CIRCUIT COURT SUPPLEMENT 2 FOR VOLUME 4 OF VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

THE FOLLOWING CIRCUIT COURT DISPOSITIONS HAVE BECOME AVAILABLE SINCE THE PUBLICATION OF OUR FIRST CIRCUIT COURT SUPPLEMENT INCIDENT TO VOLUME 4.

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15 BARISON, ERMA, WCB No. 68-756, CROOK - AFFIRMED

25 SMITH, ROBERT E., WCB No. 69-640, DESCHUTES - HEARING OFFICER AWARD REINSTATED.

72 RAILEY, CLEATWOOD, WCB No. 69-583, CLACKAMAS - SETTLED FOR 756.95 DOLLARS

88 BALMER, WILLIAM H., JR., WCB No. 68-158, TILLAMOOK - ADDITIONAL AWARD OF 60 PER CENT LOSS ARM FOR UNSCHEDULED DISABILITY.

113 CRISPIN, LEONARD M., WCB No. 69-235, POLK - DISMISSED.

116 ALFT, MARK H., WCB No. 69-646, MALHEUR - LEG DISABILITY FIXED AT 75 PERCENT.

119 DAVIS, JAMES E., WCB No. 69-1294, GRANT - AFFIRMED.

125 FENN, ALVIN, WCB No. 61-1110, LINN - CLAIM ALLOWED.

140 ROWLAND, WILLIAM C., WCB No. 69-978, MARION - SETTLED PENDING APPEAL TO COURT OF APPEALS.

149 CAWARD, THOMAS D., WCB No. 69-1254, GRANT - AFFIRMED.

155 NORRIS, RAY D., WCB No. 69-585, CLACKAMAS - HAMMOND, J. 'THIS MATTER COMING ON TO BE HEARD AS A JUDICIAL REVIEW OF THE ORDER OF THE WORKMEN'S COMPENSATION BOARD HERETOFORE ENTERED ON FEBRUARY 18, 1970, AND THE COURT HAVING EXAMINED THE TRANSCRIPT AND RECORDS SUBMITTED TO IT UPON SUCH JUDICIAL REVIEW AND HAVING HEARD THE ARGUMENT OF COUNSEL AND HAVING CONSIDERED THE BRIEFS OF THE RESPECTIVE PARTIES HERETOFORE FILED IN THIS MATTER, AND THE COURT BEING ADVISED IN THE PREMISES, NOW THEREFORE,

'THE COURT IS OF THE OPINION THAT THE CLAIMANT HEREIN HAS INJURIES AND DISABILITIES FLOWING FROM HIS ACCIDENT OF FEBRUARY 21, 1963, THAT RENDER HIM PERMANENTLY AND TOTALLY DISABLED AND THAT, THEREFORE, THE ORDER APPEALED FROM SHOULD BE MODIFIED TO PROVIDE THAT THE CLAIMANT IS ENTITLED TO PERMANENT, TOTAL DISABILITY.

'IN THE USUAL CASE THAT THIS COURT IS REQUIRED TO CONSIDER UPON JUDICIAL REVIEW, THE RESULTS OF A JERKING MOVEMENT IN PULLING A 2 x 12 PLANK FROM A GREEN CHAIN IN A SAWMILL OPERATION WOULD NOT BE EXPECTED TO PRODUCE THE INJURY HERE FOUND TO EXIST. IT IS OBVIOUS, HOWEVER, THAT INJURY DID RESULT WHICH WAS DETERMINED TO INCLUDE AN ACUTE LUMBOSACRAL STRAIN SUPERIMPOSED UPON A GRADE 1 SPONDYLOLISTHESIS AT L-5, S-1. FOLLOWING CONSERVATIVE TREATMENT THERE WERE THREE SURGICAL PROCEDURES IN AN ATTEMPT TO CORRECT THE CLAIMANT'S PROBLEMS, THE FIRST BEING A SPINAL FUSION OF L-4 TO S-1 WHICH DEVELOPED A PSEUDARTHROSIS (FALSE JOINT) NECESSITATING THE SECOND SURGICAL PROCEDURE TO CORRECT THE PROBLEM THAT DEVELOPED. WHEN A SECOND PSEUDARTHROSIS DEVELOPED, THE THIRD SURGERY RESULTED IN A SPINAL FUSION FROM L-3 TO S-1. THE CLAIMANT NOW HAS A VERY STIFF BACK AND THE

MEDICAL REPORTS INDICATE THAT THE THIRD SURGICAL PROCEDURE DID NOT RESULT IN AN ENTIRELY STABLE FUSION.

'THE PHYSIOLOGICAL PROBLEMS ARE SUPERIMPOSED ON LIMITED INTELLECTUAL ABILITIES AND A MINIMAL EDUCATIONAL BACKGROUND FOUND TO EXIST IN THE CLAIMANT, TOGETHER WITH OTHER PSYCHOLOGICAL PROBLEMS DESCRIBED BY DR. NORMAN W. HICKMAN (PH.D. IN PSYCHOLOGY) WHO, IN HIS REPORT MARKED CLAIMANT'S EXHIBIT 50 RESULTING FROM HIS EXAMINATIONS ON DECEMBER 2 THROUGH 18, 1968, CONCLUDED, 'THE PROGNOSIS FOR RESTORATION AND REHABILITATION IN THIS CASE CERTAINLY IS VERY GUARDED BECAUSE OF THE EXTENT AND NATURE OF THE PSYCHOPATHOLOGY.'

'THE LENGTHY RECORD IN THIS CASE REVEALS THAT ANY EXPECTATION THAT THIS CLAIMANT MIGHT RETURN TO GAINFUL EMPLOYMENT WOULD BE VISIONARY OR AT LEAST BASED ON HOPE RATHER THAN SOUND LOGIC. HIS PROBLEM IS QUITE SERIOUS AS IS DISCLOSED BY THE LETTER FROM DR. RODERICK E. BEGG DATED MARCH 17, 1969, AND MARKED CLAIMANT'S EXHIBIT NO. 55. HE REFERS TO THE REPORT OF ANOTHER DOCTOR AND CONCLUDES HIS LETTER BY SAYING, 'IN THE LAST SENTENCE OF DR. SHLIM'S REPORT, I FEEL IT IS COMPLETELY UNREALISTIC, IN WHICH HE SUGGESTS THAT THE CLAIM BE CLOSED WITH A PPD OF 75 PERCENT LOSS OF FUNCTION OF THE ARM. IT IS MY OPINION THAT THIS PATIENT'S PERMANENT PARTIAL DISABILITY WOULD MORE LIKELY BE 75 PERCENT LOSS OF FUNCTION OF THE BACK.' THE AWARD SUGGESTED BY DR. BEGG WOULD NOT BE POSSIBLE IN VIEW OF THE MAXIMUM BENEFITS AVAILABLE FOR PERMANENT PARTIAL DISABILITY AT THE TIME OF THE ACCIDENT IN QUESTION WHICH ARE 'COMPUTED BY DETERMINING THE DISABLING EFFECT OF SUCH INJURY AS COMPARED TO THE LOSS OF USE BY ANY MEMBER NAMED IN THE SCHEDULE IN THIS SECTION, NOT EXCEEDING, HOWEVER, 145 DEGREES.' OREGON LAWS 1957, CHAPTER 449, SECTION 1 (4).

'A VERY COMPREHENSIVE ANALYSIS OF THE PROBLEM EXISTS IN THE REPORT OF DR. C. ELMER CARLSON, ORTHOPEDIC SURGEON, DR. A. G. KIMBERLEY, ORTHOPEDIC SURGEON, AND DR. HAROLD D. PAXTON, NEUROSURGEON, WHO IN THEIR REPORT MARKED CLAIMANT'S EXHIBIT NO. 48, CONCLUDED, 'WE THINK HIS CASE SHOULD BE CLOSED ON THE ASSUMPTION THAT HE IS NOT ABLE TO RETURN TO HARD MANUAL WORK WHICH IS THE ONLY TYPE WHICH HE HAS DONE IN THE PAST. WE BELIEVE HE SHOULD BE REFERRED TO VOCATIONAL REHABILITATION TO SEE IF THEY HAVE ANY POSSIBLE SOLUTION TO THIS MAN'S DIFFICULT PROBLEMS. IN ANY CASE, HIS DISABILITY IS EXTREME, AND HIS ABILITY TO DO ANYTHING OTHER THAN MANUAL LABOR ALMOST NIL.'

'THE EVIDENCE IS THAT THE CLAIMANT, THOUGH HAVING ADVANCED THROUGH THE SEVENTH GRADE ACADEMICALLY, CANNOT WRITE EXCEPT TO SIGN HIS OWN NAME, WHICH FACT IS SUBSTANTIATED BY THE RECORD. THE HOPE EXPRESSED IN THE ORDER ON REVIEW, FROM WHICH THIS APPEAL IS TAKEN, THAT THIS CLAIMANT MAY BE ENABLED TO LEARN AND FUNCTION IN WORK SITUATIONS BY HELP OF A FACILITY SUCH AS ONE KNOWN AS THE 'LAUBACH CLINIC' DOES NOT APPEAR TO

155 HAVE THE SUPPORT OF THE RECORD SUBMITTED TO THIS COURT.

'AN ORDER MAY BE ENTERED MODIFYING THE ORDER ON REVIEW OF THE WORKMEN'S COMPENSATION BOARD IN ACCORDANCE WITH THIS OPINION AND ALLOWING TO CLAIMANT'S COUNSEL THE FEES PERMITTED BY APPROPRIATE STATUTES.'

173 WIESE, DOUGLAS, WCB No. 69-1056, DESCHUTES - AFFIRMED.

181 NICHOLAS, JOSEPH J., WCB No. 69-243, MULTNOMAH - REMANDED FOR WANT OF AN APPEALABLE ORDER.

183 KERINS, CLARENCE C., WCB No. 67-1449, BAKER - AFFIRMED.

192 RODRIGUEZ, EUGENIA, WCB No. 69-1220, MARION - HAY, J. 'ON JUNE 17, 1967, CLAIMANT SUFFERED A LOW BACK INJURY WHILE EMPLOYED BY CHASE BAG COMPANY IN PORTLAND. SHE ULTIMATELY WAS AWARDED 15 PERCENT LOSS OF AN ARM BY SEPARATION FOR UNSCHEDULED PERMANENT DISABILITY ON JULY 25, 1968.

'IN MARCH, 1969, SHE ATTEMPTED TO WORK AGAIN TRAINING BERRIES ON THE WILLIAM BONSER FARM. AFTER TWO DAYS, SHE WAS UNABLE TO CONTINUE, FOLLOWING AN INCIDENT ON MARCH 13, 1969. SHE STOOPED TO PICK UP A VINE AND WAS UNABLE TO STRAIGHTEN UP BECAUSE OF LOW BACK PAIN.

'CLAIMANT SOUGHT PAYMENT OF MEDICAL EXPENSES, FURTHER TEMPORARY TOTAL DISABILITY AND PERMANENT PARTIAL DISABILITY, BASED ON AGGRAVATION OF THE JUNE 17, 1967, INJURY. THE HEARING OFFICER BY ORDER OF NOVEMBER 13, 1969, TOTALLY DENIED THE CLAIM, FINDING THAT THE MARCH 13, 1969, INCIDENT CONSTITUTED A NEW INJURY AND THAT THERE ALSO WAS NO EVIDENCE OF INCREASED PERMANENT DISABILITY. THE BOARD, BY ORDER OF MARCH 11, 1970, AFFIRMED THE HEARING OFFICER, AND CLAIMANT APPEALS. THE COURT FINDS THAT THE HEARING OFFICER AND THE BOARD ERRED IN FINDING THAT THE MARCH 13, 1969, INCIDENT CONSTITUTED A NEW INJURY. THE MEDICAL EVIDENCE CLEARLY ESTABLISHES THAT THE MARCH 13, 1969, INCIDENT WAS MERELY AN AGGRAVATION OF THE JUNE 17, 1967, INJURY. THE TESTIMONY OF CLAIMANT DOES NOT SUPPORT A CONTRARY FINDING, ESPECIALLY WHEN IT IS APPARENT THAT THE INTERPRETER UTILIZED AT THE HEARING, BY HIS OWN ADMISSION, WAS SO INEPT IN THE USE OF ENGLISH AS TO BE INCAPABLE OF TRANSLATING THE QUESTIONS INTO SPANISH AND THE ANSWERS INTO ENGLISH. THE COURT CONCURS, HOWEVER, WITH THE OPINION OF THE HEARING OFFICER AS WELL AS THE BOARD IN THEIR CONCLUSION THAT THE EVIDENCE FAILED TO ESTABLISH ANY INCREASED PERMANENT DISABILITY. THE AGGRAVATION SUFFERED ON MARCH 13, 1969, RESULTED IN A TEMPORARY AGGRAVATION ONLY.

'IN THESE CIRCUMSTANCES, THE CLAIM SHOULD HAVE BEEN ALLOWED FOR THE PAYMENT OF MEDICAL SERVICES AND TIME LOSS PAYMENTS, WHICH ARE THE RESPONSIBILITY OF THE ORIGINAL EMPLOYER, FOLLOWING WHICH THE CLAIM SHOULD BE CLOSED WITHOUT AN AWARD OF ANY ADDITIONAL PERMANENT DISABILITY.'

198 NICHOLS, RICHARD, WCB No. 69-1257, MULTNOMAH - SANDEBERG, J. 'THE COURT HAS REVIEWED THE RECORD FORWARDED BY THE BOARD, HAS READ AND CONSIDERED THE MATTERS SUBMITTED BY THE RESPECTIVE PARTIES IN THEIR ARGUMENTS AND MEMORANDA, AND THE CONTENTS OF THE NOTICES OF APPEAL AND CROSS-APPEAL.

'THE COURT WILL FIRST COMMENT ON THE CROSS-APPEAL IN WHICH THE EMPLOYER APPEALS FROM THE ORDER OF THE WORKMEN'S COMPENSATION BOARD DATED MARCH 13, 1970, AND REQUESTS 'JUDICIAL REVIEW OF THE BOARD'S RULING THAT THE CLAIM WAS TIMELY AND THAT THE EMPLOYER DID NOT RAISE THE QUESTION OF TIMELINESS AT THE FIRST HEARING....

'THE RECORD SHOWS THAT CLAIMANT FELL WHILE WORKING ON FEBRUARY 14, 1967, THAT HE REPORTED THE FALL TO HIS EMPLOYER ON THE SAME DAY, THAT FOR MORE THAN A YEAR NOTHING HAPPENED, THAT HE DID NOT SEEK MEDICAL CARE, THAT HE DID NOT SEEK OR REQUEST COMPENSATION, THAT A CLAIM WAS NOT RECEIVED BY THE WORKMEN'S COMPENSATION BOARD UNTIL MARCH 27, 1968, AND THAT THE EMPLOYER DID NOT RECEIVE WRITTEN NOTICE UNTIL MARCH 20, 1968. INCIDENTALLY, FORM NO. 801 INDICATES ON ITS FACE THAT IT WAS SIGNED BY THE EMPLOYEE ON THE DATE OF THE ACCIDENT. THIS MATTER HAS NOT BEEN RAISED BY EITHER COUNSEL AND THE COURT HAS ASSUMED THAT IT WAS NOT SIGNED FOR OVER A YEAR AFTER THE ACCIDENT.

'THEREAFTER, ON THE 22ND DAY OF MARCH, 1968, THE CLAIM WAS ACCEPTED BY THE EMPLOYER'S CARRIER. IN THIS CLAIM FORM THE EMPLOYER DOES NOT INDICATE THAT HE DOUBTS THE VALIDITY OF THE CLAIM. THE STATUTE REQUIRES THE DIRECT RESPONSIBILITY OF THE EMPLOYER OR ITS INSURANCE CARRIER, IF IT DENIES A CLAIM FOR COMPENSATION, IS TO FURNISH A WRITTEN DENIAL TO THE WORKMAN. THIS WAS NOT DONE. ORS 656.262 (6).

'THE EMPLOYER HAS MOVED FOR DISMISSAL ON THE GROUND THAT THE CLAIM WAS BARRED SINCE MORE THAN ONE YEAR HAD PASSED FROM THE DATE OF THE ACCIDENT TO THE DATE OF THE FILING OF THE CLAIM AND CITES ORS 656.265 IN SUPPORT OF HIS POSITION. FAILURE TO GIVE NOTICE AS REQUIRED BY THIS SECTION BARS A CLAIM UNLESS THE EMPLOYER HAS KNOWLEDGE OF THE INJURY OR HAS NOT BEEN PREJUDICED OR THE NOTICE WAS GIVEN WITHIN ONE YEAR AFTER THE DATE OF THE ACCIDENT AND THE WORKMAN ESTABLISHES IN A HEARING THAT HE HAS GOOD CAUSE FOR FAILURE TO GIVE NOTICE WITHIN 30 DAYS AFTER THE ACCIDENT.

'SUBSECTION 5 OF THE SAME STATUTE STATES THAT THE ISSUE OF FAILURE TO GIVE NOTICE MUST BE RAISED AT THE FIRST HEARING ON A CLAIM FOR COMPENSATION IN RESPECT TO THE INJURY. THE EMPLOYER TAKES THE POSITION THAT THE FIRST HEARING WAS THE HEARING BEFORE THE HEARING OFFICER ON THE AWARD AND THAT THEREFORE THE ISSUE WAS TIMELY RAISED. THE COURT IS CALLED UPON TO DETERMINE WHETHER, AFTER A CLAIM HAS BEEN SO ACCEPTED AND A DETERMINATION ORDER MADE, THE EMPLOYER CAN RAISE THE QUESTION AT A HEARING ON THE AMOUNT OF PERMANENT PARTIAL DISABILITY TO WHICH THE CLAIMANT IS ENTITLED.

'ORS 656.319 PROVIDES DIFFERENT TIME LIMITS FOR REQUESTING HEARINGS ON DENIALS AND OTHER QUESTIONS. IT IS THE OPINION OF THE COURT THAT THE LEGISLATURE, WHEN IT PROVIDED THAT THE ISSUE OF FAILURE TO GIVE NOTICE MUST BE RAISED AT THE FIRST HEARING ON A CLAIM, INTENDED THIS TO APPLY ONLY TO A HEARING ON THE DENIAL OF A CLAIM AND THAT A HEARING ON THE AMOUNT OF COMPENSATION AFTER ACCEPTANCE OF THE CLAIM BY AN EMPLOYER AND A DETERMINATION

198 WAS NOT A FIRST HEARING WITHIN THE MEANING OF ORS 656.265 (5).

'THE EMPLOYER ALSO RAISED THE QUESTION OF JURISDICTION TO CONDUCT A HEARING BECAUSE NO MEDICAL SERVICES WERE PROVIDED OR BENEFITS PAID WITHIN A YEAR AFTER THE DATE OF THE ACCIDENT AND CITES ORS 656.319 (1) (A) AND EXHIBITS 2 AND 3 IN SUPPORT THEREOF. SECTION (1) (A) IS NOT APPLICABLE AND DOES NOT CONTEMPLATE THAT MEDICAL SERVICES AND BENEFITS MUST BE PAID WITHIN ONE YEAR OF THE DATE OF THE ACCIDENT. SECTION (1) (B) IS LIKEWISE APPLICABLE, MORE THAN MEDICAL SERVICES WERE PROVIDED. SECTION (1) (C) IS APPLICABLE. THE REQUEST WAS FILED WITHIN ONE YEAR AFTER DISABILITY BENEFITS WERE LAST PAID. IT IS THE OPINION OF THE COURT THAT JURISDICTION EXISTS.

'FOR REASONS GIVEN, THE ORDER OF THE BOARD ON THE QUESTION OF TIMELINESS IS AFFIRMED.

'ON THE MERITS THE COURT IS OF THE OPINION THAT THE ORDER APPEALED FROM SHOULD BE AFFIRMED.

'EMPLOYER WILL SUBMIT A FORM OF ORDER IN ACCORDANCE WITH THE FOREGOING IN WHICH THIS OPINION SHALL STAND AS THE COURT'S FINDINGS AND CONCLUSIONS.'

200 JOHNSON, LARENE, WCB NO. 69-391, JACKSON - AFFIRMED.

207 BAILEY, JOHN W., WCB NO. 68-1982, JACKSON - HEARING OFFICER AWARD REINSTATED.

215 SMALLMAN, CLAUDE R., WCB NO. 69-1411, MULTNOMAH - COMPENSATION INCREASED TO 25 PERCENT LOSS FOR ARM.

224 WITHERS, SCOTTIE L., WCB NO. 69-1895, HARNEY - HEARING OFFICER AWARD REINSTATED.

230 BURGERMEISTER, VIOLET K., WCB NO. 68-592, MULTNOMAH - SETTLED FOR 1,250.00 DOLLARS.

233 MONTGOMERY, STEVEN COLE, WCB NO. 69-1026, UNION - BROWNTON, J. 'THIS MATTER INVOLVES THE ISSUE OF THE EXTENT OF PERMANENT DISABILITY SUSTAINED BY THE CLAIMANT WHO WAS INJURED WHILE EMPLOYED BY THE BAILEY EQUIPMENT COMPANY OF ISLAND CITY. THE ONLY ISSUE TO BE DETERMINED IS THE EXTENT OF PERMANENT PARTIAL DISABILITY SUSTAINED BY THE CLAIMANT ARISING OUT OF THE ACCIDENT. PURSUANT TO ORS 656.268, A DETERMINATION WAS MADE IN WHICH IT WAS FOUND THAT THE CLAIMANT'S DISABILITY WAS 48 DEGREES AS AGAINST A MAXIMUM OF 320 DEGREES FOR OTHER OR UNSCHEDULED INJURIES. UPON A HEARING BEFORE MR. NORMAN KELLEY, HEARING OFFICER FOR THE WORKMEN'S COMPENSATION BOARD, THE AWARD WAS INCREASED TO 150 DEGREES. THE MATTER WAS THEN REVIEWED BY THE WORKMEN'S COMPENSATION BOARD WHO DETERMINED THAT THE DISABILITY DOES NOT EXCEED THE 48 DEGREES AWARDED UPON THE INITIAL DETERMINATION. THE CLAIMANT NOW HAS APPEALED TO THE CIRCUIT COURT FROM THE RULING OF THE WORKMEN'S COMPENSATION BOARD.

'THIS MATTER CAME ON TO BE HEARD ON NOVEMBER 17TH, 1970. THE CLAIMANT WAS PRESENT IN PERSON AND REPRESENTED BY MR. CHARLES R. CATER OF COUNSEL. MR. JAMES H. GIDLEY WAS PRESENT REPRESENTING THE BAILEY FARM EQUIPMENT COMPANY EMPLOYER. MR. CATER AND MR. GIDLEY REVIEWED THE EVIDENCE IN THE MATTER AND PRESENTED THEIR ARGUMENTS TO THE COURT.

'THE COURT HAS STUDIED THE FILE IN THIS MATTER INCLUDING THE TRANSCRIPT OF THE HEARING BEFORE MR. KELLEY AND INCLUDING THE STATEMENTS OF DR. DONALD D. SMITH AND DR. HOWARD E. JOHNSON AS SHOWN BY THE EXHIBITS ADMITTED AT THE HEARING. IN AWARDING 150 DEGREES BASED ON THE AMOUNT OF 320 DEGREES, THE HEARING OFFICER CONSIDERED THE NATURE OF THE INJURY SUFFERED BY THE CLAIMANT, HIS EMPLOYMENT ACTIVITIES PRIOR TO THE INJURY AND HIS EMPLOYMENT AND OTHER ACTIVITY SUBSEQUENT TO THE INJURY. THE HEARING OFFICER DID NOT MAKE A COMPARISON OF THE BEFORE AND AFTER EARNING POWER. THE HEARING OFFICER CITED RYF VS. HOFFMAN CONSTRUCTION COMPANY, 89 OR ADV SHT 438. IN THIS CASE THE COURT DID TAKE INTO CONSIDERATION THE EARNINGS OF THE CLAIMANT PRIOR TO THE DISABILITY AND SUBSEQUENT THERETO AND STATED ON PAGE 491 AS FOLLOWS -

> 'ACTUAL EARNINGS ARE IMPORTANT BUT NOT THE SOLE BASIS FOR MEASURING EARNING CAPACITY. THIS IS DEMONSTRATED BY THE CASES WHICH RECOGNIZE THAT A DISABILITY AWARD MAY BE SUSTAINED EVEN THOUGH IT IS SHOWN THAT AFTER THE ACCIDENT THE CLAIMANT RECEIVED WAGES EQUIVALENT TO OR GREATER THAN PRIOR TO THE ACCIDENT.....'

'IN THE RYF CASE THE COURT TOOK NOTE OF THE DEARTH OF EVIDENCE IN THE RECORD THAT WOULD SERVE AS A CRITERIA IN ARRIVING AT THE PERCENTAGE OF THE CLAIMANT'S DISABILITY. THIS APPEARS TO BE LIKEWISE TRUE IN THE CASE AT BAR. THE SUPREME COURT DID NOTE THAT THE CLAIMANT'S TESTIMONY WAS TO THE EFFECT THAT HIS PRESENT ABILITY TO WORK HAD BEEN REDUCED 50 PERCENT AS A RESULT OF THE ACCIDENT. IN THE RFE CASE, THE SUPREME COURT WARNED, HOWEVER, THAT SUCH TESTIMONY WAS TO BE VIEWED WITH CAUTION. IN THE RYF CASE THE COURT CITES LARSON ON WORKMEN'S COMPENSATION LAW IN WHICH LARSON STATES AS FOLLOWS -

> 'BUT A MAN WITH A STIFFENED ARM OR DAMAGED BACK OR BADLY WEAKENED EYE WILL PRESUMABLY HAVE A HARDER TIME DOING HIS WORK WELL IN THE IMMEDIATE COMPETITION WITH THE YOUNG HEALTHY MEN. THE DEFIENCY MAY DETERIORATE GRADUALLY AND IMPERCEPTIBLY. HE MAY HAVE DIFFICULTY IN RETAINING EMPLOYMENT IF HE HAS TO CHANGE JOBS.....'

'THE COURT THEN DISCUSSED THE TESTIMONY OF ONE OF THE DOCTORS IN RESPECT TO THE INABILITY OF THE CLAIMANT TO DO HEAVY LIFTING AND OTHER MATTERS INVOLVING HIS BACK.

'THE SUPREME COURT CITED THE CASE OF ROMERO VS. STATE COMPENSATION DEPARTMENT, 86 OR ADV SHT 815, WHICH STATES IN PART AS FOLLOWS -

'....WE ARE ENTITLED TO TAKE INTO ACCOUNT THE ADMINISTRATIVE EXPERTISE WHICH COMES OUT OF DEALING WITH HUNDREDS OF SIMILAR CASES.'

'IN RESPECT TO THE EFFECT OF THIS INJURY UPON THE CLAIMANT'S ACTIVITY, IT APPEARS FROM THE EVIDENCE TAKEN BEFORE THE HEARING OFFICER, INCLUDING THE TESTIMONY OF THE CLAIMANT AND HIS WIFE, THAT HE IS UNABLE TO DO A NUMBER OF PHYSICAL ACTS THAT HE COULD DO PREVIOUSLY. HE IS UNABLE TO LIFT TO THE EXTENT THAT HE DID BEFORE AND STATED IN RESPECT TO LIFTING AN ITEM OF TEN OR FIFTEEN POUNDS AS FOLLOWS -

'I FEEL A POPPING SENSATION IN THE LOWER PORTION OF MY BACK AND FOR MAYBE AN HOUR OR TWO WEEKS AFTERWARDS, I WILL KNOW I LIFTED SOMETHING WRONG.'

'WHEN THE CLAIMANT WAS THEN ASKED, 'HOW DO YOU KNOW,' HE REPLIED, 'WELL, I'LL KNOW BECAUSE OF THE PAIN IN MY LEG AND LOWER BACK.'

'HE FURTHER STATED THAT THERE HAD BEEN SOME DETERIORATION IN THAT HE STUMBLED MORE THAN HE DID BEFORE. HE ALSO STATED HE HAD NUMBNESS IN HIS LEFT LEG WHICH WENT CLEAR TO THE FOOT.

'IT FURTHER APPEARS FROM THE EVIDENCE THAT THE CLAIMANT IS ATTENDING THE BAKER BUSINESS COLLEGE AND WORKING PART-TIME AT A SERVICE STATION. THE CLAIMANT STATED THAT SITTING IN SCHOOL BOTHERS HIM SOME REQUIRING HIM TO LIE ON THE COUCH AND STRETCH OUT IN ORDER TO STRETCH THE LOWER EXTREMITIES OF HIS BODY AND THAT HE GETS STIFF AND SORE FROM SITTING. HE TESTIFIED THAT HE WORKS THREE DAYS A WEEK FOR SIX-HOUR PERIODS, IN ADDITION TO FULL-TIME ATTENDANCE AT SCHOOL. HE TESTIFIED THAT WHEN HE FIRST STARTED TO WORK, HE ATTEMPTED TO WORK SEVEN HOURS A DAY, SIX DAYS A WEEK AND THAT HIS PRESENT CAPACITY IS LIMITED TO THREE DAYS A WEEK OF SIX HOURS A DAY. HE STATED THAT HE HAD TO TAPER OFF BECAUSE HIS BACK KEPT GIVING HIM PROBLEMS CONSISTING OF LEG NUMBNESS AND PAIN IN THE LOWER BACK.

'IN RESPECT TO HIS EARNINGS, HE TESTIFIED THAT HE RECEIVED ABOUT 2.50 DOLLARS AN HOUR WHILE WORKING FOR THE BAILEY EQUIPMENT COMPANY AND THAT HIS PRESENT RATE AT THE SERVICE STATION IS 1.60 DOLLARS AN HOUR.

'DR. DONALD SMITH STATED IN HIS LETTER ADMITTED AS EXHIBIT NO. 1 THAT HE IS ABLE TO BEND FORWARD UNTIL HIS FINGERS ARE ABOUT 12 INCHES FROM THE FLOOR AND THAT THE EXTENSION OF HIS BACK IS LIMITED TO 50 PERCENT. DR. SMITH SETS FORTH OTHER FINDINGS IN THIS LETTER INCLUDING CERTAIN NORMAL REACTIONS AND THEN STATES AS FOLLOWS, 'THE PATIENT HAS TENDERNESS IN THE LOWER LUMBAR AREA AND PRESSURE OVER THE L4-5 INTERSPACE CAUSES PAIN AND TINGLING TO RADIATE DOWN INTO THE LEFT LOWER EXTREMITY.' DR. SMITH STATED AS HIS OPINION THAT THE CLAIMANT STILL HAS A PARTIAL HERNIATION OF THE DISC AT THE L4-5 LEVEL ON THE LEFT AND HAS A MODERATE AMOUNT OF PARTIAL DISABILITY. DR. SMITH EVALUATED THIS AS A 25 PERCENT LOSS OF FUNCTION OF AN ARM. DR. SMITH FURTHER STATED AS FOLLOWS, 'HE CERTAINLY HAS A DEFINITE LIMITATION AS FAR AS ANY HEAVY USE OF HIS BACK IS CONCERNED.' THESE

233 opinions were stated by letter on May 26, 1969.

'It appears that the Board of Review in concluding that the disability did not exceed the 48 degrees initially awarded, based its determination primarily upon the opinion of Dr. Smith that the disability was equal to 25 percent loss of function of an arm. It appears that the Hearing Officer based his opinion as to disability upon other factors including the inability to do heavy work which, in all probability, would not permit him to resume his former occupation. This Court recognizes the expertise of the Hearing Officer who examined the claimant and other witnesses and is of the opinion that there is substantial evidence to allow an award in excess of the 48 degrees initially allowed by the Workmen's Compensation Board. It will be noted that Dr. Smith indicates that the extension of the claimant's back is limited to 50 percent. The allowance of 150 degrees by the Hearing Officer amounted to approximately 46 percent of 320 degrees. It is the opinion of this Court that the evidence does not warrant the 50 percent of 320 degrees allowed by the Hearing Officer, but is definitely in excess of the 48 degrees or 15 percent of 320 degrees allowed by the Workmen's Compensation Board. This Court is of the opinion from reviewing the evidence as to the extent to which the claimant is able to work, the change in his occupation, the limitation on his general activities by reason of this unjury and the difference in the amount now being earned by the claimant, that his award should be 35 percent of 320 degrees, or 112 degrees of the applicable maximum of 320 degrees for other unscheduled injuries.

'An award of 112 degrees, therefore, will be allowed to the claimant.'

234 Reynolds, Edwin Adelbert, WCB No. 69-1322, WASHINGTON - Permanent Total Disability allowed.

235 Glover, Max L., WCB No. 68-304, HOOD - Appeal dismissed.

241 Billings, Ivin I., WCB No. 69-358, CURRY - Penalties and attorney's fees allowed.

254 Campbell, Andy, WCB No. 69-1766, MARION - Remand for hearing after settlement.

259 Pearson, John T., WCB No. 69-1478, CLACKAMAS - Disability adjusted to 48 degrees.

259 Murphy, Pat E., WCB No. 69-1132, MULTNOMAH - Affirmed.

266 Wendiandt, Donald K., WCB No. 69-1857, CLACKAMAS - Settled.

271 Sisson, Billy Joe, WCB No. 69-347, POLK - Affirmed.

278 Weber, William L., WCB No. 68-1572, LINN - Affirmed.

288 Carr, Darrell D., WCB No. 69-1150, MULTNOMAH - Neck award raised to 80 degrees.

289 Hamm, Barbara, WCB No. 69-2078, MULTNOMAH - Settled for reopening of claim.

298 McCoy, Alice, WCB No. 69-1298, MARION - Award fixed at 10 percent loss arm.

306 Fried, Tillie, WCB No. 69-1984, MULTNOMAH - Affirmed.

308 DeCoteau, Doris, WCB No. 69-1270, MULTNOMAH - Additional Temporary Total Disability, medicals and 48 degrees Permanent Partial Disability

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1 Fairbairn, Henry A., WCB #69-1608; Affirmed.

3 Parker, Orville F., WCB #68-72; Dismissed.

3 Fontana, Louis, WCB #69-925; Total disability allowed.

4 Van Damme, Raymond S., WCB #69-608; Affirmed.

5 Edwards, Oran, WCB #69-991; Hammond, J. "The above matter coming on to be heard on appeal by the claimant, Oran Edwards, from the determination order of the Workmen's Compensation Board and the Court having heard the argument of counsel and having reviewed the transcript submitted to the Court together with all exhibits, and the Court being advised in the premises, now therefore,

"THE COURT IS OF THE OPINION that the order appealed from properly determines the extent of the permanent partial disability of the claimant as to the losses by separation and loss of use of the several digits of his right hand and left hand and to the extent that the order appealed from determines that part of the claimant's disability by reinstating the determination order of February 20, 1969, it should be approved.

"THE COURT IS OF THE FURTHER OPINION, however, that the order appealed from should be modified by allowing claimant compensation for 10% loss of use of his right arm for injuries to the elbow of such arm as the same are described in the claimant's testimony and in the medical opinion of Dr. Arthur L. Eckhardt dated August 5, 1969 (claimant's Exhibit No. 2). In Dr. Eckhardt's opinion letter he describes the symptoms related to him by the claimant together with his analysis of the separation of portions of the digits and the resulting effect on the claimant's use of his hands and arm, and while he does not relate any objective findings with respect to loss of function of the right elbow neither does he minimize the subjective symptoms related by the claimant, and Dr. Eckhardt concludes his opinion in these words: 'I feel that his condition is stationary at the present time. I would consider the disabilities mentioned above to be permanent.' An order may be entered affirming the Order on Review of the Workmen's Compensation Board as modified in accordance with this Opinion by adding to the determination of disability described in the determination order of February 20, 1969 the additional item of 10% loss function of the right arm."

8 Boyer, Terence, WCB #68-1885; Piper, J. "The above entitled matter came before the Court February 10, 1970, on appeal from an Order on Review by the Workmen's Compensation Board denying claimant's claim for compensation; claimant appearing by Mr. David R. Vandenberg, Jr., his attorney; the State Accident Insurance Fund appearing by Mr. Earl M. Preston, Assistant Attorney General; and after hearing the statements of counsel and considering the record and the briefs and now being fully advised in the premises the Court finds:

"Claimant is a partner in a business in which all partners for many years have applied for and received coverage under the Workmen's Compensation Law. Claimant asserts that he sustained an accidental injury of

his back on August 21, 1968, in the course of his business and seeks the benefits of the Workmen's Compensation coverage. In order to prevail he must prove by a preponderance of the evidence a compensable injury, i.e. 'an accidental injury .... arising out of and in the course of employment requiring medical services or resulting in disability.....an injury is accidental if the result is an accident, whether or not due to accidental means'. O.R.S. 656.002 (6). Because he is a partner with permissive coverage 'no claim shall be allowed or paid under this section, except upon corroborative evidence in addition to the evidence of the claimant'. O.R.S. 656.128 (3).

"The State Compensation Department denied the claim assigning as its reason that the injury did not arise out of and in the scope of claimant's employment. The hearings officer considered the Department's position that the corroboration was insufficient and that claimant was on a deviation from his job and hence the injury did not occur in the course of his employment, but the hearings officer concluded that the doctor's medical report was sufficient corroboration and concluded that the injury occurred during a coffee break and so was not a deviation from employment and Ordered that the claim be remanded to provide the benefits of the Workmen's Compensation Law.

"The majority of the Workmen's Compensation Board on Review held that the accidental injury, if it occurred, happened when claimant made a deviation from his employment, and held further that the corroborative evidence was insufficient. In making this determination the majority of the Board found that the statute on corroborative evidence required 'evidence of such a stature that standing by itself the evidence would support a conclusion that an accident injury occurred in the course of employment'.

"In the Court's opinion O.R.S. 656.128 (Sub. 3) should not be so narrowly construed. The plain language of the statute requires 'corroborative evidence in addition to the evidence of the claimant'. O.R.S. 41.150 defines corroborative evidence thus: 'Corroborative evidence is additional evidence of a different character to the same point'. It is interesting that O.R.S. 656.128 (Sub. 3) was originally enacted as a part of Chapter 206, Oregon Laws 1941, and has ever since remained, but the Court can find no decision of the Supreme Court construing it.

"The majority of the Workmen's Compensation Board appears to have applied the test required under the Probate Claim statute, O.R.S. 116.555, Estate of Banzer, 106 Or. 654, and under the Survival statute, O.R.S. 30.080, DeWitt vs. Rissman, 218 Or. 549, both of which statutes contain identical language. Both have very stringent requirements because the lips of the other party to the transaction in each case are sealed by death.

"There are also corroborative requirements under Oregon's Criminal Confessions statute, O.R.S. 136.540, whose requirements have been interpreted to mean 'some independent evidence of the (corpus delicti)', State vs. Breen, 250 Or. 474; not to require the State to prove its case independently, State vs. Bodi, 223 Or. 486; also the Accomplice statute, O.R.S. 136.550, which has been interpreted to mean 'it is not the law that every material fact necessary to sustain conviction must be corroborated by independent evidence'. State vs. Doster, 247 Or. 336; also the Seduction statute, O.R.S. 167.025, which has been interpreted

8 to require corroboration of only two things: promising to marry and the having of illicit intercourse, although other elements of the offense are specified in the statute. State vs. Meister, 60 Or. 469. Under the Bastardy statute, O.R.S. 109.155, all corroboration has been interpreted to require only 'such independent evidence as strengthens, adds to and confirms her. It must be of some substantive fact, which, independent of her testimony, tends to connect the defendent with the offense. It may be either direct or circumstantial, or be wholly circumstantial, and however slight, must tend to identify the defendant as the guilty party. It is not necessary that the testimony of the prosecutrix be corroborated in every particular or upon every material point, but there must be a sufficient amount of confirmation to satisfy the jury of the truth of her testimony. State ex rel vs. Tokstad, 139 Or. 63. It has been observed that corroborative evidence may be slight and entitled to little consideration when standing alone. 30 Am. Jur. 2nd, Evidence, Section 1153, Note 2.

"Considering the evidence adduced by the claimant in this case, the doctors report is more than merely a self-serving statement. It is generally held that a patient who goes to a doctor for diagnosis or treatment is presumed to wish to recover from his illness, therefor as a policy of law what he says to the doctor is supposed to be the truth. The rule has been established allowing the doctor to testify to declarations made to him by the patient regarding pain and past and present symptoms. Applying this rule, Dr. Davis' report is corroboration of the fact that the claimant did sustain an injury on August 21, 1968, at about 6:00 P.M. to his back and that that part of his body had not been injured before.

"Is there in claimant's evidence any corroboration that the injury occurred in the course of employment? The testimony of the witness, Millard Ward, that in the usual course of claimant's business he called upon Cliff Yaden's Service in servicing his route late in the day on Wednesdays is additional evidence of the likelihood that claimant was following the established pattern at the time of the injury.

"Turning to the question of whether the coffee break was a deviation from employment, the Court believes that due to the nature of the employment and the position of the claimant as a partner and the long hours that he devoted to the work, that he can be reasonably said to have been authorized to take a coffee break.

"The Court finds that claimant's evidence meets the requirement for corroboration and that he has proved a compensable injury. Accordingly, it is,

"ORDERED that the determination of the Workmen's Compensation Board be, and the same is reversed and the cause remanded for acceptance of claimant's claim and an award of the benefits of the Workmen's Compensation Act; and it is further,

"ORDERED that an attorney's fee to be fixed by the Court is allowed to claimant, to be paid from the Fund as an administrative expense."

10 Cox, Joe, WCB #69-631; Award increased to 50% loss left foot.
12 Smith, Allard L., WCB #69-432; Affirmed.
13 Tolbert, William (Deceased), WCB #68-1646; Additional $9,365 stipulated.
20 Marvel, Robert E., WCB #69-1028; Bradshaw, J. "It is the Court's opinion first that claimant's Exhibit 1, received by the Court under advisement,

should not be considered by the Court as additional evidence not available at the time of the hearing, on the grounds and for the reason that the contents thereof are immaterial and irrelevant to the issue before the Hearings Officer since the condition described by the Exhibit relates to early January of 1970.

"It is further the opinion of the Court that the Order on Review of the Workmen's Compensation Board of December 15, 1969 is in error and should be set aside and the Opinion and Order of the Hearings Officer of September 9, 1969, and the provisions thereof, should be affirmed and set forth in an order of this Court.

"This conclusion is based upon a determination that certain findings of the Workmen's Compensation Board upon which their Order on Review was made, are erroneous. The Board stated "It appears to the Board that the hearings officer increased award may well represent the total picture including the limitations imposed by the residuals of the non-related coronary'. Quite contrary to this finding, the hearing officer's opinion and order specifically denied any permanent partial disability to the arm or other extremities and specifically denied payment of medical and hospital charges incurred under Dr. McGreevey's care. These matters specifically were related to claimant's coronary condition and obviously the hearing officer excluded the effect of this coronary condition as not having a causal relationship to the accident.

"Secondly, the Board stated 'It is the residual from the coronary which now precludes the claimant from truck driving.'

"First of all the transcript does not appear to absolutely preclude the claimant from truck driving but simply contains an intent on his part to seek other occupation because of the difficulty of performance as a truck driver. Also, claimant's testimony on pages 19, 22 and 23 specifically refers to the effect of neck and back injury upon his ability to drive truck.

"There may have been at the time of the hearing some residual of the coronary that effected his ability to drive truck, but this was only part of the cause and the transcript shows a godd part of the cause of difficulty in truck driving to be due to the condition of his back and neck injury.

"The Board states that it was particularly impressed with the report of Dr. Dennis, May 16, 1969, which the Board considers to reflect that the residuals from the accident at issue are actually minimal. Actually Dr. Dennis' report was 'It would be my impression this patient had very little residual from his neck injury although under certain circumstances still becomes symptomatic as far as his neck is concerned'. Further the doctor states 'I would expect with appropriate work this patient would get along reasonably well in the future.' The report fails to indicate the doctor's meaning of appropriate work. Certainly such a statement raises an inference indicating work other than as a truck driver.

