reconsideration allowed; former opinion modified and adhered to as modified.

<sup>1</sup> At the time of the injury ORS 656.268(3) provided:

"When the medical reports indicate to the insurer or self-insured employer that the worker's condition has become medically stationary and the self-insured employer or the employer's insurer decides that the claim is nondisabling or is disabling but without permanent disability, the claim may be closed, without the issuance of a determination order by the Evaluation Division. The insurer or self-insured employer shall issue a notice of closure of such a claim to the worker and to the Workers' Compensation Department. The notice must inform the worker of the decision that no permanent disability results from the injury; of the amount and duration of temporary total disability compensation; of the right of the worker to request a determination order from the Evaluation Division within one year of the date of the notice of claim closure; of the aggravation rights and of such other information as the director may require. Within one year of the date of the notice of such a claim closure, a determination order subsequently shall be issued on the claim at the request of the claimant or may be issued by the Evaluation Division upon review of the claim if the division finds that the claim was closed improperly. If an insurer or self-insured employer has closed a claim pursuant to this subsection and thereafter decides that the claim has permanency, the insurer or self-insured employer shall request a determination order as provided in subsection (2) of this section. If an insurer or self-insured employer has closed a claim pursuant to this subsection, if the reasonableness of that closure decision is at issue in a hearing on the claim and if a finding is made at the hearing that the closure decision was not supported by substantial evidence, a penalty shall be assessed against the insurer or self-insured employer and paid to the worker in an amount equal to 25 percent of all compensation determined to be owing between the date of original closure and the date upon which the claim is closed by determination order. The penalty shall not be less than \$500."

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Elizabeth V. Fowler, Claimant.

FOWLER,  
*Petitioner,*

*v.*

SAIF CORPORATION,  
*Respondent.*

(WCB 84-01589; CA A37228)

Judicial Review from Workers' Compensation Board.

Argued and submitted September 16, 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 respondent. With him on the brief were  
Dave Frohnmayer, Attorney General, and James E. Moun-  
tain, Jr., Solicitor General, Salem.

Before Buttler, Presiding Judge, and Warren and  
Rossman, Judges.

WARREN, J.

Affirmed.

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Fowler v. SAIF

**WARREN, J.**

Claimant seeks review of an order of the Workers' Compensation Board which reduced the referee's award of permanent partial disability on an aggravation claim from 100% to 85% unscheduled disability. She claims that she is permanently and totally disabled as a result of a work related injury. ORS 656.206(1)(a).

Claimant suffered a back injury in 1977, for which she underwent two surgeries and was eventually awarded permanent partial disability benefits totaling 50% by a referee's order of March 7, 1980. In 1982 and 1983 she experienced heart and vascular problems unrelated to her employment and underwent an aortic graft in August, 1982, and a triple bypass in January, 1983. In April, 1983, after a doctor's examination, claimant began to experience back pain and another doctor hospitalized her for conservative treatment of her back. Doctors' reports through May, 1983, stated definitely that her back condition had not worsened and that she was only experiencing an increase in symptoms.

SAIF denied an aggravation claim on June 9, 1983. In August, 1983, however, claimant visited Dr. Luce, who stated that her back condition had deteriorated and that it was time for more drastic treatment. It was his opinion that claimant's inability to work was due primarily to her back problem, not to her vascular or heart conditions, and that she was totally incapacitated. In December, 1983, SAIF reopened the claim, effective June 27, 1983. On February 7, 1984, the claim was

closed again, with an award of temporary total disability to December, 1983, and an additional 10% permanent partial disability.

Claimant requested a hearing, and the referee concluded that she "may be permanently and totally disabled"; however, he could not "escape the feeling based on this record that a significant part of her impairment and disability" arose from factors not related to the compensable back injury. In view of that, he awarded her 100% unscheduled permanent partial disability instead of permanent total disability. On review the Board, apparently persuaded that claimant's disability was due at least in part to psychological conditions related to the vascular problem, stated that claimant "is probably permanently and totally disabled" but found that

Cite as 82 Or App 604 (1986)

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"unrelated disabling factors subsequent to her industrial injury prevented her from performing gainful and suitable employment." It reduced the award to 85%.

SAIF's only argument is that claimant has not shown that she was permanently and totally disabled *before* her vascular and heart operations. We agree; the evidence indicates that she first became totally disabled as a result of her noncompensable cardiac vascular problems in late 1982 and January, 1983. Luce's report also suggests, however, that by August, 1983, claimant's disability was related more to her back than to her heart and vascular problems:

"[Claimant's] vascular pathology in the abdomen has been satisfactorily corrected and does not appear to have any particular bearing on her ability to engage in a gainful occupation of a sedentary type. The same may be said for her coronary bypass surgery \* \* \*. [Claimant's] inability to engage in a gainful occupation is primarily due to the condition of her back and its associated pain state."

Other doctors concurred in Luce's opinion. The heart and vascular problems cannot be considered in determining whether claimant is permanently and totally disabled, *see Arndt v. National Appliance Co.*, 74 Or App 20, 24-25, 701 P2d 474 (1985), because they first became symptomatic after the original injury. Luce's opinion indicates that claimant's disability was "primarily due" to the condition of her back, but does not state that other noncompensable physical and psychological conditions played no role. We cannot say that claimant's disability is not due at least in part to those noncompensable conditions.

Affirmed.

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IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Leslie Colvin, Claimant.

COLVIN,  
*Petitioner,*

v.

INDUSTRIAL INDEMNITY,  
*Respondent.*

(WCB 81-03061; CA A31519)

Remanded from the Oregon Supreme Court, *Colvin v. Industrial Indemnity*, 301 Or 743, 725 P2d 356 (1986).

Judicial Review from Workers' Compensation Board.

Submitted on remand September 16, 1986.

James L. Edmunson, Eugene, appeared for petitioner. With him was Malagon & Associates, Eugene.

John E. Snarskis, Portland, appeared for respondent.

Before Richardson, Presiding Judge, and Joseph, Chief Judge, and Warden, Judge.

WARDEN, J.

Reversed and remanded for acceptance of claim and for determination of compensation.

Cite as 83 Or App 73 (1986)

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WARDEN, J.

This workers' compensation case comes to us on remand from the Oregon Supreme Court, *Colvin v. Industrial Indemnity*, 301 Or 743, 725 P2d 356 (1986), which held that we had misinterpreted ORS 656.265(4)(a)<sup>1</sup> and, therefore, reversed our decision. An order of the Workers' Compensation Board which had reversed the referee and had concluded that the claim was untimely, because claimant had not given notice to her employer pursuant to ORS 656.265. The Board had also held that, even if the claim were not time-barred, the injury was not compensable, because it was not work-related. We affirmed the Board order, holding that the claim was time-barred, because the employer had no knowledge of the injury within the meaning of ORS 656.265(4)(a).<sup>2</sup> *Colvin v. Industrial Indemnity*, 75 Or App 87, 91, 705 P2d 231 (1985). We concluded that the relevant question in determining whether the employer had knowledge of claimant's injury within the meaning of that statute was

"whether the individuals who were aware of the injury also had the apparent authority or a duty to do something about it. \* \* \* Whether [those individuals were or were] not claimant's supervisor[s] [is] irrelevant." 75 Or App at 91.

<sup>1</sup> ORS 656.265(4)(a) provides:

"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 notice \* \* \*."

<sup>2</sup> We did not reach the question of whether claimant's injury was work-related.

On remand, the Supreme Court directs that, if we find that the individuals who were aware of the injury

“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 [of the injury]. 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).” 301 Or at 749.

We first address the issue of whether the persons

claimant told of her injury had supervisory authority over her. Claimant was a paralegal in a large law firm. Her injury occurred at a firm picnic. She told Kreft, the firm’s senior paralegal, about her injury shortly after it occurred. The next week she mentioned to Lilly, an associate attorney of the firm, that she had fallen and injured her back at the picnic. After reviewing the record, we find that both Kreft and Lilly had supervisory authority over claimant. Both testified that the firm’s organization was loosely structured at the time of claimant’s injury. Kreft’s uncontroverted testimony was that she was the senior paralegal, that she had interviewed claimant before the firm had hired her and that she always represented the paralegals when speaking with the firm’s partners concerning issues such as salaries and the need for more secretaries. Lilly, who testified for the insurer, said that he worked at least weekly, and often daily, with claimant on cases assigned to him. Both Kreft and Lilly therefore exercised a degree of supervisory authority over claimant. Claimant’s failure to give notice of the injury pursuant to ORS 656.265 therefore does not bar her claim, because her employer had knowledge of the injury within the meaning of ORS 656.265(4)(a).

Employer’s knowledge, however, is not determinative, by itself, of the issue of compensability. To be compensable, the injury must be one “arising out of and in the course of employment.” ORS 656.005(8)(a). Some discussion of the facts is required for an analysis of whether the picnic at which the injury occurred was sufficiently work-related to make the injury compensable. The facts are undisputed. The picnic was an annual affair, sponsored and paid for entirely by the firm. The organizing committee planned it on company time. It started at noon on a regular workday and lasted until late in the evening. Only the firm’s legal and paralegal staff and their spouses were allowed to participate. No clients were present. The paralegals perceived the picnic as one of their job benefits. Attendance was not compulsory, but people were encouraged to attend. If those eligible to attend did not, they were expected to be at work that afternoon. Business was discussed only on an informal and casual basis. Some humorous or “fun” awards were made by the firm to those who participated in athletic events in the afternoon. Claimant was injured at the picnic between 6:30 and 7:00 p.m.

We address the issue of whether "the relationship between the injury and the employment [is] sufficient that the injury should be compensable." *Rogers v. SAIF*, 289 Or 633, 642, 616 P2d 485 (1980). We cited with approval Larson's tests in *Richmond v. SAIF*, 58 Or App 354, 357, 648 P2d 370, *rev den* 293 Or 634 (1982):

"Recreational or social activities are within the course of employment when

"(1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or

"(2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or

"(3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life." 1A Larson, *Workmen's Compensation Law*, 5-52, § 22.00 (1985).<sup>3</sup>

The three tests are stated in the disjunctive. If claimant's attendance at the picnic satisfies any one of them, it would be within the course of her employment. She concedes that Larson's first test is not met, because the picnic occurred off the firm's premises.