"This case creates a difficult problem in segregating the effect of the neck and back injury and the effect of the coronary condition. Dr. Owen's consistent opinion was moderate amount of permanency due to superimposement. The Hearings Officer was the only person who had the

20 advantage of having the claimant testify under oath before him, and therefore determining the credibility of his testimony which would be an important factor in setting the degree of disability within the confines of 'moderate amount of permanency' or the findings of Dr. Dennis as quoted above.

"Based upon the above findings, this Court orders that the Compensation Board's Order on Review be set aside and an order entered affirming the Hearings Officer's determination and order.

"The Court will further award claimant attorney's fees in the sum of $400.00 for appearance on appeal to the Workmen's Compensation Board and appeal to the Circuit Court therefrom."

Bradshaw, J. "The Court was asked to review its award of attorney's fees to be paid by the defendant, it being the employer's position that the statutes do not provide for attorney's fees in this particular circumstance.

"It is true in this case that the employer initiated a review to the Board and was sustained by a reversal of the Hearing Officer's finding. Under such a decision the Board could not award attorney's fees. The appeal from the Board to the Court was initiated by the claimant and, of course, the statute does not provided for attorney's fees on an appeal initiated by a claimant. However, whereas in this case the Court finds that the Board's finding upon review was in error, it follows that if the Board had not erred, then the Board, pursuant to ORS 656.382, should have awarded attorney's fees.

"Therefore, it is the opinion of this Court that when the Court finds that the Board did err, this error would include the failure to award attorney's fees, and therefore this Court has authority to correct the Board's error to that extent by awarding attorney's fees. Therefore the Court shall award attorney's fees to the defendant to be paid by the employer in the amount of $400.00.

"The Court has previously entered such a judgment order so therefore it would appear no further order need be entered."

23 Jones, Steven L., WCB #69-1278; Award increased to 128°.

29 Housley, Robert L., WCB #68-1795; Affirmed; Attorney fee set at $150.00.

30 Janssens, Martin, WCB #69-938; Affirmed.

32 Barron, Floye, WCB #69-1147; Dale, J. "This is an appeal from an order of the Workman's Compensation Board which is dated December 22, 1969, wherein the Board affirmed the hearing officer, holding that since this was an occupational disease claim the factual findings of the Medical Board of Review were final and binding as provided in ORS 656.810(4), and, further holding that the occupational disease law was not constitutional for failing to provide claimant with a further hearing with respect to the extent of his permanent disability. The case involves some very interesting questions concerning the occupational disease law and certain procedural aspects connected with it.

"The claim arose on June 19, 1966 when the claimant, while working as a machinist for F. W. D. Wagner Co. was repairing and cleaning a compressor and in the process of doing so inhaled certain solvent fumes. His exposure to the fumes extended over a period of not more than two hours on this one occasion. After finishing work on that day he had a

severe headache, his eyes and ears were irritated and he had the taste of solvent in his mouth. The next morning he developed more headache, some nausea and fatigue and while at work the next day developed chills and then vomiting and diarrhea which led to hospitalization.

"The claimant filed an 801 form with the employer on February 21, 1967. The claim was tentatively accepted, but thereafter the employer, on October 13, 1967, formally denied it. After further skirmishing a hearing was held which resulted in the opinion and order of the hearing officer of January 22, 1968. A number of issues were decided by the hearing officer. At this time it is only necessary to note that the hearing officer stated that the claim would be treated for procedural purposes as an occupational disease claim and that it had been filed within the required time limits but that it was not compensable because the claimant had not sustained an occupational disase within the definition of that term in the statute. The denial of the claim was affirmed. Within the appropriate time limit claimant filed with the Workman's Compensation Board his rejection of the hearing officer's order and a request for formulation of the Medical Board of Review and for certification of legal issues to the Circuit Court and, further, in the alternative, he requested that the Board review the entire record, asserting that the claim constituted an accidental injury rather than an occupational disease claim.

"Thereafter the Workman's Compensation Board referred the case to the Medical Board of Review. Apparently the case was never certified to the Circuit Court for determination of the legal issues nor did the Board itself make a finding as to whether the claim was one for an accidental injury or for an occupational disease. The Medical Board of Review, in answering the question set forth by the statute, found that the claimant had sustained an occupational disease which arose out of and in the course of his employment and awarded him some permanent partial disability equivalent to 50% of the loss of an arm.

"On October 17, 1968, the Closing and Evaluation Division of the Workman's Compensation Board issued its determination order stating that the claimant was entitled to an award of permanent partial disability in accordance with the findings of the Medical Board of Review.

"On June 29, 1969, claimant requested a hearing urging that his permanent disability was greater than that awarded to him and asking for a hearing on the issue of whether his disability was the result of an accidental injury and not from an occupational disease. The hearing officer held that the finding of the Medical Board of Review on the question of whether this was an occupational disease was final and not reviewable by him. The Workman's Compensation Board affirmed on December 12, 1969 as noted above.

"This does not constitute a full summary of all the hearings and other proceedings which have been held concerning this claim but it does set forth those that are pertinent at this time.

"The first question to resolve is whether this claim is one for an accidental injury rather than an occupational disease. The employer, and of course this was the position of the last hearings officer, contends that this question was answered in the negative by the Medical Board of Review and that this finding of the Medical Board of Review is final and

and binding as provided by ORS 656.814. This court does not agree with the hearing officer in this respect. ORS 656.810(4) does provide that the Circuit Court on appeal shall determine the legal issues. The question of whether this claim should be classified as an accidental injury rather than an occupational disease is obviously a legal question rather than a medical one. A reading of the medical report filed by the Medical Board of Review when answering the statutory questions makes it clear that when they stated, in answer to question number one, that the claimant had sustained an occupational disease they were not attempting to distinguish between an accidental injury and an occupational disease but were merely holding that from a medical standpoint the claimant's disease had arisen out of his employment.

"It should be observed that since the passage of occupational disease laws there have been only scattered decisions distinguishing between an occupational disease and an accidental injury. The obvious reason for this is that the claim would be compensable regardless of how it was classified. Professor Larson in his text, Vol. 1A Larson on Workmen's Compensation, Sec. 41.31, states that the difference between an accidental injury and an occupational disease depends upon the (1) unexpectedness of the conditions and (2) time-definiteness. In other words, an occupational disease is a disease which arises from conditions which are inherent in the employment and therefore not unexpected and the onset of the disease was gradual rather than sudden. The Oregon Supreme Court has discussed the matter in somewhat similar terms. Banister v. SIAC, 142 Or. 97, 19 P2d 403; Concannon v. Oregon Portland Cement, ___ Or. ___, 87 OAS 447, 2 Will. L. J. 16 et seq., Oracle, Workmen's Compensation Practice in Oregon Sec. 5.7, 6.2.

"Dodd v. SIAC, 211 Or. 99, 310 P2d 324, 311 P2d 458, 315 P2d 138, is cited by the employer and also the Board. The inference is that the Dodd case holds that a throat irritation from smoke inhalation is an occupational disease. Actually the case does not so hold. The case holds that the claimant had acquiesced in the Commission's position that an occupational disease was involved and that therefore at a much later date he could not come back and claim that it was an accidental injury.

"Applying the criteria set forth in Larson it would appear clear that in this case the disease which the claimant sustained is an accidental injury and not an occupational disease. It did not arise from something that was expected as an inherent hazard of the employment and it did not have its onset from a gradual exposure to such a condition and was in fact something that arose suddenly from a short exposure to the solvent fumes.

This leaves the question of whether claimant is still in a position to raise this question. First of all it should be noted that the 801 claim form does not require the claimant to elect between an accidental injury or an occupational disease claim. Secondly, after the original determination on January 22, 1968, that the claim would be treated as an occupational disease claim, the claimant not only requested a Medical Board of Review but also requested that the Board determine the question now under discussion and also asked that the legal issues be certified to the Circuit Court. As nearly as can be determined the Board did not do anything other than refer the matter to a Medical Board of Review. Under these circumstances it would appear to this court that the claimant

32 still has standing at this time to contend, as he consistently has done, that an accidental injury is involved.

"This court having determined that it is an accidental injury claim, the matter is referred back to the Workman's Compensation Board for the purpose of providing a hearing to determine the extent of claimant's permanent partial disability."

36 Heathman, Harold R., WCB #69-587; Kaye, J. "The above named claimant appeals to the Circuit Court for a judicial review of the order of the Workmen's Compensation Board dated December 29, 1969 in which order the Board denied claimant's claim of permanent total disability and for benefits to which he would be entitled pursuant to such rating.

"Claimant contends first that the findings of his attending physician, Dr. Robert E. Begg, that claimant is permanently disabled so far as performing heavy work is concerned (Exhibit 18), and, second, that claimant is 'functionally illiterate' (Exhibit 26) is equivalent to permanent total disability under Oregon law relating to Workmen's Compensation awards.

"The employer contends that claimant's disability, if any, is a result of lack of motivation and obesity and claimant's failure or refusal to do anything about either (Exhibits 13 and 14).

"Claimant contends that because of inability to do heavy work and being 'functionally illiterate' he cannot function as a 'normal person.' Does this mean claimant can do nothing by way of gainful employment?

"Claimant relies upon Dr. Begg's findings that he can do no heavy work (Exhibits 18, 20 and 21), In each of the numbered exhibits Dr. Begg states in substance that claimant 'could do light work if available' (Exhibit 18), 'could carry on light work and be self-sustaining' (Exhibit 20), and in Exhibit 21 restates his conclusions as set forth in Exhibit 20.

"The cross-examination of claimant as to his efforts to find 'light work' is reflected in the transcript of the proceedings before the Hearing Officer, and, particularly commencing on page 19, line 14 through line 12 on page 20, again, on page 23 at line 4 and continuing through page 26.

"The contention of the claimant to be classified permanent total disabled is similar to the contention of the workman in Jones v. State Compensation Department, 250 Or. 177. In Jones the claim for permanent total disability was asserted because of the workman's loss of use of his right arm and by reason of advanced age, lack of education and limited training. The workman was substantially unemployable. The Supreme Court rejected that contention as Oregon law does not provide for compensation benefits because of the claimed deficiencies.

"In the Court's opinion the Jones decision is applicable in this case.

"The order of the Workmen's Compensation Board dated December 29, 1969 is affirmed."

37 Parnell, Arthur M., WCB #68-1821; Date that acceptance of aggravation claim adjusted to day that claim filed.

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40 Higgins, Donna M., WCB #69-743; Affirmed.
44 Fisher, Jess C., WCB #68-1834; Affirmed.
48 Stegmann, Walter F., WCB #68-1503; Remanded for evidence of earning capacity.
49 Stone, Andrew W., WCB #69-1020; Affirmed.
51 Svatos, Albert L., Beneficiaries of Deceased, WCB #68-2021; Affirmed.
62 Zimmer, Jack H., WCB #69-1076; Order of the hearings officer reinstated.
63 Williamson, Darrell B., WCB #68-1919; Remanded.
65 Klika, Cyril, WCB #68-1620; Award set at 50% loss function each arm.
76 Liggett, Herbert, WCB #69-797; Award increased to 50% loss workman.
78 Debnam, Clarence, WCB #69-2224; Bryson, J. "The Court has reviewed the file, which consists solely of the Notice of Appeal, an envelope from the office of Noreen A. Saltveit, Attorney, post-marked Dec. 4, 1969, PM, and marked 'Received Dec. 5, 1969, Workmen's Comp. Board'; a petition of some type setting forth Issues 1., 2., 3., signed by Clarence Debnam, claimant, and N. A. Saltveit, Attorney, marked 'Received Dec. 5, 1969, Workmen's Comp. Board,' with the additional notation: 'Duplicate originals by mail and shuttlebus to WCB'; forwarding letter of December 4, 1969, on MESSAGE-REPLY stationary marked 'Received Dec. 5, 1969, Workmen's Comp. Board'; letter of December 11, 1969, to H. W. Plunkett, Workmen's Compensation Board, signed by Noreen A. Saltveit, Attorney, marked 'Received Dec. 12, 1969, Workmen's Comp. Board Hearings'; letter of December 15, 1969, to J. S. Fullerton, Workmen's Compensation Board, signed by Noreen A. Saltveit, Attorney, marked 'Received Dec. 18, 1969, Workmen's Comp. Board Hearings'; letter on MESSAGE-REPLY stationary dated December 29, 1969, addressed to Henry Seifert, Hearings Officer, signed by Noreen A. Saltveit, Attorney, marked 'Received Dec. 31, 1969, Workmen's Comp. Board Hearings'; Order of Dismissal by Hearing Officer dated December 24, 1969; letter of January 5, 1970, to Workmen's Compensation Board signed by Noreen A. Saltveit, Attorney, marked 'Received Jan. 7, 1970, Wm. A. Callahan,' with accompanying envelope post-marked 'Portland, Or. Jan 6 PM'; Order of Dismissal signed by all Compensation Board members, dated January 16, 1970; Certification of Record signed by M. Keith Wilson, Chairman.

"The letter of January 5, 1970, supra, titled 'Request for Review,' sets forth three grounds, and the last paragraph reads:

> 'In view of the fact that a factual question regarding receipt of the Request for Review on December 4, 1969, has arisen, it is requested that said matter be remanded forthwith to a hearings officer for the taking of such testimony as may determine the factual question prior to a review by the Board.'

"The above-quoted paragraph sets forth the issue in this case, as elaborated on at the time of argument by both counsel. December 4th was the last day upon which notice could be given by Claimant for a hearing, assuming that the instrument dated December 4, 1969, setting forth three issues is such a request.

"The letter of December 29, 1969, Saltveit to Seifert, sets forth the Claimant's contention that Claimant's attorney 'personally delivered the duplicate original of Request for Review to the shuttle-bus driver - - -. - - -I know that the one Request for Review did in fact reach the Board on the 4th but must have been mislaid there - -.'

"The Notice of Appeal sets forth:

> '5. Appellant is dissatisfied with the Order of the Workmen's Compensation Board dated January 16, 1970, and hereby appeals to the above entitled Court.
>
> '6. Appellant prays for the following relief: that his claim be determined in accordance with the hearings provisions of the Workmen's Compensation Act; that his Request for Hearing be determined to have been filed within the statutory year period as provided by law. to-wit, on December 4, 1969; and that said Request for Hearing be set down for hearing and for a determination of said claim on its merits and that the Order of Dismissal be set aside in its entirety.'

"ORS 656.298(6) provides:

> 'The circuit court shall be by a judge, without a jury, on the entire record forwarded by the board. The judge may remand the case to the hearing officer for further evidence taking, correction or other necessary action. However, the judge may hear additional evidence concerning disability that was not obtainable at the time of the hearing. - - - and make such disposition of the case as the judge determines to be appropriate.'

"As set forth in the Order of Dismissal, ORS 656.319(2)(b) provides in part as follows:

> '.....a hearing on such objections shall not be granted unless the request for hearing is filed within one year after the copies of the determination were mailed to the parties.'

"The question, therefore, is: Was the request filed on December 4th.

"Neither party has filed a memorandum or brief on the law for the benefit of the Court.

"In Demitro v. State Industrial Accident Commission, 110 Or. 110, P. 112, the Court said:

> 'The whole scheme of the workman's compensation law is purely statutory and not acoording to the course of 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. ..... A good reason for requiring service upon the Commission by registered mail is that the personnel of the Commission is subject to change so that service upon an individual who at the time may or may not be a member of the Commission would not be fair or effective to charge the whole Commission.'

"In Johnson v. Compensation Department, 246 Or. 449, 453, the Court stated:

> 'The legislature has provided a relatively [tight] limitation statute for compensation claims.....'

"In Charco, Inc. v. Cohn, 242 Or. 566, 571, the Court stated:

> 'As we held in Fisch-Or, filing is the delivery of the document to the clerk of the court with the intent that it be filed.'

"In In re Wagner's Estate, 182 Or. 340, the respondent moved to dismiss the appeal for lack of timely filing. In that case the attorney made an affidavit that:

> '[I served the Notice of Appeal to the Supreme Court of the State of Oregon in the above entitled suit on Teiser and Keller, attorneys for the respondents, ...I laid said Notice of Appeal.....on the usual place to file papers in the Circuit Court of the State of Oregon for Multnomah County, to-wit, on the desk of the Deputy County Clerk assigned to receiving and recording Circuit Court papers; that there was no one right at the usual filing place when so I left and went about other business; ...]'

"The Court, at P. 342, said:

> '[A paper is said also to be filed when it is delivered to the proper office, and by him received to be kept on file.] * * *
>
> 'This court has several times held that a paper cannot be deemed to have been filed unless it is not only delivered to the proper official, but also received by him. For instance, In re Conant's Estate, 43 Or. 530, 73 P. 1018, the decision says:
>
> '[A paper or document is filed within the meaning of this statute when it is delivered to and received by the clerk to be kept among the files of his office.]
>
> 'In Bade v. Hibbard, 50 Or. 501, 93 P. 364, the court said:
>
> '[A paper is filed in contemplation of law when it is delivered to the proper officer with the intention that it shall become a part of the official record, and by him received to be kept on file.]
>
> 'We do not believe that the act of the appellant's counsel in laying the notice of appeal upon the desk of a deputy county clerk during the absence of the letter constituted a filing of the paper.'

"In Rosell v. State Industrial Accident Commission, 164 Or. 173, P. 192, the Court stated:

> 'One of the conditions the law imposes on the right to receive compensation is that applications therefor must be filed within certain designated time. Neither the commission nor the courts have authority to waive this requirement of the statute.'

78 "The Oregon statute, 656.319(2)(b) provides that a request for a hearing must be filed. Several other sections of the statute use the same language. The mailing on December 4 PM and the delivery of a copy of the Request for Hearing to the shuttle-bus would not meet the standard laid down by the Oregon Supreme Court. Claimant's attorney urges that the Hearing Officer re-open so that she can establish by additional evidence what might have happened to the Request, but from the reading of these cases, even if her contention is completely true, she could not establish that the papers were filed as required by the statute. For this reason there would be nothing gained by remanding the case to the Hearing Officer for the taking of further evidence.

"Based on the above, proper Findings of Fact and Conclusions of Law should be submitted to this Court for signature."

80 Tisch, Steve P., WCB #69-902; Settled.
82 Schneider, George, WCB #69-1134; Award increased to 25% workman.
83 Magnuson, Arthur E., WCB #69-862; Dismissed.
84 Fillingham, Kent E., WCB #69-528; Affirmed.
87 Arends, Dan L., WCB #69-1034; Wilkinson, J. "This matter came on for review. The record is based entirely on the medical records and arguments of counsel. No testimony was offered by the claimant in person.

"I have examined the record, and it appears that claimant sustained a back injury while unloading a 12x12 timber, and was operated on for removal of a lumbar disc. This occurred in December of 1966 and claimant returned to work in March of 1967, but because of pain he was rehospitalized by Dr. Berg in June of 1967 and was reoperated on for removal of a disc on July 8, 1967. A spinal fusion was done at this time. Thereafter, he returned to work in May of 1968 and, sofar as known, is working in Montana at the present time.

"In Dr. Berg's medical report, he stated that permanent partial disability would be rated in the vicinity of 65 percent loss function of a leg. The closing Evaluation Division made a conversion of this to 45 percent loss of an arm by separation, and it is the contention of claimant this should not be done, that his award is inadequate and that Dr. Berg should not have made any such evaluation, but should have left the evaluation to the Evaluation Division. In any event, it is claimant's position that he is entitled to a greater award for permanent disability than was given by the Hearing Officer and Workmen's Compensation Board.

"Considering the record as made in this case, it is my opinion that the 86.4 degrees as awarded is a correct rating and I am, therefore, not changing the rating given by the Hearing Officer or the Board.

"Counsel may prepare Findings and an Order in conformity herewith and submit the same for signature and filing."

90 Darby, John R., WCB #69-1645; Allowed period of temporary total disability.
93 Swerdlik, Harry, WCB #69-917; Allowed 19.2° more.
96 Staley, Thelma, WCB #69-1510; Affirmed.
100 Heurung, George A., WCB #69-1143; Edison, J. "The matter before the Court involves an appeal from the order of the Workmen's Compensation Board dated January 23, 1970. The Board's Order affirmed the Order of the Hearings Officer herein dated October 15, 1969 in which the Hearings

Officer made a permanent partial disability award to the Claimant equal to 25% of loss of arm by separation for unscheduled disability. The Claimant contends that the award is inadequate and the Respondent asserts the opposite. The matter is before the Court on the record together with a brief filed only by the Respondent.

"The Claimant contends that this court, upon review of the record, could determine that the award is inadequate because of the severity and extent of the injuries and the failure of the Hearings Officer to recognize them as such. The Claimant also makes the point that since the Hearings Officer failed to file his order within thirty days of the time prescribed for doing so by law, he lost jurisdiction of the matter and therefore, the affirmation of his order by the Board is a nullity. The Court understands Claimant's point to be that because of this late filing, the Court is not bound by the doctrine of Romero vs. SCD, 250 Or 368, in which the trial court is directed to consider the expertise of the governing agency in such matters. Claimant, in this setting, deems the Hearings Officer to be only a 'fact gatherer' rather than a 'fact finder' and that this Court is therefore the first tribunal who will be making valid finding of fact and that the court is not bound to ascribe any particular expertise to the preceding hearings' officials.

"The Respondent asserts that this Court is bound to recognize the Romero doctrine. It is further contended that the Claimant has no standing in this court because of the failure to file a brief in which he would be required to specifiy the points raised on appeal; that by virtue of ORS 656.128 the Claimant, being a self-employed person, has a greater burden of proof than an employee which the Claimant has not met herein; and that by virtue of ORS 656.222 this Court is required to give effect of prior disabilities of the Claimant in reviewing the award previously made herein.

"First of all, it would appear that by virtue of ORS 656.295 (5) and ORS 656.298 (6) the Court is to decide matters such as the instant case upon the record and such oral or written argument 'as it may receive'. The Court can find nothing in the Code requiring the filing of a brief by either party and since it appears to be a discretionary matter with the Court, this Court chooses not to require the filing of the same and will proceed to decide the case upon the oral arguments together with the rest of the record.

"Regarding Respondent's contention that there is a greater burden of proof on this claimant by virtue of his self-employment status, it would appear from ORS 656.128 (3) that there is no greater burden upon this type of Claimant but there is a requirement that there be corroborative evidence of the Claimant. The Court finds that there is corroboration of Claimant's evidence herein.

"Regarding the contention that the Court is bound by ORS 656.220, I will note for this record that this Court has given due regard to the combined effect of Claimant's prior injuries and money received for such disabilities and the injury for which he is now before the Court.

The Court would note, however, that it is possible to make an award herein which causes the total of all such awards to exceed 100% of the maximum allowable for a single injury. Green vs. SIAC, 197 Or 160.

"Regarding Claimant's contentions that the Court is not bound by Romero, the Court feels that the Claimant's assertion is more logical and reasonable. This is because ORS 656.289 seems to establish a jurisdictional requirement that a Hearings Officer determine matters of this nature and make an order in accordance therewith not later than thirty days after the hearing. Since this has not been done, this Court finds that the hearings officer lost jurisdiction of this cause, that the Court is the first finder of true fact herein and is not bound by any previous purported findings. In reviewing the record de novo and considering the medical authorities cited by Claimant in the oral argument, it would therefore appear to the Court that the award of 25% of an arm is inadequate. This Court finds that an adequate award would be 35% loss of an arm by separation for unscheduled disability.

"This Court would further find, that if the Hearings Officer and the Board had jurisdiction to find facts and to review orders, then it would still appear that the Hearings Officer has not given due regard to the nature and extent of Claimant's injuries in view of the medical testimony and the substantial surgical treatment which was required in an attempt to partially solve Claimant's problems and disabilities. This finding is made with due regard to the expertise of the administrative agencies which have previously dealt with this case but that by a free exercise of this Court's judgment in an appraisal of the evidence and the record, it would appear that the Claimant is nevertheless entitled to an award of 35% of loss of an arm. See Ryf vs. Hoffman Const. Co., 89 OAS 483."

101 Stevens, Bernice L., WCB #67-1217; Williams, J. "Upon conclusion of the arguments in the above entitled cause on July 17, 1970, I took the matter under advisement and have now had an opportunity to review the entire transcript in each of the proceedings, not only once but twice, and have reached my conclusion. I apologize for the long delay in informing you of my decision.

"The evidence taken before the hearings officers reveals that the claimant is at this time approximately 59 years of age and she has sustained three injuries to her back area in general. The first injury was sustained in 1958 resulting in a laminectomy; the second in 1965 while an employee at Fairview Home, and the 1965 injury continued to be of some difficulty to the claimant, in varying degrees, up until the time of the present injury and the one under consideration, which occurred April 27, 1967. The present injury was sustained while the claimant was an employee at Fairview Home when she slipped and fell in a shower area and striking her left side, principally the left shoulder area, against a shower wall.

"There is no question from a review of the transcript of the proceedings, and upon consideration of all medical reports that were filed and received in evidence by the hearings officer that the claimant did sustain an accidental injury to her back in April, 1967 resulting in permanent partial disability, and the sole question for determination by the Court is the extent of that permanent partial disability

arising from and as a proximate cause therefrom.

"The first hearings officer who heard the testimony of the claimant, and therefore observed her demeanor, made an award for an unscheduled partial disability equal to fifteen per cent loss of an arm by separation. The first hearing was conducted on June 12, 1968. The matter was before the Workmen's Compensation Board on January 14, 1969, and that Board affirmed the earlier order of the hearings officer. The order of the Workmen's Compensation Board was appealed to this Court and at the time of the hearing the matter was remanded to the hearings division for further medical testimony. I find no formal order in the file remanding the matter to the hearings officer for further testimony, but I recall that the claimant had been referred to a specialist whose name was Dr. Tsai, and that Dr. Tsai had not completed his examination, and this Court remanded the case for further medical testimony only. Therefore the testimony of the lay witnesses at the time of the hearing after the remand has not been considered by this Court in its determination of the issues before me. I have considered only the medical evidence upon rehearing.

"After reading and reviewing all of the exhibits and a transcript of the oral testimony I have concluded that the claimant is entitled to an award greater than fifteen per cent loss use function of an arm for an unscheduled disability. The opinion of Drs. Melgaard and Kimberly that a rating of fifteen per cent disability is sufficient, and which opinion was relied upon by the Workmen's Compensation Board in its order dated January 26, 1970, was arrived at notwithstanding either doctor was unable to make an objective finding. Dr. Tsai was however able to make objective findings, as did Dr. Spady, and concluded that there is a very definite pressure deformity, and this finding is substantiated by an objective neurological deficit.

"The evidence established that the claimant has been unable to return to work as a nurses' aid. The question of loss of earnings and whether or not the ability to return to work is relevant in such cases has now been settled by Ryf vs. Hoffman Construction Co. decided by the Oregon State Supreme Court in October 22, 1969. It is now established that loss of earnings is a factor to be considered in awarding permanent partial disability for an unscheduled back injury. This had not been decided when the hearings were conducted before the hearings officers.

"This Court does not discredit the medical report of Dr. Tsai to the same extent that the Workmen's Compensation Board apparently did by reason of an error in the history as recited in that report as to how the accident occurred. There is evidence that the claimant's emotional condition deteriorated prior to the time she consulted Dr. Tsai, and therefore the error, if in fact the claimant made one, may have been an honest one, or the error may have been made by the person recording the statement. There are discrepancies in the oral testimony of the claimant during the hearing as to which portion of her body struck the shower wall. At one point she testified that she 'hit her left side.' She later testified that she 'thought she hit the left shoulder', and did not think that she 'struck any other portion of her body'. Other discrepancies appear in the history given the other doctors as recited in their various medical reports.

101 "After considering a transcript of all of the testimony and all of the medical reports and exhibits inroduced and received in evidence during the hearings, I have concluded that the claimant has sustained the burden of proof in establishing that her disability exceeds the fifteen per cent disability heretofore allowed, and find that the evidence warrants a disability of thirty (30%) per cent loss of an arm by separation for an unscheduled disability.

"Mr. Kropp may prepare an order in accordance with this letter, and submit the original to me for my signature and filing and forward a copy thereof to Mr. Hall."

104 Grosjacques, Raymond (Deceased), WCB #68-1380; Affirmed.

106 Henderson, Charles, WCB #68-439; Affirmed.

111 Luce, Arthur, WCB #69-384; Bowe, J. "Claimant was injured while an employee of J. W. Copeland Yards while attempting to lift a roll of roofing material. The matter was referred to the Compensation Department which made an award of permanent partial disability equal to 15 percent loss of an arm by separation for unscheduled disability. Claimant appealed and the matter was heard by one hearings officer but referred to a different hearings officer for decision. The hearings officer on November 4, 1969, entered an opinion and order in which he granted Claimant an award of permanent total disability, and the Compensation Department appealed to the Compensation Board, which reversed the hearings officer by an order dated January 28, 1970.

"The Court has read the transcript of evidence and the briefs which have been submitted. It is the Court's opinion that the evidence does not support any award of permanent total disability. While it is true that the Claimant is suffering from some disability, it is the Court's opinion that the greatest portion of his disability stems from injuries or illnesses wholly unrelated to this compensable injury. While it is true that the disability evaluation of the various federal agencies rated Claimant as totally disabled, it appears to the Court that the claim is rated on claims other than the compensable claim of Claimant.

"It is the opinion of the Court that the award of Workmen's Compensation Board on Review is fair and just and that an order establishing Claimant's disability as permanent and partial to the extent of 48 degrees is adequate.

"An order affirming the Workmen's Compensation Board's order may be presented by the attorneys for the employer."

112 Klever, Charles C., WCB #69-202; Hieber, J. "The undersigned has carefully examined the record and the court cannot say with any degree of conviction what the proper result should be. Therefore, the court defers to the administrative agency and affirms the result reached by it.

"See Hannam vs. Good Samaritan Hosp., Vol. 90, Adv. Sh. 1517, 1531.

Surratt vs. Gunderson Bros., Vol. 90, Adv. Sh. 1721."

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114 Borders, Richard W., WCB #69-1051; Wilkinson, J. "The above-entitled matter came on for review. Claimant was awarded 20 percent for unscheduled disability for injury to his back. He fell off a ladder while picking fruit. The medical report of Dr. Cherry indicates he suffered a severe compression fracture of the 12th thoracic vertebra and mild compression fracture of the first lumbar vertebra. The injury healed and the condition is now stable, however, he does have some wedging. Also, according to Dr. Cherry's report, he does have a permanent residual injury.

"The record discloses that he had a very poor work record prior to the accident and after the accident has not been employed on a steady basis. He attributes part of his poor work record to his marital life and claims he was not able to settle down and work on a regular basis. It is apparent that the Hearing Officer and Board took the work record into strong consideration and concluded that: 'The nature of the claimant's employment and the extent of his earnings does not establish any impairment of claimant's earning capacity.'

"However, I have reviewed the entire record and it is my opinion claimant has actually suffered a severe injury which does impair his ability to work. He has made some attempt to work after the accident and finds that work involving the use of his back impairs his ability to carry on any kind of an occupation involving lifting over any prolonged period of time.

"I do not believe that the 20 percent or 64 degrees is sufficient under the circumstances described by the doctor's report and am, therefore, awarding an additional 10 percent, making a total award of 30 percent disability. Poor work record or not, he is entitled to the same consideration any other person would get for the same type of injury and I do not believe the Board has given sufficient consideration in this respect. In my opinion the work record should not be a controlling factor as he has suffered a severe injury and is just as disabled as any other person with that type of injury.

"Counsel may prepare a decree in conformity herewith and submit the same for signature and filing."

115 Antoine, Leona, WCB #69-1136; Affirmed.

118 Hickman, Glenn M., WCB #69-1071; Affirmed.

122 Fellon, Lloyd, WCB #69-1495; Kaye, J., "The issue in this case is the extent of claimant's disability. The Hearing Officer allowed an award of 80 degrees of a maximum of 320 degrees for an unscheduled disability. The Workmen's Compensation Board reduced the award to 32 degrees. The claimant has appealed.

"The opinion of the Hearing Officer suggests that the opinions of the claimant's treating doctor, Doctor William Parsons, did not give full consideration to the fact that when the claimant returned to work in December, 1968, he, the claimant, was not able to perform the heavier physical work of a millwright. The Hearing Officer placed more weight upon the evaluations made by Doctor G. G. Kunz of Tacoma, Washington, and Doctor Arthur C. Jones of Portland in their findings that the claimant could not perform heavy work because of a weakness in his back resulting from the original injury which was the subject of the pending claim."

122 "It is to be noted, however, that in Doctor Parsons' report of April 14, 1969, he states as follows:

> 'He was last seen in this office for a follow-up office call visit on November 14, 1968. At that time we felt that he had improved enough to return to his employment. Today, he returns for a closing examination stating that he has been doing quite well and has not had any pain whatsoever in his back or legs. He has been working ever since dismissed from this office in November. He has not had to miss any work because of recurrent pain. At the present time the patient is asymptomatic.'

"It appears to be reasonable that the doctor upon being advised by the claimant of the fact that the latter had been working since his release by Doctor Parsons in November, 1968, would have made some inquiry as to the nature of the work being done, and upon being advised of the nature of the work, would have taken that into consideration in his closing evaluation.

"The Hearing Officer acknowledges that the reports of doctors Kunz and Jones were based 'largely' upon claimant's history, much of which came from the claimant.

"Without attempting to weigh the credibility of one or more doctors as opposed to any other doctor, this Court is of the opinion that Doctor Parsons' report and evaluations have more substance because of his more direct association with the claimant throughout the entire period of time commencing with the date of the injury.

"Doctor Kunz's report of July 18, 1969, states, 'Evidently this patient had been notified by the Oregon Compensation Board that he is to receive a settlement of ten per cent PPD.'

"Reference has been made by Counsel in their respective briefs to the case of Ryf v. Hoffman Construction Co., 89 Or AD SH 483, which case holds that evidence of earnings prior to injury as opposed to earnings after injury may be considered in addition to medical evidence on the question of increasing an unscheduled disability award. Mr. Fellon's testimony as reported in the transcript indicates that he was earning a higher rate of pay per hour after he left Dwyer than he was earning at Dwyer upon his return to work after the injury. The Court does not base its determination on the fact of increased earnings after the injury, but has taken it into consideration together with the medical testimony above referred.

"The order of the Workmen's Compensation Board dated February 3, 1970, is affirmed."

123 Weedeman, Earl L., WCB #69-852; Award increased to 160 degrees.
132 Pearson, Earnest A., Deceased, WCB #69-768; Affirmed.
134 Peterson, Richard, WCB #69-667; Affirmed.
137 Clower, R. L., WCB #67-1294; Dismissed.
138 Mardis, John H., WCB #69-1228; Affirmed.
150 Sharp, William, WCB #68-1656; Woodrich, J. "The issue in this case is the extent of claimant's permanent disability resulting from his industrial accident of October 7, 1966. Claimant contends he is permanently

and totally disabled. The Compensation Board contends he is permanently partially disabled equivalent to the loss by separation of one arm which is the award appealed from.

"On the above date the claimant was employed as a heavy duty mechanic. In the course of his employment he was engaged in removing a hydraulic pump from underneath a dump truck. The pump was secured to the truck by four bolts which were very difficult to remove. Claimant had been required to use a wrench with a two-foot extension. After twenty to thirty minutes he had removed three of the bolts. In attempting to remove the fourth bolt claimant was using his full strength on the wrench plus an extra jerk. In so doing he suffered a heart attack.

His claim was initially rejected but was accepted after a hearing held April 20, 1967. An award of permanent disability was made by the Closing and Evaluation Division granting claimant permanent partial disability of 50 percent of an arm. On appeal the hearings officer granted claimant permanent total disability. On appeal from that award the Board decreased the award from the hearings officer's award to the equivalent of 100 percent loss of an arm for unscheduled disability i.e. double the Closing and Evaluation award.

"Resolution of the issue tendered involves the difficult task of evaluating the testimony and other evidence in the record to determine where the preponderance of the evidence lies. Claimant was examined and treated for his heart condition by Doctor Roy E. Hanford. Although Doctor Hanford had extensive experience in heart cases he called in Doctor J. G. Verberkmoes as a consultant. Doctor Verberkmoes is a skilled internist in Roseburg who has a greater expertise in heart cases. Doctor Hanford's treatment of claimant continued for a considerable period of time. He testified before the Hearings officer that claimant was rendered permanently and totally disabled. Although the cold record does not reveal the doctors testimony to be a model of eloquence, his demeanor was observed by the hearings officer. Experience persuades this Court that demeanor is oftentimes more reliable as a guide to credibility than the cold record. Also, Doctor Hanford's opinion was corroborated by the report of Doctor Verberkmoes. It is interesting to note that the defendant in the rejection hearing offered the opinion of Doctor Verberkmoes. Although the hearings officer rejected the offer, the fact of the offer is indicative of defendant's regard for the opinions of Doctor Verberkmoes in a heart case. The fact that Doctor Hanford was the treating Doctor, that his opportunity to know the claimant extended over a long period of time and that the consultant corroborates his opinion are persuasive to this Court.

"Claimant was also seen by Doctor O. Willis Boicourt, a cardiologist in Portland, In argument defendant conceded this doctor's qualification in his field. His report, when coupled with his supplementary report, supports claimant's contention.

"Against this evidence are the reports of Doctor Herbert J. Semler, another Portland cardiologist. Doctor Semler examined claimant on two occasions.

"The Board obviously did not accept at face value the report of Doctor Semler because their award was far greater than his report would justify."

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150 "The Board seems to impugn the order of the hearings officer by a recitation that he was terminated shortly after the entry of the order. Nothing in the record before this Court would justify this effort.

"When, all of the evidence in the record including the testimony of the lay witnesses, is weighed and further noting that the hearings officer heard the lay testimony and Doctor Hanford, this Court is of the opinion that it preponderates in favor of claimant. The Court finds that the preponderance of the evidence establishes that claimant has been rendered permanently and totally disabled as a result of his industrial accident of October 7, 1966."

157 Evans, Mary, WCB #69-1779, #69-1756 and #69-1757; Affirmed.
165 Tomhave, Albert (Deceased), The Beneficiaries of; WCB #69-434; Dismissed.
170 Aplet, Leonard L., WCB #69-888; Norman, J. "In this case the workman who sustained injury to his right arm in February 1966 was awarded the equivalent of 20% loss of use of the arm.

"In the apparent belief that the matter of loss of earnings was not relevant to the issue of disability, counsel for claimant (in accord with a generally held belief in the profession) made no effort to show lost wages, but did elicit testimony that would support the conclusion that the claimant lost his job as lead millwright due to his disability, and was thereafter able to work only as millwright. Claimant contends that because the law formerly did not allow a showing of lost earnings and that since the law has been recently changed, the case should be remanded to the Hearing Officer for consideration of this factor, which the Hearing Officer manifestly did not consider. As an aid to the court in deciding this issue, the attorneys stipulated that Mr. Foss should obtain the facts on wage differentials. It appears from date furnished pursuant to stipulation that the difference in wages between lead millwright and millwright at the time of loss of position was 10¢ per hour, and the present difference is only 4¢ per hour. Stated differently, the union contract effective June 1, 1969 entitles him to $4.20 per hour on the first shift, or $4.28 per hour on the second shift, whereas the lead millwright receives 4¢ additional. This represents a loss of less than 1% of gross wages. Actual earnings are only one factor in measuring earning capacity, and in view of the fact that the Hearing Officer did consider some of the elements of actual earnings (actual hours worked and ability to perform required work) plus the insignificance of the element not considered, it would seem to be a useless act to send the case back for further consideration.

"I have also considered the record in the light of medical and lay testimony as to physical disability, and possible intrusion upon the reserves of a claimant who is able to perform most of his former industrial chores, and conclude that there is no substantial disparity between the award actually made and what the record supports.

"While in disagreement with the finding of the Board that the claimant's loss of his lead job is not due to disability, I conclude that the award should not be altered on appeal and that there is no substantial basis for remand.

"Counsel for the employer is requested to submit an appropriate form of order."

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174 Rue, Ferdinand, WCB #68-966; Award increased to 96°.

179 Wilson, Aaron G., WCB #68-1698; Reversed, Hearing Officer award reinstated.

182 Koch, John F., WCB #69-412; Wells, J. "This matter is an appeal from an order on review of a rating by the Workmen's Compensation Board granting to the claimant 20% of the loss function for the use of an arm. The case was submitted to this Court upon oral argument after introduction of a letter dated October 5, 1968 from Dr. Donald A. Smith, an orthopedic surgeon from Walla Walla, Washington.

"The Court has carefully reviewed the transcript of testimony and exhibits submitted in the previous hearings and concludes that there is presented solely a conflict of opinion between Dr. Henry H. Dixon, a psychiatrist, and Dr. John Raff, a neuro-surgeon as to the necessity for further treatment and the extent of disability.

"Claimant has the burden of establishing by a preponderance of evidence that the prior award was unjust or erroneous. This he has failed to do. The evidence does not disclose that there is a need for further treatment or the existance of a permanent disability resulting from the injury greater than that of award already made.

"Information disclosed by the letter from Dr. Smith as to new disability during the year 1968 is not relevant to the claim as of the time it was closed. If the claimant's injuries have become aggravated since the date of closure, the matter should be handled as one of aggravation and an attempt should not be made to modify the findings of the original award on evidence not available at the time the award was made.

"The Board's findings will be affirmed."

187 Sizemore, Byron, WCB #69-959; Affirmed.

190 Filbeck, Dewane L., WCB #69-1352; Bryson, J. "This matter came on before the Court on July 23 when the Court heard arguments of counsel. The principal contention of counsel for claimant was to the effect that the claimant had not refused to cooperate and that the Workmen's Compensation Board's order should be overruled.

"The Court has reviewed the file and can find no Oregon case which would support the claimant's contention under the facts of this case. When and if the claimant does cooperate, I would assume that the Workmen's Compensation Board would reconsider the matter; but under the present record the Court has no alternative but to confirm the order of the Workmen's Compensation Board.

"Judgment should be submitted accordingly."

191 Bolt, Roger C. (Deceased), The Beneficiaries of, WCB #68-2083; Claimants found to be dependents.

193 Griggs, Lelia, WCB #69-1079; Dismissed on stipulation.

194 Knobloch, Franklin D., WCB #69-958; Affirmed.

195 Payne, William A., WCB #69-1568; Bryson, J. "The above matter is before the Court on appeal from the Workmen's Compensation Board wherein the Hearings Officer was reversed by a 2-to-1 opinion of the Board and the claimant was denied compensation. The Court has reviewed the entire file and the orders heretofore entered."

195 "This Court is willing to accept the findings of the facts as set forth on Page 1 and Page 3 of the Hearings Officer's opinion, and particularly 'For some reason he either fell.....or fainted.....and sustained a compression fracture of the spine.' The legal issue is well set forth in the briefs filed by respective counsel and culminated in the majority and minority opinion of the Workmen's Compensation Board. This Court has also attempted to find an Oregon appellate court or Supreme Court opinion directly in point but has been unable to do so.

"The majority of the Workmen's Compensation Board hold 'that there was no causal connection between the claimant's work and his fall and injury and that the applicable rule of law is that an unexplained or idiopathic fall to a level floor from fainting is not compensable under the facts in this case. The injury did not arise out of the employment.' The minority opinion makes a strong argument to the effect that "It is high time that the idiopathic fall be laid to rest as has been done with horseplay, acts of God, etc.' In other words, he says that there need not be a causal connection so long as the employee suffers an injury while acting in the course of his employment. We can assume from earlier Oregon Supreme Court decisions that Oregon does have a liberal Workmen's Compensation Act and the Act is to be liberally construed and that an employer takes an employee as he finds him.

"The medical testimony sheds no light on causation and says the fainting is unexplained. There is no evidence that nothing he had done in his work resulted in the kind of pain he found after he got up out of the hospital and returned to his work when he fainted the second time.