The second test involves the extent to which an employer requires participation or makes the activity part of the services of an employee. We find Larson's analysis helpful:

"When the degree of employer involvement descends from compulsion to mere sponsorship or encouragement, the questions become closer, and it becomes necessary to consult a series of tests bearing on work-connection. The most prolific illustrations of this problem are company picnics and office parties. Among the questions to be asked are: Did the employer in fact sponsor the event? To what extent was attendance really voluntary? Was there some degree of encouragement to attend in such factors as taking a record of attendance, paying for the time spent, requiring the employee to work if he did not attend, or maintaining a known custom

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Colvin v. Industrial Indemnity

of attending? Did the employer finance the occasion to a substantial extent? Did the employees regard it as an employment benefit to which they were entitled as a right? Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards?" 1A Larson, *supra*, 5-110, § 22.23 (1985).

The law firm sponsored the picnic and allowed it to be organized on company time. Although attendance was voluntary, the firm did provide encouragement to attend by requiring staff members to work if they did not attend and by paying those who did attend. The firm financed the picnic in its entirety, including box lunches, barbecue dinners and cocktails. The paralegal staff regarded the picnic as one of

<sup>3</sup> In *Richmond v. SAIF*, *supra*, we cited the 1979 edition of Larson's treatise. The tests set forth in the 1985 edition are identical to those in the 1979 edition. See 1A Larson, *Workmen's Compensation Law*, 5-71, § 22.200 (1979).

their employment benefits. Although the firm presumably derived intangible benefits from the picnic through better morale among its employees, we cannot say that it received any more tangible benefits.<sup>4</sup> Nevertheless, consideration of all of the factors that Larson lists leads us to conclude that the picnic was an "activity within the orbit of employment."

Employer's insurer argues that, because the injury occurred between 6:30 and 7:00 p.m. and because the normal workday at the firm ended at 5:00 p.m., the injury occurred after any work-connection had terminated. We reject that argument. We hold that claimant's injury arose out of and was within her course of employment under ORS 656.005(8)(a).

Finally, we address claimant's contention that the Board erred in awarding her interim compensation only from the time of the filing of her written claim in 1980 until its late denial, rather than calculating the award from the time when she notified Kreft and Lilly of her injury. Because we hold that claimant's notice to them was notice to employer, interim compensation should have begun at that time. Claimant is not entitled to interim compensation unless she "left work as that phrase is used in ORS 656.210(3)." *Bono v. SAIF*, 298 Or 405, 410, 692 P2d 606 (1984). The record indicates that claimant did not work the two work days immediately after the injury, but it is otherwise unclear whether she missed work before

Cite as 83 Or App 73 (1986)

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denial of her claim. We therefore remand to the Board for determination of interim compensation owed to claimant.

Reversed and remanded to the Workers' Compensation Board with instructions to accept the claim and for determination of compensation.

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<sup>4</sup> We note that under Larson's third test, the picnic does not fall within the course of employment, because the firm gained no benefit from the picnic other than boosting employe morale.

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
John E. Cain, Claimant.

CAIN,  
*Petitioner,*

v.

WOOLLEY ENTERPRISES et al,  
*Respondents.*

(WCB 82-10108; CA A34771)

On remand from the Oregon Supreme Court, *Cain v. Woolley Enterprises*, 301 Or 650, 724 P2d 819 (1986).

Judicial Review from Workers' Compensation Board.

Submitted on remand September 3, 1986.

James L. Edmunson, Eugene, appeared for petitioner. With him on the brief were Christopher D. Moore and Malagon & Associates, Eugene.

Donna Parton Garaventa, Salem, appeared for respondent SAIF Corporation. With her on the brief were Dave Frohnmayr, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

No appearance for respondent Woolley Enterprises.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

WARREN, J.

Remanded to referee for taking additional evidence and for reconsideration.

Cite as 83 Or App 213 (1986)

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**WARREN, J.**

The Supreme Court remanded this case to us for reconsideration in the light of its decision in *Compton v. Weyerhaeuser Co.*, 301 Or 641, 724 P2d 814, (1986). The question is whether additional evidence not available at the time of the hearing should be considered in determining whether claimant suffered an aggravation of a compensable back injury.

In March, 1983, the referee found that claimant had suffered an aggravation, relying on Dr. Smith's "unopposed recommendation for further surgery." After the surgery, but without reviewing surgical reports, the Board determined that claimant had not suffered an aggravation. Claimant asked the Board to reconsider its decision and to consider examination and operative reports prepared by Smith before and after the two surgeries, but after the hearing, or to remand the case to the referee for consideration of the reports. The Board refused, indicating that the reports might be relevant to a subsequent aggravation claim, but not to the question of whether claimant had suffered an aggravation on the date of the hearing. We also denied a motion to consider the additional evidence or to remand for additional evidence taking and affirmed, without opinion, the Board's reversal of the referee.

On remand, we are instructed to consider whether it is reasonably likely that the additional evidence would affect the outcome of claimant's aggravation claim. The reports were prepared by Smith, the doctor on whose opinion the referee relied in concluding that claimant had suffered an aggravation of his back injury. They relate directly to the surgery which Smith recommended and later performed on the back. We conclude that it is reasonably likely that the reports will either support or discredit Smith's opinion that claimant had suffered an aggravation of his back injury at the time of the hearing. We remand to the referee for consideration of the new evidence.

Remanded to the referee for taking additional evidence and for reconsideration.

IN THE SUPREME COURT OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Gavin L. Smith, Claimant.

SMITH,  
*Petitioner on review,*

*v.*

STATE ACCIDENT INSURANCE FUND  
CORPORATION et al,  
*Respondents on review.*

(WCB 83-04541; CA A36412; SC S32890)

On review from the Court of Appeals.\*

Argued and submitted September 3, 1986.

Edward J. Harri, Salem, argued the cause for petitioner on review. On the petition were J. David Kryger and Emmons, Kyle, Kropp, Kryger & Alexander, P.C., Albany.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondents on review. With him on the brief were Dave Frohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Peterson, Chief Justice, and Lent, Linde, Campbell, Carson and Jones, Justices.

JONES, J.

The Court of Appeals is affirmed in part and reversed in part, and the case is remanded to the Court of Appeals.

Cite as 302 Or 109 (1986)

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**JONES, J.**

Claimant, Gavin L. Smith, petitions for review from the decision of the Court of Appeals affirming the Workers' Compensation Board's denial of his claim for increased disability compensation for a worsening of a compensable injury.

The Court of Appeals reviewed the record and found that on March 10, 1977, claimant suffered a compensable low back injury. The claim was closed by a determination order on September 27, 1977. Claimant continued to work until May 1978, when he quit and requested a hearing on the September 27 claim closure because he felt that he could no longer work; he has not worked since. After the April 1, 1980, hearing, the referee awarded 70 percent unscheduled permanent partial disability on May 6, 1980. The Board reduced the award to 50 percent; the Court of Appeals reinstated the referee's award. *Smith v. SAIF*, 51 Or App 833, 627 P2d 495 (1981).

Claimant continued to have problems after the April 1 hearing. On April 16, 1980, he saw Dr. Clibborn, complaining of severe low back pain and burning pain in both legs. Clibborn treated claimant at least through April 26, 1982, sending periodic progress reports to SAIF. On July 17, 1981,

\* Judicial review from order of Workers' Compensation Board. 78 Or App 443, 717 P2d 218 (1986).

claimant saw Dr. Stanley, complaining of knee and low back pain. On February 14, 1982, Stanley examined claimant for pain in his left hip and on March 5 for right elbow and shoulder pain. Stanley also sent progress reports to SAIF. Dr. Tsai examined claimant in October 1979 and March 1983. He concluded that there had been a deterioration of claimant's condition during that interval.

SAIF denied the worsening claim on May 10, 1983. On June 22, 1984, the referee set aside the denial and found that claimant had proved a worsening. On June 11, 1985, the Board reversed, deciding that the claim was not timely filed within the period provided by ORS 656.273(4).<sup>1</sup> The Court of Appeals held that the claim was timely filed but that the claimant had not demonstrated a worsening of his condition. 78 Or App 443, 717 P2d 218 (1986).

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Smith v. SAIF

The issues in the Court of Appeals were (1) whether the aggravation claim was timely filed under ORS 656.273(4), and (2) whether claimant had demonstrated a worsening of his compensable condition under ORS 656.273(1).<sup>2</sup> On the first issue, the Court of Appeals held that the aggravation claim had been timely filed because each doctor's report submitted in claimant's case indicated a need for further treatment and, therefore, the claim was timely filed. We agree and affirm this part of the Court of Appeals decision.

On the second issue, the Court of Appeals concluded that for claimant to establish a worsening of his condition he must demonstrate that he was more disabled and that more disabled meant less able to work, stating:

"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. See *Stepp v. SAIF*, 78 Or App 438, 717 P2d 216 (decided this date) [(review pending)]; *Miller v. SAIF*, 78 Or App 158, 714 P2d 1105 (1986). At this point, we reiterate a fundamental principle of workers' compensation law: Because compensation for an uncheduled 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." 78 Or App at 448 (emphasis in original).

The Court of Appeals has utilized several different approaches in interpreting ORS 656.273(1). In one line of cases, a compensable worsening claim was allowed if the worker proved there was a worsening of the underlying condition, regardless of whether it resulted in greater disability. The court did not define "greater disability." See *Stepp v. SAIF*, 78 Or App 438, 717 P2d 216 (1986) (review pending); *Johnson v. SAIF*, 54 Or App 179, 634 P2d 488 (1981); *Bault v. Teledyne Wah Chang*, 53 Or App 1, 630 P2d 1315 (1981).

In a second line of cases, a symptomatic worsening without a worsening of the underlying condition was held

<sup>1</sup> ORS 656.273(4)(a) provides:

"\* \* \* [T]he claim for aggravation must be filed within five years after the first determination made under ORS 656.268(4)."

<sup>2</sup> ORS 656.273(1) provides:

"After the last award or arrangement of compensation, an injured worker is entitled to additional compensation, including medical services, for worsened conditions resulting from the original injury."

sufficient for increased compensation regardless of whether it resulted in greater disability. See *Consolidated Freightways v. Foushee*, 78 Or App 509, 717 P2d 633 (1986); *Ellis v. SAIF*, 67 Or App 107, 677 P2d 57 (1984).

In a third line of cases, the Court of Appeals held that there must be a permanent worsening of either (a) the underlying compensable condition, or (b) the symptoms of the compensable condition. See *Scheidemantel v. SAIF*, 68 Or App 822, 683 P2d 1028 (1984); *Peterson v. SAIF*, 50 Or App 183, 622 P2d 757 (1981).

In *Miller v. SAIF*, 78 Or App 158, 714 P2d 1105 (1986), the Court of Appeals held that a symptomatic worsening which was neither contemplated nor compensated for at the time of the last compensation arrangement was sufficient for establishing a claim for benefits under ORS 656.273(1).

In *Davidson v. SAIF*, 78 Or App 187, 714 P2d 1117 (1986) (review pending), and *McElmurry v. Roseburg School District*, 77 Or App 673, 714 P2d 264 (1986), the Court of Appeals for the first time held that the symptomatic worsening must result in greater disability by showing (a) a need for additional medical care, or (b) an inability to work as a result of the symptomatic worsening.

Finally, the Court of Appeals announced that a worsening claim requires a showing that claimant is more disabled. Claimants can demonstrate that they are more disabled only by showing that they are less able to work. See *Pearson v. SAIF*, 79 Or App 211, 718 P2d 771 (1986); *Smith v. SAIF*, 78 Or App 443, 717 P2d 218, *rev allowed* (1986).

The Court of Appeals went too far when it invented the language that "more disabled means less able to work." That definition is unsupported either by the language of the statute or by legislative history. While it is true that a worker *might* show that his condition has worsened by showing that he is less able to work, that does not mean that he can show that his condition has worsened *only* by showing he is less able to work. Worsened condition does not necessarily mean "more disabled."

An injured worker may demonstrate that his condition has worsened although he is still able to work. The worker need only prove that his underlying condition has worsened by

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proving increased symptoms or the need for additional medical treatment. Of course, a worker is entitled to medical expenses under ORS 656.245<sup>3</sup> without a showing of worsening of his underlying condition. The entitlement to services under ORS 656.245 is not tied to a worsening, but only to the requirement that the need for medical services be a result of the injury. In a claim for increased compensation for

<sup>3</sup> 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."

unscheduled disability under ORS 656.273, however, the worker need not show he is less able to work but only that his symptoms have increased or otherwise demonstrate that his underlying condition has worsened, resulting in a loss of earning capacity.

The Court of Appeals disallowed the worker's claim on an erroneous basis. We reverse and remand the case to the Court of Appeals to determine whether the claimant has proven worsening of his condition aside from his ability to work.

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October 28, 1986

No. 99

IN THE SUPREME COURT OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Johnnie Stepp, Claimant.

STEPP,  
*Petitioner on Reconsideration,*

*v.*

STATE ACCIDENT INSURANCE FUND  
CORPORATION et al,  
*Respondents on Reconsideration.*

(WCB 83-01242; CA A34646; SC S32946)

In Banc

On petition for reconsideration of order dated July 29, 1986, denying petition for review.\*

James L. Edmunson, Malagon & Moore, Eugene, for petitioner on reconsideration. David C. Force, Eugene, for petitioner on review.

Dave Frohnmayr, Attorney General, James E. Mountain, Jr., Solicitor General, and John A. Reuling, Jr., Assistant Attorney General, Salem, for respondents on review.

MEMORANDUM OPINION

Petition for reconsideration allowed; petition for review allowed; case remanded to Court of Appeals for further consideration in light of *Smith v. SAIF*, 302 Or 109, \_\_\_ P2d \_\_\_ (1986).

Cite as 302 Or 148 (1986)

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MEMORANDUM OPINION

We allow the petition for reconsideration and the petition for review.

Having concluded that this case presents, as one of the primary issues, the same question presented in *Smith v. SAIF*, 302 Or 109, \_\_\_ P2d \_\_\_ (1986), we hereby remand this case to the Court of Appeals for further consideration in light of our decision in *Smith v. SAIF*, *supra*.

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\* Judicial review of order of Workers' Compensation Board. 78 Or App 438, 717 P2d 216 (1986).

IN THE SUPREME COURT OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Raymond P. Davidson, Claimant.

DAVIDSON,  
*Petitioner on Review,*

*v.*

SAIF CORPORATION et al,  
*Respondents on Review.*

(WCB 83-10512; CA A34909; SC S33090)

In Banc

On petition for review filed August 29, 1986.\*

Robert Wollheim, Welch, Bruun & Green, Portland, for  
petitioner on review.

No appearance contra.

MEMORANDUM OPINION

Petition for review allowed; case remanded to Court of  
Appeals for further consideration in light of *Smith v. SAIF*,  
302 Or 109, \_\_\_ P2d \_\_\_ (1986).

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MEMORANDUM OPINION

We allow the petition for review.

Having concluded that the decision in the Court of  
Appeals, *Davidson v. SAIF*, 78 Or App 187, 714 P2d 1117  
(1986), as modified on petition for reconsideration, *Davidson  
v. SAIF*, 79 Or App 448, 719 P2d 75 (1986), involves one of the  
same issues as in *Stepp v. SAIF*, 78 Or App 438, 717 P2d 216  
(1986), and having this day remanded *Stepp v. SAIF, supra*, to  
the Court of Appeals for further consideration in light of our  
decision in *Smith v. SAIF*, 302 Or 109, \_\_\_ P2d \_\_\_ (1986), we  
hereby remand this case to the Court of Appeals for further  
consideration in light of our opinion in *Smith v. SAIF, supra*.

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\* Judicial review of order of Workers' Compensation Board. 78 Or App 187, 714  
P2d 1117, mod 79 Or App 448, 719 P2d 75 (1986).

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IN THE SUPREME COURT OF THE  
STATE OF OREGON

In the Matter of the Compensation of  
Gavin L. Smith, Claimant.

SMITH,

*Petitioner on review/Respondent on reconsideration,*

*v.*

STATE ACCIDENT INSURANCE FUND  
CORPORATION et al,

*Respondents on review/Petitioners on reconsideration.*

(WCB 83-04541; CA A36412; SC S32890)

On review from the Court of Appeals.\*

Argued and submitted September 3, 1986; resubmitted on petition for reconsideration by respondents on review November 12, 1986.

Edward J. Harri, Salem, argued the cause for petitioner on review. On the petition were J. David Kryger and Emmons, Kyle, Kropp, Kryger & Alexander, P.C., Albany.

Darrell E. Bewley, Assistant Attorney General, Salem, argued the cause for respondents on review. With him on the petition for reconsideration were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Before Peterson, Chief Justice, and Lent, Linde, Campbell, Carson and Jones, Justices.

JONES, J.

The petition for reconsideration is allowed, and the previous opinion is withdrawn and superseded. The Court of Appeals is affirmed.

\*Judicial review from order of Workers' Compensation Board. 78 Or App 443, 717 P2d 218 (1986).

JONES, J.

The State Accident Insurance Fund (SAIF) requests this court reconsider the opinion in this case. We allow reconsideration and withdraw the former opinion.

Claimant, Gavin L. Smith, petitioned for review of the decision of the Court of Appeals affirming the Workers' Compensation Board's denial of his claim for increased disability compensation for a worsening of a compensable injury.

The Court of Appeals reviewed the record and found that on March 10, 1977, claimant suffered a compensable low back injury. The claim was closed by a determination order on September 27, 1977. Claimant continued to work until May 1978, when he quit and requested a hearing on the September 27 claim closure because he believed that he could no longer work; he has not worked since. After the April 1, 1980, hearing, the referee awarded 70 percent unscheduled permanent partial disability on May 6, 1980. The Board reduced the award to 50 percent; the Court of Appeals reinstated the referee's award. *Smith v. SAIF*, 51 Or App 833, 627 P2d 495 (1981).

Claimant continued to have problems after the April 1 hearing before the referee. On April 16, 1980, he saw Dr. Clibborn, complaining of severe low back pain and burning pain in both legs. Clibborn treated claimant at least through April 26, 1982, sending periodic progress reports to SAIF. On July 17, 1981, claimant saw Dr. Stanley, complaining of knee and low back pain. On February 14, 1982, Dr. Stanley examined claimant for pain in his left hip and on March 5 for right elbow and shoulder pain. Dr. Stanley also sent progress reports to SAIF. Dr. Tsai examined claimant in October 1979 and March 1983 and concluded that claimant's condition had deteriorated during that interval.

SAIF denied the worsening claim on May 10, 1983. On June 22, 1984, the referee set aside the denial and found that claimant had proved a worsening. On June 11, 1985, the Board reversed, deciding that the claim was not timely filed within the period provided by ORS 656.273(4).<sup>1</sup> The Court of

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Appeals held that the claim was timely filed but that the claimant had not demonstrated a worsening of his condition. 78 Or App 443, 717 P2d 218 (1986).

The issues in the Court of Appeals were (1) whether the aggravation claim was timely filed under ORS 656.273(4), and (2) whether claimant had demonstrated a worsening of his compensable condition under ORS 656.273(1).

On the first issue, the Court of Appeals held that each doctor's report submitted in claimant's case indicated a need for further treatment and, therefore, the claim was timely filed. We agree and affirm this part of the Court of Appeals decision.