"To say that to recover compensation it is not necessary for an employee, while working on the job, to show a causal relationship is a considerable step. While the minority report of the Workmen's Compensation Board uses certain hypothetical cases, such as 'horseplay' or 'acts of God,' it does not cover hundreds of hypothetical situations that could occur. I find nothing in the Act to specifically cover this situation. If this is the intent of the Oregon Legislature, I think it should be specifically stated; and I would assume that insurance rates would be adjusted thereto.

"For this reason the Court affirms the majority of the Workmen's Compensation Board, and an order should be submitted accordingly.

202 Washtok, Donald B., WCB #69-717; Affirmed.
205 Moore, Marcella V., WCB #69-1256; Affirmed.
206 Mumpower, Clark, WCB #69-1498; Award increased to 40% loss arm.
210 Munnerlyn, Robert A., WCB #69-452; Affirmed.
213 Pericic, Petar, WCB #69-964; Award increased to 20 degrees.
214 Vanderkelen, Charles J., WCB #69-1424; Liver disease related to painting.
215 Thrasher, Mathew B., WCB #69-795; Affirmed.
217 Miller, Sharon, WCB #69-807; Affirmed.
220 Swanson, Carl O., WCB #68-1791; Settled.
222 Valian, Bud T., WCB #69-914; Hammond, J. "The above entitled matter coming on to be heard upon the appeal of the claimant from the Order on Review of the Workmen's Compensation Board entered March 30, 1970, and the Court having reviewed the record submitted upon such appeal together with the briefs of counsel, and the Court having

reviewed the record submitted upon such appeal together with the briefs of counsel, and the Court having heard the argument of the respective attorneys and being advised in the premises, now therefore,

"THE COURT IS OF THE OPINION that the claimant has not suffered a separate permanent disability for the loss of use of his left leg and that the determination of the Workmen's Compensation Board concerning that portion of the claimant's claim should be affirmed.

"The claimant contends that the Board erred in failing to find that the claimant's earnings subsequent to the injury were less than those received prior to the injury and in failing to adjust the benefits to which the claimant is entitled in accordance with the decision in Ryf vs. Hoffman, 89 Adv. Shts. 483, and the Workmen's Compensation Board Administrative Order WCB No. 1-1970. In this regard the claimant in generalities indicates that he makes less working in a set (as a faller with a second man limbing and bucking) than he did before he was hurt when he worked as a single jack (doing his own limbing and bucking of the trees he fell). However, the record does not reveal what the loss is, if any. He earned about $800.00 per month as a single jack and, according to the evidence, earned about $50.00 a day at the time of the hearing working in a set, but the last figure included $16.00 a day for the use of his saw. What arrangement was made for the use of a saw by a single jack, or whether the $16.00 a day compensation for use of a saw by a faller working in a set resulted in a benefit or loss to the faller are not revealed by the record. If the claimant hoped to base his claim for an increased award on the loss of earning capacity, the burden was upon him to present evidence that would permit the Workmen's Compensation Board to apply its Adminstrative Order, WCB No. 1-1970. The information revealed by the record does not supply such evidence.

"Findings of the Hearing Officer which were affirmed by the Workmen's Compensation Board with respect to claimant's permanent partial disability by reason of injury to his back was that claimant was entitled to 10% loss of a workman or 32° as compared to a maximum of 320°. Claimant contends that his permanent partial disability is greater than that represented by such award. In this regard, the Court is inclined to feel that the Hearing Officer and the Board failed to correctly interpret the evidence presented regarding the extent of the claimant's disability. It is true that he has continued to work since returning to his employment, but his mode of operation has been completely changed to accomodate for the disability resulting from loss of strength in his back and pain in the region of his back brought on by the compression fractures of T-6, T-7 and T-8. In order to work the claimant is required to wear a Taylor back brace and to take medication for the pain resulting from his activities but he is a rugged individual, stoical in nature, and has persisted at the altered type of logging operation contrary to the recommendation of Dr. Raymond A. Case when he said in his report of October 13, 1969, 'But I think that the most practical solution to his problem would be to change to a different job for 1-2 years.' Dr. Case described the skeletal changes resulting from the compression fractures and the claimant's symptoms flowing

222 therefrom and while he expressed the anticipation that the symptoms would continue for at least a year if he continues to work with a chain saw, the doctor offered no hope that the changes in the curvature of the spine would not continue, and leaves the claimant with only a hope that eventually his symptoms would subside if he changed employment.

"There has been some change in the claimant's activity as a ski instructor, but it cannot be determined from the record whether there has been an appreciable change in his winter activities at Mt. Hood Meadows by virtue of his injury since he explains that a change from ski instructor to working in the ski shop was brought about by economic conditions unrelated to his accident. Aside from claimant's activities related to skiing, the claimant is a logger whose livelihood has been earned at that trade, mostly as a faller with some experience in truck driving, carpentry and as a general laborer. His age is thirty-five years and he has a twelfth grade education. The award appealed from for disability suffered by this claimant does not appear to be adequate.

"The Court finds that the permanent partial disability sustained by the claimant resulting from his injury of July 17, 1968 while in the employ of Ted Bray is 20% loss of a workman or 64° as compared to a maximum of 320°.

"An order may be entered modifying the determination of the Workmen's Compensation Board in accordance with this Opinion."

227 Logan, Bobby J., WCB #68-1575; Affirmed.

244 Kahl, Harold D., WCB #68-759; Main, J. "This is a case in which none of the experts are in agreement. The medical experts disagree as to whether claimant's condition is related to his accidental injury. The Hearing Officer and one Commissioner are of the opinion that claimant's problems are due to the injury while the Chairman and the other Commissioner are of the opinion that these difficulties commenced prior to the accident and are not related to the injury.

"The claimant has filed a motion requesting the Court to consider additional evidence and to allow oral arguments. The motions are denied. The claimant was injured on July 12, 1967, and after being hospitalized under the care of Dr. Mario Campagna he consulted with Dr. Hugh Gardner, a psychiatrist, at Dr. Campagna's request. Dr. Gardner has treated claimant almost continuously since the early part of August of 1967. In March of 1968 claimant was admitted to the Veterans Hospital at Roseburg on a voluntary commitment and later at the University of Oregon Medical School Hospital at the request of the State Compensation Department. The majority opinion of the Board places emphasis on the reports of the University of Oregon Medical School and the fact that these reports indicate that claimant's condition commenced several years prior to the accident. One report dated November 27, 1968, states that claimant has shown neurotic disturbances since 1965. The other report is dated January 28, 1969, and states that claimant dates the onset of his difficulties to 1965. The facts upon which these reports are based do not agree with the sworn testimony introduced at the hearing which was held on April 10, 1969. This testimony clearly shows claimant's difficulties commenced

on the date of his injury and had continued up to the time of the hearing covering a period of almost two years. Prior to the injury claimant had always worked steady, he was a good husband and father with only one exception which was excused by his wife, he had constructed many buildings and had been a successful businessman, his wife, Norma Jean, testified that he had no prior difficulties, he testified that he had no prior difficulties and the record is devoid of any prior difficulties. The reports of the University of Oregon Medical School must be based upon oral admissions of claimant made at a time when he was having, according to the reports, extreme concern about his blackout spells. Oral admissions are, of course, to be viewed with caution. See ORS 17.250. In determining the weight to be given to opinions of experts the Court must consider the reasons given for the opinion and may reject them if the reasons given are unsound. I feel that it is very significant that claimant was never unemployed prior to the injury and all agree that after the accident at least up to the time of the hearing he was unable to return to work. In the first report from the University of Oregon Medical School dated November 27, 1968, the doctors conclude that 'at this time Don is significantly psychologically impaired and should not work.'

"The Hearing Officer and the one dissenting Commissioner place emphasis on the testimony of Dr. Gardner. The Hearing Officer in his opinion states that Dr. Gardner's diagnosis is a result of knowing what Dr. Campagna, the Veterans Hospital doctors, and the University of Oregon Medical School doctors had done in the way of treatment, diagnosis and what their reports said. The one dissenting Commissioner in his opinion states that Dr. Gardner has successfully treated claimant and his opinions are entitled to great weight. The Hearing Officer asked Dr. Gardner many questions and the doctors answers left no doubt that the claimant's psychological problems resulted from his accidental injury of July 12, 1967. Dr. Gardner was the only medical witness that testified before the Hearing Officer, he testified under oath and explained in detail his reasons for his opinion.

"I am of the opinion that Dr. Gardner, because of his intimate knowledge of claimant's case acquired over the long period of time that he treated claimant was better qualified to testify and that his testimony is in my opinion sufficient to sustain the claimant's burden of proving that he is entitled to the compensation he requests. Dr. Gardner's opinion is the only one that is supported by the facts. The claimant's problems are real and disabling. I have reviewed the other reports and opinions but do not feel that they are sufficient to overcome the positive testimony of Dr. Gardner as how can anyone under the facts conclude that claimant's problems did not result from his accidental injury of July 12, 1967?

"Counsel for claimant may prepare an appropriate order."

248 Cutright, Raymond L., WCB #69-1146 and #69-482; Hieber, J. "The Court has carefully considered the record herein. The claimant has established that the present disability was proximately caused by the accident of February 1967.

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248 "Attorney fees will be awarded to counsel for claimant in the sum of $375.00 and claimant should have his costs."

250 Hartley, Louis E., WCB #69-1529; Affirmed.

251 Egan, Ted E., WCB #69-1659; Affirmed.

256 Underhill, Donnie, WCB #69-1452; Norman, J. "This is an appeal by the Fund from a Board order.

"The Hearing Officer expressly postulated in his opinion that 'loss of earnings as such is not a determinative factor in respect to the extent of impairment of a scheduled member.' Thereafter, the decision in Trent v. SCD 466 P 2d 622 held that loss of earning capacity should be considered in scheduled injury cases. Based upon that new rule, the Board made the increase that is in dispute.

"Fund counsel argues that the case must be remanded to the Hearing Officer to take testimony that would support loss of earning capacity, apparently because the record is devoid of evidence as to dollar losses. The Board has correctly applied Ryf, because the loss of earning capacity can be the result of either lost hours or lost earnings per hour. Fund counsel further argues that the medical evidence is primarily subjective, and that the workman's problem largely relates to his preference to work as a bucker and faller. My review of the record leads me to the same factual conclusions reached by the Hearing Officer, and to the same evaluation as the Board after applying Ryf and Trent. My only question as to the evidence is how the claimant can continue to get a working partner who is willing to work half time, for in the absence of such arrangement his residue of earning capacity would have no market value in industry. Since the Hearing Officer attempted unsuccessfully to clear up this point, and its resolution can afford no comfort to the appellant, it needs no further consideration.

"Counsel for claimant is requested to submit an appropriate form of order affirming the Board."

269 Tippie, Clarence C., WCB #69-1665; Affirmed.

271 Sisson, Billie Joe, WCB #69-345; Williams, J. "Upon the conclusion of the oral arguments in the appeal by the employer of the above entitled matter, I took the matter under advisement and have now had an opportunity to review once again the transcript of the proceedings and all findings and orders by the Hearings Officer and the Workmen's Compensation Board.

"It is the finding of the Court that the claimant did sustain the burden of proof in establishing by a preponderance of the evidence that he did sustain an accidental injury on or about May 28, 1968, which is compensable under the Workmen's Compensation Act.

"Relative to the issue of late written notice and the matter of prejudice regarding the employer, I find that there was evidence produced at the time of the hearing before the Hearings Officer relating to the matter of late notice, and notwithstanding the fact that the Hearings Officer declared the question to be 'moot', the Workmen's Compensation Board does have the authority under ORS 656. 295 (6) to affirm, reverse, modify or supplement the order of the

271 Hearings Officer and make such disposition of the case as it determines to be appropriate. Therefore, even though the Hearings Officer did not rule upon the question of notice, the Board could have such authority to determine that issue. I find nothing in the transcript to warrant this Court's remanding the matter to the Hearings Officer for further testimony in connection with the matter of notice, and it is the opinion of this Court that the employer has not established by the evidence any prejudice resulting to it by virtue of a late formal written notice, and therefore the order of the Workmen's Compensation Board entered on April 23, 1970, shall be affirmed in all respects.

"Mr. Kryger may prepare an order and submit the same to me for my signature and approval, and forward a copy thereof to Mr. Mongrain and to the Workmen's Compensation Board."

272 Faler, Henry L., WCB #69-1120; Affirmed.
273 Huffer, Charles, WCB #69-1042; Affirmed.
274 Sauvola, Lloyd P., WCB #69-1364; Remanded for more evidence and reconsideration.
280 Nelson, Kenneth E., WCB #69-1567; Award increased to 50% loss arm.
289 Wright, Frank L., WCB #69-266; Sawyer, J. "The above entitled case came before the Court on an appeal from an order on review of the Workmen's Compensation Board increasing the Hearings Officer's evaluation of permanent disability from 7 degrees against the applicable maximum of 135 degrees for complete loss of a leg below the knee to an award of 61 degrees against the applicable maximum of 135 degrees.

"The employer's appeal is based primarily on the proposition that the Board on review based part of their findings on claimant's reduction in actual earnings. The employer contends that the application of 'actual earnings' to a scheduled disability by the Court of Appeals in Trent v. State Compensation Department, 90 Or. Adv. Sh. 725, was a misapplication of the rule laid down in Ryf v. Hoffman Construction Company, 89 Or. Adv. Sh. 483. The Board in its decision cited Audas v. Galaxie, 90 Or. Adv. Sh. 959, which talked only of unscheduled disabilities. The Court of Appeals once again applied the loss of earnings rule in Hannan v. Good Samaritan Hospital 90 Or. Adv. Sh. 1517. It is this Court's opinion that the loss of earnings rule is a rule of evidence and there is no reason for applying it to unscheduled disabilities and not applying it to scheduled disabilities. The scheduled and unscheduled injuries are a means of rating the extent of disability and what evidence is used to determine the extent of disability which is then applied to the formula would seem immaterial as a distinction between scheduled and unscheduled disabilities.

"The record discloses (Tr 54) that prior to the accident the claimant had a wage of $3.08 an hour, which, at the time of the hearing, had been reduced to $1.85 an hour. This testimony came in without objection by the employer and therefore was fully competent to be considered by the Board as set forth by the Trent, Hannan and Audas cases. Since the employer failed to object to this testimony he cannot now come before the Court and claim that it was incompetent. It was fairly a part of the record to be considered by the Board of Review in making their determination. It is therefore the opinion of this Court that the evidence to rebut this testimony was available to the employer at the time of the hearing and therefore his motion

to present additional testimony should be denied. Further, he had an opportunity at the hearing to present such testimony had he saw fit and the fact that he missed on his first 'bite' certainly does not justify his having a second 'bite'.

"The next question for the Court to consider is whether or not the increase from 7 degrees to 61 degrees was justified under the evidence presented by the record. This Court feels that the Board erroneously considered evidence of cramping in the claimant's leg calf in making their determination. There is no evidence in the record to disclose that the cramping in the calf was caused by the accident and injury sustained by the claimant. In fact the record clearly discloses by defendant's Exhibit B that the cramping was not caused by the injury. Therefore this factor could not be considered in making an award. It is for this reason that this Court feels that the award by the Workmen's Compensation Board should be reduced to 50 degrees against the applicable maximum of 135 degrees.

"Counsel for the employer shall prepare an appropriate judgment."

290 Jones, Sharon, WCB #69-2035; Dooley, J. "On this appeal, claimant's principal contention is that her condition of dermatitis, contracted through exposure to epoxy material in the course of her employment, should be considered to be an accidental injury and she should be entitled to an award for permanent partial disability because of an apparently resulting sensitivity to epoxy materials.

"The Closing and Evaluation Division and the Hearings Officer considered this claim to involve an occupation disease rather than an accidental injury and concluded that no permanent disability resulted therefrom.

"Being dissatisified, claimant appealed to the Workmen's Compensation Board, which considered the appeal as one to a Medical Board of Review as contemplated by ORS 656.808. Upon claimant's insistence that her claim was one for accidental injury and not occupational disease and her refusal to proceed before a Medical Board, the Workmen's Compensation Board entered an order abating proceedings on the claim and it is from that order that this appeal is taken.

"Statutory and dictionary definitions of 'disease' and 'accidental injury' are of little help in attempting to resolve the question presented.

"Common sense dictates that few, if any, persons would voluntarily expose themselves to a condition which would cause a deterioration of health or a disease, and therefore an occupational disease is unforeseen, unexpected, involunarily contracted, and, in those respects at least, is accidental. It may also be that the disease, at least temporarily, causes physical harm or damage to the body or some of its parts and, in that sense, disease causes injury. Likewise, in the sense, disease causes injury. Likewise, in the sense that an injury may cause a destructive process in an organism or a deviation of the body from its normal or healthy state, an injury could be considered a disease or, at least, to cause a diseased condition.

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290 "However, if such reasoning is followed, it would have to be said that the occupational disease statutes are meaningless except for the extension of time within which to file a claim. I cannot make that type decision. The Workmen's Compensation statutes obviously refer to an injury as contemplating an unusual or unexpected event which causes an exertion of force to or by some part or parts of the body resulting in damage thereto, while a disease contemplates an infectious, degenerative, or idiopathic departure from physical health and well being.

"The foregoing definitions are my own and will be used for the purposes of this case. I find the claimant's condition to be considered properly as an occupational disease.

"Accordingly, Claimant's petition for review is dismissed and this claim is remanded to the Workmen's Compensation Board for further proceedings."

292 Jackson, Philip W., WCB #69-2076; Award of 96° allowed.
296 Pimentel, Carmen, WCB #69-433; Affirmed.
300 Flaxel, Ben C., WCB #69-1908; Award increased to 115 degrees.
304 Deadmond, William W., WCB #69-1821; Affirmed.
308 Ruiz, Rafael, WCB #68-923; Dismissed.
313 Campbell, Roy F., WCB #69-806; Remanded for acceptance and payment of benefits for occupational disease.

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

Robert VanNatta, Editor

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WCB #69-320 December 1, 1969

PAUL D. COLLINS, Claimant.
Norman F. Kelley, Hearing Officer.
J. David Kryger, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of the extent of permanent disability sustained by a 44 year old plant electrician who fell from a step-ladder on November 11, 1966 landing on his neck and shoulders and possibly striking one leg of the ladder with his back as he fell.

"Pursuant to ORS 656.368, a determination of disability found the claimant to have a disability in the right arm of 14.5 degrees against the applicable maximum of 145 degrees for complete loss of an arm and 9.6 degrees for other or unscheduled disabilities against the maximum of 192 degrees for such disabilities.

"Upon hearing, the respective awards were increased to 29 degrees for the arm itself and 28.8 degrees for the unscheduled injuries.

"No symptoms were sought to be related to the accident with respect to claimant's low back for about 14 months. The claimant does have congenital deformities of the foot and a history of childhood paralysis in the lower extremities. Disability attributable solely to those deformities is not compensable.

"There was a very short period of temporary total disability and with a couple of exceptions for treatment, the claimant has worked quite regularly since the accident.

"The claimant seeks an increase in the awards and the employer suggests the increase by the hearing officer was not warranted by the evidence.

"The Board concludes and finds that the disabilities are as found by the hearing officer."

WCB #69-1608 December 1, 1969

HENRY A. FAIRBAIRN, Claimant.
Request for Review by Claimant.

"The above entitled matter involves a procedural question arising from a compensable injury of January 4, 1965. The claim was allowed by the then State Industrial Accident Commission and was closed by that agency on September 5, 1965. The law then in effect required that a request for hearing be filed within 60 days and permitted a hearing on a claim for aggravation as a matter of right within two years.

"Had the injury occurred on or after January 1, 1968, the claimant would have had five years for filing a claim for aggravation after the first determination of disability. ORS 656.271(2).

"The procedure in the instant case is controlled by O. L. 1964, Ch 285, Sec 43(1)(3). In order to precipitate a hearing as a matter of right under these provisions, an 'order, decision or award' of the department must be found. The record herein reflects no such 'order, decision or award' upon which to base a request for hearing. Even if a hearing could otherwise have been obtained a supporting medical opinion is required before hearing on a claim for aggravation.

"Though the claimant cannot obtain a hearing as a matter of right there are provisions in ORS 656.271 where the own motion jurisdiction of the Workmen's Compensation Board may be exercised to reopen any claim including those previously subject to the then State Industrial Accident Commission. The Workmen's Compensation Board can and does exercise this jurisdiction in appropriate cases.

"The order of the hearing officer is affirmed."

WCB #69-430 December 1, 1969

JOE B. JOHNSON, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Thomas J. Reeder, Claimant's Atty.
Evohl F. Malagon, Defense Atty.
Request for Review by Claimant.

"The claimant is a 32 year old dry wall finisher who twisted his ankle and fell while carrying a couple of buckets of water down a single step. He struck his right hip on a bucket.

"Though the claimant asserts he has had no prior back problems, he does have congenital anomalies in his back that have been present since birth. There appears to be no need for further medical care and the medical prognosis appears to be that the claimant essentially approaches his pre-injury status.

"Pursuant to ORS 656.268, a determination issued finding the claimant's disability to be 19.2 degrees against the applicable maximum of 192 degrees for unscheduled or other injuries. This determination was affirmed by the hearing officer.

"Though the claimant's earnings at the time of hearing appeared to be substantially reduced from his pre-accident earnings, the record reflects a rather poor effort towards return to regular employment. The claimant was then limiting himself to driving around looking for dry wall jobs for his brother who follows that trade.

"The symptoms presented by the claimant are mostly subjective. With minimal objective findings and with the lack of self application toward re-employment, the Board concludes and finds that the permanent disability has been properly evaluated at 19.2 degrees.

"The order of the hearing officer is affirmed."

WCB #69-925 December 1, 1969

LOUIS F. FONTANA, Claimant.
Henry L. Seifert, Hearing Officer.
Richard Noble, Claimant's Atty.
Charles T. Smith, Defense Atty.

"The above entitled matter involves an issue of the extent of permanent disability sustained by a 43 year old furniture factory employe who fell back against a cabinet and injured his back on October 8, 1966.

"Neither party has favored the Board with a brief in the matter under review.

"Two attempts to stabilize his spine by fusion of vertebrae have failed to produce an effective fusion. The efforts at vocational rehabilitation in in barbering were discontinued due to the problem encountered by the long periods of time required to be on his feet. The vocational rehabilitation was being re-directed toward shoemaking at the time of hearing.

"Pursuant to ORS 656.268, a determination issued finding the claimant's permanent disability to be only partially disabling and it was evaluated at 124.8 degrees, against the applicable maximum of 192 degrees for unscheduled or other injuries. Upon hearing, the award was increased to 172.8 degrees.

"The claimant is an otherwise healthy and intelligent workman with substantial back disability. The back surgery was successful to the point the problems of the protruding disc were relieved. Any associated problems can be relieved by therapy in the form of work within his physical limitations.

"The Board concludes and finds that the disability is substantial but partial and does not exceed that awarded by the hearing officer."

WCB #68-72 December 1, 1969

ORVILLE F. PARKER, Claimant.
Mercedes F. Deiz, Hearing Officer.
Edwin York and William V. Bierek, Claimant's Attys.
Clayton Hess, Defense Atty.
Request for Review by SAIF.

"The above entitled matter involves issues of whether the claimant, a 39 year old truck driver, sustained compensable injuries when the truck he was driving jolted over a shallow depression and allegedly bounced the claimant with sufficient force to strike his head and cause severe head and neck aches for which surgeries have been performed. A concurrent issue is whether the claim, even if otherwise compensable, is barred for failure to justify the delay of more than 30 days in providing written notice to the employer.

"The first notice executed by claimant's wife fixed June 12, 1967 as the date of the incident. The date which the claimant asserts is the true date was June 28th. Using June 28th as the date, the written notice was five days beyond the limit provided by ORS 656.265. Under the circumstances, the

question basically is whether the employer or State Accident Insurance Fund was prejudiced by the delay and whether the claimant has shown good cause for failure to technically comply at an earlier date. It appears that the claimant had been experiencing headaches for several months but the type, duration and severity of headaches changed in the period following the alleged accident. It further appears that the association between the jolting in the truck and the symptoms developed during medical examination by a Dr. Snodgrass.

"The State Accident Insurance Fund seeks to establish that the incident of bouncing in the truck never happened or if it did happen, it had no causal relationship to the claimant's problems. The State Accident Insurance Fund also urges a bias by the hearing officer and implies that claimant's attending physician somehow influenced a suggestible patient into recollection of a possibly compensable incident on which to hang a claim.

"The Board's concern in review of this record has been confined to (1) whether the jolting incident occurred; (2) if so, whether it caused or compensably exacerbated either the neuralgia or cervical disc degeneration; and (3) if so, whether the delay in filing written notice should bar the claim.

"The Board concludes and finds from the weight of the evidence that the answers to propositions (1) and (2) in the foregoing paragraph should be in the affirmative and the answer to proposition (3) is negative.

"The order of the hearing officer is affirmed.

"Pursuant to ORS 656.382 and 656.386, counsel for claimant is entitled to an additional fee payable by the State Accident Insurance Fund for services in connection with this review. That fee is set in the sum of $250."

WCB #69-608 December 1, 1969

RAYMOND S. VAN DAMME, Claimant.
Mercedes F. Deiz, Hearing Officer.
Brian L. Welch, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained any permanent injuries as the result of being floored by a side of beef as he attempted to place it on a hook on March 12, 1968.

"Pursuant to ORS 656.268, the claimant was determined to have had almost three weeks of temporary total disability followed by three weeks of temporary partial disability without any permanent injuries.

"It is not contested that the claimant as the result of compensable accidental injuries in April of 1958 and May of 1966 received awards for injuries to his back totalling, by comparison, the entire loss of use of one arm. In addition the claimant was in a taxi accident in May of 1966 as the result of which he has asserted permanent injuries to the cervical area of his neck. The claimant has also had a subsequent industrial accident

which is still pending but which the claimant asserts does not involve the cervical area. At the time of the current issue of the March 12, 1968 accident, X-rays revealed a pre-existing 60% collapse of the eighth thoracic vertebrae.

"By virtue of ORS 656.214(4), 656.222 and Keefer v. SIAC, 171 Or 405, the claimant's disability must be determined by not only taking into consideration his pre-accident status but also the combined effect of his injuries and past awards. Further, the claimant should not be compensated for either prior or subsequent non-industrial awards.

"In the rather involved history of this apparently accident prone individual, it would appear that he has previously received awards and compensation for permanent injuries which were not as permanently disabling as the award would indicate. The claimant, if he received any disability from the accident at issue, has certainly received compensation in excess of the combined disability attributable to those accidents. A doctor's recitation that the claimant has some dorsal disability is of little value in the case at issue except to indicate that the disability is probably pre-existing and less than that for which he has already been compensated.

"The record certainly does not contain evidence upon which an award could be made for additional disability allegedly attributable to the accidental injury of March 12, 1968.

"The Board concludes and finds that the claimant has sustained no compensable permanent injury as a result of the accidental injury involved in this claim.

"The order of the hearing officer is therefore affirmed."

WCB #69-991 December 1, 1969

ORAN EDWARDS, Claimant.
Page Pferdner, Hearing Officer.
Alan R. Jack, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves the issue of the extent of permanent disability sustained by a 20 year old laborer who had the misfortune of having the fingers of both hands caught between two large metal rollers on September 23, 1968.

"The permanent injury to the left hand was confined to the loss through the middle portion of the distal phalange of the thumb including the nail. Pursuant to ORS 656.268, the disability was determined to be 19.2 degrees against an applicable maximum of 24 degrees for loss of one phalange of a thumb. In addition, awards totalling 6.3 degrees were made for the loss of opposition to the uninjured index, middle and ring fingers. Upon hearing, the award for the thumb was increased to 20 degrees and the accumulated loss of opposition to the three fingers was increased to 7 degrees.

"The permanent injury to the right hand involved a complete loss of the index and ring fingers for which appropriate awards were made of 24 and 10 degrees respectively. The middle finger was evaluated at 12.1 degrees against an applicable maximum of 22 degrees. The right thumb had a minimal disability from the loss of a tip of the flesh but award was made for the loss of opposition of 28.8 degrees against a possible maximum award for complete loss of the thumb of 48 degrees. The accumulation of degrees so determined was 74.9 degrees. Upon hearing, there was some testimony of occasional symptoms in the right elbow. These symptoms arise following activity such as playing tennis. There is no showing of any permanent physical loss of function associated with the accident in these occasional symptoms. The hearing officer made an award for the forearm, without regard to the several fingers and the thumb, rounding out the disability at 100 degrees against an applicable maximum of 150 degrees for disabilities at and above the wrist. If all five digits are involved an award may be based upon the 150 degrees applicable to an injury at or above the wrist.

"The Board concludes that in the instant case, the disabilities should be rated upon the loss of physical function of the digits of either hand and that the original determination was liberal in its application of awards for loss of opposition to uninjured digits. Despite his losses, the claimant retains a substantial use of both hands and has no substantiated permanent disability other than in the digits.

"The Board, as much as anyone, is sympathetic to the injuries received by this young man who is now attending college toward the goal of a life's work which will not be as seriously affected by the digital injuries. In applying the applicable statues, however, the Board concludes and finds that the disabilities were properly evaluated by and do not exceed those established by the original order of determination.

"The order of the hearing officer is therefore reversed. The order of determination of February 20, 1969, is hereby reinstated."

WCB #69-344 December 2, 1969

DOUGLAS WYETH, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Noreen A. Saltveit, Claimant's Atty.
James P. Cronin, Jr., Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the necessity of further medical care and treatment, or in the alternative, if the condition is medically stationary, the extent of the permanent disability.

"The Determination Order issued pursuant to ORS 656.268 found the claimant to be entitled to an award of 32 degrees against the maximum of 320 degrees for unscheduled disability on the basis of a comparison of the workman to his pre-accident condition without such disability. The hearing officer, after hearing, affirmed the Determination Order.

"The claimant is an elementary school dropout, who became emancipated at the age of 16 years, and has subsequently compiled an unstable work history as a farm laborer, logger, service station attendant and more recently as a lumber and plywood mill worker. On April 15, 1968, at the age of 24 years, the claimant sustained his third low back injury when he slipped while pushing a load of veneer in a plywood mill.

"The claimant's low back difficulties commenced in 1961, when at the age of 17 years, he injured his back as the result of loading sacks of grain. In 1964 he sustained his second back injury while loading sacks of potatoes. Despite the two low back injuries, the claimant continued to engage in work of a heavy nature, primarily in the plywood industry, until his present injury.

"The claimant contends that his condition is not medically stationary and that further medical care and treatment is required. This appears to have been modified on review to a contention that his condition was not stationary at the time of claim closure although it may have been stationary at the time of hearing. This is refuted by the entire medical record which strongly supports the conclusion that the claimant's condition had become medically stationary and the necessity of further medical care and treatment had ended prior to the issuance of the Determination Order.

"The medical evidence reflects that although the claimant has sustained only minimal permanent disability, that there is a strong probability of a recurrence or aggravation of his low back difficulty should he continue to engage in employment of a strenuous nature.

"Because the claimant's prior employment experience involved essentially work of a heavy nature from which he is now precluded, and because of his limited education and below average intellectual resources, the medical reports recommended that serious consideration be given to vocational training to assist the claimant in readjusting to employment within the limitation of his current physical ability.

"Although the efforts directed toward the vocational rehabilitation of the claimant were handicapped by his limited aptitude in the occupational fields in which he was most interested, a vocational program was implemented in the course of training which appeared to offer the greatest probability of success. The claimant failed to complete the training program initiated on his behalf by the Department of Vocational Rehabilitation primarily due to his lack of recognition of the importance of assisting in his own vocational rehabilitation. Despite the failure of the vocational rehabilitation program to be of assistance in the restoration of the claimant to a status of self-support, by reason of the claimant's lack of responsibility in conscientiously applying himself to the vocational training offered to assist him in overcoming his disability, nevertheless the claimant retains a substantial employment capability which will permit him to secure acceptable regular employment in the numerous occupational fields which remain within his physical capability. At such time as the claimant becomes motivated to assist in his readjustment to his present limitation of physical ability, he should encounter no difficulty in becoming a productive and self-supporting member of society.

"The Board finds and concludes from the weight of the evidence that the claimant is not in need of further medical care and treatment and that the initial determination of 32 degrees which was affirmed by the hearing officer properly evaluated the permanent disability attributable to this accident.

"The order of the hearing officer is therefore affirmed."

WCB #68-1885 December 3, 1969

TERENCE BOYER, Claimant.
Forrest T. James, Hearing Officer.
David R. Vandenberg, Jr., Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by SAIF.

"The above entitled matter involves the compensability of alleged accidental injuries sustained by an employer who had obtained insurance upon himself with the State Accident Insurance Fund pursuant to ORS 656.128. At best the claimant is a 'statutory workman' since he was not a workman in fact.

"In authorizing the State Accident Insurance Fund to insure employers against injuries the employer personally sustains the Legislature has provided that no such 'claim shall be allowed or paid under this section, except upon corroborative evidence in addition to the evidence of the claimant.'

"The State Accident Insurance Fund denied the claim and after the hearing officer found the claim compensable, the matter was brought to this review.

"The claimant and three other associates operate a business known as B C Sales which buys, sells and delivers various foods and sundries including a delivery route to regular customers.

"The claimant and his wife also operate what is known as a KOA campground which was not included in the employment activity insured. If the accident occurred as alleged it occurred at this KOA campground. The claim filed with the State Accident Insurance Fund alleged the accident happened upon the 'employer's premises.' As to the insurance extended to this claimant with B C Sales as the employing entity, the accident, if it occurred, did not occur on the employer's premises.

"The accidental injury, if it occurred, happened when the claimant made a deviation from his appointed rounds to enter the premises of a different business occupied by himself and his wife 'to have a cup of coffee.' It is alleged that some papers fell from his truck and that he got a catch in his back when he stooped over to pick it up.

"The only corroborative evidence upon which the claimant relies is the medical report of a chiropractic physician who examined the claimant at 8:30 a.m. the day following the alleged injury with a diagnosis of lumbosacral sprain reportedly sustained at 6:00 p.m. the day before and without

further history. Aside from any report to the doctor being entirely self-serving, there is nothing in the report to corroborate an injury associated with B C Sales.

"It is inconceivable to the majority of the Board that the claimant could have experienced the incident as alleged without observation by some person about the campground being available to corroborate that an injury did occur as alleged.

"Claimant urges that no workman with an unwitnessed accident could recover if corroborative evidence is required. The issue does not involve all workmen. It does not involve any workman in fact. The issue only involves employers who elect to be insured as workmen and whose policy of insurance as written by the legislature contains a reservation of special proof required to establish a claim. The obvious legislative intent was to require special proof in situations where there is not the usual check and balance available where the claimant and employer are not the same individual.

"The majority of the Board deems the legislative restriction requiring corroborative evidence to require evidence of such a stature that standing by itself, the evidence could support a conclusion that an accidental injury occurred in the course of employment.

"No burden of proof rests upon the State Accident Insurance Fund to disprove the claim. The claim must be judged in light of the statute and in light of evidence produced.

"The majority of the Board concludes and finds that this employer-claimant has not met the standard of proof required by ORS 656.128. If the 'corroborative' evidence offered in this instance meets the legislative requirement, the requirement might just as well be repealed.

"The order of the hearing officer is therefore reversed and the denial of the claim by the State Accident Insurance Fund is affirmed."

WCB #68-1951 December 3, 1969

ROLLIN I. DOOLEY, Claimant.
Norman F. Kelley, Hearing Officer.
Maurice V. Engelgau, Claimant's Atty.
Evohl F. Malagon, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability attributable to a torn medial meniscus of the right knee sustained by a 39 year old heavy equipment mechanic and welder on April 8, 1968.

"Pursuant to ORS 656.268, a determination was made finding the claimant to have a permanent disability of 15 degrees against the scheduled maximum of 150 degrees for complete loss of use of a leg. This determination of the claimant's disability was affirmed by the hearing officer.

"The claimant on review asserts that his permanent disability is in excess of the 15 degrees awarded, and submits that the award should be not less than 30 degrees.

"The record reflects that the surgical repair of the claimant's right knee enabled the claimant to resume his former employment just over two months following his injury, and to work regularly thereafter including overtime work without any lost time attributable to the injury.

"The medical reports of the treating orthopedic surgeon indicate that an excellent result was obtained from the surgery on the claimant's right knee. The final medical report, which includes a history of essentially the same complaints as were related by the claimant in his testimony at the hearing, indicates that the claimant retains a full range of motion in the right knee passively, and that the previously noted limitation of flexion in squatting has improved to the extent that squatting can now be accomplished as well on the injured right knee as on the uninjured left knee.

"The Board finds and concludes from its review of the record that the claimant's permanent disability does not exceed the 15 degrees heretofore awarded.

"The order of the hearing officer is affirmed."

WCB #69-631 December 4, 1969

JOE COX, Claimant.
Forrest T. James, Hearing Officer.
Richard Kropp, Claimant's Atty.
Thomas A. Davis, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of the extent of permanent disability attributable to an accident of September 1, 1967, when the 46 year old millwright slipped and fell a distance of five feet from a conveyor belt on which he was working, fracturing the heel of his left foot as a result of landing with his entire weight on his left foot.

"In his early childhood, the claimant had been the victim of an attack of paralytic poliomyelitis, involving principally his left lower extremity. The residual effects of the polio required several foot stabilization operations, consisting of a triple arthrodesis, an ankle bone block, and tendon transplants, which corrective surgery was completed when the claimant was 12 or 13 years of age. The claimant retained a left lower extremity with very limited motion in the ankle and foot, which served primarily as a weight bearing structure.

"Because the present injury occurred to a foot that was the site of extensive pre-existing disability, the foot was more susceptible to further disability.

"Pursuant to ORS 656.268, a determination issued finding the claimant to be entitled to an award of 13.5 degrees against the scheduled maximum of

135 degrees for loss of a foot, evaluating the disability attributable to the present injury at 10% of his left foot.

"Upon hearing, the hearing officer increased the award by 27 degrees to a total of 40.5 degrees. The hearing officer evaluated the claimant's pre-existing disability of his left foot at 60%, and evaluated the disability resulting from the injury at 30%, in concluding that the claimant's total post accident disability is 90% loss of use of his left foot.

"The claimant asserts on review that the hearing officer erred in his evaluation of the permanent disability attributable to this injury, as a result of an excessive evaluation of the claimant's pre-existing disability. The claimant does not appear to question the hearing officer's post accident evaluation of the extent of permanent disability of the left foot.

"The evaluation of the disability attributable to the injury in this matter is complicated by the difficulty presented in the evaluation of the pre-existing disability caused by the polio, since the claimant had not required medical care or treatment for his left foot since the completion of the surgical repair of his foot as a result of the polio over 30 years prior.

"Prior to his present injury, despite his substantial disability from the polio, the claimant had been able to pursue an active and near normal life with respect to both occupational and social and recreational activities. The claimant's employment as a millwright required that he walk on rough surfaces, and that he climb stairs, ladders, and on machinery. His social and recreational activities included skating, swimming, playing ball, hunting and dancing. The claimant had an almost unnoticeable limp and experienced no pain in his ankle or foot.

"Following his injury, the claimant was able after being off work for a period of five months, to return to work for his same employer as a fork-lift operator and later as a mechanic, both of which jobs are somewhat less physically demanding than his former employment as a millwright. The claimant now has constant pain in his foot, intermittent swelling, a noticeable limp, and even less motion and flexion than previously.

"The medical reports of Dr. McHolick, and the testimony of Dr. Anderson, both of whom are orthopedic surgeons, furnish the most detailed and illuminating medical evidence in this matter. They are in substantial agreement that the claimant had a substantial pre-existing disability to his left foot as a result of the attack of polio, that some additional impairment resulted from the present injury, and that there is extreme difficulty in segregating the impairment attributable to the polio from that attributable to the injury. Dr. Anderson goes the furthest, although acknowledging that his opinion is somewhat speculative, in concluding that 75% of the claimant's current disability is attributable to the pre-existing polio, or in other words a one-fourth ratio.

"The medical reports of Dr. Stanwood, the treating physician, and Dr. Stanford, an orthopedic surgeon, while not as complete and authoritative in this matter, are nevertheless entirely consistent with the foregoing medical evidence.

"By reason of the fact that the extent of the claimant's pre-existing disability is admittedly an unknown factor, with respect to which the medical authorities candidly acknowledge they are only able to provide an educated estimate, the claimant's testimony relative to the extent of his pre-existing disability is entitled to be accorded substantial weight and has been given full recognition.

"The Board concurs with the hearing officer in finding and concluding from its de novo review of the entire record that the measurement of the loss of function reflected in the medical evidence, considered in light of all the evidence does not support a finding of permanent disability attributable to the injury of September 1, 1967, in excess of the 40.5 degrees awarded by the hearing officer.

"The order of the hearing officer is therefore affirmed."

WCB #69-432 December 5, 1969

ALLARD L. SMITH, Claimant.
Henry L. Seifert, Hearing Officer.
David A. Vinson, Claimant's Atty.
Evohl F. Malagon, Defense Atty.
Request for Review by SAIF.

"The above entitled matter involves the issue of whether attorney fees are chargeable to an employer or the State Accident Insurance Fund with respect to the denial of a claim for aggravation under ORS 656.386 (1).

"The instant claim arose from a compensable injury of September 13, 1965. The first final order was entered by the State Compensation Department on March 7, 1967. Within two years thereafter, the claimant filed his claim of aggravation with the State Compensation Department. The claim was denied. Pursuant to O.L. 1965, Ch 285, Sec 43, the claimant elected to have a hearing under the new procedures.

"Upon hearing, the aggravation claim was allowed together with attorney fees payable by the (State Compensation Department) now State Accident Insurance Fund protests that it is only the denial of an original claim which carries the charge of an attorney fee when the denial is set aside. The words of the former statute did include the words 'original claim' but this was deleted by the 1965 Act. Further the Supreme Court in discussing aggravation claims has had occasion to identify such claims as having the dignity of a claim in the first instance. Grimmett v. SIAC, 108 Or 178.

"The 1965 Act requires that a claimant procure a medical opinion supporting the claim in order to entitle the claimant to a hearing. In order to constitute a legal claim the medical opinion must also be presented. The claimant in this instance presented a legal claim to the State Accident Insurance Fund supported by the medical opinion required by law.

"The Board deems the denial of that claim by the State Accident Insurance Fund to be the denial of such a claim as to bring into force the provision of ORS 656.386(1) requiring attorney fees to be paid by the State Accident Insurance Fund.

"The order of the hearing officer is affirmed.

"Counsel for claimant is allowed the further sum of $150 payable by the State Accident Insurance Fund for services entailed on this review, also under ORS 656.386(1)."

WCB #68-1646 December 5, 1969

The Beneficiaries of
WILLIAM TOLBERT, Deceased.
George W. Rode, Hearing Officer.
Robert Bennett, Claimant's Atty.
Robert Joseph, Jr., Defense Atty.
Request for Review by Employer.

"The above entitled matter involves issues of whether the death of a workman from an overdose of barbiturates entitles his widow to benefits on the basis of death attributable to an accidental injury. The workman had been injured September 2, 1967 and was still drawing compensation as temporarily totally disabled when he died from acute barbiturate intoxication on March 19, 1968. A procedural issue is also involved in that no written claim was ever made by the widow, no written denial of a claim was ever made by the employer and request for hearing was not made to the Workmen's Compensation Board until more than six months following the workman's death.

"The record reflects substantial dispute over what constitutes a 'claim' in that no statutory provision is found with respect to filing such a claim. Even the definition of claim in ORS 656.002(5) ignores the area of claims by beneficiaries and dependents in their own right. Such voids in the compensation law are common. For example, no procedure for claim of aggravation with the employer is found in the statute. The recent decision of Printz v. SCD, 88 O.A.S. 311, (453 P.2d 665) held a written denial by the State Compensation Department prior to a written claim to be void and of no effect with the rights of the widow to hearing dating from a subsequent denial. A reading of Printz v. SCD would appear to preclude a hearing on the instant case unless some authority is found permitting a hearing request to be filed with the Board more than six months following the date of the workman's death.