On the second issue, the Court of Appeals concluded that for claimant to establish a worsening of his condition he must demonstrate that he was more disabled and that more disabled meant less able to work, stating:

"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. See *Stepp v. SAIF*, 78 Or App 438, 717 P2d 216 (decided this date); *Miller v. SAIF*, 78 Or App 158, 714 P2d 1105 (1986). 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." 78 Or App at 448 (emphasis in original).

We agree with the analysis of the Court of Appeals on this issue and affirm.

At argument and in his briefs to the Court of Appeals and to this court claimant asked the court to construe ORS 656.273(1), which reads:

<sup>1</sup> ORS 656.273(4)(a) provides:

" \* \* \* [T]he claim for aggravation must be filed within five years after the first determination made under ORS 656.268(4)."

“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.”

and its relationship to ORS 656.245(1), which reads:

“For every compensable injury, the insurer or the self-  
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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.”

ORS 656.273(1) states that a worker may seek additional compensation *including medical services* for worsened conditions, whereas ORS 656.245(1) relates solely to providing medical services for conditions resulting from an industrial injury without reference to any worsening.

A worker seeking increased compensation for impairment in earning capacity is entitled to such compensation benefits under only one of four statutes:

1. *Permanent total disability* (ORS 656.206)

If the claim for worsening is filed to recover benefits for permanent total disability, the claimant must demonstrate a worsening to an extent that makes the claimant unable to work to the extent that the worker is incapacitated from “regularly performing work at a gainful and suitable occupation,” and a “suitable occupation” is defined as “one which the worker has the ability and the training or experience to perform or an occupation which the worker is able to perform after rehabilitation.”

2. *Permanent partial disability* (ORS 656.214(5))

If the claim for worsening is filed under ORS 656.214(5) to obtain increased benefits for permanent partial disability, the claimant must demonstrate a worsening that makes the claimant less able to work to the extent that he is less able to obtain and hold employment in the broad field of general occupations than he was prior to the worsening.

3. *Temporary total disability* (ORS 656.210)

If the claim is filed under ORS 656.210 to obtain additional temporary total compensation, the claimant must prove a worsening that makes the claimant less able to work to

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the extent that the worker is temporarily incapacitated from “regularly performing work at a gainful and suitable occupation.” See *Cutwright v. Weyerhaeuser*, 299 Or 290, 294, 702 P2d 403 (1985).

4. *Temporary partial disability* (ORS 656.212)

ORS 656.212 provides:

"When the disability is or becomes partial only and is temporary in character, the worker shall receive for a period not exceeding two years that proportion of the payments provided for temporary total disability which his loss of earning capacity at any kind of work bears to his earning power existing at the time of the occurrence of the injury."

No other statutes provide payment of compensation for impaired earning capacity.

Increased symptoms in and of themselves are not compensable and not sufficient to require the payment of additional compensation, unless the worker suffers pain or additional disability that results in loss of the worker's ability to work and the worker thereby suffers a loss of earning capacity. *Harwell v. Argonaut Insurance Co.*, 296 Or 505, 678 P2d 1202 (1984). A worker may be able to continue to work at a present job but still suffer a loss of earning capacity to carry on other work in the broad field of general occupations, see ORS 656.214(5), because of a worsened condition. That is, in a claim for increased compensation for unscheduled disability under ORS 656.273, the worker need not show that he is less able to work in his present employment, but must prove that his symptoms have increased or otherwise demonstrate that his underlying condition has worsened so that he is less able to work in the broad field of general occupations resulting in a loss of earning capacity.

In cases such as this we emphasize that the test for loss of earning capacity for unscheduled disability claims is to be measured by the worker's "ability to obtain and hold gainful employment in the broad field of general occupations, taking into consideration such factors as age, education, training, skills and work experience." ORS 656.214(5). As Chief Judge Schwab aptly explained in *Ford v. SAIF*, 7 Or App 549, 552-53, 492 P2d 491 (1972):

402 "Earning capacity must be considered in connection with  
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a workman's handicap in obtaining and holding gainful employment in the broad field of general industrial occupations and not just in relationship to his occupation at any given time. A workman's post-injury earnings is evidence which, depending upon the circumstances of an individual case, may be of great, little, or no importance in determining loss of earning capacity. A person whose physical and mental capacities have been impaired not at all by an injury may voluntarily choose to enter an occupation which provides less compensation than his pre-injury occupation. Likewise, a person with almost total physical disability may find a post-injury occupation not involving physical effort which pays him substantially more than his pre-injury occupation — yet such a man is severely disabled in terms of ability to obtain and hold gainful employment in the broad field of general industrial occupations. \* \* \*

Of course, a worker is entitled to medical expenses under ORS 656.245 without a showing of worsening of his underlying condition. The entitlement to services under ORS 656.245 is not tied to a worsening but requires only that the need for medical services be a result of the injury.

We now turn to claimant's contentions that a claim for worsening may not be extinguished by the five-year

limitation if the claimant requires only medical treatment within the five years and, after the five years expires, the medical treatment itself causes the claimant's condition to worsen, resulting in loss of earning capacity.

Claimant asserts that the worsening statute, ORS 656.273, specifically includes "medical services" within its provisions. Thus, he contends that a worker is not left solely to the remedy of lifetime medical services provided by ORS 656.245. If a worker requires medical services within a five-year period, the worker may opt to proceed under ORS 656.245 or 656.273. Claimant contends that the option to proceed under the worsening statute is important because medical treatment may require time off from work or time in an institution that occurs after the five-year aggravation period expires and yet is directly attributable to the original injury. Further, medical treatment may not improve the claimant's condition and may in fact worsen it, causing increased impairment of earning capacity. Claimant sets forth the following hypothetical example in his petition for review:

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" \* \* \* Assume that a worker has been told by a doctor on the 30th day of the 4th year and 11th month that surgery is necessary to correct a condition related to the compensable injury. On that day the doctor files a medical report with the carrier or the claimant's attorney files [a worsening claim], thereby protecting the claimant's [worsening claim] rights. However, since surgery will not be performed until after the expiration of the [worsening claim] period, it cannot be determined within the five-year period whether or not the claimant's condition will be improved or worsened at the time the worker files the [worsening] claim. Nor, at this point, can the worker always show a diminished earning capacity. Nonetheless, the claimant is entitled to have the claim reopened, the time loss paid, and is also entitled to appeal a subsequent determination order, if appropriate. It is not until such time as the claimant is medically stationary that his disability can be then rated.

"Moreover, the claimant's condition may deteriorate following the filing of the [worsening] claim and before recommended medical treatment is performed. \* \* \*"

These contentions made by claimant are interesting but not applicable to the facts in this case. Anything we would say on those subjects would be *dicta*. The Court of Appeals found that the worker failed to prove that he is less able to work now than before the alleged worsening or that in any way has he suffered a greater loss of earning capacity. No worsening occurred after the five-year period expired because of medical treatment or otherwise.<sup>2</sup>

The petition for reconsideration is allowed, and the previous opinion is withdrawn and superseded. The Court of Appeals is affirmed.

<sup>2</sup> The five-year worsening claim period expired September 19, 1982. Apparently the Court of Appeals considered the claimant's medical condition as of March 1983 and found no worsening.

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 petition for reconsideration filed November 13, 1986, of Supreme Court's order allowing costs and disbursements dated October 28, 1986.

James L. Edmunson, of Malagon & Moore, Eugene, filed the petition for reconsideration for petitioner on review.

No appearance contra.

MEMORANDUM OPINION

Petition for reconsideration allowed. Order allowing costs against claimant affirmed.

Cite as 302 Or 366 (1986)

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MEMORANDUM OPINION

Petitioner, the claimant before the Workers' Compensation Board, was charged with costs after this court's decision reviewing his workers' compensation claim in which the insurer prevailed. *Compton v. Weyerhaeuser*, 301 Or 641, 724 P2d 814 (1986). He petitions for reconsideration from an order of this court, entered October 28, 1986, awarding costs against him. Petitioner relies on *Shetterly v. Employment Division*, 302 Or 139, 727 P2d 117 (1986), decided October 28, 1986, and interprets it to mean that the Administrative Procedures Act (APA) limitation on costs and attorney fees controls not only Employment Division cases but also cases from the Workers' Compensation Department. We allow the petition for reconsideration and affirm the order of costs.

Costs, like attorney fees, are not recoverable in the absence of a statute or contractual provision authorizing the award. See *Lewis v. Department of Revenue*, 294 Or 139, 653 P2d 1265 (1982). Any entitlement to costs must be found in, and is limited by, statute. *State Highway Com. v. Efem Whse. Co.*, 207 Or 237, 242, 295 P2d 1101 (1956). In *Shetterly* this court held that neither ORS 183.497, a provision of the APA, nor ORS 20.120, a much older statute, authorized costs against a private party in Employment Division cases. *Shetterly* reviewed the history of ORS 183.497 and found that the legislature considered and rejected allowing costs against a private party in state agency litigation.

ORS 183.497 authorizes costs against a "state agency" for judicial review of agency actions when such review

occurs "as provided in" the administrative procedures act. ORS 183.497(2).<sup>1</sup> This section is of relatively recent origin. It

was enacted in 1981, Or Laws 1981, ch 873, to elaborate on a more general costs and attorney fees statute, ORS 183.495, which appeared in the APA between 1975 and 1985. *Enacted by Or Laws 1975, ch 759, § 16a, repealed by Or Laws 1985, ch 757, § 7.*<sup>2</sup> This court has interpreted the statutory standard for when costs may be awarded against an agency, first with regard to ORS 183.495, *Cook v. Employment Division*, 293 Or 1, 643 P2d 1271 (1982), and later with reference to an earlier version of ORS 183.497, *1000 Friends v. LCDL*, 293 Or 440, 649 P2d 592 (1982). Not until *Shetterly* has this court addressed to whom costs may be awarded.

Of importance in the present case is the requirement, found in ORS 183.497(2)(a)-(c), that judicial review of the agency action must occur "as provided in" enumerated provisions of the APA. This requirement distinguishes Employment Division cases from workers' compensation cases and confirms the propriety of both the denial of costs in *Shetterly* and the award of costs in *Compton*.

By the terms of the Employment Division enabling act, judicial review of Employment Appeals Board final orders is as provided in the APA. ORS 657.282. In contrast, judicial review of actions of the Workers' Compensation Board is as provided in the workers' compensation statutes, not the APA. ORS 656.298. Cases on review from the Workers' Compensation Board do not meet the requirement of subsection (2) of ORS 183.497 that judicial review of the agency action occur "as provided in" the APA.

<sup>1</sup> ORS 183.497 provides in full:

"(1) In a judicial proceeding designated under subsection (2) of this section the court:

"(a) May, in its discretion, allow a petitioner reasonable attorney fees and costs if the court finds in favor of the petitioner.

"(b) Shall allow a petitioner reasonable attorney fees and costs if the court finds in favor of the petitioner and determines that the state agency acted without a reasonable basis in fact or in law \* \* \*.

"(2) The provisions of subsection (1) of this section apply to an administrative or judicial proceeding brought by a petitioner against a state agency, as defined in ORS 291.002, for:

"(a) Judicial review of a final order as provided in ORS 183.480 to 183.484.

"(b) Judicial review of a declaratory ruling provided in ORS 183.410; or

"(c) A judicial determination of the validity of a rule as provided in ORS 183.400.

"(3) Amounts allowed under this section for reasonable attorney fees and costs shall be paid from funds available to the state agency whose final order, declaratory ruling or rule was reviewed by the court."

<sup>2</sup> ORS 183.495 provided:

"Upon judicial review of a final order of an agency when the reviewing court reverses or remands the order it may, in its discretion, award costs, including reasonable attorney fees, to the petitioner to be paid from funds appropriated to the agency."

*Shetterly* held effectively that ORS 183.497 superseded ORS 20.120 with regard to the cases within the purview of ORS 183.497. However, ORS 20.120 still controls cases not subject to the APA costs limitation. *Compton* is such a case.

ORS 20.120, a version of which first appeared in the General Laws of Oregon § 554, p 226 (Deady & Lane 1843 - 1872), provides the statutory authorization for "costs or disbursements" on review of decisions of a "tribunal."<sup>3</sup> Before the APA costs provision existed, the Court of Appeals relied on this statute to uphold an award of costs by the circuit court in an appeal from the Workers' Compensation Board. *Cunningham v. State Compensation Department*, 1 Or App 127, 459 P2d 892 (1969).<sup>4</sup> The later enactment of the APA costs provision, which does not apply to review of workers' compensation cases, does not change this.

Petition for reconsideration allowed. Order allowing costs against the claimant affirmed.

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<sup>3</sup> ORS 20.120 provides:

"When the decision of an officer, tribunal, or court of inferior jurisdiction is brought before a court for review, such review shall, for all the purposes of costs or disbursements, be deemed an appeal to such court upon errors in law, and costs therein shall be allowed and recovered accordingly."

<sup>4</sup> The workers' compensation statutes provide for attorney fees but not costs. ORS 656.382 to 656.388.

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Jeffrey Barnett	36 Van Natta 1636 (1984)	7,609,1450
Robert A. Barnett	31 Van Natta 172 (1981)	20,164,266
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Merle Barry	37 Van Natta 1492 (1985)	39,95,439,450
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Judy A. Britton	37 Van Natta 1262 (1985)	213,1430,1553
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William Bunce	33 Van Natta 546 (1981)	1300
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 Hoard, Michael J., 85-01157 (6/86)  
 Hobbs, Raymond E., 84-05576 (5/86)  
 Hobson, Perry W., 84-01772 (1/86)  
 Hoekstre, Diana L., 85-05277 (10/86)  
 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)  
 Holz-Lundeen, Shirley,84-11767 (10/86)  
 Hopson, William E.,78-06309 etc.(3/86)  
 Horner, Billy J., 85-04081 (8/86)

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Howard, James W., Jr., 84-12395 (9/86)  
Hudson, Debra S., 85-05099 (12/86)  
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)  
Hussey, Emmitt L., 86-03465 (12/86)  
Hylla, Frank R., 85-00569 (4/86)  
Iacolucci, Laura L., 84-03467 (2/86)  
Imbler, George L., 85-09208 etc.(12/86)  
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)  
Jeggli, Keith L., 84-12742 (12/86)  
Jenkins, Leonard V., 85-07550 (5/86)  
Jiricek, Ronald G., 85-9728 (12/86)  
Jirschele, Deborah K., 85-09242 (10/86)  
Johnson, Jacqueline, 85-11107 (10/86)  
Johnson, Richard C. III, 85-03900(1/86)  
Johnson, Ruth I., 85-14095 (12/86)  
Jones, Alma E., 84-07904 (1/86)  
Jones, Robert V., 84-10854 (9/86)  
Jordan, Kari W., 86-01500 (12/86)  
Jordan, Rebecca J., 85-05322 (12/86)  
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)  
Keeler, Mark A., 86-02991 (12/86)  
Kelly, Carl, 84-03620 (2/86)  
Kelsey, Timothy, 85-02371 etc. (11/86)  
Kendregan, James P., 85-03930 (4/86)  
Kennedy, Charles F., 84-04493 (3/86)  
Kennel, Jaynee R., 85-07763 (6/86)  
Kensler, Robert L., 86-00968 (11/86)  
Kerns, Franklin N., 85-12930 (8/86)  
Khong, Phou, 85-03689 (8,9/86)  
Kight, Gordon P., 84-08780 (8/86)  
King, John H., 83-04287 etc. (12/86)  
Kirk, Darrel M., 86-00890 (12/86)  
Kirk, Karl D., 85-05202 (12/86)  
Kiser, Harold J., 85-03400 (12/86)  
Kittel, Steven A., 85-07088 (8/86)  
Knapp, Carol J., 84-10829 (1/86)  
Knight, Nola B., 85-02827 (12/86)  
Krause, Joanne C., 85-00752 etc.(10/86)  
Kribs, Chester G., 84-12322 (11/86)  
Kuhn, Ronald C., 84-03301 (6/86)

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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)  
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)  
Larsen, Richard C., 85-15043 (12/86)  
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, Pamela D., 84-08138 (2/86)  
Lebleu, Marjorie A., 85-11735 (12/86)  
Lehnherr, Karla M., 85-02783 (5/86)  
Lenaburg, Dewey L., 84-04899 (12/86)  
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)  
Londahl, Kris P., 85-03191 (12/86)  
Louie, Richard C., 85-07217 (12/86)  
Lowe, Richard A., 85-13836 (9/86)  
Lux, Melvin J., 85-09970 (8/86)  
Lynch, Christine M., 85-08640 (8/86)  
Lynch, Gary D., 83-11068 (12/86)  
Maben, Charles, 85-02436 (8/86)  
Macklin, Thomas E., 84-02195 (11/86)  
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)  
Marcolina, William D., 85-00818 (12/86)  
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)  
Matheny, Phillip D., 85-08142 (12/86)  
Mathis, Glenn H., 84-12083 (4/86)  
Mathis, Jimmy, 83-10182 (6/86)  
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 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)  
 McCool, Catherine C., 85-12937 (12/86)  
 McCoy, Ernest E., 85-11917 (7/86)  
 McDonald, Charles R., 84-01981 (10/86)  
 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)  
 McLaughlin, Earl, 85-15314 (12/86)  
 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)  
 Meeds, Norman R., 84-12239 (11/86)  
 Mefford, James S., Jr., 85-13227 (8/86)  
 Mendoza, Esperanza, 85-04638 (9/86)  
 Merrill, Bruce, 85-11812 (12/86)  
 Merrill, Virginia M., 84-09408 (9/86)  
 Merritt, Terry L., 85-03374 (4/86)  
 Mershon, Felix A., 85-11970 (12/86)  
 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)  
 Miller, Cary O., 84-12260 (12/86)  
 Miller, Donald K., 85-10740 (12/86)  
 Mischel, Henry L., 84-00903 (10/86)  
 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)  
 Moore, Douglas D., 85-08537 (10/86)  
 Morey, Alvin C., 85-10255 (7/86)  
 Morgan, Robert E., 84-09915 (12/86)  
 Morris, Arthur R., 85-01913 (2/86)  
 Morris, Lonnie D., 84-01189 etc. (4/86)  
 Morrison, Edna M., 84-12038 (7/86)  
 Morse, O.C., 85-02304 (10/86)  
 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)  
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 Neuman, Paul E., 85-04215 (8/86)  
 Neumann, Ronald, 84-08853 (12/86)  
 Newkirk, Beverly, 85-11733 (12/86)  
 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)  
 Nollette, Felicia K., 85-07218 (11/86)  
 Nunez, Eduardo, 85-00862 (1/86)  
 O'Donnell, William R., 85-13289 (12/86)  
 O'Neill, Rickey A., 85-08221 (8/86)  
 Oddie, L.C., 85-05576 (10/86)  
 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)  
 Patterson, Ronald W., 86-01083 (12/86)  
 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)  
 Petrie, Terry A., 85-05192 (10/86)  
 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)  
 Platner, Dorothy, 85-10772 (12/86)  
 Polston, Kevin D., 85-15351 (12/86)  
 Pope, Deborah A., 85-00333 (9/86)  
 Popham, Larry W., 84-07500 (6/86)  
 Powers, Donald L., 82-07424 etc. (10/86)  
 Proctor, Robert E., 85-10124 (12/86)  
 Puckett, Lawrence A., 85-02225 (8/86)  
 Puckett, Robert V., 85-08295 (11/86)  
 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)  
 Quinn, Michael F., 84-10833 (8/86)  
 Rabern, Mark D., 84-04321 etc. (4/86)  
 Rabideau, Quentin E., 85-05518 (12/86)  
 Randall, Clarence W., 85-09930 (12/86)  
 Ray, Bobby L., 85-04061 (9/86)  
 Ray, Harold M., 85-08748 (6/86)  
 Ray, Robin M., 85-03290 etc. (11/86)  
 Ray, Sally A., 84-12965 (3/86)  
 Reed, John C., 85-07587 (10/86)  
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 Rice, Howard, 85-02881 (7/86)  
 Richesin, Eddie D., 86-00394 (9/86)  
 Richmond, Geraldine, 85-08262 (10/86)  
 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)  
 Rodgers, Joseph, 83-04168 etc. (11/86)  
 Rogers, Floyd E., 85-07445 (9/86)  
 Rohde, Mark W., 82-09518 (1/86)  
 Roppé, 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)  
 Rowe, James A., 85-01169 (12/86)  
 Rozell, Gary A., 84-10715 (3/86)  
 Rush, George N., 85-11004 (12/86)  
 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)  
 Sanders, Rene, 85-04819 (10/86)  
 Satcher, Elmira K., 85-07300 (9/86)  
 Satterfield, Fred L., 85-10246 (12/86)  
 Saunders, Wayne, 84-13377 (10/86)  
 Savage, Buddy L., 85-01107 (7/86)  
 Scheel, Paula, 85-02532 (11/86)  
 Scheetz, David A., 85-07077 (12/86)  
 Schiermeister, John H., 85-02029 (8/86)  
 Schmidt, Carla L., 85-05597 (12/86)  
 Schmidt, Gregg D., 85-07561 (12/86)  
 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)  
 Seavy, Lawrence E., 85-04076 (12/86)  
 Sebastian, Vernon G., 85-13067 (12/86)  
 Sell, William J., 84-11795 (11/86)  
 Senske, Susanne E., 85-03388 (7/86)  
 Severe, Jerald H., 84-02646 (3/86)  
 Severson, Carl E., 85-01864 (10/86)  
 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)  
 Shinall, Roy E., 85-11356 (11/86)  
 Shipman, Glenn E., 84-10449 (1/86)