"In the instant case there is no question but that the widow was orally making known to the employer's insurer that she considered her husband's death to have been caused by his accidental injury. While ORS 656.002(5) refers to knowledge of an injury as 'a claim,' ORS 656.262(5) requires written notice of acceptance or denial of a claim within 60 days after notice or knowledge of the claim as distinguished from notice of an injury. Though the employer may not have had knowledge as to whether the accident caused the death, the employer did have knowledge that the widow was making a claim. The employer, however, failed to comply with ORS 656.262(6) requiring written notice of the denial stating reasons for the denial and informing

the workman of hearing rights. Instead of informing the claimant of hearing rights, the employer allowed the right to hearing based on the six months limitation to expire.

"The Board cannot adopt the concept of the hearing officer that there was some legislative oversight. Rather than an oversight, the Legislature attempted to achieve simplicity by elimination of special forms, statements of issues, etc. The Board interprets ORS 656.319(2) to grant the right to hearing beyond the six months period in case of a denial. Whether the doctrine of estoppel is required or whether the employer's failure to properly deny preserves the right to hearing, the Board concludes that under the facts of this case, the right to hearing was retained under ORS 656.319(2).

"The other issue becomes one of whether the back injury set in action a chain of circumstances from which the decedent's death was attributable to that injury. There is an opinion from a treating psychiatrist that the 'suicide' was 'probably directly related to the paranoid state precipitated by his injury.' The briefs do not discuss the application of ORS 656.310(2) which creates a presumption that 'the injury was not occasioned by the willful intention of the injured workman to injure or kill himself.' The circumstances of over consumption of the barbiturates are not reflected in the record. Though the death was labeled 'suicide,' the death could certainly have been produced by the voluntary taking of the barbiturates without intent to produce death.

"The purpose of ORS 656.156 is clearly to preclude benefits based upon intentional self injury. Where the injury is purely accidental but sets in motion a chain of circumstances impeding the reason of the injured workman, whereby his death results from an overdose of medication, does not fall within the intentional self injury -- particularly in light of the presumption against intentional self injury.

"The Board therefore concludes and finds that the request for hearing was timely and that the decedent's death was compensably related to his back injury.

"The order of the hearing officer, though for different reasons, is affirmed.

"Counsel for claimant is allowed a fee of $250 for services in connection with this review payable by the employer pursuant to ORS 656.386(1)."

WCB #68-756 December 5, 1969

ERMA BARISON, Claimant.
H. Fink, Hearing Officer.
Hal F. Coe, Claimant's Atty.
E. David Ladd, Defense Atty.
Request for Review by SAIF.

"The above entitled matter involves the issue of the relation of low back difficulties to an accidental injury sustained by the then 43 year old claimant in September of 1967 when she was reaching over a belt for a piece of moulding.

"Pursuant to ORS 656.268, a determination issued January 2, 1968, finding the claimant to have sustained only temporary total disability to September 25, 1967 and closed the claim without award of permanent disability.

"A petition for hearing was directed against this order on April 30, 1968. During 1968 her back condition deteriorated and an operation was performed on the low back on November 11, 1968. The hearing was conducted June 10th and August 15, 1969.

"The State Accident Insurance Fund contends that there was no history of low back difficulty until a subsequent intervening incident when the claimant was working in a restaurant and lifted a tray of dishes on January 21, 1968.

"There is evidence of low back difficulty following the September 1967 accident in the form of the report from a physical therapist. The upper back was causing the greater problem but the low back was also involved.

"The Board concludes and finds that the work at the restaurant was not such an independent subsequent event as to be the cause of claimant's discomfort. Her symptoms were symptoms relating to the prior accident.

"The request for hearing, however, was directed to the determination order of the Workmen's Compensation Board of January 2, 1968. It is unfair to look back on the 19 month interval to final hearing and charge the State Accident Insurance Fund with having 'denied' the claim. The issue throughout was the extent of disability attributable to the accident.

"For the reason stated, the order of the hearing officer ordering the claim reopened with directions to assume responsibility for the low back is affirmed.

"The order is modified only to relieve the State Accident Insurance Fund from paying the attorney fee. The attorney fee remains as set, but payable from claimant's increased compensation."

SYLVIA CRITES, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of whether the claimant is entitled to additional temporary total disability as the result of a back injury incurred on July 27, 1966, when the 38 year old claimant fell down a flight of stairs in the plywood mill in which she was employed as a machine operator.

On November 15, 1968, the determination order which is involved in this review was issued pursuant to ORS 656.268 finding the claimant to be entitled to additional temporary total disability for the period from July 28, 1967 to October 23, 1968, and further finding the claimant to have no residual permanent disability as a result of the accidental injury.

From this determination order the claimant requested a hearing which resulted in the determination order being affirmed by the hearing officer.

The claimant on review asserts that the period of temporary total disability should be extended from October 23, 1968, to March 18, 1969, and that she is now precluded from regularly performing any work at a gainful and suitable occupation and is permanently and totally disabled.

The record reflects that the claimant continued to obtain chiropractic treatment from Dr. McCauley from time to time during the period for which she seeks further temporary total disability compensation. It is evident from both the testimony and medical reports that the chiropractic treatment during this period was basically palliative and directed to the temporary relief of her continuing complaints rather than curative of any physical disability.

In a comprehensive medical report, Dr. Rockey, an orthopedic surgeon, concluded as the result of a thorough examination of the claimant for the purpose of disability evaluation, that the claimant had fully recovered from the effects of her injury, and that there was no objective evidence of residual permanent disability to either her lower or upper back.

The medical reports of Dr. McCauley, the treating chiropractic physician, confirm that the claimant's condition has become medically stationary by October 23, 1968. As a result of his examination of the claimant for the purpose of disability evaluation, he concluded that the claimant had sustained an 8% total impairment of her spine, predicated upon his finding of a loss of motion in six of twelve motion measurements, none of which individually exceeded a 2% loss of motion. In a postscript to his report, Dr. McCauley has qualified his finding of some minimal permanent disability in indicating that although he feels that there has been some permanent disability which will, at least under chiropractic care, not be alleviated, "It is hard to evaluate the probability of disability in so far as her complaints are not consistent with the amount of movable impairment."

The Board in weighing the medical reports of the respective doctors, is of the opinion that the conclusions of Dr. Rockey are entitled to be accorded the greater weight.

The conflict between the subjective complaints and the medical evidence is irreconcilable. The Board is unable to find any sound basis upon which to justify reliance on the claimant's long continuing purely subjective complaints in light of the strength of the medical evidence to the contrary.

The Board finds and concludes, as a result of its review of the entire record in this matter, which includes the record made in the two preceding hearings with respect to the claimant's injury, that the claimant is not entitled to additional compensation for temporary total disability beyond October 23, 1968, and that there is no residual permanent disability resulting from the accidental injury.

The order of the hearing officer is therefore affirmed.

WCB #69-457 December 9, 1969

JESSIE HART, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 51 year old truck driver as the result of an accidental injury on October 13, 1967, when one of the logs being unloaded from his log truck fell and struck him on the right side of his body, causing fractures to the ankle and heel of his right foot.

The determination order entered pursuant to ORS 656.268 granted the claimant an award of permanent partial disability of 10% loss of the right foot, or 13.5 degrees of the 135 degrees provided for a complete loss of one foot. This determination of the claimant's permanent disability was affirmed by the Hearing Officer.

The claimant on review contends that he has sustained greater disability to his right foot than that awarded, and that he has sustained permanent disability to his right arm and shoulder for which he has received no award.

The claimant's injuries were diagnosed as a trimalleolar fracture and an os calcis fracture of the right foot, for which the treatment consisted of surgical repair and the application of a long leg cast.

The final medical report reflects the os calcis fracture to be well healed with a slight widening in the fracture area. The ankle was found to have a full range of motion with some pain on extreme motion. It indicated he was able to walk without limp and exhibited no external evidence of disability. Circulation, innervation and motor function were all within normal limits. While the doctor indicated that the claimant will very likely develop moderate traumatic arthritis which may eventually limit him from heavy duty walking and work, it was his opinion that he retained a serviceable foot which would permit him to remain gainfully employed during the remainder of his life.

The claimant returned to his prior employment as a log truck driver for his former employer seven months after his injury, and is able to perform this arduous employment as effectively now as he was prior to his injury. The record indicates that he is one of the top five senior drivers for his employer,

and statistically is the most efficient driver. Since his return to work he has worked regularly including overtime with no lost time due to his injury, and it is apparent, although the record is silent, that he has suffered no loss of earnings, providing no basis for the application of the recent decision in Ryf v. Hoffman Construction Company, 89 Or Adv Sh 483, 459 P2d 991.

Extensive testimony was presented by the claimant at the hearing with respect to the alleged permanent disability of his right arm and shoulder. Although the claimant concluded that he had 50% less use of his right arm and shoulder than he had prior to his injury, his testimony dealt primarily with the pain and discomfort he experienced in the use of his arm and shoulder, with little indication of any permanent loss of physical function.

The first disclosure that claim was being made by the claimant for an award of permanent disability involving the right arm and shoulder appears to have been his testimony at the hearing over one and one-half years following the occurrence of the accident.

The determination of the existence and extent of permanent disability founded solely upon the claimant's testimony, must be considered in light of the great reliance placed upon medical evidence in such determination of disability under the present Workmen's Compensation Law.

The physical impairment of the claimant's right arm and shoulder is not reflected in any of the medical reports, and is without any medical substantiation.

The mere occurrence of an accidental injury does not in and of itself warrant an award of permanent disability, despite the severity of the initial injury, unless the workman after having been restored as nearly as possible to his former condition, has sutained some permanent loss of physical function. Non-disabling pain and suffering are not compensable.

A subsidiary issue raised during the hearing and presented on this review involves whether the claimant requires and should be provided with shoes with built in arch supports.

While ORS 656.245 authorizes providing a workman with such items as special arch support shoes which are required by him as a result of his injury, the inclusion of such items within the medical services required to be provided to a workman, indicates that the necessity of such items should be determined by medical prescription.

Since the statute provides that 11 medical services as are required after the determination of permanent disability shall be provided, the claimant may hereafter be provided with such special shoes as are medically prescribed as necessary as a result of his condition.

The Board finds and concludes from its de novo review of the entire record in this matter that the determination order granting the claimant an award of 13.5 degrees against the scheduled maximum of 135 degrees for the complete loss of a foot, which was affirmed by the Hearing Officer, correctly evaluated the claimant's permanent disability attributable to his accidental injury.

The order of the Hearing Officer is therefore affirmed.

WCB #69-152 December 9, 1969

JAMES W. LADD, Claimant.
Request for Review by Employer.

The above entitled matter involved issues of the extent of temporary disability with respect to the injuries of a 58 year old meat cutter who sustained an injury on February 17, 1968 when a box of frozen meat fell and fractured a bone in claimant's right foot.

In addition to periods of temporary total disability awarded pursuant to ORS 656.268, the hearing officer awarded further temporary total disability plus increased compensation and attorney fees for unreasonable delay in payment of compensation awarded.

The order of the hearing officer was made the subject of a request by the employer for Board review. That request has now been withdraw together with a consent by the employer for dismissal of the matter.

The matter is accordingly dismissed.

No notice of appeal is deemed applicable.

WCB #69-319 December 10, 1969

WILLIAM R. WOOD, Claimant.

The above entitled matter involves issues of the extent of disability arising from a back injury sustained by a 56 year old chef in moving a barrel of corned beef on June 15, 1967. The claimant had a history of back disabilities and a related instability of his legs dating from at least 1955. One of the chief issues on hearing was the compensability of other injuries from falls sustained since June 15, 1967, which are allegedly causally related to the industrial injury.

Following a hearing the hearing officer ordered the employer to accept the responsibility for the results of such subsequent falling incidents.

The employer requested a Board review but unfortunately the records of the hearing were partially destroyed by fire at the home of the hearing reporter.

Pursuant to ORS 656.295(5), the record is incomplete and cannot be heard de novo by the Board or subsequent appeal to Court without a reconstruction of the record.

The matter is therefore remanded to the hearing officer for further hearing and such further order as may be justified by the evidence thereupon obtained.

WCB #69-1028 December 15, 1969

ROBERT MARVEL, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of the extent of residual permanent disability attributable to an accidental injury of March 27, 1968, when the truck in which claimant was riding in the "sleeper" compartment was involved in a wreck. The symptoms involved the head, neck and arm. The claimant had been in prior truck and airplane crashes but asserts he had no residuals from those accidents. He was released by his doctors for return to work on April 28, 1968. About the first of September, 1968 the claimant again developed similar symptoms, some of which were caused by a coronary problem unassociated with the accident at issue. Some further orthopedic treatment was also given in addition to treatment for the cardiac problem.

Pursuant to ORS 656.268 a determination issued finding the claimant to have a disability of 16 degrees for unscheduled or other injuries on the basis of a possible maximum of 320 degrees and comparing the workman to his pre-accident status.

Upon hearing, the award was increased to 80 degrees and the employer sought Board review.

It appears to the Board that the hearing officer increased award may well represent the total picture including the limitations imposed by the residuals of the non-related coronary. It is the residual from the coronary which now precludes the claimant from truck driving. Claimant would be unable to procure his license under the limitations imposed by federal authorities.

The Board is particularly impressed with the most recent medical report of Dr. Dennis of May 16, 1969 which reflects that the residuals from the accident at issue are actually minimal.

The Board concludes and finds that the permanent disability attributable to this accident does not exceed in degree the 16 degrees originally awarded. The order of the hearing officer is therefore modified to reduce the award of disability from 80 to 16 degrees. The order of the hearing officer with respect to payment of the fees of Dr. Puziss is affirmed.

WCB #69-374 December 15, 1969

HAROLD L. THROOP, Claimant.

Workmen's Compensation Board Opinion:

The above entitled matter involved the issue of whether the 50 year old claimant sustained a compensable occupational disease in the form of acute bronchial asthma precipitated by exposure to wood dust.

The claim was denied by the employer and the denial was affirmed by the hearing officer.

The workman rejected the hearing officer order and the matter was then submitted to a Medical Board of Review as provided by ORS 656.808, 814.

The findings of that Board are attached, by reference made a part hereof and are declared filed with the Workmen's Compensation Board on December 9, 1969.

Pursuant to ORS 656.814, the findings of the Medical Board of Review are by law declared final and binding.

Though the Board's position on such occupational disease claims review is basically ministerial, it appears that pursuant to ORS 656.804(1) and 656.386 that claimant is entitled to have his attorneys fee on the rejection of the claim be set by the Workmen's Compensation Board and made payable by the employer.

It is accordingly ordered that the employer pay to claimant's counsel a fee of $500 in addition to whatever compensation the claimant may be entitled to receive.

Medical Board of Review Opinion:

On Wednesday, November 26, 1969 a Medical Board of Review, consisting of myself, Dr. Donald E. Olson as chairman, plus Dr. Donald V. Romanaggi and Dr. John O'Hollaren, met to review the case of Mr. Harold L. Throop. The Medical Board of Review was held in the offices of The Portland Clinic at 1216 S.W. Yamhill, Portland, Oregon commencing at 4:30 p.m.

The complete file from the Workmen's Compensation Board had been reviewed by the examiners.

Mr. Throop was interviewed and gave the following history. He stated that he was not currently short of breath and had no other respiratory symptoms. He felt that he could carry on normal physical activity without dyspnea. He had no cough, sputum production, chest pain or wheezing. He was not currently on medication with the exception of injections for his allergy each week.

Mr. Throop confirmed the previous reports in the record that he had gone to work for the Publishers Paper Company about May, 1968. At first he worked on the mill pond and was not exposed to much dust. About August, 1968 he began working on the bark hog machine. In addition to this duty he sometimes worked on the green chain and cleaned up under conveyor belts and filled in at other sites. However, his main duty was about the bark hog machine. He related how the machine sometimes would become plugged and he would have to get on top of the machine and clear the apparatus by poking materials through it with a long pole. The materials fed into the machine were primarily hemlock and fir wood and bark. The area about the machine was quite dusty.

In about late October or early November, 1968 the patient began having symptoms of cough and sneezing when he would put on his coveralls on entering the plant. This would last a few moments and then he would be reasonably free from symptoms. However, in December he began noticing congestion in his chest and a mild cough. By the evening of December 4 he had not only congestion but wheezing and rather striking shortness of breath which forced him to stop work. The following evening he not only had the cough and wheezing but severe dyspnea, particularly when trying to climb a ladder. He was unable to go on with his work and left employment on approximately December 5 and has been unable to return to his employment. For a few days after leaving the job his respiratory symptoms continued. He then saw Dr. Gustafson who prescribed Ephedrine

but in spite of this the symptoms persisted and he was referred to Dr. Romanaggi. Additional medication seemed to offer improvement. In late December, 1968 the patient was beginning to feel better but had a load of fir shavings which he attempted to spread around his place of residence and shortly thereafter had an acute exacerbation of dyspnea, more cough and wheezing. This ultimately resulted in his hospitalization which is recorded in the information with which we were provided. Subsequent to his hospitalization he slowly improved but still noted tightness in the chest, only slight wheezing and a very slight nonproductive cough. He believes that his last symptoms disappeared during April, 1969.

The patient stated that about fifteen years ago when he was helping to load some six-year-old moldy hay he had an episode of sneezing, stuffy nose, runny nose and watering eyes which was of relatively short duration. Then he noticed that in subsequent years any time he worked around the dusty old hay his eyes would water and his nose might run a bit but he specifically denied having cough, wheezing, dyspnea, chest pain, known chills, fever or sweats. There was no antecedent history of other allergies. He had handled wood shavings in the past as he used to scatter them over the barn floor frequently for his dairy cattle, but he never had experienced any reaction when handling this material in his barn. It was his impression that his mother may have had some allergies since she did have some bronchitis and wheezing. He also believed that his sister did some wheezing, but the family history was not particularly clear-cut for allergic background.

The patient had smoked for a four-year period but had never consumed more than a package of cigarettes daily and he had not smoked for approximately four years before the acute respiratory symptoms noted above.

On examination, Mr. Throop appeared to be in good health. His nasal mucous membrane appeared normal. The pharynx was clear. There was no palpable adenopathy in the neck or in the axillae. The chest cage was normal in configuration and gross expansion. The lung fields were resonant to percussion. The breath tones were of good quality and intensity and no wheezes or rales could be heard. The heart was not enlarged. The rhythm was regular. No murmurs could be detected and A2 was about equal to P2. There was no evidence of peripheral edema. He had no evidence of cyanosis and there was no clubbing of the fingers.

PA and lateral 14 x 17 chest x-rays were obtained on November 26, 1969 and appeared normal.

Pulmonary function studies were done on November 26, 1969. It is noted that his forced vital capacity was 6.08 liters or 150% of predicted. The one second forced expiratory volume was 3.68 liters or 108% of predicted but the ratio of the forced expiratory volume in one second to the total forced vital capacity was 61. The forced expiratory flow rate between 25 and 75% was 2.55 liters per second or 67% of predicted whereas the forced expiratory flow rate between 200 and 1200 c.c. was 8.14 liters per second or 106% of predicted. After IPPB with nebulization of a mixture of Isoproterenol and NeoSynephrine there was no appreciable change in the ventilatory studies with the exception of a rise in the forced expiratory flow rate between 25 and 75% to 4.28 liters per second and the study is interpreted as showing very slight obstructive impairment of ventilatory pulmonary function with a reversible component.

Previous studies by Dr. Romanaggi indicate some reactivity to house dust, some animal danders and molds.

It was our conclusion that Mr. Throop did have an acute episode of bronchial asthma as a result of wood dust exposure.

Attached are our replies to the five questions which have been asked of this Board.

/s/ Donald E. Olson, M.D.

WCB #69-1278 December 16, 1969

STEVEN L. JONES, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability sustained by a 28 year old workman who sustained a low back strain on August 22, 1968.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 32 degrees against the applicable maximum of 320 degrees for unscheduled or other injuries. The hearing officer increased the award to 80 degrees and it is urged by claimant's counsel that the claimant should be classified as permanently and totally disabled.

It is not seriously contended that the claimant sustained major disability as the result of this low back strain. The claimant had the misfortune of having polio at the age of eight years. He has a speech impediment dating from about that time. Though there is some mention of literacy levels, the claimant has successfuly completed the eighth grade equivalency test given on an oral basis.

The Board concludes the award of disability is liberal with reference to the additional disability attributable to this accident. The brief of the State Accident Insurance Fund urges the award be affirmed.

Though the initial rehabilitation efforts were toward barbering, the Board records (not of record from the hearing) now reflect the claimant is making satisfactory progress in an upholstery school program.

The Board recognizes that when claims of disability are made, it is sometimes thought advantageous to ask "for the moon" with the thought that one may always settle for less. This young man has had to face life with physical problems but no one should urge him to resign from efforts to remain a useful constructive citizen. A major concern in workmen's compensation laws is the hesitancy of employers to hire epileptics, for instance, or persons similarly disabled. Some protection is given such employers by special funds to absorb some of the extra cost. There remains a real responsibility on both the disadvantaged workman, employer and compensation administration to encourage the employment of such handicapped workmen. Such encouragement will avail nothing if otherwise minimal injuries are the basis of claim for permanent total disability. Disservice is done to the individual by officially classifying him as totally disabled and disservice is done to others with similar problems by closing off possible avenues of employment.

The Board commends this young man for the efforts he is making toward vocational rehabilitation extended at the expense of the Workmen's Compensation Board. The Workmen's Compensation Board, for the record, adds that if some speech-reading therapy is deemed advisable to augment the program of vocational rehabilitation, such therapy, though not a disability from the accident, is within the services properly available as a vocational aid.

The Board concludes and finds that the disability attributable to the accident does not exceed that awarded by the hearing officer. The order of the hearing officer is therefore affirmed.

WCB #69-77 December 16, 1969

JAMES F. LOPER, Claimant.
Request for Review by Employer.

The above entitled matter involved a number of issues at hearing on the application of increased compensation and attorney fees for delay in payment of compensation previously ordered as well as issues of continuing responsibility for medical care and disability.

The claimant is a 37 year old mill worker who sustained a head injury in December of 1966. The claim was previously before the Board and Circuit Court.

The order of the hearing officer subjected to this review was issued on July 10, 1969. On August 7, 1969, a request for review entitled Before the State Accident Insurance Fund determined it was not intended for that agency. The Board withheld passing upon the procedural question at the time.

The Board now concludes that the failure to comply with the provisions of ORS 656.289(3) and 656.295 made the order of the hearing officer final.

The request for review is therefore dismissed as not properly directed to or received by the Workmen's Compensation Board within the time provided by law.

If the matter had been dismissed forthwith no further attorney fees would have been assessed to the employer at the level of Board review. Under the circumstances, the Board deems the fee allowed at hearing adequate and that technically no Board review was ever precipitated.

ROBERT E. SMITH, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability attributable to a low back injury sustained by a 28 year old workman who fell from a catwalk while stacking lumber on August 12, 1968.

The claimant had previous low back difficulties and had undergone two surgeries in 1962 and 1964 precipitated by injuries from an automobile accident. Both surgeries were to relieve the symptoms from intervertebral disc pressures. There was some confusion with respect to whether one of the surgeries involved the fusion of vertebrae and unfortunately much of the testimony of Dr. Carlson was predicated upon this supposition.

Pursuant to ORS 656.268 a determination of disability awarded 32 degrees against the maximum allowable of 320 degrees for unscheduled or other injuries and comparing the workman to his condition prior to the accident at issue without such disabilities.

The hearing officer increased the award to 80 degrees. The hearing officer opinion starting on page 3 asserts that the initial award was "erroneously" made upon the basis that the injury aggravated a pre-existing disability and that there was no medical substantiation for this conclusion. Joint Exhibit A subscribed by Doctors McHolick, Marxer and Dow, is a report of a back evaluation clinic in an impartial facility maintained by the Workmen's Compensation Board. That report concluded in March of 1969, "At the present time this patient appears to have had some minimal aggravation of a pre-existing low back which had been treated with two previous surgeries." The hearing officer further recites the claimant was symptom free in the interim following the previous surgeries but the same report of Doctors McHolick, Marxer and Dow also recites the residuals attributable to the former accident in its physical examination with references to weakness of toe extension on the left, numbness of nerve distribution of the left foot and a depressed left ankle jerk.

It cannot be said that the accident at issue is the real reason for avoiding heavier types of work. With only minimal additional disability, it is apparent that the pre-existing disabilities play a large role in the advisability of further exposure of a partially disabled back to the possibility of re-injury or extending disability.

The gross disability in the back may approximate the 80 degrees awarded by the hearing officer. The Board concludes and finds, however, that the disability attributable to this accident does not exceed the 32 degrees awarded by the determination.

The order of the hearing officer increasing the award from 32 to 80 degrees is therefore set aside.

The Board clarifies an auxilliary issue with reference to the time within which the claimant may obtain a hearing on a claim of aggravation as a matter of right by fixing the date as five years from April 4, 1969.

Pursuant to rule, counsel for claimant is authorized to collect a fee from claimant not to exceed $125 for services in connection with an employer initiated review where the award of compensation is reduced.

WCB #46, 67-255 and 67-271 December 16, 1969

MARIE THOMAS, Claimant.
Request for Review by SAIF.

The above entitled matter involves a claim for accidental injury which occurred June 24, 1963, with an initial diagnosis of lumbosacral sprain. The claim proceedings have been long and involved. Since January of 1968 the claimant has been drawing compensation on the basis of being permanently incapacitated from regularly performing work at a gainful and suitable occupation.

The claimant has been residing for some time in the State of Arkansas. The Workmen's Compensation Board has been requested by the now State Accident Insurance Fund to exercise the Board's own motion jurisdiction under ORS 656.278 to set aside the finding of permanent total disability. The State Accident Insurance Fund also advises that the State Accident Insurance Fund is being billed for medications obtained by the claimant in amounts up to $220.22 per month.

The claimant was recently examined by an orthopedic specialist, Coy C. Kaylor, M.D., Fayetteville, Arkansas. The concluding paragraphs of Dr. Kaylor's three page report are as follows:

> "In my opinion, this lady does not have a bodily injury resulting from her alleged accident of the 24th of June, 1963 which requires further treatment. Her emotional problem predated her accident of the 24th of June, 1963. It is unfortunate, in my opinion, that this lady was operated on for this condition supposed to have arisen from the accident. This patient was apparently doing quite well until she came under treatment by her various doctors. Her well known addiction can be controlled by not giving her any further medication. The only solution to her problem of drugs is simply for your insurance company to quit providing funds for doctors to give her medication. If she is permitted to see a doctor of her own choice, on her own at her expense, I feel certain that her drug problem will be much less.
>
> I would like to point out that my findings on examination, including the presence of achilles reflexes may differ with some of the examiners, however, I was careful in this examination, having noted after reading the correspondence that some of the doctors were not able to elicit achilles reflexes on either side, I examined and re-examined these reflexes. It is my opinion that to prolong treatment of this lady by the use of more medications and including psychiatric care will do her untold harm. She is poorly educated and apparently not overly intelligent but she is very cunning and very knowledgeable in dealing with doctors and insurance companies, otherwise this case would never have gone this far."

The Workmen's Compensation Board is not prepared at this time to issue an order re-determining the extent of claimant's disabilities. However, the Board finds that the claimant is obtaining medications which are not only not required by the injury but the medications being obtained actually will cause untold harm to the claimant if continued.

Pursuant to the continuing jurisdiction vested by ORS 656.278, the Workmen's Compensation Board hereby authorizes the State Accident Insurance Fund to cease authorization and payment of billings for medication obtained by the claimant herein until further order of the Board.

Since ORS 656.278 provides that an order of the Board terminating medical care is entitled to a hearing, the Board deems this order to be in the nature of a determination pursuant to ORS 656.268. If the claimant is dissatisfied with this order, request for hearing must be filed within one year of the date of mailing of this order.

The Board advises the parties that if and when any such request for hearing is filed, hearing will be set in the State of Oregon and testimony will be taken upon all aspects of the extent of claimant's disabilities. Any hearing will be for the purpose of making a record for further Board consideration, own motion jurisdiction being an authority reserved to the Board proper without delegation of order on the merits to the hearing officer.

WCB #69-676 December 17, 1969

COLLEEN LISOSKI, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of when compensation for a permanent disability award becomes payable.

In the instant case the claimant's award of benefits following the initial determination, hearing and Board review was increased by the Circuit Court. The employer's position is that the increased compensation becomes payable on a monthly basis when the Circuit Court judgment is entered. The claimant's position is that the Court review establishes that the original award was in error and that the compensation which would have been paid had the initial award been correct should be paid to date in a lump sum.

ORS 656.216 (1) reads as follows:

> "Compensation for permanent partial disability shall be paid at the same rate per week as provided for compensation for temporary total disability. In no case shall such payments be less than $25 per week."

ORS 656.230 (2) reads as follows:

> "If a workman has been awarded compensation for permanent partial disability, the board may, in its discretion, order to be paid to him in a lump sum an amount not exceeding one-half of the present value of the unpaid award, computed as provided in this section. Thereupon, all subsequent instalments shall be reduced proportionately."

The Board's sympathy is with making the increased award payable from the expiration of payments upon the prior award. However, the operative part of the statute does not mention retroactive payments. The statute recites, "If a workman has been awarded compensation for permanent partial disability, the board may, in its discretion, etc." The award under discussion is that of the Circuit Court. That award did not exist until made by the Circuit Court. The importance of the existence of an award in another area of compensation is noted in the recent Fertig v. SCD, 88 Adv 505, 455 P2d 180, in interpreting ORS 656.218.

The payment of compensation follows the award and any advance payment is subject to application to and exercise of discretion by the Workmen's Compensation Board in all cases where the award exceeds 24 degrees. This principle applies to initial determinations, hearing officer and Board orders awarding or increasing awards of compensation.

The Board is being asked to approve a policy that all payments of compensation accruing prior to an award shall be paid. The statute clearly limits the authority of the Board to authorize, on application, 50% of the total unpaid award.

In the latter connection it should be noted that the original award would have paid out October 23, 1968. The increase by the Circuit Court was made March 19, 1969, some five months later. The monthly payments at $100 involve a total of $500 allegedly past due and payable with the Circuit Court order. A lump sum of over $1,000 could have been obtained by the claimant in lieu of initiating this hearing and review.

The order of the hearing officer did not address itself to the applicable law with respect to payment of awards but discussed the humanitarian aspects of compensation. The humanitarian aspects must be kept within statutory bounds.

The order of the hearing officer is therefore reversed.

Counsel for claimant is authorized to retain the fee ordered paid out of compensation on the basis of the Board rule permitting a fee where the employer initiates a successful appeal.

WCB #69-548 December 17, 1969

GLEN COUCH, Claimant.

The above entitled matter involves issues of extent of temporary partial disability relating to injuries sustained by a 50 year old workman who injured his back in a mill accident on February 29, 1968.

Following an order of the hearing officer remanding the claim to the employer for payment of temporary partial disability and thereby keeping the claim open, the matter was brought to this review.

The parties have now stipulated that the claimant's loss of earning capacity is 70% and the compensation payable until the claimant's condition becomes stationary is 70% of the compensation payable if claimant was temporarily and totally disabled. Copy of the stipulation is attached and by reference made a part hereof.

The stipulation is hereby approved and the matter is hereby dismissed upon the basis of the stipulation.

No notice of appeal is deemed applicable.

WCB #68-1795 December 18, 1969

The Beneficiaries of
ROBERT L. HOUSLEY, Deceased.
Request for Review by Employer.

The above entitled matter involves an issue of whether three stepchildren are beneficiaries of their stepfather--the relationship having existed only from July 29th to August 8, 1968, when the stepfather was killed in a compensable industrial injury.

ORS 656.002 (4) includes stepchildren as beneficiaries "if such stepchild was, at the time of the injury a member of the workman's family and substantially dependent upon him for support."

The claim of these beneficiaries was denied by the employer but ordered allowed by the Hearing Officer.

At the time of her remarriage to the deceased workman, the mother of the children was drawing welfare benefits for aid to dependent children. She was also entitled under the decree of divorce to support payments from the natural father of the children. In the year following the divorce, the natural father had paid but $315 of the $1,800 required by the decree.

The evidence of actual support in the interval between marriage and death includes payments of rent, groceries, clothing and babysitting. The word "substantial" is relative. The remarriage terminated the established aid to dependent children benefits. The token payments of support from the natural father left no doubt but that the new stepfather had assumed an obligation under which the stepchildren were an immediate factor of substantial dependency.

The Board concludes that the word substantial does not mean any stated percentage. The support required to create a dependency could be less than half the total support, for instance, and still be substantial.

The rights and liabilities are created by the compensation law as of the date of the injury. It is immaterial that the relationship in this instance had existed less than two weeks.

The Board concludes and finds that as of the date of the death of Robert L. Housley, the three children of Norma Housley from her prior marriage to Arlen Jones were substantially dependent upon Robert L. Housley and therefore are entitled as beneficiaries under the compensation law.

The order of the Hearing Officer is affirmed.

Counsel for the beneficiaries shall be paid the further sum of $250 by the employer for services in connection with this review pursuant to ORS 656.386.

WCB #69-938 December 18, 1969

MARTIN N. JANSSENS, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the rate of temporary total disability payable to a workman whose contract of employment entailed working two or three days a week. The workman was seeking full time employment with the employer, but had only been accorded that work during two weeks of the Christmas season. His injury on February 1, 1969 occurred while the regular employment was restricted to three days or less per week.

ORS 656.210 provides temporary total disability compensation on a monthly basis with a provision that for a workman regularly employed for not more than three days a week the monthly wage for purposes of determining benefits is obtained by multiplying the daily wage by 14.

The Board adopts the following reasoning and conclusion from the order of the Hearing Officer:

> "The Hearing Officer finds it impossible to subscribe to the arguments of either party in full. If a workman were employed five days a week and was willing and available to work six or seven days a week, under claimant's theory he would be entitled to have his temporary total disability compensation computed on a 6 or 7 days basis. Under defendant's theory he would be entitled to compensation based on the number of days per week he was working at the time the injury occurred, and if he normally worked five days a week but was only working three days a week when the injury occurred, his compensation would be computed at the lower scale.
>
> "It is the opinion of the Hearing Officer the definition of 'regularly employed' was inserted for the purpose of protecting those workmen who normally work a greater number of days each week than they happen to be working at the time they were injured. Thus, a workman who is regularly employed five days a week but is reduced to three days a week because of some other temporary problem, would receive compensation as though he had been working five days a week when he was injured. A workman who usually works three days a week who was injured during a period of time when he was employed five days a week would be entitled to compensation computed on the basis of a five-day week; but a workman who normally worked three days a week is only entitled to compensation computed on a three-day week, even though he might have been willing or even anxious to work five or six days a week.
>
> "Here, claimant was employed to work part time and worked part time during the majority of the eleven weeks he was employed, and his

temporary total disability compensation was correctly computed since he was not 'regularly employed' more than three days a week."

The order of the Hearing Officer is therefore affirmed.

WCB #69-1014 December 18, 1969

CLYDE MARTIN, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of the extent of permanent disability attributable to a low back injury sustained by a 60 year old worker while pulling lumber on a green chain on May 29, 1968.

Pursuant to ORS 656.268, the disability was evaluated at 32 degrees against the applicable maximum of 320 degrees for unscheduled or other injuries on a comparison to the workman to his pre-accident status. Upon hearing the award was increased to 80 degrees.

The claimant's back had not bothered him prior to the incident though the examinations by doctors reflected that the back was the subject of degenerative processes. A concurrent problem of gout or similar systemic disease also existed which improved with medication and worsened when the medication was stopped. The illness of the doctor treating the claimant for this condition apparently precluded a full exposition of the disease condition.

The claimant has not found re-employment and no factor of comparative wages utilized in Ryf v. Hoffman, 89 O.A.S. 483, 459 P2d 991 can be applied. The mill at which he was employed burned a few days after injury.

The functional disabilities attributable to the injury appear to be minimal in the opinion and report of Dr. Rockey. The fact that some disability follows and injury does not necessarily make all such disability compensable. As noted above there is evidence of a systemic condition not causally related to the accident which worsened when medication was stopped.

To the extent the pre-existing degeneration was made symptomatic, the claimant has sustained a permanent disability. The Board concludes and finds that the compensable disability does not exceed the 32 degrees established upon the determination pursuant to ORS 656.268.

The order of the hearing officer is therefore reversed and the award of disability is reduced to 32 degrees.

The award having been reduced on appeal by the employer, counsel for claimant is entitled to claim a fee of $125 for services rendered on review and payable by the claimant.

FLOYE BARRON, Claimant.

The above entitled matter involves procedural issues stemming from a claim based upon disabilities associated with claimant's inhalation of certain fumes in June of 1966.

An order of the Hearing Officer of February 25, 1969 gives the interval history of the claim between those dates as follows:

> "This is an occupational disease claim which originally arose June 19, 1966 when the claimant inhaled certain solvent fumes while in the course and scope of his employment for defendant-employer. Claimant was hospital admitted June 22, 1966. The subsequent medical treatment and history has been detailed in the Opinion and Order of Hearing Officer H. L. Pattie dated January 22, 1968.
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> "An 801 form was filed by the claimant with the employer on February 21, 1967. Temporary total disability payments were paid by the defendant-employer for the period February 21, 1967 until October 12, 1967. On April 19, 1967 the carrier tentatively accepted the claim, pending further investigation. Under date of October 13, 1967, the attorney for the employer formally denied the claim based upon: (1) failure to file within the statutory time, and (2) that the disease or infection did not arise out of and in the scope of claimant's employment.
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> "In the meantime, on July 27, 1967 and August 17, 1967, the claimant requested a hearing. Said hearing was held after an initial pre-hearing conference on November 9, 1967 before Hearing Officer H. L. Pattie. Some 12 issues were before the Hearing Officer and were resolved by the Opinion and Order of January 22, 1968. That document, inter alia, held that the claimant had not sustained an occupational disease within the meaning of the Oregon Workmen's Compensation Law and affirmed the Notice of Denial.
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> "On February 2, 1968, claimant filed a rejection of the Hearing Officer's order and requested the formation of a Medical Board of Review. The claimant desired Dr. Morton Goodman to be appointed to the Board and the defendant filed a petition objecting to this appointment. On March 18, 1968, the Workmen's Compensation Board denied the defendant's petition. This denial was appealed to the Circuit Court of Multnomah County and, on May 16, 1968, Judge Sulmonetti issued an Order reversing the Workmen's Compensation Board denial and disqualified Dr. Goodman.
>
> "A Medical Board of Review was subsequently constituted and on August 13, 1968 issued their finding that claimant suffered from an occupational disease contracted June 20, 1966, and that same was disabling to the extent of 30% of the whole man. On August 29, 1968, the Workmen's Compensation Board issued its Order filing findings of Medical Board of Review and equating the disability in terms of 50% of the loss of an arm.

"On September 18, 1968, claimant filed a further Request for Hearing setting forth the following issues to be determined: (1) Temporary total disability from June 20, 1966 to February 21, 1967, penalties and attorney's fees; (2) Temporary total disability from October 12, 1967 to date of hearing, penalties and attorney's fees.

"On October 9, 1968, the defendant filed a request for determination of the claim, filing certain medical reports and information with the Workmen's Compensation Board. The defendant-employer also requested that the scheduled hearing be delayed until after the Determination was issued. This request was denied by the Hearing Officer on October 15, 1968. On October 9, 1968, the claimant submitted certain medical reports to the Workmen's Compensation Board.

"On October 17, 1968, the Closing and Evaluation Division of the Workmen's Compensation Board issued its Determination Order awarding to claimant compensation for temporary total disability to July 19, 1967 and temporary partial disability from July 19, 1967 to August 6, 1968."

No request for review was made with respect to that order of the Hearing Officer. On June 29, 1969 claimant requested a hearing urging that his disability was greater than that awarded. In the hearing the claimant urged that the claim should now be considered as an accidental injury or in the alternative that the variance in procedures between accidental injury and occupational disease claims is unconstitutional.

The Hearing Officer dismissed the request for hearing upon both issues and the matter then came to the Board for review. The problem posed to the Board is whether the Board has been given any review authority on occupational disease claims in light of ORS 656.810 (4) channeling legal issues directly to the Circuit Court and ORS 656.814 making the factual findings of a Medical Board of Review final and binding.

As noted in Schulz v. SCD, Or Adv Sh 761, 766, the Board has broad authority and disposition will be made rather than concede that a vacuum exists. The Board deems Dodd v. SIAC, 211 Or 99 applicable to the case at hand in that the claim is one committed to the concept of Occupational Disease and the claimant is now precluded from urging that the claim be converted to one for accidental injury.

The constitutional issues were primarily resolved by White v. SIAC, 227 Or 306. The Board would deem it presumptuous for this agency to hold such a statute unconstitutional and possibly deprive workmen of any remedy as was the case prior to the enactment of the Occupational Disease Law.

The Board does not believe such claimants are barred from all further proceedings because of the first evaluation of disability by the Medical Board. Claims for aggravation may be made but such claims must be processed to the employer-insurer with the supporting medical required by ORS 656.271 and thence processed to hearing and further Medical Board of Review. Any aggravation claim accepted by the employer-insurer may be processed for determination pursuant to ORS 656.268 and thence proceed to hearing and further Medical Board of Review on the extent of disability. There was no supporting medical to warrant a consideration of that possible issue at the hearing now under review.

The Board concludes and finds that the Hearing Officer properly dismissed the matter and the order of the Hearing Officer is affirmed.

If the Board had the authority in this matter to entertain the issues and thus enter this order, the right of appeal is as follows:

WCB #69-142 December 23, 1969

ALBERT L. GRUMBLES, Sr., Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 34 year old sawmill worker who injured his back December 12, 1967 when he fell 14 feet and landed on his left side and back on a beam. The initial diagnosis was a fractured left 10th rib and a contusion of the left kidney. It appears that the claimant has a chronic lumbosacral strain syndrome with mild low back pain. There is reference to an "early ankylosing spondylitis."

Pursuant to ORS 656.268, a determination issued finding the claimant's disability to be 32 degrees against an applicable maximum of 320 degrees comparing the workman to his pre-accident status. Upon hearing, the determination was increased to 48 degrees. The determination order and also the decision of the Hearing Officer were entered before the decision of Ryf v. Hoffman Construction, 89 Or Adv Sh 483, 459 P2d 991. The Board's interpretation of the Oregon Law relating to evaluation of permanent disability has always been that set forth in the dissenting opinion in the Ryf case. The legislative direction for initial determination of disability set forth in ORS 656.268 appears to contemplate a determination based on "medical reports necessary to make such a determination." It is true, the Board may require "additional medical or other information," but the emphasis has been upon ratings of loss of physical function as reflected in medical reports. The Board is advised that the Supreme Court is being urged to reconsider the implications of the wage loss factor of the Ryf decision. The administrative process must continue. If Ryf is modified, any administrative decisions based thereon may be similarly modified. Such modification can be accomplished under the Board's own motion jurisdiction of ORS 656.278 if the Board order is otherwise final for want of appeal.

The Closing and Evaluation Division of the Board has issued over 82,000 Closing and Evaluation orders since the 1965 Act became operative on January 1, 1966. It is estimated that over 20,000 of these orders involve injuries in the unscheduled area.

The Closing and Evaluation Division, in issuing these orders, looked only at medical evidence indicating the presence or absence of a permanent partial disability. If the medical evidence submitted by the State Accident Insurance Fund, the Direct Responsibility Employer or self insurer was inadequate, the Closing and Evaluation Division requested and obtained adequate medical evidence so they could decide whether or not there was permanent partial disability and their decision was based on loss of physical function alone.