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 Shivley, Henry O., 84-03367 (4/86)  
 Shutt, Carmen D., 84-12752 (2/86)  
 Simon, Dallas J., 85-00550 (4/86)  
 Simons, Kenneth M., 85-06039 (12/86)  
 Simonton, Steven, 84-02067 etc.(6,7/86)  
 Simpson, Wesley L., 85-05267 (4/86)  
 Sims, Marvin L., 84-13382 etc. (12/86)  
 Slaughter, Mattie, 85-03539 etc.(10/86)  
 Sleppy, Vesta E., 85-02128 (12/86)  
 Sloan, Jerry, 83-11221 etc. (6/86)  
 Sluder, Lois I., 85-08157 (12/86)  
 Smith, Ellen D., 84-11958 (8/86)  
 Smith, Gary J., 84-05174 (4/86)  
 Smith, Janet G., 85-05425 (10/86)  
 Smith, Kent R., 85-13338 (12/86)  
 Smith, Leonard W., 84-09472 etc.(8/86)  
 Smith, Richard W., 85-06395 (12/86)  
 Smith, Sharon, 85-03486 etc. (9/86)  
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 Snyder, Leland L., 84-06586 (4/86)  
 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)  
 Spino, Levi M., 85-14000 (12/86)  
 St. Onge, David B., 85-02078 (4/86)  
 Stamps, James R., 84-10279 etc.(4,5/86)  
 Starr, Owen R., 85-12900 etc. (11/86)  
 Stedman, Steven G., 85-07815 (4/86)  
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 Steele, Margie A., 85-07594 (8/86)  
 Steenkolk, Robert, 85-04672 (8/86)  
 Steiner, Donald G., 86-05359 (12/86)  
 Stieg, Daniel J., 85-00609 (4/86)  
 Storkel, Donald L., 84-09077 (1/86)  
 Strickland, Cleone R., 84-11049 (11/86)  
 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)  
 Swearingen, Ford, 85-13959 (12/86)  
 Sweeden, Gloria G., 84-04875 (1/86)  
 Symonds, Virginia A., 84-01073 (10/86)  
 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, Beverly, 84-09858 (12/86)  
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Taylor, Shirley L., 84-07824 (4/86)  
Teeters, Susan K., 85-06599 etc. (11/86)  
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)  
Torgerson, Linda, 85-15689 (12/86)  
Torres-Smith, Michele, 84-12769 (8/86)  
Trask, Winston W., 82-10951 (1/86)  
Tucker, Charles W., 85-10553 (12/86)  
Turner, Harold, 83-09731 etc. (4/86)  
Turner, Troy L., 85-08570 (11/86)  
Utrera, Leonila C., 85-14220 (12/86)  
Valdez, Karen, 84-12412 (1/86)  
Valum, John L., 84-10185 (1/86)  
Vanator, Nancy L., 85-10355 (9/86)  
Vanbloklund, Patricia, 83-06632 (10/86)  
VanDamme, Carol L., 85-04773 (12/86)  
Vanloo, Loren, 84-04143 (11/86)  
Vaughn, John R., 84-12339 (7/86)  
Vaughn, Michael D., 84-01665 (1/86)  
Vella, Michelle, 85-08434 (12/86)  
Vizcarra, Miguel C., 84-12813 (4/86)  
Walker, Anthony C., 85-03124 (12/86)  
Walker, Charles E., 84-11309 (5/86)  
Wallace, John M., 85-02757 etc. (9/86)  
Ward, Edward G., 85-07319 (9/86)  
Ward, Kenneth A., 85-06143 (5,5/86)  
Warner, Russell T., 83-08187 (1/86)  
Wassing, Witold, 85-12542 etc. (12/86)  
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)  
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Wertz, Clement P., 84-13111 (1/86)  
Westwood, Clarence, 84-13489 (9,10/86)  
Whelchel, Katherine L., 84-03557 (1/86)  
White, David H., 84-09822 (2/86)  
White, Dawn C., 85-02637 (9/86)

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Wild, Patricia L., 85-03401 (11/86)  
Wilkerson, Catherine, 85-01964 (12/86)  
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Williams, Floyd, 85-11775 (9/86)  
Willis, James W., 85-13390 (12/86)  
Willis, Jerry W., 84-07510 (3/86)  
Wilson, Carlette L., 83-10650 (4/86)  
Wilson, Charles A., 85-06971 (7/86)  
Wilson, Earnest D., 84-06164 (10/86)  
Wilson, Esther, 85-03731 (1/86)  
Wilson, Marilyn, 85-03481 etc. (10/86)  
Wincer, Donald S., 85-14001 (12/86)  
Wisely, Mildred M., 84-06320 (9/86)  
Withers, James L., 85-03282 (12/86)  
Wojick, Jerry E., 84-02193 (9/86)  
Wolfe, Robert M., 85-04021 (12/86)  
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)  
Wuerch, Rebecca L., 85-06587 (11/86)  
Yancey, Pauline R., 84-05047 (3,4/86)  
Yates, Laurence, 84-01741 etc. (12/86)  
Young, Robert A., 82-11592 etc. (3/86)  
Young, Terry (Emp.) (10/86)  
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.

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Aaron, Mike L., 86-0343M (6/86)  
Aber, Leo L., 84-0436M (4/86)  
Adair, Mavis L., 86-0591M (11/86)  
Adams, Harold L., 86-0512M (10/86)  
Adams, William Paul, 86-0299M (12/86)  
Akin, Sally, 86-0232M (4/86)  
Alderman, Herb L., 86-0199M (7/86)  
Aldinger, Raymond E., 86-0026M (7/86)  
Alexander, Dennis G., 86-0379M (12/86)  
Allen, Ricky D., 85-0631M (2,3/86)  
Allen, Wendy S., 86-0451M (8/86)  
Allison, Gaylord, 86-0553M (12/86)  
Allquist, Violet D., 85-0625M (4,4,8/86)  
Allwander, Charles H., 86-0655M (12/86)  
Alton, Harry K., 86-0329M (10/86)  
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)  
Anderson, Marion R., 86-0411M (12/86)  
Anderson, Michael, 86-0555M (10/86)  
Apilada, Filomeno M., 86-0602M (11/86)  
Arms, William C., 86-0174M (3/86)  
Arnett, Edward R., 86-0376M (8/86)  
Arroyo, Sam R., 86-0649M (12/86)  
Bader, Betty J., 86-0432M (10/86)  
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)  
Banzer, Raymond K., 86-0568M (10/86)  
Barber, Vivian I., 86-0355M (10/86)  
Barison, Erma, 86-0641M (12/86)  
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)  
Belden, David A., 86-0598M (11/86)  
Belshee, David W., 86-0200M (4/86)  
Bender, Wilma, 86-0567M (12/86)  
Benefield, Sam, 86-0031M (4/86)  
Bennett, Joseph M., 85-0483M (6,7/86)  
Benson, Kathy L., 84-0612M (2/86)  
Benson, Yvonne E., 86-0578M (11/86)  
Bentley, Hubert P., 86-0414M (8/86)  
Beranek, Marvin R., 86-0204M (10/86)  
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 (2,12/86)  
Blakeley, Randy L., 86-0455M (9/86)  
Blakely, Bobbie J., 85-0177M (1/86)  
Blank, Michael T., 86-0548M (10/86)  
Boehmer, Harold R., 86-0128M (3/86)  
Bogle, John H., 86-0142M (5/86)  
Bolling, Douglas E., 86-0428M (11/86)  
Bonnin, Raymond A., 84-0382M (2,3,5/86)  
Booth, Larry A., 86-0408M (11/86)  
Boring, Olen V., 85-0699M (4/86)  
Borisoff, Henry T., 84-0482M (9/86)  
Boyles, Gary T., 86-0496M (10/86)  
Brant, Hilda Brown, 85-0667M (7/86)  
Brant, John L., 86-0475M (10/86)  
Bratton, John R., 85-0218M (7/86)  
Breazeale, Jerry W., 86-0452M (9/86)  
Brieger, Donald N., 85-0252M (12/86)  
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, Gary O., 84-0266M (12/86)  
Brown, James M., 86-0386M (8/86)  
Brown, Margaret I., 85-0099M (4/86)  
Brown, Margaret I., 86-0560M (11/86)  
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)  
Burch, Dwane M., 86-0585M (12/86)  
Burgess, Curtis A., 86-0677M (12/86)  
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)  
Calkins, Kenneth W., 86-0632M (12/86)  
Campbell, James M., 86-0492M (10/86)  
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)