The Ryf decision brings into sharp focus its impact on the future evaluation determinations to be made by that division of the Workmen's Compensation

Board. It will now be necessary for the Closing and Evaluation to receive and or obtain wage data indicating whether or not there has been a "loss of earnings" in approximately 6,000 to 7,000 cases of unscheduled injuries per year which is the current rate. It follows that the Hearing Officers and the Board will have to be certain that adequate earnings data is adduced when cases are appealed from a Closing and Evaluation Division Determination.

As of this writing the Board makes its decision in this case with what the Board understands to be the interpretation of the Supreme Court. That interpretation is that awards are to be made for disability, but unscheduled disability is measured by a dual yardstick in which award is made for loss of physical function with an increment based upon comparative wages equating lowered wages with decreased earning capacity which thereby denotes a somewhat equivalent disability.

This factor is only added where the injury is to unscheduled or other injuries and is not applicable to arms, legs, hearing or sight. The violinist who loses a finger is paid $500 for the finger without regard to his loss of earnings as a violinist. The violinist who sustains a minimal injury to the cheek or neck precluding holding the other end of the violin would be paid a substantial part of over $17,000 for his loss as a violinist.

The Board, in its review, carefully compared the Ryf and the Grumbles cases considering age, occupation, education, employment history, employment when injured, injury, work impairment, post-injury work history as of hearing date, pre-injury wage rate, wage rate at time of hearing, subjective symptoms, future plans, medical evidence and awards made at the Closing and Evaluation and Hearing Officer levels.

In the case of the Ryf claim, the Closing and Evaluation Division found a 15% unscheduled disability which the Hearing Officer, after considering wage loss, raised to 35%. In the Grumbles case, under review by the Board at this moment, the Closing and Evaluation Division found an unscheduled disability equal to 10% which was raised, upon hearing by the Hearing Officer, to 15% without any consideration being given to earnings loss.

In the Ryf case the Supreme Court stated in its concluding paragraph as follows:

> "Upon the basis of this evidence we have concluded that plaintiff's unscheduled injury is equal to 40% loss by separation of an arm. This is 5% more than the award made by the Hearing Officer. However, his award was made upon the assumption that plaintiff's hourly wage rate before the injury was $4.68, whereas we find that the pre-injury rate was $5.03. This greater difference in loss of earnings indication a greater work disability should be reflected in the award.
>
> "The cause is remanded with directions to enter a judgment for an award equal to 40% loss by separation of an arm.
>
> "Judgment modified."

The wage loss determined by the Hearing Officer in the Ryf case was 25% which the Supreme Court raised to 30% on the basis of finding that a higher pre-injury rate should have been considered.

In the Grumbles case there is no evidence that the Hearing Officer took wage loss into consideration in his order. The Board finds uncontroverted evidence that Mr. Grumbles' loss of earnings from $875.00 per month gross, before the injury, was $425.00 per month gross at the time of hearing, or 48.57% earnings loss.

The Supreme Court, in the Ryf decision on page 8 stated as follows:

"Actual wages earned over a short period of time after the accident are not necessarily the measure of the claimant's earning capacity for various reasons.

> '***Unreliability of post-injury earnings may be due to a number of things: increase in general wage levels since the time of accident; claimant's own greater maturity or training; longer hours worked by claimant after the accident; payment of wages disproportionate to capacity out of sympathy to claimant; and the temporary and unpredictable character of post-injury earnings.' 2 Larson's Workmen's Compensation Law, S 57.21, p. 27 (1968)."

In the Ryf case earnings testimony at the time of hearing was after two months' and 10 days' work history since the claim was closed. In the Grumbles case earnings testimony at the time of the hearing was two months and 19 days after the claim had been closed.

The Board concludes and finds that the loss of physical function does not exceed the 15%, or 48 degrees, awarded by the Hearing Officer; however, in applying the earnings loss component of 48.57% to the 15% physical impairment found by the Hearing Officer, this results in an unscheduled disability rating of 63.57% or 203.42 degrees.

The order of the Hearing Officer is accordingly modified and claimant is determined to have a disability of 203.42 degrees.

Counsel for claimant is allowed a fee for services at both hearing and on review of 25% of the gross increase in compensation awarded but not to exceed the sum of $1,500 and payable from the increased compensation.

WCB #69-587 December 29, 1969

HAROLD R. HEATHMAN, Claimant.
Request for Review by Claimant.

The above entitled matter involves the extent of permanent disability sustained by a 41 year old workman on August 8, 1966, when lifting a heavy crate. The mechanics of a top crate falling and driving claimant backwards into the edge of another crate does not appear in any of the records until nearly a year following. The claimant is no stranger to back problems,

having had a horse roll over him in 1952. There were also episodes following the incident at issue.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 38.4 degrees against the then applicable maximum of 192 degrees. Upon hearing, the award was increased to 65 degrees. Upon review, the claimant seeks to be classified as permanently and totally disabled as not being able to regularly perform any work at a gainful and suitable occupation.

The claimant is five foot six and carries a weight of 196 pounds with a pendulous abdomen upon this short frame. He has been medically advised to reduce by at least 50 pounds. He complains that he can carry but a few pounds but over three years following the accident he carries 50 pounds of excess bodily weight 24 hours a day. In addition to being obese the record reflects little genuine effort to seek work or to cooperate with the facilities for vocational rehabilitation. In being examined by doctors he over-reacts to stimuli and thus places a substantial doubt upon the extent and severity of his disabilities.

The record reflects the claimant's former work record is unstable and inadequate. Though the psychopathology is not attributable to the injury, it appears that it is the self imposed obesity and psychological factor which stand in the way of return to work--not the residuals of the accident.

The Board concludes and finds that the objective evidence of permanent physical injury is so limited and the motivation against return to work is so great that the compensable disability does not exceed the 38.4 degrees found on the original determination. Upon a de novo review, the Board makes its own finding of disability.

The order of the Hearing Officer is therefore set aside and the claimant's disability is determined to be 38.4 degrees.

WCB #68-1821 December 29, 1969

ARTHUR M. PARNELL, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of whether the now 52 year old claimant has sustained a compensable aggravation of an injury to his neck incurred June 19, 1965. The claimant had advanced degenerative disc disease made symptomatic by the cervical strain occurring when the mobile loader he was operating went into a bank.

The claim was initially closed in November, 1967 by the State Compensation Department (now State Accident Insurance Fund) as insuring successor of the former State Industrial Accident Commission with the maximum award then payable for unscheduled injuries of 145 degrees.

In July of 1968 the claimant filed a claim for aggravation with the State Compensation Department. This claim was denied in September of 1968 and the claimant elected to have the procedural remedies applicable to injuries on and after January 1, 1966.

Upon hearing the now State Accident Insurance Fund in effect admits that the claimant's condition has worsened but contends that any worsening is due to a subsequent intervening incident of January, 1968 when the claimant was forced to jump to avoid his personal car falling from a jack. The State Accident Insurance Fund also asserts that there has been a gradual worsening of the pre-existing degenerative processes which would have occurred in the absence of any industrial injury.

The Hearing Officer found there to be a compensable aggravation and it is this order which the State Accident Insurance Fund requested this review by the Workmen's Compensation Board.

Not all of the factors noted in the record favor the claimant. He continues to be overweight against the advice of treating doctors. He has a substantial problem of a poor attitude or motivation toward vocational rehabilitation. Not all of his cervical problems are due to the accident at issue. In addition to natural degeneration, the claimant sustained severe cervical strain in a vehicle-train collision in 1960.

The Board's approach to the chain of circumstances in this instance is to apply the "but for" consideration to arrive at a conclusion whether the claimant's condition would have required further treatment but for the accident without regard to the car jack incident or without regard to the natural progression of underlying degenerative processes.

It is upon this basis that the Board concludes and finds that the claimant did sustain a compensable worsening of the condition attributable to the accident at issue.

As a denied claim for aggravation attorney fees were allowed by the Hearing Officer pursuant to ORS 656.286(1). That section previously attached attorney fees to the denial of the "original" claim for compensation. The word "original" has been deleted. Starting with Chebot v. SIAC, 106 Or 660, the Supreme Court has classified claims of aggravation as of exactly the same dignity as the right to receive compensation in the first instance. Though the procedure for aggravation claims in the 1965 Act is not as well defined as formerly, the Board deems denial of such a claim to warrant the assessment of attorney fees.

The order of the Hearing Officer is therefore affirmed.

Pursuant to ORS 656.382, attorney fees on this review are also payable by the State Accident Insurance Fund. An additional fee of $250 is assessed the State Accident Insurance Fund payable to counsel for claimant for such services.

WCB #69-579 December 29, 1969

ARNOLD HANSON, Claimant.
Request for Review by Employer.

The above entitled matter involved the issue of the extent of permanent disability sustained by a 58 year old welder and mechanic as the result of severe lacerations to his right hand incurred on June 28, 1968, when the motor of a drill rig he was repairing started unexpectedly and his hand was caught between two V-belts.

The determination order issued pursuant to ORS 656.268 found the claimant to be entitled to an award of 30 degrees against the scheduled maximum of 150 degrees for the loss of a forearm.

At the hearing held at the request of the claimant, it was candidly acknowledged by counsel for the employer and its insurance carrier that the disability reflected in the medical reports was in excess of the 30 degrees awarded by the determination order. The calculations of the employer and its insurer based upon the impairment schedules of the American Medical Association showed the permanent disability, however, not to be in excess of 45 degrees.

The hearing officer, based upon the evidence adduced at the hearing, found the claimant to have sustained a greater permanent disability than that acknowledged by the employer and its carrier. His order increased the award by 45 degrees to a total of 75 degrees of the scheduled maximum of 150 degrees for the loss of a forearm.

A request for board review of the order of the hearing officer was filed on behalf of the employer and its insurance carrier claiming that the hearing officer gave inadequate attention to the medical evidence.

By letter dated December 15, 1969, counsel for the employer and its carrier withdrew the request for review.

The request for review having now been withdrawn, the above entitled matter is dismissed, and the order of the hearing officer is final pursuant to the provisions of ORS 656.289(3).

The notice of appeal required by ORS 656.295(8) is appended, although it is not deemed applicable to this order of dismissal.

WCB #69-743 December 29, 1969

DONNA M. HIGGINS, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a now 33 year old envelope machine operator as the result of a low back strain incurred on July 10, 1967, when a carton of envelopes she was stacking fell, striking her on the hip and leg.

The determination order issued pursuant to ORS 646.268 (sic) found the claimant to be entitled to compensation for temporary total disability to April 18, 1969, and further found the claimant to have sustained no permanent partial disability.

The hearing held upon the request of the claimant culminated in an order of the hearing officer finding the claimant to be entitled to an award of permanent partial disability of 20 degrees against the maximum of 320 degrees for unscheduled disability based upon the extent of disability compared to the workman before the injury and without the disability.

The request for review by the board of the order of the hearing officer filed by the claimant is predicated upon the claimant's contention that her disability is greater than the 20 degrees awarded.

A prior hearing with respect to this claim which was not subjected to review resolved the question of the compensability of the claim.

The claimant's continued complaints of pain, primarily low back pain initially and later pain in the neck, head and shoulders, which ultimately became predominate, as the low back pain largely subsided, resulted in the claimant remaining temporarily totally disabled for in excess of twenty-one months. During this period she received extensive treatment, consultation and examination from numerous medical experts in a wide range of medical specialties. The medical experts were unable to locate any physical abnormality or make any positive diagnosis of the claimant's condition. All of the various possible diagnoses were ultimately ruled out. The treating physicians were finally forced to the conclusion that the continuation of the present treatment was not likely to be of additional value, and that they did not know of any further treatment that would be beneficial. It was their recommendation that the claimant be referred to the Physical Rehabilitation Center maintained by the Workmen's Compensation Board for evaluation in connection with claim closure.

The claimant was admitted to the Physical Rehabilitation Center for evaluation, to include psychiatric evaluation in addition to the evaluation of the Back Evaluation Clinic. The reports of the Center reflect a diagnosis of conversion reaction and hysterical neurosis which is the result of emotional factors and underlying dependency problems related to the obtaining and continuation of temporary total disability benefits and the pendency and outcome of the compensation litigation, which will cease to exist coincidentally with the conclusion of these proceedings. Those conditions are thus not permanent if otherwise compensable. The claimant's actual demonstrable physical disability attributable to the accidental injury was evaluated as minimal.

While the issue raised in the claimant's request for hearing of the need for further medical treatment was not withdrawn, it was not pursued at the hearing and no evidence was presented with respect to the issue. The record reflects that the claimant's condition is medically stationary, and that no further diagnostic or therapeutic treatment is indicated.

The Board finds and concludes that any residual permanent disability the claimant may have sustained does not exceed the 20 degrees awarded by the hearing officer.

The order of the hearing officer is therefore affirmed.

WCB #69-125 December 29, 1969

JAMES W. COLLINS, Claimant.

Workmen's Compensation Board Opinion:

The above entitled matter involves issues of whether the claimant is entitled to further medical care and temporary total disability and if medically stationary, the extent of permanent partial disability causally related to an occupational exposure in an aluminum factory and the part of such exposure in producing bronchial asthma, chronic bronchitis with bronchospasms and an allergic rhinopharyngitis.

Pursuant to ORS 656.268, the determination of disability found there to be no permanent residuals. Upon hearing a determination found the claimant to have a disability of 32 degrees against the applicable maximum of 320 degrees and comparing the workman to his pre-injury status.

The claimant rejected the order of the Hearing Officer. A Medical Board of Review was duly constituted and the findings of that Board answering the questions set forth in ORS 656.812 together with a three page explanatory letter subscribed by Dr. John Tuhy are attached, by reference made a part hereof and declared filed as of December 17, 1969.

Pursuant to ORS 656.814 the findings of the Medical Board are made final as a matter of law.

It appears that the Medical Board of Review finds the condition to be stationary and evaluates the disability at 64 degrees. The Medical Board further qualified the issue of whether certain medical services involved were palliative.

No notice is deemed applicable.

Medical Board of Review Opinion:

A Medical Board of Review, consisting of Dr. Charles M. Grossman, Dr. James Speros and the undersigned, met at Medical Center Hospital, Portland on December 3 to examine Mr. Collins and to answer the five questions required. The physicians had reviewed the WCB file, including the medical testimony (Dr. Merle Moore, Dr. A. Daack) and the opinion of the Hearing Officer, so that the patient's history and treatment need not be reviewed in any detail.

This 45 year old man had last worked for Harvey Aluminum Company on June 9, 1968. His employment began in August, 1958, and he had been a pot man for about nine years. Before that, he had worked on road construction and on the railroad. From about 1962 on, he began to complain of recurrent "raw throat" and nosebleeds while at work, associated with cough, wheezing, a burning sensation in the chest, shortness of breath on exertion, and inability to smell. He saw Dr. Daack about these complaints in February, 1968 and was referred to Dr. Merle Moore, who prepared a vaccine (discontinued in January, 1969). Acute nocturnal asthma occurred frequently from the fall of 1967 through February, 1968. The patient attributes the disappearance of paroxysmal asthma at that time to treatment. He continued to complain of "tightness" in the chest, sore throat, dyspnea, and wheezing at work, so that his physicians advised him to quit work in June, 1968.

Since then, he has been helping with farm chores. Certain exposures in his shed at home cause nasal congestion, a dry throat, and nonproductive cough. He has continued to complain of some anterior and posterior nasal discharge, but has had no acute sinusitis. He has had frequent "colds" since quitting work, characterized by increased nasal discharge and cough, productive of a little gray sputum. He has coughing at night during such episodes, and some wheeze on lying down at night, but no acute asthma.

He states that he has no shortness of breath on walking on the level, but does on climbing a flight of stairs, especially if he is carrying something heavy, or on doing such heavy work as shoveling. He feels he tires more easily than he should since quitting work. He sleeps with a foam rubber pillow.

Another complaint is that of sharp pains in the lower anterior chest intermittently, sometimes worse on exhalation, beginning in the fall of 1968, lasting four or five minutes at a time. These tend to radiate up to the midsternum, but not to the neck or arms. They have usually been brought on by severe exertion. On one occasion late in November, 1969, they occurred frequently for four days, after moving something heavy. He was aware of the pains then on twisting about or stooping. Chest pains do not occur at rest or with excitement. The examiners felt that these were not typically anginal pains, and in any case, were not related to work exposures.

His weight is 187 lbs. in June, 1968 and is 180 lbs. at present. His only medication now is potassium iodide drops two or three times a week. Another incidental complaint is that of "spots in front of the eyes" on straightening up quickly, associated with flushing of the face, roaring in the ears, and lightheadedness from 1965 on. No known hypertension. No past history of pneumonia. He has not smoked since 1962. Before that he smoke 2/3 of a package a day, having started at age 25.

After quitting work, he drew unemployment insurance temporarily. Through DVR training, he tried to pass an exam for a Real Estate operators license, but failed. He applied for many kinds of employment, but states that he was rejected (this may have been that he indicated to prospective employers that he had "industrial asthma").

Physical exam showed him to be a well developed and nourished man in no apparent distress. Blood pressure 126/88; pulse 80, regular. Slight injection of the posterior pharynx. Nasal airway satisfactory. Rib motion and breath

sounds normal. A slight wheeze was heard over the hila anteriorly on forced expiration. There were a few inspiratory sonorous rales in the lung bases posteriorly, disappearing with cough.

A note about his chest X-rays is enclosed. A timed vital capacity determination was done at the Thoracic Clinic on the morning of his examination (December 3). Forced vital capacity was 4.4 liters, 99% of predicted normal. The first second volume was 2.8 liters, about 80% of predicted. He could exhale 64% of his forced vital capacity in the first second (a normal value for him would be about 80%). The medical examiners concluded that he had mild ventilatory impairment of the obstructive type.

It was the concensus of the Panel that this patient gave a history of paroxysmal bronchial asthma from the fall of 1967 through February, 1968, and thereafter, has had symptoms of chronic bronchitis with bronchospasm (so-called "chronic asthmatic bronchitis"). He also has symptoms of nasal and pharyngeal allergy. He appears to be an allergic individual whose respiratory symptoms have been precipitated and exacerbated by work exposures. Even since quitting work, various exposures, as to exhaust fumes, paint fumes, soap powders, hair spray, housedust, and dust in the animal shed on his place cause nasal congestion, some cough, and slight wheezing.

We cannot say whether or not his respiratory symptoms would have arisen whether or not he was working as a pot man in an aluminum company. He has been awarded a partial disability equal to 10%. The board feels that it is not possible accurately to estimate the extent of impairment in a case like this, where the patient would not be expected to have work-related respiratory symptoms in many occupations, but would in certain others. Because of the decreased first second expired volume and his symptoms, he would be placed in Class II of the AMA classes with an estimated 20% impairment "of the whole man". The Panel recommends that 20% of permanent total disability be chosen as an appropriate figure to close this case. His long absence from employment is certainly unfortunate in a man of 45, and he should be urged to train for or seek the kind of employment that he thinks he can do. For example, he thought he could drive a truck without difficulty.

The Panel also wish to point out that the distinction between "palliative" and "curative" treatment in a case like this is too fine a line to draw. For example, hyposensitization with a vaccine can be considered curative in a sense, but from the psychogenic effect alone, it may also be palliative.

/s/ John E. Tuhy, M.D.

WCB #68-1072 December 29, 1969

WILLIAM F. DELES DERNIER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 57 year old claimant's coronary thrombosis or coronary infarction was compensably related to work effort on April 10, 1968.

The claimant had a pre-existing hardening of the arteries and had experienced chest pains which led to numerous medical examinations and

electrocardiograms but none of the latter diagnostic tests were abnormal until the one following the incident at issue.

The claim was denied by the State Accident Insurance Fund as insurer of the employer and this denial was upheld by the Hearing Officer.

The claimant experienced chest pain after lunch on the day in question while working on a gear assembly. He was taken home with some dispute over whether home rest was prescribed due to a shortage of hospital beds. The pain returned the next day and the claimant was then hospitalized for about six weeks.

There is an on-the-job occurrence with evidence which would probably support a finding of legal causation. The problem is in weighing the conclusions of the two medical experts whose opinions on the case at hand are diametrically opposed. Though Dr. McKenzie testified at length, his conclusion of medical relationship is somewhat clouded by the fact that he found himself first adopting a theory of a diminished blood supply and later an over abundance of blood supply as the causative factor.

There was a remission of symptoms and a good night's rest between the events of April 10th and April 11th. There was the history of prior episodes of chest pain apparently unassociated with any work effort.

The Board does not place the same significance as recited by the Hearing Officer on the coincidence of symptoms and effort on April 10th. The Board concurs in finding that the claimant on April 10th was simply experiencing symptoms of his narrowed and hardened arteries and that the coronary infarction occurred on April 11th in the natural course of the coronary disease without reference to work effort. There are various types of heart deficiencies and Dr. Miller's opinion reflects that the type here involved is not generally precipitated by exertion.

The Board concludes and finds that claimant's work effort was not a materially significant contributing factor to the coronary infarction. The order of the Hearing Officer denying the claim is therefore affirmed.

WCB #68-1834 December 30, 1969

JESS C. FISHER, Claimant.
Request for Review by SAIF.

The above entitled matter involves issues of whether the provisions of the 1965 Act ORS 656.262(8) authorizing increased compensation for unreasonable delays in payment of compensation is applicable to a pre-1966 injury. The action of the State Accident Insurance Fund with respect to which increased compensation is sought to be applied occurred prior to the election of the claimant to have the procedures of the 1965 Act applied as permitted by O. L. 1965, Ch 285, Sec 43.

This matter has been held in abeyance by the Workmen's Compensation Board pending the decision of the Court of Appeals in Larson v. SCD, 89 O.A.S. 819, 462 P2d 694, issued December 18, 1969. There is some distinction in that

the actions of the State Compensation Department upon which attorney fees were predicated in the Larson case occurred after the claimant had made the election of remedies provided in O.L. 1965, Ch 285, Sec 43. In the matter on review the Hearing Officer applied the provisions of ORS 656.268. That section does not apply to a pre-1966 claim. The State Accident Insurance Fund is charged with making the first determination on those claims. The right to elect the 1966 procedures is vested in the claimant--not the State Accident Insurance Fund. The application of ORS 656.268 prior to a claimant's election would deprive the claimant of his right to elect the other procedures including a trial by jury. The Hearing Officer was thus in error in ruling that the State Accident Insurance Fund was bound by the procedures of ORS 656.268 prior to an election by the workman which is necessary to put those procedures in operation. The Board also notes the Hearing Officer applied ORS 656.325 pursuant to which the supervision of the Board may be invoked to warrant a suspension of compensation. It is not quite as clear whether ORS 656.325 is applicable prior to the election of the claimant to subject the matter to the adminstration of the Workmen's Compensation Board in lieu of direct appeal and jury trial.

Once a claimant has elected to subject the pre-1966 claim order by the State Accident Insurance Fund to Board hearing and review, all facets of the State Accident Insurance Fund order are subject to consideration. This includes issues on timeliness and amounts of temporary total disability, medical care as well as consideration of permanent disabilities. It would not be in keeping with the overall spirit of the compensation law if the State Accident Insurance Fund could with impunity unreasonably delay or suspend compensation with respect to a pre-1966 injury and then assert the Board is without authority to apply the penalties for such unreasonable delay once the claimant has elected the post 1965 procedure. The language of the two decisions in Larson v. SCD, 251 Or 478, 445 P2d 486 (1968), and 89 Or Adv Sh 819, 462, P2d 694, December 18, 1969 is broad enough to impose the sanctions for unreasonable refusal or delay of compensation.

It should be noted at this point that the State Accident Insurance Fund issued several letters with respect to suspension of compensation without advising the claimant of any right to object or appeal under either the old or new procedures. Having given the claimant no notice of his rights upon terminating compensation, the State Accident Insurance Fund should not now object that the claimant is without right to question the reasonableness of that termination when the State Accident Insurance Fund eventually issued a formal order.

Though the reasoning and procedural basis differs from that applied by the Hearing Officer, the Board hereby affirms the order of the Hearing Officer imposing increased compensation and attorney fees.

Counsel for claimant is awarded the further sum of $250 for services on review payable by the State Accident Insurance Fund pursuant to ORS 656.382.

WCB #68-1049 December 30, 1969

EINO JOHN MACKEY, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of the compensability of a claim for aggravation made by a now 65 year old workman with reference to an upper back injury sustained May 27, 1966 when he failed to bend low enough in walking under a conveyor.

The claim of aggravation was denied by the employer but ordered allowed by the Hearing Officer. Essentially the order of the Hearing Officer is limited to finding that there is an aggravation requiring only medical care since the claimant has had a subsequent leg injury and subsequent non-industrial disease processes of a shoulder bursitis and a heart condition which prevent the claimant from working.

The forum provided on a claim for aggravation cannot serve as a basis to impeach the original award. Grunnett v. SIAC, 108 Or 178. The claimant, with commendable frankness, testified (Tr. pg 23) to the effect his neck condition neither improved or worsened since May of 1966.

If the claimant has a permanent disability attributable to that injury which existed upon claim closure, the only remedy is by way of the own motion procedure provided by ORS 656.278. The Hearing Officer, before the hearing was closed took the following position, (Tr 19, lines 7-12):

> "And then in response to Mr. Zafirato's inquiry of Dr. Cherry on January 4, 1969, Dr. Cherry states: 'As nearly as I can tell, this man was working until his injury of May 27, 1966, and he has not been able to function since that time.' This is an indication, to me, that there is definitely a relationship between that injury and his present condition."

That position failed to note that the claimant worked for four months after the May injury and was terminated due to a leg injury and heart condition. The position of the Hearing Officer also appears directed toward impeachment of the original award rather than toward the merits of a claim of aggravation.

Since the only benefit ordered by the Hearing Officer is for medical care, there should be medical evidence supporting a course of treatment. Dr. Steinmann at one point states that the claimant would benefit from medical care but there was no attempt to identify any further medical care with the injury at issue. If the claimant requires medical services after a determination of disability that benefit may be obtained under ORS 656.245 without a claim for aggravation.

The evidence simply does not support a claim for aggravation. The Hearing Officer refers to a Dr. Gianelli whose therapy treatments in January of 1968 were admittedly of no help and Dr. Cherry's report in February of 1968 who recommended therapy with a tongue in cheek conclusion that "the condition probably could not be improved greatly." These inconclusive reports should hardly serve as the basis for reopening the claim upon hearing held some 16 months later.

ANDREW W. STONE, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issues of the need for further medical care and treatment and the extent of permanent partial disability. The claimant, who at the time of his injury was a 36 year old construction worker for a company engaged in power line construction, sustained an injury to his low back on October 12, 1966, when he slipped from the ladder on which he was painting tower footings and fell a distance of approximately four feet.

The determination order issued pursuant to ORS 656.268 granted the claimant a permanent partial disability award of 28.8 degrees against the then applicable maximum of 192 degrees for unscheduled disability.

The hearing officer, based upon the evidence adduced at the hearing, concluded that the claimant was not in need of further medical care and treatment and that the claimant's permanent partial disability was correctly evaluated, and therefore, affirmed the determination order.

The claimant asserts on review that his permanent disability is greater than that awarded, and that he is entitled to an award of at least 50% loss of an arm by separation for unscheduled disability, or not less than 96 degrees.

Following an initial period of chiropractic treatment and an ensuing program of conservative treatment from an orthopedic surgeon, the claimant consulted Dr. Raaf in August of 1967. Based upon the findings of a lumbar myelogram, a lumbar laminectomy with the removal of a protruded intervertebral disc was performed by Dr. Raaf. Although the myelogram disclosed a bilateral defect, it was the opinion of the noted neurosurgeon that surgery should be restricted to the right side, and that surgical exploration of the disc space on the left side was not warranted. Subsequent examination reflected a good post operative recovery from the surgical procedure and no evidence of recurrent nerve root compression.

In January of 1968, the claimant received training as an outboard motor mechanic under the auspices of Vocational Rehabilitation, following which he secured employment with a sporting goods store. Although his employment was seasonal, as a result of which his income varied with the extent of boating activity, his earnings reached a high of between $700 and $800 per month during the summer months. In November of 1968, following the end of the boating season and his separation from his wife, the claimant terminated this employment, giving as the reason his recurrent low back and leg pain.

Since November of 1968, the claimant has resided in the State of California with his brother. During his residency in California, the claimant has neither had employment nor sought employment. The lack of adequate motivation in connection with his resumption of employment is clearly evident. The medical evidence indicates that not only is the claimant physically able to resume employment, but that he may even be able to return to heavy employment such as he was engaged in previously. There is also medical evidence to indicate that his greatest deterent to the resumption of employment may be an unfounded fear of sustaining futher injury to his back as a result of

future employment. With proper motivation, the claimant should experience no difficulty in resuming his place as a productive and self-supporting member of society.

The medical evidence following the laminectomy consists of the medical reports of two neurosurgeons, Dr. Parsons and Dr. Rivers, whose findings and conclusions are in essentially complete agreement. The medical reports reflect that further myelography or surgery are not warranted and is unacceptable to the claimant, and that there is little chance that further physical therapy would be beneficial. Both doctors find little objective medical substantiation for the claimant's considerable complaints, and are of the opinion that the claimant has sustained no significant or minimal, permanent disability.

The Board finds and concludes, from its review of the entire record, that the claimant is not in need of further medical care and treatment, and that the initial determination of 28.8 degrees, which was affirmed by the Hearing Officer, properly evaluated the claimant's permanent partial disability.

The order of the Hearing Officer is therefore affirmed.

WCB #69-1365 December 31, 1969

HARRY R. GARDNER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claimant is entitled to a hearing as a matter of right upon a claim of aggravation based upon an accidental injury which occurred prior to January 1, 1966.

The accidental injury involved herein occurred on April 7, 1964. The first final order of the then State Industrial Accident Commission closed the claimant's claim on July 31, 1964, with an award of compensation for temporary total disability. The claimant's request for a hearing for increased compensation on account of aggravation of the disability resulting from his compensable injury was filed with the Workmen's Compensation Board on July 28, 1969.

The 1965 Act provides in Sec 43, S 3 that when the State Compensation Department makes an order, decision or award pertaining to a claim based upon an injury that occurred before January 1, 1966, the claimant may then elect whether to exercise the rehearing and appeal rights provided under the law in effect at the time of the injury, or whether to request a hearing under the provisions of ORS 656.001 to 656.794.

The record in this matter reflects that no "order, decision or award" was made by the State Compensation Department, the successor of the State Industrial Accident Commission, and now re-named the State Accident Insurance Fund, upon which to base a request for a hearing for increased compensation on account of aggravation pursuant to the provisions of ORS 656.271.

Since there is no "order, deicision or award" of the State Compensation Department upon which the claimant may elect to request a hearing under the 1965 Act, the procedure governing his right to request a hearing based upon

the aggravation of his 1964 injury, is the law in effect at the time that the injury occurred, which provided that a request for a hearing based upon a claim of aggravation must be filed within two years following the first final order, or in this instance prior to July 31, 1966.

The Board notes that even if the provisions of ORS 656.001 to 656.794 governed the claimant's request for a hearing based upon aggravation, the claimant has failed to comply with the provisions of ORS 656.271(1) which provides in part that a claim for aggravation must be supported by a written opinion from a physician that there are reasonable grounds for the claim.

ORS 656.278 provides that the Board has continuing power and jurisdiction to modify and change former findings, orders and awards on its own motion if in its opinion such action is justified. The Board does have authority pursuant to ORS 656.278 to entertain own motion jurisdiction over claims arising prior to January 1, 1966. The Board does exercise own motion jurisdiction in all cases where the claimant is not entitled to a hearing as a matter of right and when in its opinion such action is justified.

The Board finds and concludes that the claimant is not entitled to a hearing as a matter of right for increased compensation based upon aggravation of the disability resulting from his compensable injury of April 7, 1964.

The order of the Hearing Officer dismissing the claimant's request for hearing filed on July 28, 1969, on the ground that the Workmen's Compensation Board is without jurisdiction, is affirmed.

WCB #68-2021 January 6, 1970

The Beneficiaries of
ALBERT L. SVATOS, Deceased.
Request for Review by Employer.

The above entitled matter involves the compensability of a heart failure allegedly caused by the physical activities of the deceased workman, a Mr. Svatos.

The claim of the beneficiaries was denied by the employer but ordered allowed by the Hearing Officer.

The following statement of the case and specifications of issues appear in the Employer's Brief before the Board.

STATEMENT OF THE CASE

"At the end of January 1963, Albert Svatos, an installer-repairman employee of Pacific Northwest Bell had a heart attack.*

*The employer had rejected the benefits of the Workmen's Compensation law then in effect. However, Svatos was covered by the employer's Sickness & Disability Benefit Plan during the period of this disability.

He was off work for two months until March 25, 1963, at which time he returned to work on a part-time basis. On April 8, 1963, Svatos commenced working full-time again but under a restriction to do no pole climbing and to use only short ladders. Svatos was permitted to climb stairs and crawl around on hands and knees (Tr. 149-156).

"Svatos chafed under this work restriction and sought to have it removed. However, following an examination by the Company doctor in September 1964 the restriction was retained. Svatos continued to do the routine work of an installer-repairman until October 2, 1968, the time of his death, -- albeit at his own pace.*

"On Wednesday, October 2, 1968, Svatos, returning from lunch, went to the U. S. Veterans Hospital in Portland and on the fourth floor encountered Mr. Stanley Hughes, a hospital technical medical equipment repairman. Hughes already had a ladder erected at a spot to enter the ceiling area in the vicinity of where Svatos was to move a telephone from one location to another. Svatos climbed the ladder with his repair kit and flashlight. He passed through the hole between the false ceiling and the permanent ceiling. Svatos crawled on hands and knees approximately 15 feet inspecting the situation. Svatos returned to the ladder complaining to Hughes, 'I am having pain in my chest; I think I will get out of here.' (Tr. 11).

"Svatos took his tools down the ladder and entered the monitoring room where he was found by Mr. Furlong (Tr. 19-20). Dr. Collis described the resuscitative efforts which ultimately failed. (Ex. 11). At the request of the employer an autopsy was consented to and performed.

"The decedent's widow filed a claim for Workmen's Compensation benefits (Ex. 15) which the employer denied (Ex. 16). A hearing was held on June 2, 1969, resulting in a decision of the hearing officer that the decedent sustained an accidental injury arising out of and in the course of his employment and hence sustained a compensable injury.

ISSUES ON APPEAL

"Appellant requests that the Board review the decision of the Hearing Officer de novo as provided in ORS 656.295: Coday v. Willamette Tug & Barge Co. (1968) 86 Or. Adv. 751, 250 Or. 39 (440 P2d 224). However, the appellant submits in response to WCB Rule 6.02 that the Hearing Officer erred on four specific issues:

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* Inasmuch as the hearing officer attached some significance to it, it should be pointed out that for the last year of his life Svatos was transferred from the 'apartment house route' in Portland to the downtown area. This required the deceased to work on more complex switchboard and key telephone equipment with buttons rather than the regular residence type phone. The work still involved climbing stairs and working on hands and knees. It also included the pulling of cable through conduit in the walls and ceilings of buildings. (Tr. 194-200).

"1. The Hearing Officer misinterpreted the testimony of witnesses Blakeslee and Bowman (Tr. 193-216) as it related to the nature and extent of physical activity normally involved in claimant's work during 1967 and 1968 prior to claimant's death.

"2. The Hearing Officer misinterpreted and misapplied the testimony of Dr. Brady relating to his findings from the autopsy and in that the evidence showed no evidence of new injury to the heart.

"3. The Hearing Officer misinterpreted and misapplied and failed to relate the expert testimony of Drs. Sutherland (Tr. 132-148), Rogers (Tr. 158-194) and Conley (Tr. 75-97) to the testimony of witnesses Blakeslee and Bowman in the context of the entire record.

"4. The Hearing Officer erroneously, intentionally, arbitrarily and capriciously refused to admit into evidence or to consider defendant's Exhibits D, E, F and G. (Tr. 87-93 and 170-178).

The Board is not unanimous in its decision on the issues. The majority have concluded that the death of Mr. Svatos was not a compensable accidental injury.

The employer's brief concedes there is a legal causation. There is a factor in this claim which makes even legal causation a questionable factor. The concept of accidental injuries was extended beyond those caused by accidental means to include those in which the result is accidental. If a given physical result is to be expected from a given physical effort, it cannot then be said that the result is unexpected or accidental. At some point those with known circulatory problems whose activities have been medically restricted must expect the predicted result. The reasoning of the medical opinions upon which the beneficiaries of Mr. Svatos relies is to the effect that with such a diseased heart and circulatory system, any effort or strain would be causative. The majority of the Board does not base its opinion upon the legal issue of expected results but notes that the concept of an accidental injury law has never been abandoned and the claim based on a result must still retain the concept of an accidental result.

The majority of the Board concludes that the Hearing Officer did minimize the physical activity of Mr. Svatos in the period prior to the date at issue and maximized the effort being used on that date. The Hearing Officer concluded that crawling requires an unusual expenditure of energy but excluded from evidence scientific tests tendered to prove that such activity requires less than normal energy output. The Hearing Officer further erroneously recites the testimony of Dr. Brady on the critical issue from the possibilities of a "could" to the certainties of a "would". It is of significance, too, that Dr. Brady found no evidence of any new injury to the heart which ceased to function. Little satisfaction can be found on behalf of the claim in light of Dr. Brady's testimony that the decedent "could have died just as easily while he was sleeping or watching television."

Where there is some conflict in the medical testimony, the Board must evaluate that testimony in light of the totality of the evidence and to some extent upon the background and experience of the medical experts involved. Dr. Sutherland and Dr. Rogers are both recognized cardiologists. Their conclusions with respect to the incident at issue is that the heart failure was coincidental. Their conclusions are given more weight than the contrary conconclusions of the expert witnesses who practice under license of osteopathy does not reflect the specialized training in cardiology. Though there is some conflict on the extent of physical activity involved at the time in question, the weight of the evidence supports a conclusion that it was not unusual as contended by the claimant.

The majority of the Board conclude that the deceased Mr. Svatos did not sustain a compensable accidental injury and that the work activity of Mr. Svatos was not a material factor in his death.

(Note: Mr. Redman, in participating in this review, notes his former association with the employer and joins the review reluctantly but due to the necessity of arrive at a majority decision).

The order of the Hearing Officer is hereby reversed and the claim is denied.

WORKMEN'S COMPENSATION BOARD

/s/ M. Keith Wilson, Chairman
/s/ James Redman, Commissioner

Mr. Callahan, dissenting from the majority opinion, states his reasons as follows:

"The deceased, Albert L. Svatos, was a telephone installer who died on the job October 2, 1968. It was known that Svatos had a bad heart. He was ordered on restricted duties by the medical director for the employer.

"The question before us is: Did the work activities of October 2, 1968, superimposed upon the already critical condition of the workman, constitute a material contributing factor to the workman's death?

"It will assist the review of this matter to understand how bad was the condition of the deceased. Dr. Brady, a pathologist, performed an autopsy. His testimony should be studied. In addition, Dr. Sutherland, called as a witness for the defense, testified (Tr. 140):

'My opinion is that Mr. Svatos' coronary disease was extremely severe, unusually so, I should say, and if one, for example, were to consider the pathway of normal coronary arteries to death by coronary artery disease, as a result of coronary artery disease, I should think Mr. Svatos was about 98% toward it on the morning he woke up on October 2, 1968. I don't believe I can recall a coronary arteriogram, which are pictures of coronary arteries done on living individuals, as severe as I imagine Mr. Svatos' would have shown had they been done prior to that time. It seems to me that his coronary artery disease was in fact very far advanced; and I should think that his situation was an extremely precarious one for sometime, whether or not he had been having any symptoms.'

"It would seem that Dr. Sutherland, a Board certified cardiologist, is testifying that the deceased is very near death at the time he went to work and that very little was needed to push him over the threshold of death's door. However, the employer accepts the workman as he is.

"Drs. Sutherland and Rogers were called by the employer as expert witnesses. Both are eminent cardiologists. They did not have personal knowledge of what Mr. Svatos did on October 2, 1968. Their opinions had to depend on information furnished to them. If this information did not disclose all of the pertinent facts, opinions of even such highly qualified experts as Drs. Sutherland and Rogers are deficient to the extent of the missing pertinent facts. It is clear that the opinions of Drs. Sutherland and Rogers are based on the assumption that there was nothing unusual in what Mr. Svatos did on the day of his death.

"What did the deceased do on October 2, 1968? The witness Hughes testified (Tr. 6) about the 8-foot stepladder and the hole in the ceiling (see also Claimant's Exhibit 3).

> 'Tr. 6 A. Well, I had an eight foot ladder, and you have to get on top of the eight foot ladder, and it about a foot to the false ceiling and about eighteen inches to the old ceiling, about ten foot; ten or ten and a half foot.
>
> Tr. 12 Q. 'When you climb up from the top of the ladder through the hole, do you stand on the very top of the ladder?
>
> A. 'You have to stand on the top; there are a few pipes running there and you can use the pipes for support and then pull yourself up.
>
> Q. 'Pull yourself up through the hole into the crawl space area?
>
> A. 'That is right.'

"The reviewer should look at Claimant's Exhibit 3. The false ceiling is hung on wires. (Tr. 23 and 24), a hole was chopped in the ceiling (Claimant's Exhibit 3). This was not a regular access hole that was framed in. If it was, less effort would have been required to gain access to the crawl space. For the deceased to 'use the pipes for support and then pull yourself up' would require a great amount of exertion.

"It is claimed that the deceased was doing his usual and customary work of a telephone installer. This could not be true. It is public knowledge that Pacific Northwest Bell has an outstanding safety program and employees are required to follow rules of safe work practices.

"I am taking judicial notice of the Oregon Safety Code for ladders and scaffolds which provides as follows:

> 19-1-30 The upper end of all fixed or portable ladders shall extend not less than 36 inches above a platform, floor or other landing served.

19-3-26 Top. All step ladders shall have a top with wood or metal brackets or fittings tightly secured to the top, side rails and back legs, to allow free swinging of the back section without excessive play or wear at the joints. This top shall not be used as a step. (Emphasis supplied.)

"To comply with the safety code would require a ladder to be placed through the hole in the ceiling and extending 36 inches above the ceiling and extending 36 inches above the ceiling which constituted the floor of the crawl space. If this had been done, the least possible hazard would have been encountered. The deceased would have gained access to the crawl space without having to 'pull himself up.' The least possible effort would have been expended in contrast to the great amount of effort used in pulling himself up from the top of the step ladder.

"Considering the well-known safety program of Pacific Northwest Bell, it follows that the means of access to the crawl space used by the deceased October 2, 1968 was not the usual and customary work practice followed by the deceased. It is unbelieveable that a long time employee of Pacific Northwest Bell would, or would be allowed to, as a usual and customary practice, violate a longstanding safety code. He was a telephone installer. He would sometimes be required to enter attics and similar places. It would not be an every day occurrence and it would not be usual and customary to gain access to the attic by violating a safety code and incurring forbidden hazard.

"The deceased performed extreme and unusual exertion only minutes before the symptoms were manifested (Tr. 11) and a very short time before his death.

"The ordinary activities of a telephone installer are not what must be considered. In this case it is the activities of Albert L. Svatos on October 2, 1968. However, these activities, even violation of safety codes, are not a bar to the compensability of the claim.

"Dr. Brady is a well-recognized pathologist, well qualified to testify as to causes of death. His testimony is a matter of record and will not be quoted at length. Dr. Brady testified (Tr. 132):

Q. 'But so far as this case is concerned, so far as Mr. Svatos' case is concerned, the physical activity, in your opinion, is reasonably probably what produced the increased demand that tipped the scale, it was this activity that I described to you, going up the ladder and crawling around in this particular case in this particular man?

A. 'The timing is the crucial point here; we have got the man doing the activity, and we have him having chest pain and dying while he is doing that activity.