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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)  
Carter, Dennis C., 86-0507M (11/86)  
Carvello, William B., 86-0310M (11/86)  
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)  
Childers, Larry L., 86-0611M (12/86)  
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)  
Cobb, Vernon G., 86-0529M (10/86)  
Cole, Johnny D., 86-0179M (12/86)  
Cole, Johnny D., 86-0179M (3/86)  
Combs, Harold W., 83-0015M (9/86)  
Compton, Diana L., 85-0411M (6/86)  
Cooke, Lester D., 86-0421M (12/86)  
Cooper, Charles E., 85-0593M (4/86)  
Copher, Edwin L., 86-0669M (12,12/86)  
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)  
Cutts, Stanley K., 85-0434M (4/86)  
Cutts, Stanley K., 86-0575M (12/86)  
Daining, David C., 85-0122M (8/86)  
Dalton, Robert W., 86-0436M (10/86)  
Darcy, James G., 86-0600M (11/86)  
Davenport, Jack A., 84-0226M (3/86)  
David Hernandez, I., 86-0247M (10,11/86)  
Davidson, Richard C., 85-0612M (3,8/86)  
Davis, Dan A., 85-0471M (4/86)  
Davis, Wallace J., 86-0164M (5/86)  
Dawson, Bliss S., 86-0271M (6/86)  
Dees, Glenn R., 86-0410M (11/86)  
DeGarlais, Kevin P., 86-0297M (7/86)  
Delacruz, Joe H., 85-0363M (10/86)  
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)  
Dimmick, Dennis, 86-0484M (10/86)  
Discant, Gladys J., 85-0521M (3/86)  
Dodrill, Donald L., 85-0410M (1/86)  
Doggett, Kenneth M., 86-0590M (11/86)  
Doring, Lorraine D., 86-0038M (1/86)  
Dorrenbacher, Billy J., 85-0552M (1,5/86)  
Dorsey, Terry E., 84-0372M (5,11/86)  
Douglas, Frieda M., 85-0511M (6,10/86)  
Douglas, Raymond H., 86-0579M (11/86)  
Douglass, Lloyd A., 86-0459M (12/86)  
Downes, Eugene, 86-0093M (9/86)  
Dowse, Myrna, 86-0656M (12/86)  
Drew, Dorothy J., 86-0536M (10/86)  
Driscoll, Harry, 85-0543M (12/86)  
Duffy, Patrick M., 86-0226M (5/86)  
Dump, Robert L., 86-0115M (3/86)  
Duncan, James A., 86-0522M (10/86)  
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)  
Edwell, William E., 85-0360M (10/86)  
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)  
Ensminger, Harvey J., 85-0315M (11/86)  
Erwen, Ted N., 86-0501M (10/86)  
Essary, Thomas E., 85-0580M (1/86)  
Essary, Thomas E., 86-0644M (12/86)  
Essig, Natalie O., 86-0375M (12/86)  
Estep, Ricky, 86-0290M (5/86)  
Evans, Arnold "Gene", 86-0385M (7/86)  
Evans, Vicki S., 86-0532M (12/86)  
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)  
Fandrigh, Frank S., 85-0153M (5/86)  
Farrar, Marlene T., 86-0389M (7/86)  
Feldt, Darold J., 85-0135M (1,11/86)  
Felsing, Estear R., 85-0435M (1/86)  
Ferber, Gwynn, 86-0417M (11/86)  
Fields, Kathleen M., 86-0518M (10/86)  
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)  
Forney, Norman R., Sr., 86-0587M (11/86)  
Forrester, Billy H., 86-0258M (5,8/86)  
Fountain, Stanley T., 85-0506M (6/86)  
Foust, George W., 86-0117M (3,9/86)  
Fowler, Charles O., 86-0116M (2/86)  
Fox, Gary E., 86-0316M (6/86)  
Franke, Donald M., 86-0097M (4/86)

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Franklin, Donna, 85-0639M (1,3/86)  
 Frear, James, 85-0675M (4,9/86)  
 Frederick, Carl J., 86-0684M (12/86)  
 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)  
 Gardner, Lois, 86-0435M (12/86)  
 Garnett, William E., 86-0517M (10/86)  
 Garoutte, Howard, 86-0563M (12/86)  
 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)  
 Getman, Gary A., 86-0681M (12/86)  
 Gibbs, Frank L., 86-0002M (3/86)  
 Gibson, Leonard K., 86-0034M (1/86)  
 Gibson, Ramon L., 86-0631M (11/86)  
 Gifford, Elizabeth, 86-0353M (9/86)  
 Gilcrist, Sharon W., 85-0319M (8/86)  
 Gilman, Charles A., 86-0251M (6/86)  
 Givens, Christine N., 85-0158M (10/86)  
 Goble, Vicki A., 85-0596M (1/86)  
 Goedert, Debbie K., 86-0687M (12/86)  
 Gomez, Mario, 86-0438M (9/86)  
 Goodall, Thomas V., 86-0056M (3/86)  
 Gordineer, Harley J., 85-0686M (12/86)  
 Gorecki, Thaddeus J., 86-0456M (12/86)  
 Gough, Peter, 84-0122M (1/86)  
 Gould, Keith D., 86-0029M (1/86)  
 Gower, Earl C., 86-0381M (8,10/86)  
 Granville, Alton, 86-0597M (11/86)  
 Graves, Peggy J., 85-0683M (4/86)  
 Gray, Arthur W., 85-0586M (12/86)  
 Greenlee, C.M., 86-0273M (7/86)  
 Greer, Lynda Hanneman, 86-0106M (10/86)  
 Gregory, Daniel G., 85-0407M (12/86)  
 Gregory, Daniel G., 85-0407M (7/86)  
 Grenbemer, David L., 86-0348M (11/86)  
 Gretzon, Arvid J., 86-0645M (11/86)  
 Grimes, Robert G., 86-0335M (10/86)  
 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 (4,10/86)  
 Haas, Edward R., 84-0539M (12/86)  
 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)

Haley, Dolores F., 85-0391M (10/86)  
 Halle, Gerald I., 86-0196M (7/86)  
 Hamlett, Mark C., 85-0307M (12/86)  
 Hamm, James E., 85-0394M (1,7/86)  
 Hansen, Knute, 85-0659M (3/86)  
 Hansen, Richard A., 85-0539M (1/86)  
 Hardenbrook, James M., 86-0434M (12/86)  
 Hardison, Rick L., 86-0129M (3/86)  
 Harkins, Susan N., 86-0193M (4/86)  
 Harkleroad, Jim R., 85-0268M (1/86)  
 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)  
 Hawkins, John H., 86-0559M (12/86)  
 Hayes, Larry L., 85-0393M etc. (7/86)  
 Heald, Peggy L., 86-0121M (3,3/86)  
 Helm, Jacob M., 86-0112M (3/86)  
 Hendershott, Clifton, 86-0584M (10/86)  
 Hendrickson, Shirley, 86-0169M (11/86)  
 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 (1,8/86)  
 Hinton, Larry A., 86-0695M (12/86)  
 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)  
 Hollenbeck, Lauren D., 86-0394M (12/86)  
 Holloway, Joyce L., 86-0521M (12/86)  
 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)  
 Howard, Robert L., 86-0599M (11/86)  
 Howell, James C., 85-0609M (12/86)  
 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)  
 Hughes, Robert L., 86-0481M (12/86)  
 Hunter, David O., 86-0218M (9/86)  
 Hunter, George A., 85-0194M (11/86)  
 Hurley, Garold L., 85-0547M (1/86)  
 Hurt, Louise M., 86-0384M (7/86)

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Husfloen, Carol D., 86-0035M (1,4/86)  
Hutcheson, Orvilla J., 85-0438M (5/86)  
Hutchinson, Joseph O., 86-0440M (9/86)  
Hyatt, Harold, 86-0557M (11/86)  
Hyneman, Joseph R., 86-0592M (11/86)  
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)  
Jaynes, Gayle A., 86-0673M (12/86)  
Jeffers, Donald W., 86-0476M (12/86)  
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, Linda G., 86-0595M (11/86)  
Johnson, Robert V., 86-0493M (10/86)  
Johnson, Scott R., 86-0176M (3/86)  
Johnson, Steven E., 86-0073M (2/86)  
Johnson, William E., 85-0344M (7/86)  
Jolivette, Ronald L., 86-0268M (6,7/86)  
Jones, Allan L., 86-0626M (12/86)  
Jones, Charles C., 86-0576M (11/86)  
Jones, Murl E., 85-0602M (6/86)  
Jones, Samuel L., 86-0674M (12/86)  
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)  
Kellogg, Lawrence L., 86-0607M (11/86)  
Kendrick, John C., 86-0370M (12/86)  
Kennison, Roxanna D., 86-0407M (10/86)  
Kester, Clifford L., 86-0102M (11/86)  
Ketchum, Donald R., 86-0513M (10/86)  
Ketchum, Harry R., 86-0658M (12/86)  
Keyes, James R., 86-0511M (10/86)  
Keyser, John P., Jr., 82-0191M (4/86)  
King, Walter F., Jr., 84-0464M (6/86)  
King, Walter F., Jr., 86-0425M (12/86)  
Kirchhoff, Rex S., 85-0235M (10/86)  
Kivett, Juanita F., 86-0571M (12/86)  
Kliever, Delbert D., 86-0004M (1/86)  
Knapp, David A., 86-0311M (6/86)  
Knight, Robert A., 86-0363M (11/86)  
Knight, Stirman M., 86-0250M (8/86)  
Knowlson, James C., 86-0666M (12/86)  
Koch, M. Irene, 86-0450M (9/86)  
Kral, Robert B., 86-0266M (5,7/86)  
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)  
Landers, Arthur W., 86-0402M (10/86)  
Lang, Christine A., 86-0547M (10/86)  
Lanz, Ray J., 86-0028M (1/86)  
Lanz, Ray J., 86-0506M (10/86)  
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 (12/86)  
Leckington, Charles E., 86-0298M (8/86)  
Lee, Patricia O., 86-0025M (12/86)  
Lee, Patricia, 86-0025M (2/86)  
Lehr, Wayne B., 86-0139M (3/86)  
Leslie, Fay, 85-0502M (7/86)  
Lichau, James W., 86-0538M (10/86)  
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 (5,12/86)  
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 (5,11/86)  
Main, Ken A., 86-0556M (10/86)  
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)  
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)  
McAlister, J.D., 86-0388M (12/86)  
McAllaster, John E., 85-0326M (3/86)  
McBride, Dennis L., 86-0301M (6/86)  
McCall, Cathy J., 85-0508M (4/86)  
McCann, Herbert I., 86-0464M (12/86)  
McCarroll, Jode, 86-0114M (3/86)  
McClaurin, Jenevieve F., 86-0395M (7/86)  
McClay, Taylor L., 82-0309M (2/86)  
McCool, James R., 86-0530M (11/86)  
McCorkhill, Derek L., 86-0554M (10/86)  
McCreery, Randall K., 86-0427M (8/86)

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McGhee, Arthur, 85-0365M (1/86)	Nicklin, Robert E., 85-0405M (12/86)
McLeod, Ronald P., 85-0510M (1/86)	Nicks, Edward J., 85-0630M (4,8/86)
McMahill, Ronald L., 86-0581M (10/86)	Nowotny, Ray O., 86-0533M (12/86)
McMahon, Daniel R., 86-0483M (9,11/86)	Nugent, Carole P., 86-0074M (4/86)
McQueen, James R., 86-0636M (11/86)	O'Connor, Richard S., 86-0005M (7/86)
McQuigg, Paul D., 86-0534M (11/86)	O'Keefe, Daniel, 86-0474M (10/86)
McTague, Michael O., 86-0315M (6/86)	Odell, Kenneth, 85-0695M (2,4,5/86)
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Meeuwesen, Christiana H., 86-0039M (5/86)	Oldfield, Danny S., 86-0291M (7/86)
Melampy, Diane V., 85-0267M (4/86)	Olson, Robert O., 85-0297M (7,9/86)
Melbye, Michael G., 85-0644M (7/86)	Orozco, Anastacio, 86-0015M (5/86)
Melcher, Jim W., 86-0110M (2/86)	Orr, Robin L., 86-0092M (2/86)
Menke, Carlos R., 84-0282M (2/86)	Osborn, Rachel B., 85-0465M (6/86)
Mercier, Darrel L., 85-0181M (6,10/86)	Otero, Fred, 85-0530M (5,8/86)
Messer, George R., 85-0179M (5,9/86)	Paganoni, Audrey R., 86-0149M (3/86)
Mezyk, Stanley R., 86-0182M (8/86)	Parcels-Kramer, Jacquetta, 85-0584M(4/86)
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Miller, Hugh, 86-0509M (9/86)	Parsley, Donald E., 86-0588M (11/86)
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Miller, Raymond I., 86-0127M (3/86)	Patterson, Katherine I., 86-0397M (7/86)
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Milner, Grace C., 86-0580M (12/86)	Payne, James L., 86-0166M (3,5/86)
Miltenberger, Bert E., 86-0564M (10,11/86)	Peach-Kennedy, Delaine A., 86-0225M (8/86)
Minster, Alice, 86-0465M (9/86)	Pedersen, Robert D., 86-0053M (2,5/86)
Mitchell, Karl E., 86-0064M (3/86)	Pence, Rene L., 85-0110M (3/86)
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Moore, LaDonna J., 86-0143M (3/86)	Phillips, Amos, Jr., 86-0562M (10/86)
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Moore, Stephen H., 84-0532M (1/86)	Phillips, Joseph K., 86-0415M (8/86)
Moreno, Allan J., 86-0072M (2/86)	Phipps, Ivan L., 86-0622M (12/86)
Morris, Arthur R., 85-0073M (9/86)	Pierce, Richard J., 86-0393M (7/86)
Morris, Lonnie D., 84-0221M (4/86)	Pike, Timothy M., 86-0500M (9/86)
Mossman, Leslie W., 86-0326M (7/86)	Pinnell, Ruth E., 84-0454M (4/86)
Moudy, Robert J., 86-0657M (12/86)	Pittman, Beulah F., 85-0673M (1/86)
Mowry, Robert L., 85-0131M (2/86)	Pitts, Carl D., 86-0508M (12,12/86)
Muchmore, Brian K., 86-0235M (5/86)	Pitzer, Diana J., 86-0665M (12/86)
Mullen, Lois E., 86-0288M (6,9,11/86)	Poelwijk, James, 86-0627M (11/86)
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Nava, Kathie S., 85-0577M (4/86)	Poplin, James R., 86-0351M (8/86)
Neal, James W., 86-0462M (11/86)	Porras, Consuelo A., 86-0066M (1/86)
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Nelson, Robert L., 85-0633M (5/86)	Price, Juanita P., 86-0338M (7/86)
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Newport, Howard, 86-0542M (12/86)	Primiano, Michael J., 85-0288M (1/86)
	Pritchard, Debra K., 86-0240M (5/86)
	Proffitt, Helen L., 86-0213M (5/86)

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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)  
Rauschert, John, 83-0353M (11/86)  
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 (10/86)  
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Regehr, Richard A., 86-0615M (11/86)  
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)  
Robbins, Janette M., 86-0647M (12/86)  
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)  
Scaggs, Gloria D., 86-0648M (12/86)  
Schabert, Robert N., 86-0336M (7/86)  
Schram, Debra L., 86-0069M (12/86)  
Schram, Debra L., 86-0069M (6,7/86)  
Schuessler, Billie E., 85-0159M (1,3/86)  
Schulenburg, Charles C., 86-0021M (1/86)  
Schwirse, Steven O., 86-0544M (10/86)  
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)  
Sellers, Ronald J., 86-0582M (12/86)  
Setness, Frank L., 86-0138M (3/86)  
Severson, Carl E., 85-0604M (7,8,11/86)  
Sevey, Gene A., 85-0060M (1/86)  
Shaw, Elvin D., 86-0040M (1,7,8/86)  
Shelby, Willard T., 86-0539M (12/86)  
Sherbina, Steven P., 85-0642M (2/86)  
Shine, Donn F., 85-0693M (1/86)  
Shingledecker, Irma L., 86-0359M (11/86)  
Shobe, John L., 86-0230M (7/86)  
Shoemaker, Sammy J., 85-0641M (1/86)  
Short, Erle R., 85-0197M (2,8/86)  
Sierzega, Louis A., 86-0201M (6/86)  
Simmons, Roy D., 86-0604M (12/86)  
Simmitt, 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)  
Slinger, Edward A., 86-0504M (10/86)  
Sloan, Kenneth L., 85-0248M (2/86)  
Smalley, Donald D., 86-0264M (5,10/86)  
Smith, Arthur G., 85-0687M (1/86)  
Smith, Edward G., 85-0352M (8/86)  
Smith, Fred E., 86-0670M (12/86)  
Smith, Grace V., 86-0198M (10/86)  
Smith, Kirk G., 86-0377M (8/86)  
Smith, Michael A., 86-0186M (11/86)  
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)  
Steen, Donald R., 86-0537M (10,11/86)  
Stephens, John R., 86-0019M (1/86)  
Stevens, Dennis, 85-0632M (3,5/86)  
Stocks, Lanny G., 86-0635M (11/86)  
Stone, Bert L., 85-0285M (11/86)  
Stoneman, Leland B., 86-0577M (12/86)  
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 (6,11/86)  
Strickland, Lawrence M., 86-0357M (9/86)  
Strong, Jerry E., 86-0424M (9/86)  
Sullivan, Leslie M., 86-0077M (7,11/86)  
Sunderland, Wayne G., 86-0478M (9/86)  
Swank, Donald L., 86-0261M (8/86)  
Swartz, Wilma M., 86-0118M (6,7/86)

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Tarpley, Gary O., 85-0620M (4/86)  
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Tatum, Beverly J., 86-0202M (4,12/86)  
Taylor, Lloyd L., 86-0693M (12/86)  
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 (5,10/86)  
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)  
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, Cecil S., 86-0566M (10/86)  
Trump, Robert L., 84-0506M (5/86)  
Trusty, Stonewall, Jr., 84-0168M (1/86)  
Turnbull, Sylvia, 86-0239M (5/86)  
Turner, Barbara L., 86-0325M (12/86)  
Tyler, Thomas R., 85-0617M (2/86)  
Uhls, Darrell L., 86-0468M (12/86)  
Valle, Salvador B., 86-0392M (10/86)  
Van Cleave, Emmett, 86-0286M (9/86)  
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Walker, Virgil E., 85-0257M (1/86)  
Wallace, Willard, 86-0211M (5/86)  
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Wheatley, Roy T., 86-0349M (8/86)  
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Whitman, Cecil C., 85-0374M (7/86)  
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Wilson, William H., 86-0639M (11/86)  
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Wright, Noah A., 86-0158M (12/86)  
Wright, Ronald C., 81-0174M (5/86)  
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Young, Rose Ann, 86-0479M (9/86)  
Young, Thomas A., 86-0120M (3/86)  
Young, Thomas A., 86-0552M (10/86)  
Younger, Allen D., 86-0161M (3/86)  
Zander, John W., 85-0488M (2/86)  
Zander, Marvin R., 86-0527M (10/86)  
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Woodward, Thomas E. [84-08962 & 82 Or App 274 (1986)]-----1626  
Workman, Alice M. (83-06558)-----522  
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Wright, Dick H. [83-11167 etc. & 80 Or App 444 (1986)]-----1085  
Wright, Norman E. (84-08871)-----463  
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Zachary, George A. (84-00512)-----923  
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Zimmerman, Anna M. (84-05720)-----1437  
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