Q. 'So you would agree that the activity was reasonably probable the cause of that attack which ultimately produced his death?

A. 'I think it was reasonably related; I will put it that way.'

"It will be noted that Dr. Brady was somewhat cautious in his statement. At this point this reviewer is guided by the Supreme Court in Clayton v. SCD, 88 Ad. Sh 457, 454 P.2d G28.

"Dr. Griswold was the only medical witness called by the plaintiff in the Clayton case. He is head of the Cardiology Department of the University of Oregon Medical School. The Court quoted some of Dr. Griswold's testimony from which it is apparent that the doctor, an eminent cardiologist, was reluctant to make a flat statement that the stress to which Clayton was subjected was the probable cause of death. The Court accepted the testimony of Dr. Griswold.

"To determine the cause of death is the specialty of the pathologist. Dr. Brady is as eminent in his field as is Dr. Griswold in his. Dr. Brady performed the autopsy. He recognized the extremely severe condition of Mr. Svatos' heart and arteries. However, like Dr. Griswold in the Clayton case, he was cautious in his statement.

"Dr. Sutherland, in his letter to Dr. Voth, (Defendant's Exhibit B) stated:

> 'I gather that the amount of physical exertion he performed in the several minutes prior to the onset of his chest pain was not severe or unusual for him.'

"It is clear that Dr. Sutherland based his opinion on the assumption that Mr. Svatos was not engaged in the extreme physical exertion as shown by the record.

"Dr. Sutherland answered Mr. Hammel's questions (Tr 144):

Q. 'But it is your opinion the physical activity he was engaging in at the time didn't contribute any substantial or material---?

A. 'In a substantial or material way, that is my opinion ---.'.

"Dr. Sutherland did not say it did not contribute, and on cross-examination (Tr. 147):

Q. 'Did it contribute at all?

A. 'I don't know.'

It should be noted that in the long question posed by Mr. Hammel to Dr. Sutherland, the only reference as to how Mr. Svatos got into the attic was (Tr. 138):

> '. . . on October 2, when he was at the Veterans' Hospital to install a telephone he had to climb an eight foot ladder above which there was a false ceiling of about a foot in between the false ceiling and the permanent ceiling there was a space of about a foot and a half, he climbed through that opening to gain entrance to a crawl space above the permanent ceiling . . .'

"There is not a word about Mr. Svatos standing on the top of the eight foot ladder and 'pulling himself up' through the hole chopped in the ceiling (Claimant's Exhibit 3). It was not a case of going through a regular framed-in access hole. The hole chopped in the ceiling (upper photo and middle photo, Claimant's Exhibit 3) would be much more difficult to get through, and as was testified to, necessitated the use of the pipes, by means of which Svatos pulled himself up.

"Dr. Rogers is an eminent cardiologist but his expert opinion loses its value because it is based upon a situation not in keeping with the facts in evidence. Mr. Hammel propounded a long question to Dr. Rogers. The only part referring to gaining access to the crawl space (Tr. 165) was:

> '. . . and in doing so, he climbed an eight foot ladder, which extended to within a foot of the ceiling, a false ceiling, the space between the false ceiling and the permanent ceiling being about a foot and a half, he climbed through an opening to gain entrance to a crawl space over the permanent ceiling; . . .'

"To the long question, Dr. Rogers replied:

A. 'My opinion is that this effort as described probably bore no significant causal relationship to his death from the coronary artery disease.'

"The answer has no value. The question does not state the facts as such are in the evidence. This divergence from the facts renders the answer valueless.

"Dr. Rogers further stated:

> 'I heard nothing described that sounded unusual in the way of effort for an installer.'

"The error is that the description did not fit the facts. The doctor further state (Tr. 169):

> 'This is important to my analysis of the case, that the level of activity was normal for him, and not extraordinary for him in any way, * * *'

"The good doctor was basing his statements on a situation not in accord with the facts.

"On cross examination Mr. Bemis did speak of Mr. Svatos' efforts (Tr. 184):

> '* * * and you were aware of the fact that he was going to climb this ladder, pull himself up through a hole, a three and a half foot hole in the ceiling, and climb back and around and through on his hands and knees * * *'

"Mr. Bemis stressed the hands and knees part of it more than I do. In my de novo review I place more weight on the exertion of Mr. Svatos pulling himself up through the hole and that this is not the usual and customary method of entering such a crawl space, because such a method being contrary to safety codes would not have been the usual and customary way to enter such a space. In spite of Dr. Rogers' statement that it was all ordinary everyday work, it could not have been. Pacific Northwest Bell would not allow an employee to do this as an ordinary everyday practice.

"Mr. Hammel (Tr. 189) stated the pictures of the work area were not sent to Dr. Rogers. This was important evidence the doctor did not have.

"When asked if his opinion might be different if the doctor knew the exertion was greater than he assumed, Dr. Rogers replied (Tr. 186):

> A. 'So, if one said, "It was a very slight effort for me to do this." Then I would say it was not materially different; but if Mr. Svatos had come out of that hole saying, "That is the most strenuous thing I have done in months; it just overwhelmed me." Then my opinion would be different.' (Emphasis supplied).

"It is not recorded that Mr. Svatos made such a statement, but when he 'come out of that hole' he was having severe pains and died a short time later.

"The employer's brief seeks to show that there was no new injury and for that reason the claim should not be allowed.

"This was resolved by the Supreme Court in Kinney v. SIAC. In that case the Court stated:

> '4. We are concerned here with a man in apparent normal health, able at least to hold down a job, who suddenly as the result of unusual exertion in the course of his employment, is stricken and is never thereafter able to work. He did not have a "heart attack" which, as Dr. Ritzmann testified, involved "destruction of the heart muscle," but he exhibited the symptoms of a heart attack, precipitated by the stress of exertion, was disabled, and eventually was required to undergo open heart surgery and now lives with an artificial aortic valve. Had he suffered a coronary occlusion with the same results he would, without question, have been entitled to compensation: Olson v. SIAC, supra; but the Commission says that, because nothing has happened to him except that his heart has ceased to function properly, there has been no injury and should be no compensation.
>
> 'We do not agree. The Legislature has not seen fit to define the word "injury" and the courts are left with a clear choice between two possible meanings. It seems to us to be our plain duty to adopt the meaning which more nearly accords with the purpose intended to be served by the Workmen's Compensation Law, and we therefore hold that the plaintiff suffered an accidental injury arising out of and in the course of his employment and is entitled to compensation.

'Other questions raised by the defendant are, we believe, sufficiently covered by what has already been said.

'The judgment is affirmed.'

"I do not agree with the Hearing Officer in all respects. There are some of her conclusions that I do not accept. The excluded exhibits should have been accepted, but are not of as much worth as employer's counsel states:

"From the entire record subjected to a de novo review, I make the following findings of fact:

1. Legal causation is established. It is also admitted by the employer.

2. Medical causation is established by Dr. Brady. Although accorded lesser weight, testimony of Drs. Scourfield and Conley has considerable value in this respect. Dr. Brady is an eminent pathologist, recognized as being well qualified to give an opinion on the cause of death. He performed the autopsy.

3. Mr. Svatos had an extremely severe coronary artery disease. Very little was needed to 'tip the scales.'

4. Mr. Svatos was working at his usual occupation of installing telephones, but the physical effort of 'pulling himself through the hole in the ceiling' was not usual and customary activity. The physical effort put forth by Mr. Svatos, October 2, 1968, was unusual exertion for him.

5. Drs. Sutherland and Rogers are eminent cardiologists, but their testimony is nullified because it is based on their erroneous assumption that the physical activities of Mr. Svatos preceding the attack were usual and customary for him.

6. The unusual exertion on October 2, 1968 was a substantial contributing factor in the condition resulting in death.

"From these facts and the sequence of events, as shown by the record, I conclude that Albert L. Svatos met his death as the result of unusual physical exertion superimposed upon an extreme case of coronary artery disease.

"The death qualifies as a compensable fatal claim."

/s/ Wm. A. Callahan, Chairman

WCB #69-1968 January 7, 1970

MARDELL BICE, Claimant.
Request for Review by Claimant.

The above entitled matter involves questions of the need for further medical treatment arising from an injury of November 20, 1968 when she fell due to water on the floor.

A request for hearing was filed July 28, 1969. The Hearings Division on November 3, 1969 concluded the claimant was not pursuing the request for hearing and dismissed the matter. The claimant requests Board review of the Order of Dismissal asserting that she was still in need of treatment and that the employer has ceased authorizing such treatment. The claimant's doctor is a licensed osteopath in the State of Washington.

The matter has never been submitted by the employer for determination pursuant to ORS 656.268. If there is no need for further medical care, the matter should be submitted for determination.

The order of the hearing officer is set aside. The employer is ordered to forthwith submit the matter for determination pursuant to ORS 656.268. Right to hearing of either party would then be fixed by the order of determination. If the record is such that determination cannot be made, the matter may then be referred to the Hearings Division for resolution of any dispute on the need for further medical care or other issue of compensation.

WCB #69-53 January 8, 1970

WILBUR J. PRATER, Claimant.

Workmen's Compensation Board Opinion:

The above entitled matter involved the compensability of an infectious condition developed by a 34 year old worker which was eventually diagnosed as "shigella intercolitis and hepatic dysfunction." The condition was allegedly related to the claimant's work in cleaning out what is described as a very filthy building.

The claim was denied but ordered allowed by the Hearing Officer. The rejection of the Hearing Officer order by the State Accident Insurance Fund operated to refer the matter to a Medical Board of Review.

The report of the Medical Board of Review has now been received and is declared filed with the Workmen's Compensation Board as of December 26, 1968. The report is attached, by reference made a part hereof and by ORS 656.814 is made final and binding on the parties as a matter of law.

The report, in summary, finds the claimant to have sustained an occupational disease resulting in temporary total disability from June 18, 1968 to January 1, 1969 with no permanent disability.

No notice of appeal is deemed applicable.

Medical Board of Review Opinion:

"Mr. Wilbur J. Prater, Workmen's Compensation Board Case Number 69-53 was examined at 9:00 AM in my office on 12-10-69, by Dr. Charles Grossman and myself. Dr. George Long had been called to Vancouver, Washington by an emergency and was unable to be present at the examination at that time, however, he had completely reviewed all of the submitted data and concurred with the findings of Dr. Grossman and myself.

At this examination we found nothing in particular relating to Mr. Prater's previous illness as outlines in the materials submitted, however, the last laboratory data obtained on 9-17-68 showed a thymol turbidity 25 units, cephalin flocculation of 4+ in 24 hours, slightly elevated gamma globulin on protein electrophoresis, and a SGOT which was elevated. As we felt is essential to rule out any on-going abnormal liver function, tests of SGOT, total bilirubin, total protein and alkaline phosphatase were determined. Cephalin flocculation was negative in 48 hours. The SGOT was 45, with normals ranging from 15 to 50. Total bilirubin was .8, alkaline phosphatase was 35 units with normals ranging from 30 to 85 units. Total protein was 7.6 grams percent. It is therefore concluded that this individual no longer suffers from any hepatic or gastrointestinal disorder. A date for his complete recovery is estimated to be January 1, 1969.

/s/ Ernest T. Livingstone, M.D.

WCB #69-1076 January 8, 1970

JACK H. ZIMMER, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of the extent of permanent disability attributable to a low back injury sustained October 28, 1968.

The claimant has had a chronic low back problem at least since May of 1964. The claim at issue is the first for which surgery was performed and the surgery is apparently successful in its relief of the problem.

The claimant admits that his condition is improved but asserts that the small portions of disc and bone material removed, though reducing his symptoms, constitute a disability. The claimant also urges that the prior awards of 45 degrees for permanent disability should be disregarded.

ORS 656.222 is as follows:

"Should a further accident occur to a workman who is receiving compensation for a temporary disability, or who has been paid or awarded compensation for a permanent disability, his award of compensation for such further accident shall be made with regard to the combined effect of his injuries and his past receipt of money for such disabilities."

ORS 656.214 (4) is as follows:

"In all other cases of injury resulting in permanent partial disability, the number of degrees of disability shall be a maximum of 320 degrees determined by the extent of the disability compared to the workman before such injury and without such disability."

The law clearly requires a consideration of prior awards and a comparison of the workman to his status prior to the injury at issue. The injury in this instance did not produce increased disability. The disability is actually less.

The claimant is to be commended for his frank testimony with regard to the history of his back problems. He is back on the same job and by surgery now presents a picture of reduced rather than increased disability.

The Board concludes and finds that the Hearing Officer was in error in finding any compensable disability attributable to this accident.

The order of the Hearing Officer is therefore reversed and the original determination order finding no compensable disability is reinstated.

Pursuant to the rules in such matters, counsel for claimant is authorized to bill claimant for a fee of not to exceed $125 for services in connection with this review. Pursuant to ORS 656.363 no compensation paid pursuant to the order of the Hearing Officer is repayable.

WCB #68-1919 January 8, 1970

DARRELL B. WILLIAMSON, Claimant.
Request for Review by SAIF.

The above entitled matter involves the compensability of a non-fatal myocardial infarction sustained by the claimant while at work on August 2, 1968. The claim was denied by the State Accident Insurance Fund but ordered allowed by the Hearing Officer.

The issue is of course whether there is evidence of legal and medical causation. The history of the work effort is important in these matters and as usual in contested cases there are divergent medical opinions on the relationship of the particular work effort to the myocardial infarction. Dr. Lumsden, a general practitioner, or page 6 of the transcript bases his opinion on an understanding that the claimant was tugging on a fouled cable, "and suddenly he experienced a very severe incapacitating chest pain." The claimant's testimony at the hearing reflected on pages 19-21 that the first symptoms occurred some time after the fouled cable incident while getting off the "cat." They symptoms were a mild tingling self diagnosed by the claimant at first as "stomach gas" and later as hunger pains whereupon he started to eat lunch. The emphasis placed upon excruciateing pain contemporaneous with the effort by Dr. Lumsden thus clouds his medical opinion. Dr. Lumsden as a general practitioner does have substantial experience in treating heart cases. Dr. Bittner as an internist has a substantially greater training and experience in this field. Dr. Bittner's opinion was based upon a more accurate and detailed explanation of the events at work.

It may be that Dr. Lumsden would still be of the opinion that the work effort at issue was still causative in the absence of excruciating pain contemporaneous with effort. It requires conjecture and speculation to so modify his opinion of record.

The Board concludes and finds that there was no medical causation between the work effort and the myocardial infarction.

The order of the Hearing Officer is therefore reversed.

Compensation paid pursuant to order of the Hearing Officer is not repayable conforming to ORS 656.313.

WCB #69-1374 January 8, 1970

MARVIN D. PEARSON, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of the extent of permanent disability attributable to a low back injury sustained by a 39 year old log pond worker on October 13, 1967.

Pursuant to ORS 656.268 a determination issued finding the claimant to have sustained no permanent disability. Upon hearing, however, an award was made of 80 degrees against the applicable maximum of 320 degrees and comparing the workman to his pre-accident status.

The claimant had a prior episode of back trouble in 1964. The treatment has been conservative and largely chiropractic. The claimant has returned to work following the accident at issue and the present occasional symptoms appear to be the same as those preceding this injury.

The Board concludes, particularly from the report of Dr. Wilson of May 6, 1969, that the claimant has sustained no permanent disability attributable to this injury. There are no objective findings of new disability and even the subjective symptoms appear to be in keeping with the claimant's pre-accident status.

The workman has returned to full work for a substantial period of time without need for further medical care.

The order of the Hearing Officer is therefore reversed and the award of permanent disability is set aside. No compensation paid under the order of the Hearing Officer is reimbursable pursuant to ORS 656.313.

The award having been reduced on appeal by the employer, counsel for claimant for services in connection with this review in an amount not to exceed $125 pursuant to the rules of procedure in such matters.

WCB #68-1620 January 8, 1970

CYRIL H. KLIKA, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of disability attributable to an accidental injury of December 29, 1965, when the jackhammer claimant was operating struck a high voltage line. The claim was accepted by the then State Compensation Department and as a pre-1966 injury, the matter was subjected to Workmen's Compensation Board hearing and review on election of the claimant. The State Compensation Department, now State Accident Insurance Fund, found a permanent disability of a loss of use of 25% of each arm. This award was sustained by the Hearing Officer.

In light of the current wide range of symptoms including both arms, both legs, the head and body, it is important to view the matter in its proper prospective. The claimant's brief is replete with reference to burns from 11,000 volts. The measure of disability cannot be based upon the voltage or the fact that some superficial burns occurred.

The incident occurred at about 5:30 p.m. It was not of sufficient severity to even require first aid. The claimant continued working until 9 p.m. On the next day the claimant complained of eye blurring while at work and reported to the emergency room at the hospital. Dr. Rowell, an opthamologist, diagnosed "a mild ultraviolet light flash burn of both corneas, the lashes of both eyes singed." All evidence of injury had cleared by January 20th, some three weeks after the incident. Though there is testimony by the claimant of a temporary redness on the wrists and legs there is no record of any "burn" requiring medication or treatment. The claimant returned to work in February of 1966 and worked most of the summer as a foreman.

In the four years since the accident the list of symptoms and number of areas of the body allegedly affected have grown. It is quite apparent from various medical reports that the claimant's responses to various medical tests are not consistent with true physical disability. The claimant will almost collapse as a reaction to a simple brushing but withstand heavy palpation on occasion to an area of the body allegedly causing unbearable pain. Though he asserts he is unable to use the various parts of his body, the lack of muscle atrophy and the presence of good muscle tone make it obvious that he can and does retain good bodily function.

There is substantial discussion of hysterical ond conversion reaction and the place of conscious or subconcious motivation of the claimant in asserting physical impairments for which the medical profession can find no physiological explanation. Claimant's counsel even suggests that the length of the fruitless search by the doctors may be proof that something exists. The argument that no one would seek compensation for not working in lieu of the higher remuneration of work is an expression of logic, but does not take into consideration the frailties of human nature. Unfortunately there are some who prefer the "compensation" of being accepted as seriously ill to the monetary compensation derived from work. If a claimant is motivated to prove that he has disabilities which are in fact non-existent and this motivation is precipitated by an accident, does the alleged disability automatically become compensable?

The Board, taking all of the evidence into consideration, concludes that whatever disabilities the claimant may have which are attributable to the accident do not exceed in degree the award by the State Accident Insurance Fund.

The order of the Hearing Officer is affirmed.

WCB #69-1591 January 9, 1970

BRENT L. ENGLISH, Claimant.
Request for Review by Claimant.

The above entitled matter involves the procedural issue of the timeliness of the filing of the claimant's request for hearing following the partial denial of his claim by the State Accident Insurance Fund.

The claimant is an 18 year old college student who sustained an admittedly compensable injury to his low back on August 6, 1968, while employed as a service station attendant, when he fell from a chair on which he was standing to reach an object on an overhead shelf.

Thereafter the claimant was involved in two incidents while attending college. On October 18, 1968, he fell as the result of kicking a football with a friend on the lawn behind the college dormitory, and on May 8, 1969, he fell while patronizing the college cafeteria. Both incidents involved the possible exacerbation of his back condition. No claim for compensation was made by the claimant with respect to either incident, and it appears from the record that the claimant does not contend that either of these incidents constituted a compensable injury. In light of Printz vs. State Compensation Department, 88 Or Adv Sht 311, 453 P.2d 665, the denial where no claim was made may be a nullity. At best the denial serves as notice that there were subsequent non-compensable injuries to the same part of the body. The State Accident Insurance Fund would have no liability for such injuries in any event.

The State Accident Insurance Fund mailed a denial of responsibility for these two incidents to the claimant on June 16, 1969. The partial denial contained the required statutory notice in the usual form notifying the claimant that if he was dissatisified with the denial he could request a hearing by the Workmen's Compensation Board within 60 days from the date of the mailing of the notice, and that failure to request a hearing within that time limit would result in the loss of his right to object to the denial.

In reply to correspondence from the claimant's attorney and father, the State Accident Insurance Fund by letter dated August 6, 1969, advised the claimant that it acknowledge responsibility for the injury sustained at the service station on August 6, 1968, and that the denial of responsibility related only to the two subsequent incidents which occurred at the college. This letter further advised the claimant that if a hearing was requested, that the request should be submitted to the Workmen's Compensation Board.

The claimant's request for hearing was dated and mailed on Monday, August 25, 1969, the 60th day following the date of mailing of the notice of

denial, and was received and filed by the Workmen's Compensation Board on Tuesday, August 26, 1969, the 61st day following the date on which the notice of denial was mailed. The computation of time is made in accordance with the procedure provided in ORS 174.120.

ORS 656.262(6) provides that where a claim for compensation is denied, the claimant shall be given a written notice of the denial, stating the reasons for the denial, and informing the workman of his right to hearing under ORS 656.283. The workman may request a hearing on the denial at any time within 60 days after the mailing of the notice of denial.

ORS 656.319(2)(a) explicitly provides:

> "With respect to objection by a claimant to denial of a claim for compensation under ORS 656.262, a hearing thereon shall not be granted and the claim shall not be enforceable unless a request for hearing is filed within 60 days after the claimant was notified of the denial."

A request for hearing is "filed" when it is delivered to and received by the Workmen's Compensation Board. In Re Wagner's Estate, 182 Or 340 (1947).

The claimant's request for hearing in this matter was not filed with the Workmen's Compensation Board within the time required by law, and as a result thereof, a hearing cannot be granted to the claimant.

The Board notes that subsequent to the filing of the claimant's request for hearing, and the entry of the order of dismissal of the hearing officer with respect thereto, which has been subjected to this review, a determination of the claimant's compensable injury of August 6, 1968, was made in accordance with the procedure provided by ORS 656.268. The mailing date of this determination order is October 30, 1969. The claimant may request a hearing on this determination within one year after the mailing date of said order.

The order of the hearing officer dismissing the request for hearing is affirmed.

WCB #69-504 January 12, 1970

EVELYN M. BATHKE, Claimant.

Workmen's Compensation Board Order:

The above entitled matter involves an issue of the extent of permanent disability with respect to arm and shoulder difficulties sustained by a 36 year old poultry plant worker in extracting turkey crops.

The claim was accepted by the State Accident Insurance Fund as an occupational disease. Pursuant to ORS 656.268, a determination issued finding a disability of 9.6 degrees against the applicable maximum of 192 degrees for total loss of an arm.

Upon hearing, the award was increased to 38 degrees. The State Accident Insurance Fund, by rejecting the order, precipitated the reference of the matter to a Medical Board of Review as provided by ORS 656.808.

The Medical Board of Review was duly constituted and the findings of that Board are attached and by reference made a part of this order and are declared filed by the Workmen's Compensation Board as of January 7, 1970.

The Board function is limited to the ministerial act of filing the findings. Those findings, with explanations attached, find the claimant not to be suffering from an occupational disease and to be without objective disability at this time.

Pursuant to ORS 656.814 the findings are final and binding.

No notice of appeal is deemed applicable.

Medical Board of Review Opinion:

"This brief letter is attached to form 866, and is intended as an explanation of the problems involved in arriving at our unanimous opinions as outlined. As the patient's problem is not a discreet one, such as one sees in a laceration or in a fracture, but a problem involving three primary areas, one of pain about the right shoulder, not well localized, but having the underlying tone of mild rotator cuff type tendonitis. (2) Pain and swelling on the dorsum of the hand, which by description fits the story of extensor tenosynovitis at the wrist level and (3) Vague, vascular type phenomenon involving the right upper extremity. As a group we were agreed that the shoulder problem does not fit the definition of an occupational disease. However, there certainly was some question as to the extensor tenosynovitis, if in fact, it did exist at all, as of course, there were no physical findings of such, but only a good history of such when the three of us examined her, even dating back to my initial examination. If, in fact, the patient does have a rather vague or nondescript type of symptomatology secondary to a vascular problem, for which the history was suggestive, then continuance on some form of vasodilator is in order. The physical findings by Doctor Jones, including oscillometric findings were suggestive of some changes in both upper extremities, although slightly more on the right, but were without gross findings to orthopedic examination in the relms of thoracic outlet syndrome and is well controlled on medication. As to the shoulder, one would normally expect some atrophy, either gross or measurable along with some stiffness or loss of motion and more localized findings should one consider sufficient rotator cuff tendonitis over a three year period to warrant surgical exploration in the form of acromioplasty or simply exploration. We unanimously agreed that the patient was not a surgical candidate.

"In summary, the patient remains subjectively symptomatic, while objectively the findings were not convincing for moderate or major pathosis. The fact that the patient has continued symptomatic despite three years abstinence from her working conditions, represents a problem when one tries to fit the condition under the definition of occupational disease, although it must be admitted that if the patient were to return to the repetitious motion in cold water, that the symptomatology, if real, may return and in fact, conceivably present objective findings that can be measured."

/s/ J. R. Becker, M.D. Thomas A. Edwards, M.D. Arthur C. Jones, M.D.

WCB #69-525 January 12, 1970

FLOYD M. ZUNCK, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 32 year old worker while handling a barrel of molasses on January 21, 1967.

The claimant has a history of prior back injuries in 1954 and 1958 with surgery associated with the 1954 injury in 1955. A repeat lumbosacral fusion was performed to again stabilize the offending area of the low back.

The claimant has a place of some 40 acres with an additional 112 under lease and is running some 60 head of feeder cattle. He also works occasionally at an auction yard and his present aim is to engage as a cattle buyer. The claimant is not interested in pursuing any of the services available toward vocational rehabilitation.

Pursuant to ORS 656.268 a determination issued finding the claimant's disability to be 38.4 degrees against the applicable maximum of 192 degrees. This award was increased to 125 degrees by the Hearing Officer.

One of the greatest obstacles to this claimant's continuing work capabilities is the fact that he is obese and has continually failed to cooperate with the doctors who have advised him that carrying somewhat more than 200 pounds on a 5'6" frame is his principal problem. Counsel argues that the employer takes the workman as he finds him. There is no argument with this basic concept of compensation law. However, there is no such rule that once an obese workman is injured, he has a basic right to perpetuate disability which is within his sole power to relieve. A substantial part of the excess weight of this climant is associated directly with the musculature which transfers the force of the weight to the back. It is of interest to note that the claimant, since the accident but not caused by the accident, has developed upper back and cervical complaints. These are diagnosed as of postural origin and are again attributable to the refusal to cooperate in a realistic program of weight reduction. A workman also has obligations when injured and among these obligations is the duty to cooperate with the efforts to restore the workman to his maximum capabilities. Compensation may be suspended in some cases pursuant to ORS 656.325 (2). The obvious legislative intent inherent in such a provision certainly encompasses the principle of refusing to make an award for disability which is only permanent to the extent the claimant, by his own action, maintains the disability. The claimant's motivation in avoiding vocational rehabilitation must also be considered.

The Board concludes and finds that the award of disability of 125 degrees by the Hearing Officer is certainly generous under the circumstances and that the permanent disability attributable to this accident does not exceed the 125 degrees awarded.

The order of the Hearing Officer is affirmed.

WCB #69-295 January 12, 1970

JAMES L. WARD, Claimant.
Request for Review by SAIF.

The above entitled matter basically involves issues of whether increased compensation for unreasonable delay in payment of compensation and attorney fees may be assessed to the State Accident Insurance Fund with respect to the refusal to accept responsibility for a claim of aggravation involving an exacerbation of a knee injury.

The injury on October 10, 1967 was diagnosed as an acute strain and sprain to the soft tissue of the right knee. The claimant returned to his trade as a cement mason in about a month and worked without apparent difficulty until one morning early in September of 1968, the claimant awoke finding his affected knee sore and locked.

The claimant's treating doctor is licensed to practice in the State of Washington. Unfortunately, difficulty was experienced in obtaining a more complete report from this doctor and efforts at obtaining evidence by way of a deposition were abandoned of necessity. A 1969 amendment to ORS 656.310 by Ch 447 O. L. 1969 requires that out of state doctors' reports may be received only upon cross-examination of the doctor by deposition or by written interrogatories. It would appear that Dr. Cone has to some extent imperilled his patient's right to compensation to whatever extent Dr. Cone may be responsible for the failure to adduce evidence in the manner required by law.

There is a consulting report from a Dr. Gill to Dr. Cone dated September 12, 1968, but the record is not clear whether this consulting report was transmitted to the State Accident Insurance Fund. It was introduced upon hearing by the claimant.

The compensability of the claim as a claim for aggravation essentially is dependent upon the opinion of Dr. Fitch, obtained following the formal hearing in the matter.

In retrospect it would appear that the claim of aggravation when presented to the State Accident Insurance Fund in the form of a request for medical authorization by Dr. Cone did not meet the requirements of ORS 656.271 as interpreted by the Supreme Court in Larson v. SCD, 87 Or Adv Sh 197, 200, 445 P.2d 486 (1968). It is not logical to charge unreasonable resistance to payment of compensation with respect to an issue which was not clearly resolved until supporting medical evidence was received post-hearing.

The State Accident Insurance Fund suggests that since the matter arose within one year of the original claim closure, the matter was of necessity a simple request for hearing of the closing order. The Workmen's Compensation Board acknowledges that the original order of determination may be subjected to review within one year without the corroborative medical report required for a claim of aggravation by ORS 656.271. This does not preclude a claim for aggravation within that year.

There is another phase of the law applicable to this case and not presented by the parties' briefs or considered in the order of the Hearing Officer.

ORS 656.245 requires the employer to "cause to be provided medical services for conditions resulting from the injury for such period as the nature of the injury or the process of recovery requires, including such medical services as may be required after a determination of permanent disability."

The record now reflects that the State Accident Insurance Fund refused to provide those medical services following the determination of disability which were found to be required by the nature of the disability. There was some nominal additional temporary total disability but the crux of the issue was the denial of responsibility for additional medical found to be required by the nature of the injury.

ORS 656.262 (1) and (4) impose upon the State Accident Insurance Fund the responsibility of processing claims and payment of compensation within 14 days after notice or knowledge of the claim. The Board is in effect asked to interpret the law to mean that it is only the initial period of compensation to which this applies and that compensation for subsequent episodes of disability may be delayed for weeks or months without the employer or insurer being charged with unreasonable delay. The State Accident Insurance Fund was advised by Dr. Cone on September 30, 1968 that Dr. Cone had obtained the consultation of Dr. Gill, but apparently denied Dr. Cone's request for authorization without obtaining the benefit of Dr. Gill's opinion in the matter.

It is upon the failure of the State Accident Insurance Fund to maintain the continuing responsibility vested by ORS 656.245 and ORS 656.262 (1) and (4) that the Board deems the application of increased compensation and imposition of attorney fees to have been proper.

For the reasons stated, the ultimate order of the Hearing Officer is affirmed together with the allowance of a further attorney fee to claimant's counsel in the sum of $250 for services on this review, such further fee also payable by the State Accident Insurance Fund.

WCB #69-778 January 12, 1970

HAROLD O. ROST, Claimant.

The above entitled matter involves issues of the extent of permanent disability sustained by a 48 year old wallboard applicator who fell from a scaffold in August of 1967, incurring a fractured right heel, strained right wrist and lacerated right elbow.

Pursuant to ORS 656.268 a determination finding a permanent disability of 27 degrees against the applicable maximum of 135 degrees for the complete loss of a foot.

Upon hearing the award was affirmed. The claimant sought review and the Board has been unable to complete a review of the record due to the accidental destruction of the record of the hearing in a fire.

The matter is deemed within the authority of the Workmen's Compensation Board to remand for further hearing and reconstruction of the record for purposes of review and appeal.

Pursuant to ORS 656.295 (5) the matter is remanded to the Hearings Division for further hearing and for such further order as the evidence upon hearing may warrant.

WCB #69-583 January 12, 1970

CLEATWOOD RAILEY, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the compensability of an exacerbation of low back difficulties sustained by the 35 year old claimant when he slipped on the ice at home while going to the mail box. The claimant did not fall but caught himself. The next morning he could hardly get out of bed.

The claimant's history of low back troubles dates back at least to 1961 with associated surgery in 1962. The present claim dates from February 8, 1967, when the claimant lifted a tire and in the process backed into a pipe. This incident was followed by another laminectomy. The claim was "closed" in January of 1968 with an award of 38.4 degrees out of the maximum possible award of 192 degrees for such unscheduled injuries. During 1968 the claimant undertook rehabilitative training in barbering but did not require medical treatment during that period.

The crucial issue then arose when the claimant sustained the incident of slipping on the ice. The claimant contends that this constituted a compensable "aggravation." There is some banter in the record by one of the doctors to the effect that he had been told that further incidents on the job were new "accidents" but similar incidents while not at work were "aggravations." The Supreme Court, in Keefer v. SIAC, 171 Or 410, concludes that disabilities resulting from further accident are not within the intendments of the aggravation provisions of workmen's compensation. A distinction must be drawn between increased symptoms which are directly traceable to the accident and symptoms caused by a new intervening traumatic event.

The majority of the Board concludes and finds that the incident of slipping on the ice at home was a subsequent intervening event to remove the results of that incident from the area of a compensable aggravation. Had this slip occurred on the job, it would have been a new accident arising out of and in the course of employment.

The order of the Hearing Officer is therefore affirmed.
/s/ M. Keith Wilson, Chairman
/s/ James Redman, Commissioner

Mr. Callahan, dissenting from the majority opinion, states his reasons as follows:

"Aggravation is not defined in the law. Some persons may say that it should be. One problem of attempting to do so is that a worthy claimant may be 'fenced out' or, in order to avoid that, the words of the statute may be too inclusive.

"Counsel for the State Accident Insurance Fund, which hereinafter will be called the State Fund, would have us believe that, if this case is allowed as an aggravation, great injustice will be done to the State Fund as an insuring agency. There is also a matter of justice to an injured workman.

"Counsel for the State Fund would have us believe that, if this case is allowed as an aggravation of the occupational injury, it will mean approval of the theory that 'anything that happens at home or off the job is an aggravation.' I do not subscribe to that theory, and to allow this matter as an aggravation does not grant approval to that theory.

"A workman having sustained an occupational injury resulting in permanent partial disability has been legally determined to be able to work at some gainful occupation. He is still a useful member of society. He certainly is <u>not expected</u> to lie in bed, nursing his disability and living an overly protective life, guarding against <u>all possibility</u> of having his occupational disability flare up and thereby requiring additional medical treatment. To do so would invite justly applied criticism. He would become a welfare case, a cost to the general public, the very thing workmen's compensation was designed to prevent. He can and should be expected to be prudent in his ordinary daily living and not attempt unusual activities that could reasonably be expected to cause additional injuries.

"In the instant case this young man never recovered from his injury. He was never free from pain. His former employer, called as a witness by the State Fund, testified that the claimant was a good worker although he was in pain when he did so. The claimant had been rehabilitated and trained as a barber. This is not a case of a workman being free from symptoms for an extended period of time. This man never was free from symptoms. He was found to be <u>stationary</u>, meaning that medical treatment was deemed to have been completed and that he would not get any better.

"In the course of everyday, ordinary living with his family, this man went to the mail box. He slipped on the snow, did not completely fall, but the next morning could not go to work because of extreme pain and required medical treatment. There is no question about this being due almost entirely to the occupational disability which was still causing pain before the incident at home.

"It was not a case of the man attempting some unusual activity from which he could reasonably expect an additional injury to his already disabled back.

"The Hearing Officer and the majority of the Board have made a too rigid interpretation of the law in this case. There was a rationalization that the rule of a minor injury superimposed upon a pre-existing

disability requiring payment for costs of the resulting condition, must be applied to the termination of responsibility for a case that never had been free of active symptoms.

"This is not in keeping with the basic fundamentals of the Workmen's Compensation Law. There is no statutory suggestion that such an interpretation be made. A law should be interpreted to accomplish the purposes for which the law was enacted. The Oregon Supreme Court in Kinney v. SIAC stated:

> ' * * * It seems to us to be our plain duty to adopt the meaning which more nearly accords with the purpose intended to be served by the Workmen's Compensation Law, and we therefore hold that the plaintiff suffered an accidental injury arising out of and in the course of his employment and is entitled to compensation.' (Emphasis supplied.)

"The 'purpose intended to be served by the Workmen's Compensation Law' is to pay for the costs of occupational injuries. The Supreme Court has stated repeatedly that the Workmen's Compensation Law should be interpreted liberally in order to accomplish its purposes. The instant case does not require a liberal interpretation of the law. It requires only that an extreme legal interpretation not be made.

"Following the guidance of the Supreme Court as applied to the facts of this matter, the order of the Hearing Officer should be reversed and the claim of Cleatwood Railey remanded to the State Fund to be reopened and compensation paid as required."

/s/ Wm. A. Callahan, Commissioner.

WCB #69-1053 January 13, 1970

JESSE C. MATNEY, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 49 year old sawmill cleanup man on May 19, 1968 when he injured his back while lifting a slab of wood.

Pursuant to ORS 656.268 a determination issued evaluating the claimant's disabilities at 32 degrees against the applicable maximum for unscheduled injuries of 320 degrees.

The claimant had a prior back injury in 1966 following which he returned to work until the present injury. The treatment for the injury involved in this claim included a laminectomy which apparently has not relieved the subjective symptoms.

The Hearing Officer found the claimant to be unable to regularly perform work at a gainful and suitable occupation by awarding compensation for permanent and total disability.

The transcript includes testimony by the claimant, Mr. Matney, regarding ineffectual or incomplete attempts at vocational rehabilitation of injured workmen suffering a substantial vocational impairment, as the result of a compensable accident arising out of and in the course of employment. In effectuating this responsibility it is the Board's policy to make every effort to retrain such injured workman whenever it is feasible in an effort to restore the workman to a self-supporting basis, unless there is crystal clear medical and other evidence that the workman is, for all practical purposes, industrially permanently totally disabled.

In the case of Mr. Matney, the Board is not convinced that he is industrially permanently totally disabled; and, by this order, directs its Administrator, Mr. R. J. Chance, to see to it that every effort is made to vocationally retrain Mr. Matney.

The services that are available to Mr. Matney, with his cooperation, are expert advice and assistance by vocational rehabilitation experts working for the Workmen's Compensation Board and the Department of Vocational Rehabilitation. Benefits include all costs of tuition and training, necessary transportation, board and lodging, books, tools and where necessary an adequate subsistence allowance supplementing permanent partial disability payments to maintain the family unit while Mr. Matney would be in training.

If all efforts at retraining Mr. Matney are unsuccessful, through no fault of his own, then the Board may re-examine the propriety of a permanent total disability award. At age 49 he is too young for the Board not to make a massive effort at retraining.

When the 1967 Legislature changed the maximum award for unscheduled injuries from 192 degrees, in terms of the loss of an arm, to 320 degrees, in terms of the extent of the disability compared to the workman before such injury and without such disability, it was the clear understanding of this Board that the legislative intent was to make it possible to avoid making a permanent total disability award because a disability was equal to greater than the loss of an arm, but not equivalent to a permanent total disability condition, by making it possible to make a much larger monetary award in those cases that fall short of industrial permanent total disability. The Board believes that the instant case justifies a higher award than granted by the Board's evaluation division, but does not justify the permanent total disability award by the Hearing Officer. It is the Board's opinion, based on all the evidence adduced and the testimony of the witnesses that this gentleman has a substantial degree of unscheduled permanent partial disability in the amount of 200 degrees, out of a maximum of 320 degrees which can be found as permanent partial disability in the unscheduled area, resulting from the latest injury.

The order of the Hearing Officer is accordingly modified. The award of disability is hereby reduced from one of permanent total disability to a permanent partial disability of 200 degrees.

WCB #69-797 January 13, 1970

HERBERT LIGGETT, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 44 year old truck driver who injured his low back on October 5, 1967, when he fell through a ladder. The claimant had certain congenital defects in his back and surgery was performed to relieve some of the symptoms produced by the accident.

Pursuant to ORS 656.268, the claimant was determined to have a disability of 64 degrees against the applicable maximum of 320 degrees for unscheduled or other injuries. This award was increased to 96 degrees upon hearing.

The determination of partial disability must be restricted to disability attributable to this injury. The law requires a comparison to the workman prior to the accident and without such disability.

There is a serious doubt in the instant case concerning the real disability and motivation of this claimant toward return to work. He appears able to pursue arduous forms of sport including fishing and hunting. The medical reports reflect none of the atrophy commonly associated with lack of use of muscles. The claimant's disability income is augmented from at least two other sources. This is of interest only when motivation is subject to question.

This claimant does not present the picture of a hale and hearty workman who is suddenly rendered seriously disabled. The claimant, at page 40 of the transcript, professed to have been discharged from the service as a truck driver during the war without knowing or being told why he was discharged. Joint Exhibit 23, a report by a Dr. Hoffman, reflects that the claimant did know and was told why he was discharged. He received a medical discharge because he "couldn't do the work" as a truck driver back in 1943. The record does not reflect whether the claimant is also drawing military disability compensation. The glaring inconsistency in this vital area requires great caution in assessing purely subjective symptoms. This caution is also required by the fact that upon medical examination, the claimant apparently attempted to influence the doctors by making muscle movements diagnosed as voluntary as opposed to the involuntary spasm found with true disability.

The claimant seeks the greatest possible award consistent with being just short of totally disabled. With the foregoing observations, the Board concludes that the claimant has some disability but that the disability does not exceed the 96 degrees awarded by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #69-1834 January 13, 1970

ABE ZAHA, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of procedure and the responsibility of the employer for surgical repair of the claimant's nose.

The claimant's nose was originally injured in an automobile accident a number of years ago. On March 28, 1969, the claimant arose from work at a drawing board and struck his nose against a lamp. The employer's insurer on behalf of the employer assumed responsibility for the initial care of the bleeding caused by the injury at work but on August 7, 1969, notified the claimant it would not be responsible for surgery to repair the longstanding defect due to the former automobile accident.

The request for hearing with respect to this denial was not filed with the Workmen's Compensation Board until October 7, 1969.

The provisions of ORS 656.262 (6) and 656.319 (2)(a) preclude granting a hearing on a denial if the request is not filed within 60 days of the mailing of the notice of denial. The request in the instant case was thus filed 61 days following the denial.

The only issue involved is the responsiblity for corrective surgery. The employer is responsible for the temporary effects of the blow to the nose and for any disability attributable thereto.

The order of the Hearing Officer is affirmed.

WCB #69-794 January 16, 1970

LINDA J. BALCOM, Claimant.
Request for Review by Claimant.

The above entitled matter involves various issues of disability arising from an incident when she fell onto a bed while helping a patient in a nursing home. The patient fell across the claimant causing neck and suboccipital pains and headaches. The claimant lost only two or three days of work. The injury was on December 21, 1967.

A request for hearing was filed with the Workmen's Compensation Board on May 5, 1969. Procedural objections were raised by the employer that the claim did not constitute a legal basis for allowance of a hearing on a claim for aggravation. The medical report of Dr. Campbell under date of April 25, 1969 does not meet the test required by the Supreme Court in Larson v. SCD, 87 Or Adv Sh 197, 200, 445 P.2d 486. The alternative basis for denying a hearing was that the claim involved no compensation other than medical care and no medical care had been provided for more than a year. SEE ORS 656.319 (2)(b).

A complicating factor on review was the destruction by fire of the reporter's notes precluding a review of testimony given at the hearing. If a hearing was precluded by law, no necessity existed to reproduce the testimony.

The Board notes in the record, however, that a determination order issued in the matter on June 4, 1969. Pursuant to ORS 656.268(5) and ORS 656.319 (2) (b), the claimant has one year from the order of June 4, 1969 to request a hearing on any of the issues involved in the closure of her claim. With that order before the Hearing Officer, the matter should have been heard as a review of that order or the claimant should have been permitted to convert the proceedings to that basis.

Since it appears of record that the proceedings were such that the claimant had a right to a hearing as a matter of law, the matter is remanded to the Hearings Division for such further hearing and order upon the merits as the evidence adduced may warrant.

WCB #69-2224 January 16, 1970

CLARENCE DEBNAM, Claimant.

The above entitled matter involves a procedural issue on the timeliness of filing a request for hearing with respect to a determination order issued and mailed December 4, 1968.

No such request for hearing was filed with the Workmen's Compensation Board until December 5, 1969. Pursuant to ORS 656.319 (2) (b), "a hearing on such objections shall not be granted unless a request for hearing is filed within one year after the copies of the determination were mailed." ORS 656. 268 (4) contains a similar limitation.

Counsel for claimant asserts that one copy of a request for hearing was mailed in Portland on December 4, 1969 and was therefore "received" by the Board upon that date. Even if some presumption attaches to mailing it would not be presumed delivered in Salem after a Portland posting before December 5th. No presumption attaches that a letter is received the same day.

Counsel for claimant also asserts that a duplicate copy of the request for hearing was personally delivered to a "shuttle bus" which operates several times per day carrying state employes and communications between Salem and Portland. The Workmen's Compensation Board has no record of any receipt of this copy. The shuttle bus may be an arm of state government but it is in nowise a function of the Workmen's Compensation Board, is not a service operated for members of the public and any documents delivered are first processed through central headquarters before delivery to any agency.

With respect to both attempts at filing the request for hearing within time, the Board refers to the decision of the Supreme Court in "In Re Wagner's Estate, 182 Or 340, citing other Oregon cases. In order to be legally filed the document must not only be delivered to but received by the proper office. Neither document allegedly forwarded to the Workmen's Compensation Board was delivered to or received by the Workmen's Compensation Board before December 5, 1969 and the attempt to duly request a hearing within the time limited by law was untimely.

Any inadvertence was obviously not by an employe of the Workmen's Compensation Board. With an entire year within which to request the hearing, the burden must fall upon claimant and counsel when the last possible moment is allowed to lapse without making certain that the document is properly filed.

The order of the Hearing Officer dismissing the request for hearing is affirmed.

WCB #69-142 January 16, 1970

ALBERT L. GRUMBLES, SR., Claimant.

The above entitled matter was the subject of an order of the Board on December 23, 1969, applying a loss of wages as a factor increasing an award of disability beyond the findings of physical impairment in keeping with the recent decision of Ryf v. Hoffman Construction, 89 Or Adv Sh 483, (459 P.2d 991).

The Workmen's Compensation Board has faced a dilemma in all pending cases involving the principles of the Ryf decision since its publication. Should every pending case be remanded for re-determination pursuant to ORS 656.268? Should every new case require a full implementation of wage factors? Should the possibility of a modification by the Supreme Court be cause to ignore the present implications of the decision? The Board, in the instant case, reflects a middle course where the record before the Board contained more evidence for application of the wage factor than was accepted as adequate for purposes of the Ryf decision. If the acceptance of the record in this instance is unconstitutional, the Board would of necessity imply a similar fault to the outcome of the Ryf case.

The employer seeks a reconsideration or remand of the Board's decision in this case. The order of the Board, which the employer seeks to set aside, notes that any factor improperly added by virtue of any subsequent modification by the Supreme Court in its Ryf pronouncement may be corrected by the Circuit Court or upon the Board's own motion.

The Board regrets the uncertainties but concludes that each case coming before the Board for review must be considered in light of the law as the Board understands the law to be at that time. The standard for adequacy of wage evidence accepted by the Court, as noted, has been exceeded in the record of this case.

The petition for rehearing is therefore denied.

No new notice of appeal is appended, the right of appeal being deemed that attaching to the order of the Board herein of December 23, 1969.

WCB #69-902 January 16, 1970

STEVE P. TISCH, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of disability arising from an injury which resulted in an amputation of one half of the distal phalanx of the left thumb on December 13, 1967.

Pursuant to ORS 656.268, a determination issued finding the disability to be 14.4 degrees against an allowable maximum for total loss of the thumb of 48 degrees.

Upon hearing, an award was made of 75 degrees which equals the compensation payable if the claimant had lost 50 percent of the use of the entire forearm at or above the wrist and exceeds the cumulative degrees assigned by law for complete loss of all four fingers.

The sections of the law involved are ORS 656.214 (2)(b), (j) and (k) and (3) as follows:

> 656.214 (2)(b) For the loss of one forearm at or above the wrist joint, or complete loss of all five digits, 150 degrees, or a proportion thereof for losses less than a complete loss.
>
> (j) For the loss of a thumb, 48 degrees, or a proportion thereof for losses less than a complete loss.
>
> (k) For the loss of a first finger, 24 degrees or a proportion thereof for losses less than a complete loss; of a second finger, 22 degrees, or a proportion thereof for losses less than a complete loss; of a third finger, 10 degrees, or a proportion thereof for losses less than a complete loss; of a fourth finger, 6 degrees, or a proportion thereof for losses less than a complete loss.
>
> 656.214 (3) The loss of one phalange of a thumb, including the adjacent epiphyseal region of the proximal phalange, is considered equal to the loss of one-half of a thumb. The loss of one phalange of a finger, including the adjacent epiphyseal region of the middle phalange, is considered equal to the loss of one-half of a finger. The loss of two phalanges of a finger, including the adjacent epiphyseal region of the proximal phalange of a finger, is considered equal to the loss of 75 percent of a finger. The loss of more than one phalange of a thumb, excluding the epiphyseal region of the proximal phlange, is considered equal to the loss of an entire thumb. The loss of more than two phalanges of a finger, excluding the epiphyseal region of the proximal phalange of a finger, is considered equal to the loss of an entire finger. The loss of any digit shall be rated as specified with or without the loss of the metacarpal bone and adjacent soft tissue. A proportionate loss of use may be allowed for an uninjured finger or thumb where there has been a loss of effective opposition.

It is obvious that the Hearing Officer has seized upon the permissive allowance for "loss of opposition" to digits to convert an injury obviously limited to the tip of the thumb into an award equal to half of a forearm.

It should be noted that the injured thumb had a preexisting disability due to arthritic changes caused by prior injuries which limited extension of the thumb.

To follow the logic of the Hearing Officer and claimant's counsel, every thumb injury must be rated with respect to all five digits. If that was the legislative intent, it would have been a simple task to assign given values to the loss of opposition when the entire thumb was lost. It is obvious that the greatly enhanced degree value of the thumb is largely based upon the very function of the thumb as an opposing digit. The loss of the entire thumb is limited to 48 degrees. As noted, everyone who loses the entire thumb loses all effective opposition it formerly had. It should be noted that the "loss of opposition" is not a mandatory feature. Contrasted with the use of "shall" in other respects, the use of "may" for loss of opposition denotes an intended application for unusual cases. There certainly was no intent to grant to the workman losing a thumb tip the compensation allowed a workman losing half the use of the forearm at or above the wrist.

Regardless of semantics or emphasis upon a single phrase or sentence of the law, a rule of logic and common sense must prevail to effectuate a graduated scheme of awards in which the various awards are commensurate with a scale of disabilities. The award by the Hearing Officer in this instance does not conform to a rule of logic or common sense.

The law permits an award of 24 degrees for the entire distal phalanx of the thumb. The claimant's proportionate loss of this phalanx is 50% and 50% of 24 is 12 degrees. The Board deems the case to be within those in which a loss of opposition may be granted but such loss is minimal and does not exceed 6 degrees.

The order of the Hearing Officer awarding 75 degrees is therefore modified and the award of disability is reduced to 18 degrees, an increase of 3.6 degrees above the original order of determination. No compensation paid pursuant to the Hearing Officer order is repayable pursuant to ORS 656.313.

WCB #69-1209 January 16, 1970

RONALD TOMPKINS, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of whether the claimant sustained a compensable accidental injury when he sneezed at work and incurred a low back injury.

There is no question but that the injury occurred in the course of employment. The issue is whether the injury arose out of the employment.

The claim was denied by the employer but ordered allowed by the Hearing Officer.

There is not one bit of medical evidence associating the injury with the work. The Board recognizes that work conditions may possibly precipitate a sneeze or that the claimant's position at work may precipitate injury when he

sneezes for a reason not caused by work. Either circumstance could bring about a causal connection.

Not every happenstance in the course of employment constitutes a compensable injury. The Board concludes that upon the present state of the record, it would be necessary to resort to conjecture and speculation with respect to the relation of the work to the results of the episode of sneezing and, more particularly that some medical opinion evidence should be adduced.

Upon this basis, the Board deems the matter incompletely heard pursuant to ORS 656.295 (5).

The matter is hereby remanded to the Hearing Officer for the particular purpose of requiring the parties to present medical evidence with regard to the association between the work and the injury from sneezing and for such other evidence as may be obtained relative thereto. Further order of the Hearing Officer shall be based upon the record as so implemented.

WCB #69-1134 January 16, 1970

GEORGE SCHNEIDER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the permanent disability sustained by a 39 year old workman in lifting a garbage can on September 9, 1968.

The claimant has had intermittent episodes of back pain but was able to work for some 15 years with a back diagnosed as showing a severe degenerative disease.

The incident highlighted the need for the claimant to seek employment which the degenerating back could tolerate and the claimant, at time of the hearing, was being vocationally rehabilitated as a machinist.

Pursuant to ORS 656.268, a determination issued finding the accident at issue to have produced a disability of 32 degrees against the applicable maximum of 320 degrees and comparing the workman to his pre-accident status. This determination was affirmed by the Hearing Officer.

The physical disability attributable to this incident appears to be minimal. The need to avoid further stress upon the degenerative back is not attributable to whatever degree of disability was contributed by the accident. The claimant is described as obese and appears to recognize that a weight reduction is part of the regimen he must adopt to maintain his utmost physical efficiency.

The Board concludes and finds that the disability does not exceed the 32 degrees heretofore awarded.

The order of the Hearing Officer is affirmed.

WCB #69-862 January 16, 1970

ARTHUR E. MAGNUSON, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of the extent of permanent disability attributable to an accidental injury of September 22, 1967 when the claimant was thrown from a tractor as it upset and he rolled down a rough hillside. The tractor did not, as erroneously recited in the Hearing Officer order, roll over the claimant.

The claimant has some degenerative intervertebral discs and the accident produced a now healed fracture of the second segment of the sacrum. One of the major items in dispute is the relationship of urethral difficulties and the relationship and compensability of decreased sexual functions.

The claimant was what is referred to as a utility man whose work varied with his all around ability to operate trucks, tractors, graders and loading equipment. He has returned to full time work with all the overtime he elected to work. The particular work at time of hearing involved an 8.82 percent decrease from the job at time of injury.

A urethral problem appears to have been either directly caused or at least certainly exacerbated by tearing of the structure in attempts to pass a catheter. It is immaterial from a standpoint of compensation if additional disability is caused by treatment being given for the injury. The claimant will require urethral dilations on a probable basis of once a month for the rest of his life. The probabilities, however, are also that the sexual function will improve.

Pursuant to ORS 656.268 a determination issued finding the claimant to have a permanent disability of 48 degrees against the applicable maximum of 320 degrees. Upon hearing, this was increased to 128 degrees.

The claimant has a condition which necessarily invokes sympathy. The actual limitation upon his work capabilities are obviously not of major significance.

The Board concludes and finds that the physical impairment does not exceed the 48 degrees allowed by the original determination order. If one applies the additional factor of wage loss noted above from the principle applied in Ryf v. Hoffman Construction, 89 AD. Sh. 483, 459 P.2d 991, there would be a measure of 28 additional degrees applicable.

The Board concludes and finds that the proper evaluation of disability is thus 76 degrees.

The order of the Hearing Officer is modified and the award is reduced from 128 to 76 degrees for the unscheduled disability including both back and urethral and associated limitations as influenced by a decrease in earnings.

WCB #69-528 January 16, 1970

KENT E. FILLINGHAM, Claimant.
Request for Review by Claimant.

The above entitled matter involves the sole issue on review of the extent of permanent disability sustained by a 38 year old carpenter as the result of a torn tendon in the right shoulder incurred on May 2, 1968, on a school construction project from pulling on a fifty foot truss joint in positioning one end of the joist on an elevated beam.

The determination order entered pursuant to ORS 656.268 found the claimant to be entitled to an award of permanent partial disability of 10% loss of the right arm, or 19.2 degrees of the maximum of 192 degrees provided for the complete loss of one arm.

As the result of the hearing held at the request of the claimant, the hearing officer found the claimant to be entitled to an award of permanent partial disability of 25% loss of the right arm, or 48 degrees against the scheduled maximum of 192 degrees.

The claimant's request for review by the board of the order of the hearing officer asks for a further increase in the disability award.

The medical reports of the treating orthopedic physician reflect an ultimate diagnosis of the claimant's injury as a torn or pulled tendon attachment in the rotator cuff area of the right shoulder. It was his opinion that surgical repair of the lesion was not indicated, and that healing could be expected from conservative treatment with some intermittent residual difficulty. Although improvement was expected over a period of time, the claimant failed to make any significant improvement, and continued to experience pain in his right shoulder which was aggravated by physical activity, causing him to conclude that a return to heavy carpenter work may not be feasible.

On December 23, 1968, the claimant was referred to the Physical Rehabilitation Center maintained by the Workmen's Compensation Board for vocational rehabilitation evaluation. The medical examiner's physical examination of the claimant disclosed a full range of motion in both shoulders, with a palpable click and pain with abduction and flexion of the right shoulder. No obvious atrophy in the shoulder or arm was observed, and muscle strength of the arms and grip of the hands was determined to be essentially equal. Rotation of the shoulders was normal and without symptoms. The history taken by the medical examiner indicated the continuation of complaints of pain in the anterior aspect of the right shoulder extending into the muscles of the upper arm, particularly after physical activity, resulting in an inability to use the right arm after extended activity.

The psychological evaluation of the claimant by the Physical Rehabilitation Center reveals that his vocational interests and aptitudes were consistent with his vocational choice of engineering technology, and that the prognosis for his restoration and rehabilitation was very good.

The Discharge Committee of the Physical Rehabilitation Center evaluated the claimant's physical disability as minimal, although recognizing that the nature of his injury made it virtually impossible for him to return to his former employment as a carpenter.

The treating orthopedist, after his review of the discharge summary, reported his full agreement with the findings and determinations of the Discharge Committee, and concurred with their evaluation of a small permanent partial disability.

In recognition of his need for vocational rehabilitation, the claimant on his own initiative, enrolled in a two year engineering technology course at Portland Community College. At the time of the hearing on May 29, 1969, he had completed the first year of this course and part of the first term of the second year. At the time of this review, the claimant should either have been graduated, or be very close to graduation, and able to resume employment as a civil engineering technician.

The claimant's future employment and earning capability is unknown, precluding application of the wage differential test of Ryf vs. Hoffman Construction Company, 89 Or Adv Sht 483, 459 P.2d 991.

It is clear from the record in this matter that the claimant had worked exclusively as a carpenter for over fifteen years prior to his injury, and that his earning ability was limited to the carpenter trade. As a result of the nature of his injury, he was prevented from engaging in carpenter work and was required to pursue a program of vocational rehabilitation leading to employment as a civil engineering technician, which is compatable with the nature and extent of his disability.

The Board based upon its de novo review of the full record in the above entitled matter, finds and concludes that the hearing officer has realistically and correctly evaluated the claimant's permanent partial disability attributable to this injury by the award granted of 48 degrees.

The order of the hearing officer is therefore affirmed.

WCB #69-757 January 16, 1970

SAMUEL G. HENTHORNE, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 47 year old claimant sustained a compensable injury to his right elbow on February 10, 1969, while employed as a construction laborer on a library building construction project. The unwitnessed accident is alleged to have occurred on the second floor of the building when the claimant struck his elbow on a partition on two occasions while hauling concrete in a two wheel concrete buggy in connection with the pouring of concrete for the second story walls.

The claim was denied by the then State Compensation Department, and this denial was affirmed by the hearing officer whose order is now the subject of this review.

The record in this matter consists of the testimony of the claimant and the employer's superintendent. Their testimony is in irreconcilable conflict. One major conflict relates to the existence of inner partitions. The claimant contends that his right elbow struck a partition on two occasions while handling a concrete buggy, although he was unable to describe or locate the

the partitions involved. The superintendent maintains that no partitions or other obstructions extended above the second floor level on which the work was being performed, and that the entire second floor area was "just a wide open space."

Another major conflict concerns notification of the injury. It is undisputed that the claimant notified the superintendent that he was terminating his employment due to strenuous nature of the work. The claimant contends that he additionally notified the superintendent of the injury to his elbow. The superintendent maintains that he was not notified of the claimant's injury, which is corroborated by the lack of an entry in his daily work journal in which he customarily recorded such information.

The claimant's testimony indicates that immediately following the injury, his elbow swelled up to at least a third larger than its normal size, and that after leaving the construction site, he visited with a friend who observed his injured elbow. No effort was made by the claimant to subpoena this witness to corroborate his testimony.

The claimant testified that he delayed seeking medical treatment for the injury to his right elbow due to his personal aversion to the obtaining of medical attention except as a last resort, but that on March 2, 1969, the pain and swelling in his elbow had become so severe that he telephoned Dr. Baldwin late at night and made an appointment for early the following morning. The circumstances relative to the claimant obtaining medical treatment for the injury to his elbow are recorded in the medical report of Dr. Baldwin to the effect that the claimant presented himself at his office complaining of chest pain on effort, and that he was examined for his condition and referred to an internist. "Incidently (sic) while in the office the patient showed me his right elbow which appeared to be swollen and contained some fluid in the olecranon bursa." The claimant was referred to Dr. McHolick, an orthopedic specialist, for treatment.

The claimant indicates in his testimony that although he has attempted to work that he has been unable to work since his accident on February 10, 1969, due to the extent of the swelling and the severity of the pain in his elbow. He also testified that he was unable to perform normal household and yard work or make mechanical repairs on his automobile as he had previously. Dr. McHolick's medical report of March 3, 1969, reflects that his examination of the claimant's right elbow disclosed a minimal distended olecranon bursa, which in his opinion was the result of a recent injury rather than a chronic injury. His history notes that in 1966 the claimant contused his elbow and developed an olecranon bursitis which was treated by excision. His treatment of the claimant consisted of the aspiration of the fluid from the olecranon bursa. Dr. McHolick saw no reason why the claimant was not working full time, and was of the opinion that the claimant's injury was not cause for either time loss or disability.

In the final analysis, it becomes necessary to determine whether the claimant's testimony, in light of the inconsistent, conflicting and contradictory nature thereof, is reliable and worthy of belief.

The hearing officer, with the additional advantage of a personal observation of the manner in which the claimant testified, concluded that no compensable injury occurred. The great weight to be given to the hearing officer's

evaluation of the credibility of a witness because of his opportunity to see and hear the witness whose credibility is in issue was recently announced in Moore vs. U. S. Plywood Corporation, 89 Or Adv Sht 831, 833, Or. App, 462 P.2d 453 (1969).

The Board from its review of the entire record of the proceedings in this matter, finds and concludes that the weight of the credible evidence is insufficient to establish that the claimant sustained a compensable accidental injury as alleged.

Therefore, the order of the hearing officer denying the claim is affirmed.

WCB #69-1034 January 16, 1970

DAN L. ARENDS, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 28 year old iron worker on December 1, 1966, when his back was injured while unloading 12 x 12 timbers. Following surgical repair of an intervertebral disc, the claimant underwent further disc surgery and a fusion of lumbar-sacral segments of the spine.

Pursuant to ORS 656.268, a determination order issued finding the disability to be 86.4 degrees against the applicable maximum of 192 degrees.

The claimant apparently was working in Montana at the time of hearing. The hearing consisted of certain written documents including medical reports and the contentions of respective counsel.

Upon review, claimant's counsel urges in his brief that Dr. Berg, who iterated and reiterated a comparison of the disability to a leg really intended to compare the disability to the maximum permitted by law (65% of 192 degrees). The Board has not delegated its ultimate responsibility of evaluating disabilities to the doctors and is certainly not going to engage in conjecture and speculation that when a doctor has assumed to evaluate, that in doing so he meant something other than he said. The doctor should not be concerned with degrees of disability when assessing or comparing a loss of function. For whatever it is worth, Dr. Berg stayed by his comparison of 65% of a leg which was 71.5 degrees. The claimant, as noted, was awarded 86.4 degrees.

There is no earning data of record for possible application of the Ryf v. Hoffman decision. From the medical evidence, the Board concludes and finds that the disability does not exceed the 86.4 degrees heretofore awarded.

The order of the Hearing Officer is affirmed.

WCB #68-158 January 16, 1970

WILLIAM H. BALMER, JR., Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of permanent disability sustained by a 19 year old logger whose primary injury consisted of a skull fracture when struck by a log on June 20, 1966. The head injury caused damage to the brain which resulted in disability to the right arm, right leg, vision of the right eye and unscheduled disabilities.

Pursuant to ORS 656.268, a determination of disability found a 15% loss use of the right arm (21.75 degrees), a 10% loss of use of the right leg (11 degrees), a 6% loss of vision of the right eye (6 degrees) and 19.2 degrees for other and unscheduled injuries against the applicable maximum for such injuries of 192 degrees.

There is a wide variance in evaluation made of the disabilities by reporting doctors. Such attempts by doctors to evaluate the ultimate disability award have been discouraged by the Workmen's Compensation Board which urges the doctors to report findings from which the ultimate award may be made.

It appears that the prime issue is over the adequacy of the unscheduled award which the claimant urges should be doubled. This would coincide with Dr. Davis but the claimant's progress in his school studies is far better than Dr. Davis assumed from a history of "getting by." Claimant's speech at the hearing was not affected, also reflecting improvement over Dr. Davis' earlier observations. It is true that present studies may not be as difficult and that the claimant may not have applied himself prior to his injury but his present scholastic levels appear to be better than those achieved prior to the accident.

The Board also notes a tendency of some of the lay witnesses to chronicle events from a basis during the 3½ years since the injury. Fortunately, the claimant has improved greatly during this period. The sympathies of some of those witnesses are not calculated to be of benefit if the residuals are magnified out of true proportion.

The Board does not wish, on the other hand, to minimize the fact that this young man unfortunately received a severe blow to the head with some moderate permanent results. The substantial improvements in speech coordination and various psychological and intelligence tests reflect a permanent disability substantially less than might have been prognosticated a couple of years ago.

The Board concludes and finds that the disability does not exceed in degree the awards by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #69-732 January 16, 1970

DENIS BARRY, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 42 year old ranch hand whose horse fell while working cattle on September 21, 1968 fracturing the claimant's left arm at the wrist and radial head.

Pursuant to ORS 656.268, a determination issued finding a disability of 28.8 degrees on a loss of function of 15% of the arm. Upon hearing, the award was increased to 67.2 degrees representing a 35% loss of function of the arm.

The Board concludes that the original determination of 28.8 degrees was inadequate but that the disability does not exceed the 67.2 degrees awarded by the Hearing Officer. The medical prognosis is for further improvement as the arm regains strength with use.

The order of the Hearing Officer is therefore affirmed.

WCB #69-1667 January 19, 1970

HAROLD KEITZMAN, Claimant.
Request for Review by Claimant.

The above entitled matter involves the claim of a temporary service station employe who alleges he hurt his back lifting an oil drum on or about August 13, 1968. No notice or knowledge of the alleged incident was given to the employer until March of 1969.

The claim was denied by the employer for failure to provide the notice of injury required by ORS 656.265.

The claimant then failed to file a request for hearing before the Workmen's Compensation Board within 60 days of the denial of his claim as required by ORS 656.262 (6) and 656.319 (2)(a).

The claimant further failed to respond promptly to an inquiry about the matter and a dismissal of the request for hearing was made on the basis of an "abandonment."

The claimant seeks a review of that order. Normally, where a claimant is not represented by counsel at the time involved, the Board is quite lenient in remanding such matters of claim abandonment for hearing upon the merits.

Here, however, the claim was denied and the request for hearing was not timely filed. The law provides that no hearing be had in such cases.

Based upon the record, but for the reason set forth herein, the order of the Hearing Officer dismissing the matter is affirmed.

WCB #69-1645 January 19, 1970

JOHN R. DARBY, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of whether the claimant's condition was medically stationary in the period between June 13, 1968 and April 8, 1969, and whether the State Accident Insurance Fund should be required to pay increased compensation and attorney fees with respect to a delay in payment of temporary total disability for the subsequent period of April 9, to July 14, 1969.

The claimant requested the review. The State Accident Insurance Fund, in its brief, requested relief from a part of the order under review. The claimant contends that the State Accident Insurance Fund is not entitled to consideration of any issue unless raised by the procedural step of asking for a cross review. The Board in the instant case is not granting any relief to the State Accident Insurance Fund upon the request set forth in its brief. The 1965 Act does not require either party to state issues in order to obtain a Board review. The Board review is de novo. Either party requesting a Board review does so against the possibility that the Board, in making its de novo review, may alter the decision of the Hearing Officer to a degree adverse to the party requesting the review. If the Board finds disability to be less upon a claimant's request or disability to be greater upon an employer's request, the Board is going to make its findings and issue its order accordingly. Regardless of any other procedural posture, the Board's broad authority as re-enforced by ORS 656.278 requires that the Board make such modifications, changes or terminations in compensation as the record in the matter before the Board shall warrant. (Also Shulz v. SCD, 87 Or Adv Sh at 761, 766, 448 P.2d 551.)

In the instant case, a determination issued pursuant to ORS 656.268 on June 20, 1968, finding the claimant's condition to be medically stationary on June 13, 1968 with an award of permanent disability. A prior Board review affirmed that determination. An appeal to the Circuit Court was dismissed upon reopening of the claim reserving right to the claimant to raise the issue of propriety of the initial closing order upon subsequent proceedings. The Hearing Officer found in this proceeding that the condition was medically stationary, that the treating doctor then advised against further medical care and that only a deterioration of that condition produced the need for further medical care and the basis for reinstatement of temporary total disability compensation. The Board concurs in these findings.

The order of the Circuit Court provided for the "payment of temporary total disability from the time claimant reports to the hospital for surgery." The surgery was not performed until July 14, 1969, apparently due to delays encountered by the claimant's treating doctor in arranging the surgery. The Hearing Officer allowed temporary total disability for the interval between April 9, 1969 and July 14, 1969, but the claimant now asserts the State Accident Insurance Fund should be assessed "penalties" for not having immediately instituted the compensation despite the clear reservation of the court judgment.

The State Accident Insurance Fund could have instituted the payment forthwith and the Workmen's Compensation Board deems the Hearing Officer within his authority in having ordered compensation paid for the period despite

the wording of the judgment. The Board does not deem the failure to so institute compensation to be unreasonable so as to require the penalty of increased compensation and attorney fees.

The order of the Hearing Officer is therefore affirmed.

WCB #69-438 January 20, 1970

CHARLES S. SEACAT, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claimant's injuries while crossing a street arose out of and in the course of employment.

The claimant is an elderly salesman whose working hours on the day in question were from 9 a.m. to 6 p.m. The employer had a parking lot for employes a couple of blocks away but, that lot being full, the claimant parked nearby in parking space available to the general public.

At 5:30 the claimant left the store with the knowledge of his supervisor to bring his car to the customer parking lot adjacent to the store and with the understanding that he was to again contact his supervisor with regard to future work schedules. The claimant's compensation was on a combination guarantee-commission basis making it difficult to resolve whether he was being paid for the time involved in going to the car and bringing the car to the employer's parking lot.

The legal issue is whether these facts bring the claim within any of the exceptions barring compensation for injuries arising out of going to and coming from work. In a sense the claimant was merely completing, by a supplemental and belated act, the process of transportation between home and work. The additional facts creating the possible exception to the going and coming rule are that the workday had not ended and the supervisor had acquiesced in the claimant going to obtain his car.

One Oregon case of interest is Livingston v. SIAC, 200 Or 468. The claimant had left work and was enroute home on a public forest road but with a period of 15 minutes while being paid travel time for travel between living quarters and the jobsite. Payment of travel time rendered the claim in that interval compensable. The decision of the Appeals Court in Jordan v. Western Electric, 90 Or Adv Sh 81, 463 P.2d 598, January 15, 1970 is also of interest.

In the instant case, the claimant's workday had not ended, the employer acquiesced in the special trip to his car and the workman was to report back for further instructions from his supervisor.

The Board concludes that these facts preclude the journey from being a deviation from employment or from being within the exclusion of the going and coming rule.

The order of the hearing officer is therefore reversed and the claim is hereby ordered allowed.

Pursuant to ORS 656.386, counsel for claimant is entitled to a fee payable by the State Accident Insurance Fund for representation both at hearing and upon Board review. There was a relatively short hearing and the briefs are not extensive. The fee is set in the sum of $750.

WCB #69-1193 January 20, 1970

ROBERT BARBER, Claimant.
Request for Review by Employer.

The above entitled matter involves issues of procedure and extent of permanent disability of a 44 year old steam fitter who injured his right knee when he slipped while descending a ladder on September 23, 1966.

The procedural issue arose over the fact that the claim was originally closed by a determination of disability pursuant to ORS 656.268 on September 22, 1967. Within the one year from that date in which the claimant could have sought a hearing as a matter of right on that order, the claim was voluntarily reopened by the employer. Pursuant to Workmen's Compensation Board rules, any such claim must be resubmitted pursuant to ORS 656.268 for re-determination. The claimant was not awarded additional permanent partial disability on this second determination and the employer urges that the claimant must now prove an aggravation claim in order to be heard on the issue of the extent of disability.

The reopening by the employer within the year of the first order precluded consideration of the issue of the extent of permanent disability. The Supreme Court in Helton v. SIAC, 142 Or 49, ruled that an issue of permanent partial disability cannot be resolved until temporary total disability has ended. The Board deems the issue of permanent partial disability to be properly raised against the second determination order without requiring proof of an aggravation claim.

On the merits of the disability the first determination evaluated the disability at 22 degrees against the applicable maximum for loss of the leg of 110 degrees. The order of determination subjected to appeal granted no additional degrees but upon hearing, the Hearing Officer increased the award to 44 degrees. (The Hearing Officer order erroneously recites the permanent partial disability was granted in the order under appeal.)

The claimant's knee continues to have chronic pain and instability with periodic episodes of swelling and stiffness. The claimant has obtained work assignments within the reduced capabilities of the knee. From a standpoint of the evidence based solely upon the medical reports, the award of 44 degrees appears to be somewhat generous. However, viewed in the totality of the evidence, the Board concludes and finds that the disability equals the 44 degrees allowed by the Hearing Officer.

Pursuant to ORS 656.382 (2) counsel for claimant is allowed a fee of $250 payable by the employer for services in connection with a review initiated by the employer in which the compensation awarded is not reduced.

The order of the Hearing Officer is affirmed.

WCB #69-917 January 20, 1970

HARRY SWERDLIK, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of extent of permanent disability sustained by a 50 year old freight agency and common carrier salesman who incurred a back injury while moving a desk on April 26, 1966.

The claimant had been involved in two automobile accidents in 1961 which required short term hospitalizations and was involved in an auto accident on July 3, 1968.

Pursuant to ORS 656.368, a determination order issued May 14, 1969, finding the claimant to have sustained a permanent disability to the left arm of 14.5 degrees against the applicable maximum of 145 degrees for complete loss of use of an arm and other or unscheduled injuries of 38.4 degrees against the applicable maximum of 192 degrees for such injuries. These awards were affirmed by the Hearing Officer.

The subsequent accident of July 3, 1968 is a basic issue. The claimant attempts to minimize the accident, though admitting it caused increased disability to the back. Though claimant's treating doctor was undoubtedly aware of that accident, his reports with respect to the industrial accident are largely notable for their complete lack of reference to that accident. Other examining doctors have not had the benefit of the possible contribution of that accident to the total picture. It appears that this subsequent auto accident was of sufficient severity to be the basis of an $1,897.00 claim to a medical pay insurer on claimant's automobile.

Another factor is the fact that although the claimant has a condition for which surgery was recommended, he has refused to undergo the surgery. Whether such refusal is reasonable is not at issue. However, when all of the other factors are considered, the purely subjective symptoms may be evaluated in that light. The claimant's symptoms are obviously such that he prefers to live with them unless he receives a 100% assurance that those symptoms will be relieved by surgery.

There are also pre-existing functional and personality problems which are not the result of this accident and which are not the responsibility of the employer in this case.

The circumstances are such that the evidence does not warrant any finding of disability attributable to the industrial accident in excess of the awards as set forth above. The Board concludes and finds the disabilities have been properly evaluated.

The order of the Hearing Officer is affirmed.

WCB #69-862 January 22, 1970

ARTHUR E. MAGNUSON, Claimant.

The above entitled matter involves the issue of the extent of disability attributable to an accidental injury of September 22, 1967, when the claimant was thrown from a tractor.

The matter was the subject of a Board order under date of January 16, 1970, whereby a Hearing Officer order increasing an award for unscheduled disability from 48 degrees to 125 degrees was reduced to 76 degrees.

The Workmen's Compensation Board is formulating a policy for uniform application of the wage loss factor in cases of unscheduled disability in keeping with the recent Ryf decision of the Supreme Court.

The Board now concludes that the above entitled matter was incompletely developed upon hearing for application of the tests to be applied with reference to the disability award attributable to permanent loss of wages.

According to the records of the Workmen's Compensation Board, the above entitled matter has not been subjected to appeal and is within the time within which the Board retains jurisdiction to modify or set aside its awards and orders.

The order of January 16, 1970, is therefore set aside and the matter is remanded to the Hearings Division for the purpose of receiving further evidence upon the issue of the extent of permanent wage loss and any modification of award of disability as may be thereby warranted.

In keeping with Barr v. SCD, Or App, 90 Adv Sh 55, January 15, 1970, no notice of appeal is attached.

WCB #68-721 January 22, 1970

BESSIE IRENE HUSTON, Claimant.
Request for Review by Claimant.

The above entitled matter involved issues upon review limited to whether the attorney fees were chargeable to the employer on the basis of an unreasonable delay or resistance in payment of compensation. As part of this issue there is also a contention that claimant is entitled to increased compensation payable by reason of alleged delay in payments.

The claimant sustained an injury to her back on October 23, 1966, while lifting freight in her capacity as a grocery clerk. She underwent an anterior cervical fusion on December 16, 1966 and a posterior lumbar laminectomy on February 15, 1967.

On January 22, 1968, claimant's treating doctor made a report to the effect, "This patient should have returned to work several months ago, in fact it is felt she should have returned to work a minimum of at least six months ago." Compensation of temporary total disability was suspended at that time.

The matter was not submitted for a determination pursuant to ORS 656.268 until June 21, 1968. The claimant, in the interval, had instituted the request for hearing on stoppage of the payment of temporary total disability. A determination issued finding temporary total disability payable to May 4, 1968 together with awards of disability for loss of use of 5% of the left leg and unscheduled injuries equal to the loss of 25% of an arm (48 degrees out of the maximum award of 192 degrees.

The application of increased compensation and attorney fees under ORS 656.262 (8) is not automatic. The issue is not whether compensation has been delayed but whether the delay is unreasonable under all of the circumstances.

The Hearing Officer gave a careful consideration to the chain of circumstances. If there was any single factor contributing to the delay in compensation, it was the reports of claimant's doctors which certainly justified the action of the employer.

The Board concludes and finds that there was no unreasonable delay or resistance to payment of compensation to justify imposition of increased compensation or to justify shifting the liability for attorney fees to the employer.

The allowance of the attorney fee by the Hearing Officer is not entirely clear. Letters from claimant's counsel to the Hearing Officer dated May 6 and May 13, 1969, are incorporated in the official record on review as an absolute limitation of attorney fees in the sum of $400, payable from increased compensation.

The Hearing Officer order is further modified by inserting the word "shall" in lieu of "may" in the last paragraph of page five of the Hearing Officer order to require the re-designation of payments of permanent partial disability as temporary total disability for the period May 4, 1968 to November 24, 1968.

Except as modified in these two minor respects, the order of the Hearing Officer is adopted as the order of the Board and is thereby affirmed.

SAIF Claim No. RB 150454 January 22, 1970

GILBERT E. LEE, Claimant.

The above entitled matter involves a claim wherein the claimant sustained accidental injuries on September 13, 1965, for which he was subsequently awarded permanent disability for unscheduled injuries equal in degree to the loss of 50% of an arm.

A proceeding by way of a claim for aggravation was dismissed by the Workmen's Compensation Board on November 15, 1969.

The parties have now reached an agreement pursuant to which the State Accident Insurance Fund is to increase the payment of compensation in an amount equal to a further disability of 10% loss of an arm.

A stipulation to that effect has been submitted to the Workmen's Compensation Board for approval and by reference is made a part hereof.

The stipulation is hereby approved and the matter remains procedurally closed.

No notice of appeal is deemed applicable.

WCB #69-1510 January 22, 1970

THELMA STALEY, Claimant.
Request for Review by Claimant.

The above entitled matter involves the sole issue on review of the extent of permanent partial disability sustained by a 54 year old woman employed as a combination cook and waitress in a restaurant, as a result of an injury to her low back incurred on November 28, 1967, when she bent over to dip ice cream out of a container in the freezer cabinet.

The determination order entered pursuant to ORS 656.268 found the claimant to be entitled to an award of permanent partial disability of 16 degrees of the maximum of 320 degrees for unscheduled disability determined by her present condition as compared to her condition before this injury and without such disability.

The hearing held at the request of the claimant resulted in an order of the hearing officer affirming the determination order.

The claimant's request for review of the order of the hearing officer is based upon the contention that her permanent partial disability far exceeds the 16 degrees awarded by the determination order and affirmed by the order of the hearing officer.

A further issue of additional temporary total disability was raised at the hearing, but has not been pursued on review. The hearing officer found that the claimant's condition was medically stationary and that she was not entitled to receive further compensation for temporary total disability. Although the evidence on this issue is not without some dispute, it is nevertheless sufficiently conclusive to be decisive of the issue.

The claimant's injury was diagnosed by Dr. Rask, the treating orthopedic physician, as a lumbosacral sprain, which he treated conservatively.

The claimant complains of continuing low back pain with occasional radiation into her right leg which she claims is completely disabling and precludes her resumption of employment.

The strongest support for the claimant's position is provided by Dr. Rask who is of the opinion, as reflected in his latest medical report, that the claimant has a residual disability requiring retraining for lighter work.

The medical evidence which the Board finds to be more compelling consists of the medical reports made as a result of the examination of the claimant on behalf of the State Accident Insurance Fund by Dr. Puziss and Dr. Blauer, and by Dr. Kimberley, as an orthopedic consultant.

The medical reports of these doctors are consistent in finding minimal to a complete absence of significant objective clinical findings to substantiate the claimant's subjective complaints. Their reports express the belief that her subjective complaints are considerably exaggerated and that they are likely to continue only as long as there is recognition of their validity.

The medical reports of each of these doctors reflect the opinion that the claimant has sustained some permanent disability, but that the extent or degree of permanent disability is extremely limited.

The Board finds and concludes from its review of record in this matter that the claimant's permanent partial disability has been properly evaluated by the award of 16 degrees.

The order of the hearing officer affirming the determination order is therefore affirmed on review.

WCB #69-1119 January 22, 1970

CLARENCE G. BRAUCKMILLER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 47 year old City of Portland utility worker who slipped and fell down some stairs on May 19, 1968.

The claimant had prior non-industrial injuries to the dorsal area of the spine which resulted in a fusion by natural processes of the affected vertebrae and which did not materially affect the claimant's ability to resume working. This prior injury also resulted in the loss of a portion of one lung.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 32 degrees against the applicable maximum for other or unscheduled injuries and comparing the workman to his pre-accident status. Upon hearing the award was increased to 160 degrees. The claimant asserts that as a result of this injury he is now permanently precluded from engaging regularly in suitable employment:

The most recent of the medical reports of record is that of Dr. Shlim under date of May 28, 1969, whose conclusions and recommendations are as follows:

> "This patient has enough medical disease to keep him from working. He is markedly obese. He is extremely short of breath. He has marked emphysema. He might even be in a little heart failure. He has an alcoholic state. All of this is enough in itself to make him a permanent total disability. I do not think he has too much back disability, but it is very difficult to evaluate this man. I do know that there is no further treatment which will change his condition and his claim should be closed."

The question then becomes one of whether the claimant's obesity, emphysema and alcoholic intake are in themselves the cause of the claimant's

cessation of work. Was the back injury the so-called straw which broke his ability to work? Did the back injury cause a disability which precludes working or is it an excuse to cease working in light of his other problems? The motivation with respect to further work of one inflicted with major self-imposed physical and social problems is a proper factor to consider in such cases.

The claimant is certainly eligible for vocational rehabilitation or job placement services of the Workmen's Compensation Board, Division of Vocational Rehabilitation and Department of Employment with respect to any need for avoidance of further heavy manual labor. The failure of the claimant to avail himself of these opportunities should not serve as the basis of a claim that an industrial injury has rendered him totally disabled.

The Board concludes and finds that the Hearing Officer properly refused to classify the claimant as permanently and totally disabled and further concludes and finds that the award of permanent partial disability was generous and the disability does not exceed in degree the 160 degrees awarded.

The order of the Hearing Officer is affirmed.

SAIF Claim # A 759674 January 22, 1970

HELEN L. SMITH, Claimant.

The above entitled matter involves a matter under the own motion jurisdiction of the Workmen's Compensation Board with respect to a low back injury sustained by the claimant. The history of the claim is as follows:

> "This claimant injured her low back on September 24, 1959, while lifting a can of ice cream. On October 27, 1959, a protruded intervertebral disc was surgically removed. Following surgery she continued to have considerable pain in the low back which radiated down both legs. Further consultations were had, a repeat myelogram was performed which proved to be negative for recurrent disc. The claim was first closed in June, 1960 with an award of 30% loss function of an arm for unscheduled disability. A rehearing was requested and the claim settled in September, 1960, for an additional award of 20% loss of function of an arm for unscheduled disability, making a total award of 50%. The claim was reopened by the State Industrial Accident Commission in February, 1961 for further surgery consisting of laminectomy and a fusion from L-4 to the sacrum. The claim was again closed in October, 1962 without additional permanent partial disability. Litigation followed and, by judgment order of the Court, her award was raised to 75% loss function of an arm for unscheduled disability. There was very little activity which should be repeated in this memorandum until November 14, 1968 when the Board, on its own motion, reopened the claim for additional compensation as is indicated. On July 31, 1968 (prior to the date of the Board's own motion order), a pseudarthrosis of L-4, L-5 was repaired by Dr. Francis Schuler. Following discharge from the hospital around the middle of August, 1968, the claimant, apparently, went to New Zealand. In any event, compensation for temporary total disability has been paid continuously from July 31, 1968 to January 14, 1970."

The claim was reopened by the State Accident Insurance Fund pursuant to order of the Workmen's Compensation Board of November 14, 1968. As noted, further medical services have been rendered and temporary total disability paid from July 31, 1968 to January 14, 1970.

The Board concludes and finds that the claimant's medical condition is stationary as of January 15, 1970 and that claimant's permanent partial disability is equal to the loss of use of 90% of an arm. The claimant's award of compensation is therefore increased from the comparative basis of 75% loss of use to 90% loss of use of an arm and the claim is ordered reclosed upon this basis.

Pursuant to ORS 656.278 (3), no notice of appeal is attached with reference to the claimant since the order of the Board does not diminish or terminate former orders.

The State Accident Insurance Fund has whatever right of appeal may be accorded pursuant to ORS 656.278 (3) granting an employer further procedural rights under orders of the Board increasing such award.

WCB #69-142 January 22, 1970

ALBERT L. GRUMBLES, SR., Claimant.

The above entitled matter has been the subject of two Board orders under dates of December 23, 1969 and January 16, 1970, with reference to the extent of disability associated with a back injury of December 12, 1967, and the application of the factor of wage loss to be applied to evaluations of unscheduled injuries pursuant to the Ryf decision of the Supreme Court.

The Workmen's Compensation Board on January 16, 1970, denied a petition to reconsider the order of December 23. The Board has been formulating a policy application of the Ryf decision and now concludes that the evidence available upon review in this case is not adequate to meet the tests to be applied by the Board in the general policy to be used in all such cases.

The orders of December 23, 1969 and January 16, 1970, are hereby set aside and the matter is remanded to the Hearings Division for the special purpose of receiving further evidence upon the issue of permanent loss of wages associated with the injury and any modification of award of disability as may be warranted by the additional evidence.

The Workmen's Compensation Board notes that on this date, a notice of appeal in this matter was received by the Board. The Board has been advised this date by the Clerk of the Circuit Court for Coos County that the appeal was withdrawn by U. S. Plywood-Champion Papers, Inc., and Liberty Mutual Insurance Company and the Board has likewise received notice of the withdrawal of said appeal and therefore deems the matter within Board jurisdiction to modify and set aside awards and to remand for further evidence.

In keeping with Barr v. SCD, Or App, 90 AD. Sh. 55, January 15, 1970, no notice of appeal is attached to this order.

WCB #69-1143 January 23, 1970

GEORGE A. HEURUNG, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a self-employed feed store operator who was injured in a vehicular accident on August 27, 1966 in the course of his feed store business. The claimant had elected to be insured as a workman subject to the then State Industrial Accident Commission.

The claimant has had prior compensable injuries subject to the Oregon Workmen's Compensation Law for which awards were made totalling 80% of the maximum then allowable for unscheduled injuries.

Pursuant to ORS 656.268, a determination issued in the instant case awarding further disability equal to 25% loss of an arm for the additional disability incurred in this claim. The suggestion by the State Accident Insurance Fund that the total thereby exceeds the maximum allowable was resolved against the position of the State Accident Insurance Fund in Green v. SIAC, 197 Or 160. The Board deems prior injuries and awards of significance in light of ORS 656.222 but in evaluating a 1966 injury, the maximum award for a single unscheduled injury did not preclude exceeding that amount for two or more injuries. It is the combined effect of the injuries, however, which is being evaluated and the claimant is not to be re-compensated for prior injuries.

It appears from the record that this self-employed claimant has been able to continue full time work involving rather arduous duties in spite of very substantial awards of disability. One should keep in mind that ORS 656.128 places a somewhat greater burden of proof upon self-employed persons who obtain what amounts to health and accident insurance since there is no employment relationship to meet the concept of workmen's compensation. The usual checks and balances arising from an employment relation are missing.

The claimant has disabilities and apparently has some disabilities not attributable to the prior accident. The Board concludes and finds that the additional disability attributable to this accident does not exceed in degree the 48 degrees awarded.

The order of the hearing officer is affirmed.

WCB #69-995 January 23, 1970

JOSEPH GUY NELSON, JR., Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of responsibility of the State Accident Insurance Fund for further medical services allegedly required for injuries sustained May 3, 1965. The matter is before the Board under the provisions of ORS 656.278 relating to own motion jurisdiction which may be assumed by the Board when the parties are not entitled to hearing as a matter of right.

On November 13, 1969, the Workmen's Compensation Board dismissed a previous request for review upon the basis that the party was not procedurally entitled to hearing as a matter of right.

The Board has since reviewed the merits of the issue and concludes that the claimant sustained an intervening nonindustrial incident involving his personal camping trailer which was the causative factor producing the need for further surgery.

The Board accordingly concludes that it should not exercise the own motion jurisdiction vested by ORS 656.278 and the matter therefore remains closed.

No further order increasing or decreasing compensation having been entered, no notice of appeal is deemed applicable.

WCB #67-1217 January 26, 1970

BERNICE L. STEVENS, Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 56 year old Fairview Home attendant who slipped while taking a shower on April 27, 1967, and experienced low back pain.

The matter was heretofore before the Workmen's Compensation Board on January 14, 1969, at which time her disability was evaluated as equal to the loss of 15% of an arm or 28.8 degrees in affirming the Hearing Officer and the determination previously made pursuant to ORS 656.268

The order of the Workmen's Compensation Board was appealed to the Circuit Court for Polk County and by that Court was remanded to the Hearings Division of the Workmen's Compensation Board for further testimony.

Upon further hearing, the award was tripled to 86.4 degrees and the matter is again on review, this time at the request of the State Accident Insurance Fund.

Unfortunately, the claimant did not testify at the further hearing. The magnitude of the original trauma has increased substantially with the passage of time. Her sworn testimony at the original hearing and the version given earlier treating and examining doctors was limited to a slip on the shower mat with her shoulder striking the wall. The medical history since the injury contains recitations of symptoms in every part of claimant's body. Whether the claimant's memory is not accurate or whether she felt the need to expand upon the original trauma is not clear but the reports and opinions of Dr. Tsai introduced at the last hearing reflect that the claimant gave him a history of having fallen flat on her back with immediate pain in the neck and head, arms and between the shoulder blades. This does not appear in her sworn testimony (Tr. 13-16) nor, as noted, in the earlier reports to other doctors. This unreliable history to Dr. Tsai destroys the validity of any conclusions he may have drawn with respect to the responsibility of that incident for current problems.

The Hearing Officer in the order under review has further clouded the issues by describing the claimant as a "very active, hard working person before the injury." The claimant has a long history of medical problems including widespread complaints of her head, neck and extremities prior to

the shower incident. It is difficult to comprehend the conclusions of this former Hearing Officer who never saw the claimant and who apparently did not review the medical evidence with due care. The Hearing Officer even recites a "loss of will power" which he attributes to the accident without medical substantiation.

The Board is more impressed by the conclusions of Doctors Melgard and Kimberley who are able medical practitioners with a personal knowledge of the claimant and her widespread symptoms and are far better equipped to establish the extent of the effect of the relatively minor trauma. Both of these doctors conclude that the disability does not exceed that heretofore awarded.

The Board concludes and finds the disability does not exceed 28.8 degrees upon the comparison to a loss of 15% of an arm. The order of the Hearing Officer is therefore reversed and the award of disability is reduced to 28.8 degrees. Pursuant to ORS 656.313 no compensation paid pursuant to the order so reversed is reimbursable.

WCB #69-1422 January 26, 1970

WILLIAM D. PADRICK, Claimant.
Request for Review by Claimant.

The above entitled matter involves the sole issue on review of the extent of permanent disability sustained by a 59 year old cook due to a compression fracture of the T-10 vertebra incurred on November 10, 1968, as a result of a fall down a flight of stairs.

The determination order entered pursuant to ORS 656.268 awarded the claimant permanent partial disability of 32 degrees of the maximum of 320 degrees for unscheduled disability determined by a comparison of his present condition to his condition before his injury and without such disability.

The order of the hearing officer affirmed the determination order.

The claimant asserts on review that his permanent disability is substantially in excess of that awarded.

The claimant's injuries from his fall down the stairs were initially diagnosed as consisting only of contusions to the right rib area and to the right elbow. The x-rays taken at this time were reported to be negative. He was treated for a short period with an elastic bandage for his elbow and medication for his pain and released to work.

He returned to work as a cook for a few days at one restaurant, and thereafter for approximately thirty days at another restaurant. The heavy lifting required in connection with his duties as a cook caused him to terminate his employment on both occasions.

In February of 1969, as a result of an examination by a medical examiner for the then State Compensation Department, the claimant was referred to Dr. Case for orthopedic examination and evaluation. The x-rays taken by Dr. Case revealed a mild compression fracture of the T-10 vertebra, which was well healed at this time. The claimant remained under the care of Dr. Case.

The claimant was thereafter referred to the Physical Rehabilitation Center of the Workmen's Compensation Board for evaluation. The reports of this facility reflect a history of a constant dull ache in the upper lumbar area aggravated by lifting and bending activity. Physical examination disclosed all findings to be essentially normal with the exception of slight tenderness on deep pressure in the mid-lumbar region. It was the consensus of the three doctors comprising the discharge committee of the Center that the claimant's condition was medically stationary and that he had sustained only a minimal physical disability.

Dr. Case, in his medical report, indicates the claimant reported a burning sensation in the left lumbar area, primarily during the afternoon and evening, with some aggravation upon motion and walking, and a continuing inability to do heavy lifting. His examination disclosed a full and painless range of motion of the lumbar spine and a mild tenderness in the area of the T-10 vertebra. He was of the opinion that the claimant's condition was medically stationary and that there was some permanent partial disability.

The claimant asserts that he continues to experience a constant dull ache in his back which is completely disabling, and that although he has made no effort to return to work, that there is no reason to seek employment because he knows that he cannot handle any type of job. With the added advantage of an opportunity to personally observe the claimant while testifying, the hearing officer formed the opinion that the claimant's inability to work stems chiefly from a lack of motivation, rather than as a result of his very minimal accidental injury. The Board finds from its review of the record, coupled with the weight given to the hearing officer's evaluation of the claimant's credibility, that the claimant's complaints, to the extent that they are unsubstantiated by the medical evidence, must be rejected. Although he may have suffered some limitation upon his ability to do heavy lifting, there is no credible evidence in the record to substantiate that the claimant is precluded from resuming appropriate employment.

The Board, based upon its de novo review of the record in this matter, finds and concludes that the determination order awarding the claimant 32 degrees for unscheduled disability, which was affirmed by the order of the hearing officer, properly evaluated the claimant's permanent disability attributable to his accidental injury.

The order of the hearing officer is therefore affirmed.

WCB #68-591 January 26, 1970

HARLEY J. HENSLEY, Claimant.
Request for Review by Claimant.

The above entitled matter involves procedural issues as well as consideration of whether the 42 year old truck driver sustained a compensable heart injury on February 15, 1968.

The heart injury allegedly was caused in the course of building a fire in a sawmill burner with some used tires to aid as a starter.

The claimant was first taken to the hospital emergency room late at night on January 16, 1968, with similar distress. The issue became whether there is evidence of medical and legal causation of the on the job incident to make the claim compensable.

As usual in such cases there is a conflict in the medical opinions. The treating doctor, with a normal experience of treating some patients with heart problems, differs from the cardiologist who has admittedly greater expertise in the particular field of medicine.

The procedural issue arose when the hearing was delayed for the purpose of obtaining a cross examination, deposition or interrogatories from the cardiologist, Dr. Rogers. That was not accomplished whereupon the Hearings Division dismissed the matter "for want of prosecution."

Upon review, counsel now urges that the matter be decided upon the record without cross examination of Dr. Rogers.

The Board, recognizing the greater medical expertise of Dr. Rogers in this somewhat litigious area of law and medicine concludes that the coronary thrombosis and myocardial infarction was coincidental with but not caused by any stress or work effort associated with claimant's employment.

The order of the Hearing Officer dismissing the case for want of prosecution is set aside. The Board, proceeding to then hear the matter upon the record, concludes and finds that the denial of the claim by the employer was proper and legal under the circumstances. The claim is therefore denied.

WCB #68-1380 January 26, 1970

The Beneficiaries of
RAYMOND GROSJACQUES, Deceased.
Request for Review by Beneficiaries.

The above entitled matter involves a claim by the beneficiaries of a Raymond Grosjacques that his death was caused by an injury to his right foot on April 22, 1966.

It appears that the claimant had an undiagnosed and non-symptomatic cancerous condition of the foot and the issue of medical chain of causation is based upon a contention that the injury to the foot caused the cancer to metasticise necessitating the amputation of the foot in October of 1966.

The present proceedings apparently were commenced upon a claim of aggravation filed by the workman on August 19, 1968. This claim was not acted upon at the time of the workman's death on December 5, 1968. On December 24, 1968, an application for hearing was filed with the Workmen's Compensation Board for hearing claiming temporary total and permanent total disability compensation allegedly due the claimant prior to his death but with respect to which no compensation had ever been paid nor awards made with the exception of payment for nominal medical services rendered immediately following the injury in April of 1966.

The claimant was thereafter referred to the Physical Rehabilitation Center of the Workmen's Compensation Board for evaluation. The reports of this facility reflect a history of a constant dull ache in the upper lumbar area aggravated by lifting and bending activity. Physical examination disclosed all findings to be essentially normal with the exception of slight tenderness on deep pressure in the mid-lumbar region. It was the consensus of the three doctors comprising the discharge committee of the Center that the claimant's condition was medically stationary and that he had sustained only a minimal physical disability.

Dr. Case, in his medical report, indicates the claimant reported a burning sensation in the left lumbar area, primarily during the afternoon and evening, with some aggravation upon motion and walking, and a continuing inability to do heavy lifting. His examination disclosed a full and painless range of motion of the lumbar spine and a mild tenderness in the area of the T-10 vertebra. He was of the opinion that the claimant's condition was medically stationary and that there was some permanent partial disability.

The claimant asserts that he continues to experience a constant dull ache in his back which is completely disabling, and that although he has made no effort to return to work, that there is no reason to seek employment because he knows that he cannot handle any type of job. With the added advantage of an opportunity to personally observe the claimant while testifying, the hearing officer formed the opinion that the claimant's inability to work stems chiefly from a lack of motivation, rather than as a result of his very minimal accidental injury. The Board finds from its review of the record, coupled with the weight given to the hearing officer's evaluation of the claimant's credibility, that the claimant's complaints, to the extent that they are unsubstantiated by the medical evidence, must be rejected. Although he may have suffered some limitation upon his ability to do heavy lifting, there is no credible evidence in the record to substantiate that the claimant is precluded from resuming appropriate employment.

The Board, based upon its de novo review of the record in this matter, finds and concludes that the determination order awarding the claimant 32 degrees for unscheduled disability, which was affirmed by the order of the hearing officer, properly evaluated the claimant's permanent disability attributable to his accidental injury.

The order of the hearing officer is therefore affirmed.

WCB #68-591 January 26, 1970

HARLEY J. HENSLEY, Claimant.
Request for Review by Claimant.

The above entitled matter involves procedural issues as well as consideration of whether the 42 year old truck driver sustained a compensable heart injury on February 15, 1968.

The heart injury allegedly was caused in the course of building a fire in a sawmill burner with some used tires to aid as a starter.

The claimant was first taken to the hospital emergency room late at night on January 16, 1968, with similar distress. The issue became whether there is evidence of medical and legal causation of the on the job incident to make the claim compensable.

As usual in such cases there is a conflict in the medical opinions. The treating doctor, with a normal experience of treating some patients with heart problems, differs from the cardiologist who has admittedly greater expertise in the particular field of medicine.

The procedural issue arose when the hearing was delayed for the purpose of obtaining a cross examination, deposition or interrogatories from the cardiologist, Dr. Rogers. That was not accomplished whereupon the Hearings Division dismissed the matter "for want of prosecution."

Upon review, counsel now urges that the matter be decided upon the record without cross examination of Dr. Rogers.

The Board, recognizing the greater medical expertise of Dr. Rogers in this somewhat litigious area of law and medicine concludes that the coronary thrombosis and myocardial infarction was coincidental with but not caused by any stress or work effort associated with claimant's employment.

The order of the Hearing Officer dismissing the case for want of prosecution is set aside. The Board, proceeding to then hear the matter upon the record, concludes and finds that the denial of the claim by the employer was proper and legal under the circumstances. The claim is therefore denied.

WCB #68-1380 January 26, 1970

The Beneficiaries of
RAYMOND GROSJACQUES, Deceased.
Request for Review by Beneficiaries.

The above entitled matter involves a claim by the beneficiaries of a Raymond Grosjacques that his death was caused by an injury to his right foot on April 22, 1966.

It appears that the claimant had an undiagnosed and non-symptomatic cancerous condition of the foot and the issue of medical chain of causation is based upon a contention that the injury to the foot caused the cancer to metasticise necessitating the amputation of the foot in October of 1966.

The present proceedings apparently were commenced upon a claim of aggravation filed by the workman on August 19, 1968. This claim was not acted upon at the time of the workman's death on December 5, 1968. On December 24, 1968, an application for hearing was filed with the Workmen's Compensation Board for hearing claiming temporary total and permanent total disability compensation allegedly due the claimant prior to his death but with respect to which no compensation had ever been paid nor awards made with the exception of payment for nominal medical services rendered immediately following the injury in April of 1966.

The procedural questions arising from this posture of the case will be discussed later.

Upon the merits of whether the decedent's ankle injury materially contributed to the disability or death, the Hearing Officer found adversely to the Beneficiaries. The problem of the causal relationship of a trauma to cancer is one which requires expert medical opinion. In the instant case, the only medical evidence supporting the position of the Beneficiaries was submitted from a California doctor whose training and qualifications other than possession of a license to practice medicine in California are completely unknown of record. The evidence at the hearing from the California doctor was expressed entirely in possibilities. Upon review, a further letter from the doctor recites that he meant to say "probably" wherever he had said "could have." With no delineation of this doctor's qualifications and without benefit of either the doctor's medical training or understanding of the doctor's understanding of the semantics involved, the Board must rely upon the known expertise of Dr. Alfred Hutchinson whose special training and standing in the medical field of malignancies is well established. Dr. Hutchison (sic) concluded there was probably no relation between the trauma and the subsequent disability and death.

The Board therefore concludes and finds that the matter was properly dismissed by the Hearing Officer. The order of the Hearing Officer is affirmed.

There are some procedural matters involved in this rather unusual claim.

If a claim is otherwise compensable no award could be made for the permanent partial disability claimed in light of Fertig v. SCD, 88 Or Adv Sh 505, 455 P.2d 180, 89 Or Adv Sh 1, 458 P.2d 682. No award was made prior to death and no beneficiary can therefore seek such an award after death.

With respect to any other benefits payable prior to death, these would be payable to the decedent's estate rather than to any beneficiaries in light of Heuchert v. SIAC, 168 Or 74.

Though a request for hearing was filed with the Workmen's Compensation Board, no claim as such was ever filed by the widow. On December 24, 1968, as noted, a request for hearing was filed but unless that request for hearing can be substituted as a "claim" it would appear that from Printz v. SCD, 88 Or Adv Sh 311, 453 P.2d 665, that there technically was no jurisdiction to proceed. Any proceedings in absence of a claim as such would be a nullity.

The decedent's claim appeared to be limited to the medical services at the time of the injury. No determination of disability was deemed necessary under the circumstances. Pursuant to ORS 656.319 (1)(b), the decendent's right to hearing on the initial basis were unenforceable. Subsection (e) of the same section permits a hearing request within six months following death if the workman has received or is entitled to temporary total disability. There appears to be no basis for concluding that the decedent "had received or is entitled to temporary total disability." None was ever paid nor even claimed by the claimant until well over two years after the accident.

The Board also notes Mikolich v. SIAC, 212 Or 36, for whatever implication that decision may have. An award of disability had been made in that case and sections of the law interpreted have since been repealed or modified.

Having decided the "claim" is not compensable upon the merits, the Board does not reach any decision upon the procedural issues other than to note that if the Board is reversed upon the merits, some disposition must then be made upon the procedural status of the matter.

WCB #68-439 January 26, 1970

CHARLES HENDERSON, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 32 year old claimant on October 6, 1967. The claimant subsequently underwent surgery in February and July of 1968. On March 4, 1969, (the Hearing Officer order erroneously recites 1960), a determination issued finding the claimant to have sustained an unscheduled disability of 80 degrees against the applicable maximum of 320 degrees. This was affirmed by the Hearing Officer.

The initial claim form recites that the claimant's difficulties arose from stooping over a low machine for several days. Essentially the same history was given to Dr. Borman according to his report of October 27, 1967, some three weeks following the claim. Again the same history appears when the claimant was examined by a Dr. Hudelman on January 16, 1968. A Dr. Subczynski, reports on January 24, 1968, the same origin of the back difficulty. Dr. Raaf recites a similar history from the claimant in his report of March 29, 1968. In February of 1969, the claimant was examined by Dr. Carlson in connection with an examination at the Physical Rehabilitation Center of the Workmen's Compensation Board for purposes of evaluation for vocational rehabilitation. The accident was then related as "lifting the handles of a wheelbarrow and he slipped and fell and landed on his back with two boxes of material on top of him." Claimant's counsel was also taken by surprise since his opening remarks at page two of the transcript about a stooping strain were suddenly followed at page five by the description of an alleged major trauma which was never related to treating doctors for at least 16 months.

With this background, the Hearing Officer also found that the claimant's demeanor as a witness, particularly in being evasive upon critical matters, cast grave doubts upon the weight to be given the testimony. This evasiveness was also evident in an area which bears largely upon the claimant's motivation to return to work. It is obvious that the claimant is not interested in vocational rehabilitation and did not cooperate with efforts by members of the staff of the Workmen's Compensation Board in this regard.

Counsel for claimant would explain the entire situation away on the basis of stupidity and the Texas school system. The matter comes within the principles of the recent decision of Leech v. Georgia Pacific, 89 Or Adv Sh 127, 581, with respect to weight to be given to contradictory testimony by claimants on unwitnessed accidents.

The Board concludes and finds that the disability attributable to this accident does not exceed the 80 degrees heretofore awarded. There is no basis for application of any measure of disability for comparative wage loss from the

Ryf (459 P.2d 991) decision. The history of the claim and claimant's lack of work motivation would make any such evidence of negligible value even if available.

The order of the Hearing Officer is affirmed.

WCB #68-715 January 26, 1970

LEVI LARSON, Claimant.
Request for Review by Claimant.

The above entitled matter is the third of a series of hearings, Board reviews and appellate court proceedings.

The claimant was injured prior to January 1, 1966 and the issue has been whether the now State Accident Insurance Fund is subject to the imposition of increased compensation and attorney fees for unreasonable resistance to compensation.

The issue in this particular proceeding is limited to whether the now State Accident Insurance Fund should be assessed attorney fees and a further increase in compensation from 5% (ordered by the Hearing Officer) for failure to pay the 5% increase.

This 5% is not compensation for disability as such, but is a sort of penalty imposed upon employers who fail to promptly pay. The posture of this case is that the able Judge Burke of the Multnomah Circuit Bench upheld the legal position of the State Accident Insurance Fund with respect to this point.

It is true that the Court of Appeals has now reversed Judge Burke upon the issue of whether penalties are payable. (See 462 P.2d 694) Does this render the action of the State Accident Insurance Fund unreasonable? Such a decision would also indict the able Circuit Judge who considered the problem.

The Board concludes and finds that there is no basis for the imposition of further penalties or attorney fees. The action of the State Accident Insurance Fund may have been erroneous but that does not make the action unreasonable.

The order of the Hearing Officer is therefore affirmed.

WCB #68-1853 January 28, 1970

DOUGLAS ESPESETH, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 38 year old claimant employed in the shipping and receiving department of a steel fabrication plant, as a result of an injury to his low back incurred on Febraury 21, 1968, from lifting a heavy crate of window framing.

The determination order of the Closing and Evaluation Division of the Board entered pursuant to ORS 656.268 determined that the claimant was entitled to compensation for temporary total disability to August 31, 1968, and to an award of permanent partial disability of 64 degrees of the 320 degrees provided for unscheduled disability, determined by a comparison of his present condition to his condition before this injury and without such disability.

The order of the hearing officer modified the determination order by determining that the claimant was entitled to additional compensation for temporary total disability for the period from February 28, 1969, to May 28, 1969, less time worked, and in all other respects affirmed the determination order.

The claimant asserts in his request for Board review of the order of the hearing officer that the award of permanent partial disability is inadequate and not commensurate with the actual disability.

Following a conservative program of treatment for several months, the claimant was referred to Dr. Abele, an orthopedic specialist, for examination and treatment. Dr. Abele diagnosed a lumbosacral sprain associated with minimal congenital problems and marked shearing stress at the lumbosacral joint. He further diagnosed the immediate problem as neuritis involving the fifth lumbar nerve root on the left side. He referred the claimant to Dr. Raaf for lumbar myelography and a probably laminectomy. The myelogram disclosed a probable herniated disk, as a result of which a laminectomy was performed. Although no protruded disk was found, pressure on two nerve roots was relieved. Spinal fusion was determined to be unadvisable.

Post operative examination by Dr. Raaf disclosed no further back or leg pain, except for slight back ache at the end of the day relieved by brief rest. The left leg numbness disappeared. There was good range of motion in the back and the reflexes were normal. He indicated that the claimant could resume employment as a medical technologist. The findings and conclusions of Dr. Abele in his final report are consistent with those of Dr. Raaf. He was of the opinion that the claimant had sustained some permanent partial disability.

The claimant in his testimony at the hearing indicated that following the surgery he "got along great" and "really felt good" for several months when his condition commenced getting worse. At the time of the hearing his condition was indicated to be about the same as it had been prior to the surgical treatment. Based upon the claimant's current complaints, at the conclusion of the hearing, the State Accident Insurance Fund offered to have the claimant re-examined for re-evaluation of his condition.

Pursuant to stipulation, the hearing was continued, and the claimant was referred to Dr. Raaf for re-examination, which was conducted on February 28, 1969. Based upon the present complaints of back and leg pain, Dr. Raaf was of the opinion that the claimant's condition was not medically stationary, and that further conservative treatment was advisable. He recommended physical therapy for a period of one month. Dr. Raaf next saw the claimant on May 28, 1969. The claimant reported that he had gone to the physical therapist for a period of two and a half weeks, that his condition had improved greatly, that he had no further back and leg pain and feels very well. He advised that in April he had obtained part-time employment in Corvallis in a chemistry laboratory. Dr. Raaf concluded his report with the opinion that the claimant can carry on full time work as a laboratory technician.

The record reflects that the claimant has been employed in medical and laboratory work for over twenty years of his total of roughly twenty-two years of employment. Although the claimant is now precluded from performing heavy labor, such as the type of employment in which he was temporarily engaged at the time of his injury, he is capable of continuing to work as a medical or laboratory technician, in which field he has been employed for most of his working career. Accordingly, it would appear that the claimant has suffered no impairment of earning capacity.

The Board, from its own de novo determination of the degree of the claimant's disability, finds and concludes that the 64 degrees of the 320 degrees provided for unscheduled disability awarded to the claimant by the determination order, and affirmed by the order of the hearing officer, properly evaluates the claimant's permanent partial disability attributable to his accidental injury.

The order of the hearing officer is therefore affirmed.

WCB #69-547 January 28, 1970

BILL HOPKINS, Claimant.
Request for Review by Employer.

The above entitled matter involves some procedural complications as well as issues of disability, further medical care and reopening of a claim with respect to low back injuries sustained by a 20 year old mobile home manufacturing laborer who fell backwards at work on August 26, 1968. He was treated conservatively and returned to work September 10, 1968. He was shifted to lighter work. On February 11, 1969, the claimant was discharged from his job for excessive unexcused absenteeism and tardiness. On February 14, 1969, the claimant had written the employer's insurer requesting further time loss and medical treatment. On February 17, 1969, the matter was submitted to the Workmen's Compensation Board for determination of disability pursuant to ORS 656.268. On February 27, 1969, a determination issued finding there to be no permanent disability and further finding the claimant's condition to be medically stationary. On March 10, 1969, the claimant was involved in a non-industrial incident involving the moving of a home type refrigerator appliance down a flight of steps. The magnitude of the trauma involved in the latter incident is at issue as well as the issue over whether the incident was in any wise a subsequent intervening event substantially affecting the claimant's disability. One complicating factor in the chain of circumstances was the alleged series of attempts by the claimant to contact Dr. Halferty. Dr. Halferty was in the process of closing out his medical practice and it is understandable that some fruitless attempts to contact the doctor could well have been made.

On March 31, 1969, the present proceedings were commenced by a request for hearing before the Workmen's Compensation Board protesting (1) premature closing of the claim by the Workmen's Compensation Board; (2) requesting further medical care; (3) unreasonable refusal to pay compensation; (4) unreasonable resistance to payment of compensation; (5) extent of permanent partial disability and (6) payment of penalty compensation and attorney fees. The Hearing Officer thought it significant that this document was dated March 19, 1969. No significance was attached to the fact that this document was not

mailed by claimant or his counsel until March 28, 1969. The document does not purport to relate that it was signed March 19th. March 19th is a critical date since it is the day before the refrigerator incident. The claimant's testimony, Tr. 115, prior to being reminded of the date of the document, tends to indicate the document was not signed the day it is dated. The claimant's former address is shown but other parts of the record would indicate he had already moved in with Mr. Patton.

The Hearing Officer proceeded to order the claim reopened as of March 20, 1969, with no allowance of any compensation prior to that date and assessed penalties or unreasonable delays, resistance and refusal to pay, etc. Since the Workmen's Compensation Board had issued a determination on February 27, 1969, and since the Hearing Officer found no compensation due for any period prior to or including the date of the request for hearing, it is difficult to fathom upon what basis the employer was guilty of any unreasonable resistance. The claimant had been working fairly regularly. He had some viral infections in January which precluded work but this was not associated with any consequences of his industrial accident.

The Hearing Officer makes no findings with respect to reliance upon the claimant's testimony, probably because of matters of record such as appear at page 95 of the transcript. There was an apparent failure to disclose the full nature of his past physical history to Dr. Myers. He sought medical care from Dr. Lenci in January without even mentioning his back. He claims he reported leg symptoms to Dr. Myers but this is not substantiated by other than a profession that "maybe he didn't hear me."

Though the Hearing Officer made no finding with respect to reliability to be placed upon the claimant's testimony, he did place "great faith" in Mr. Patton's credibility. The Board does not have the benefit of a personal observation of this witness. The witness did answer numerous questions in an equivocal manner concerning the claimant's separation from his wife and was quite positive in areas concerning which he had no real personal knowledge. He was quite eager to explain away any statements made upon the claimant's admission to the hospital. He admitted the claimant was "kind of balancing" the refrigerator, but was otherwise anxious to put the matter in a posture of the claimant hardly touching the refrigerator. The witness was hardly in a position to even see the extent of the claimant's participation.

Too much of the ultimate decision in this case depends upon the weight to be given the claimant's testimony to turn the matter upon the second hand knowledge of Mr. Patton.

The claimant's prior injuries and the refrigerator incident are major factors in any disability the claimant may have. The Board concludes and finds that an exacerbation of March 20, 1969 was a separate intervening non-industrial event in moving the refrigerator.

<u>The order of the Hearing Officer remanding the matter for further medical care and compensation is therefore reversed.</u>

As noted, there are some procedural matters which require clarification and correction.

While this matter was pending on review the employer, who had resumed responsibility for the claim under order of the Hearing Officer and ORS 656.313, re-submitted the matter pursuant to ORS 656.268. The Closing and Evaluation Division made a determination December 22, 1969, awarding certain temporary total disability and permanent partial disability without reference to the records on review before the Workmen's Compensation Board proper. That order of December 22, 1969, copy of which is attached, is also set aside and revoked in keeping with the Board decision that the matter should not have been remanded to the employer by the Hearing Officer and in light of a conclusion that the disabilities awarded are not attributable to the accident at issue.

The Board is advised that there is yet another hearing pending instituted by the claimant over the alleged failure of the employer to meet all of claimant's demands including penalties and attorney fees assessed by the order of the Hearing Officer which is now being set aside.

The confusion attendant upon this matter is such that further hearing should not have been scheduled, particularly upon such issues, pending the disposition of the review. Such proliferation of proceedings is not warranted, particularly in areas involving major questions of doubtful responsibility of the employer as in this instance.

WCB #69-384 January 28, 1970

ARTHUR LUCE, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of disability sustained by a 45 year old yardman and truck driver for a retail lumber sales yard who sustained a low back injury on January 27, 1967, while lifting a roll of roofing.

The claimant had a pre-existing disability in the right ankle as well as circulatory disease affecting the extremities.

Pursuant to ORS 656.268 a determination issued finding the claimant to have a disability from this injury of 28.8 degrees against the applicable maximum of 192 degrees.

The matter was not decided by the Hearing Officer who heard and observed the witnesses and the decision of the Hearing Officer was that the claimant is permanently and totally disabled. Though the procedures under the 1965 Act do not require definitive statements of the issues in order to obtain a hearing, the result of the hearing was obviously a surprise to both counsel. When the hearing commenced, plaintiff's counsel (Tr. 2) stated the issue as being "the extent of permanent partial disability." Though workmen's compensation procedure is not bound by ordinary rules of procedure, the results should be within keeping of the basis upon which the matter was heard. The Hearing Officer relied for his opinion upon the Supreme Court decison of Armstrong v. SIAC, 146 Or 569. As noted in the appellant's brief, that decision was with reference to aggravation of an existing disease causing death and is not applicable in this case. It must be remembered that many of the early appeals from jury decisions only required "some" evidence in order to be sustained.

The real issue is whether the back injury is such "other condition permanently incapacitating the workman from regularly performing any work at a gainful and suitable occupation." ORS 656.206 (1). According to the various medical reports the back condition is a relatively minor part of the total physical problem. Whether the claimant could or could not return to work is often affected by the motivation of the claimant. It is obvious that the claimant herein is motivated to retire and thus not utilize his remaining capabilities for work. When the medical record reflects "moderate subjective" symptoms associated with the accident at issue, these subjective symptoms may be weighed in light of the motivation toward early retirement.

Before any intelligent 45 year old workman with varied work experiences is relegated as permanently and totally disabled from the relatively small part contributed by an industrial injury, the record should reflect a wholehearted effort and cooperation by the claimant in the broad field of vocational retraining, relocation and rehabilitation available through agencies of the state.

The Board concludes and finds that the disabilities attributable to the accident at issue are partially disabling only and do not exceed 48 degrees. The order of the Hearing Officer is therefore set aside and the disability is determined to be 48 degrees.

Pending review, a further issue arose with the claimant contending the order of the Hearing Officer should have been made effective retroactively to the time of termination of the temporary total disability. The order of the Hearing Officer was not made upon that basis. Since the order of the Hearing Officer was made in part upon symptoms such as leg cramps not caused by or attributable to the accident and which were not even mentioned in the medical reports, the order would have been in error in retroactively setting the compensation.

The request to make compensation paid retroactively is therefore denied. No compensation paid pending review is repayable pursuant to ORS 656.319.

Counsel for claimant, with respect to an award reduced upon appeal, may bill claimant for not to exceed $125 for services in connection with this review.

WCB #69-202 January 29, 1970

CHARLES C. KLEVER, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 38 year old meat cutter who injured his low back in a fall while carrying frozen chickens on November 4, 1967.

The claimant had a prior back injury in 1964 and was improved by surgery. He received an award in excess of 20 degrees for permanent disability from the injury. The intervening difficulties with the back were relatively mild. Following the accident at issue the claimant again had surgery. He has returned to work in a supervisory capacity with a lesser physical demand upon his injury prone back, but with an increase in earnings.

Pursuant to ORS 656.268, a determination issued January 24, 1969, finding the claimant to have a permanent disability of 64 degrees against the applicable maximum for unscheduled disabilities of 320 degrees and comparing the workman to his pre-accident status.

It is obvious that not all of claimant's problems with his back are causally related to this claim. Disability evaluation is to be measured by the disability attributable to this claim. The claimant's testimony with respect to asserting that he could perform his duties "as well as ever" would preclude any additional award.

The Board concludes and finds that there is additional disability attributable to the accident of November 4, 1967, but that the disability does not exceed the 64 degrees heretofore awarded.

The order of the Hearing Officer is affirmed.

WCB #69-235 January 29, 1970

LEONARD M. CRISPIN, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the compensability for a left inguinal hernia allegedly associated with an incident of August 26, 1967, when the claimant's right arm was caught in a conveyor belt and the claimant exerted great effort in freeing himself.

The claimant had numerous complaints following the accident including abdominal pains which he self-diagnosed as gas pains. It was not until November, 1968, that the claimant was examined by a doctor for possible hernia in connection with the lower abdominal pains. It is interesting to note that the doctor found nothing at first but several days later was able to diagnose the hernia.

Due to the passage of time from the date of the trauma the employer denied responsibility for this aspect of the claim.

Upon hearing, there was medical evidence adduced to the effect that there was a reasonable medical probability that the hernia resulted from the incident at work.

The situation is just the reverse of the facts in the Plowman v. SIAC case, 144 Or 138. There the hernia was diagnosed first and subsequent claim of concurrent injury to the sacroiliac was questioned. The Court ruled that a claimant is not to be precluded from claim for disability by virtue of inability to diagnose his own condition. The principle of that decision is applicable to the facts herein.

The Board concludes and finds that the hernia was caused by the accident of August 26, 1967.

The order of the hearing officer is affirmed.

WCB #69-1051 January 29, 1970

RICHARD W. BORDERS, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 37 year old claimant employed as a fruit picker on August 15, 1968, when he fell from a picking ladder in a pear orchard resulting in two vertebral compression fractures in the lower thoracic and upper lumbar region of his back.

The determination order entered pursuant to ORS 656.268 awarded the claimant permanent partial disability of 64 degrees of the maximum of 320 degrees for unscheduled disability determined by a comparison of his present condition to his condition before such injury and without such disability.

The order of the hearing officer affirmed the determination order.

The claimant has requested a review of the order of the hearing officer. The claimant seeks an increase of his permanent partial disability award.

The medical report of Dr. Cherry provides the most recent and complete medical evidence in this matter. The report indicates that the claimant's injuries consisted originally of a rather severe compression fracture of the twelfth thoracic vertebra and a mild compression fracture of the first lumbar vertebra. However, both fractures healed completely solid and stable. There is mild wedging of the twelfth thoracic vertebra and a more severe wedging of the first lumbar vertebra. Some wedging of the second and third lumbar vertebrae is also noted. There is a mild kyphosis and tenderness at the lower thoracic and upper lumbosacral region. Bending, hyperextension and straight leg raising is almost normal. It is his impression from his examination and treatment of the claimant that he has sustained some permanent residual disability.

The claimant's present complaints if substantiated would indicate severe permanent disability precluding most employment. He relies upon his employment history subsequent to his accidental injury as substantiation of his claim for greater disability.

During the period preceding and following his accidental injury, the record reflects that the claimant and his wife were having serious marital difficulties, and that the claimant during this period compiled an extremely spasmodic employment history.

The claimant contends that proper analysis of the record discloses that his erratic work history prior to his injury was the result of his marital problem, and that his erratic work history subsequent to his injury was the result of his physical disability, which in turn caused the marital problems following his injury. He asserts that the hearing officer failed to discern and distinguish the pre-accident and post-accident causal factor for the unsteady employment pattern, and thereby based his decision upon an improper consideration of the marital difficulty and the employment record, and failed to give proper consideration to the disabling effect of the claimant's injury.

The hearing officer states in his order that he was unable to give much credance to the claimant's testimony with respect to his inability to work and the extent of his disability, due to the claimant's unsteady employment history and unstable domestic situation. Accordingly, he was unable to find that the claimant's permanent disability was greater than that which was documented by the medical evidence, and which was fully reflected in the 64 degrees awarded by the determination order.

The Board's review of the record, including the claimant's testimony, together with the weight to which the hearing officer's evaluation of the claimant's credibility is entitled because of his opportunity to see and hear the claimant during his testimony at the hearing, causes the Board to conclude that the hearing officer has correctly evaluated the evidence with respect to the extent of the claimant's permanent disability.

The transient and spasmodic nature of the pre-accident and post-accident employment history of the claimant as reflected in the record of this matter, renders unavailable adequate wage data upon which to base a determination of whether or not a loss of earning capacity has resulted from his accidental injury. Such evidence as is obtainable relative to the nature of the claimant's employment and the extent of his earnings does not establish any impairment of the claimant's earning capacity.

The Board finds and concludes from its de novo review of the record in this matter, that the 64 degrees awarded to the claimant by the order of the hearing officer in affirming the determination order, is a fair and equitable evaluation of the claimant's permanent partial disability.

The order of the hearing officer is affirmed.

WCB #69-1136 January 29, 1970

LEONA ANTOINE, Claimant.
Request for Review by Claimant.

The above entitled matter involves a claim for aggravation with respect to an accidental injury of May 22, 1967, which resulted in a lumbosacral sprain. The claim was the basis of a previous Board review and Court appeal on the issue of the rate of compensation payable for temporary total disability.

Pursuant to ORS 656.268, a determination of disability issued June 18, 1968. The year within which that determination could have been questioned as a matter of procedural right expired prior to filing the claim for aggravation herein on June 24, 1969.

Pursuant to ORS 656.271, as interpreted by Larson v. SCD, 87 Or Adv Sh 197, 445 P2d 486 (1969), a claimant, in order to be entitled to a hearing upon the merits of a claim of aggravation, must be supported by a medical opinion setting forth facts which, if true, constitute reasonable grounds for the claim.

Two medical reports were tendered by claimant from Dr. Winfred Clarke. The first was dated December 9, 1968, at which time the claimant was several

months pregnant with symptoms related to that pregnancy. The second report of June 2, 1969, merely reflects a continuation of subjective symptoms--neither better nor worse.

The request for hearing was dismissed upon the basis the tendered reports did not reflect a compensable aggravation of the disabilities.

The statute as interpreted by the Supreme Court is quite clear. If there are facts from which one can conclude that there is a reasonable basis for a claim of aggravation there should be no difficulty in obtaining medical substantiation of those facts. No recitation of such facts is found in the report of Dr. Clarke.

The Board concludes and finds that the Hearing Officer properly refused to proceed to hearing upon the merits.

The order of the Hearing Officer dismissing the request for hearing is affirmed.

WCB #69-646 January 30, 1970

MARK H. ALFT, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 62 year old farm worker who injured the soft tissue of the right leg when a tractor seat came loose and fell against his right leg on May 15, 1967.

The claimant developed an arterial insufficiency due to occlusion of the right femoro-politeal arterial system with a fairly high degree of obstruction and poor collateral circulation.

Pursuant to ORS 656.268, a determination issued finding the claimant to have sustained a disability of 38.5 degrees against a maximum possible award of 110 degrees on the basis of a loss of use of 35% of the leg. Upon hearing, this award was increased to 55 degrees in evaluating the loss at 50% of the leg.

The claimant was predisposed to injury by an underlying arteriosclerotic condition. The claimant has sustained a thrombosis about a year following the successful surgery which had been given to correct an injured artery. It is not clear from the medical evidence whether the subsequent thrombosis was substantially related to the industrial injury.

The Board concludes and finds that the disability in the leg is greater than the 38.5 degrees awarded by the determination, but that the disability does not exceed the 55 degrees awarded by the Hearing Officer.

To the degree that some of the claimant's problems are a continuance of the arteriosclerotic process without established medical relationship to the trauma, it appears that the evaluation attributing a disability of 50. of the leg to the injury is a fair evaluation.

The order of the hearing officer is therefore affirmed.

WCB #69-700 January 30, 1970

JAMES H. LOWERY, Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 58 year old workman whose right leg was cut and broken by a falling wheel from a hand grinder.

Pursuant to ORS 656.268, a determination was issued finding the claimant to have sustained a disability of 50% of the loss of use the leg.

Though issues are not required to be specified in order to request a hearing, the application for hearing in this case raised issues of only further medical care, further temporary total disability and extent of permanent partial disability. The State Accident Insurance Fund was obviously misled as to the true demand for an award of permanent total disability. The demand was primarily based upon pre-existing injuries.

Despite the obvious fact the claimant is able to walk upon the injured foot and use the foot on operating an automobile, the Hearing Officer found "claimant's right foot is actually permanently and totally a loss." Further, despite the injuries being limited to the foot, the Hearing Officer converted the disability to one of permanent total disability.

The order is by a former Hearing Officer who, in apparent haste to clean up all pending matters, further ignored the fact that the record reflects he had agreed to keep the instant case open and closed the matter without notice.

The matter is obviously incompetely and improperly heard and decided. Pursuant to ORS 656.295 (5), the matter is remanded to the Hearings Division for such further evidence and order thereupon as may be justified by the further evidence.

The order of the Hearing Officer is set aside.

WCB #69-1344 January 30, 1970

GENE J. ELDER, Claimant.
Request for Review by SAIF.

The above entitled matter involves issues of the need for further medical care and associated temporary total disability with respect to a 37 year old carpenter who fell 20 feet or more from a scaffold on October 15, 1968. The primary medical problem involved the left knee.

Pursuant to ORS 656.268, a determination issued July 10, 1969, finding the claimant's condition to be medically stationary with a residual disability of 22.5 degrees against the applicable maximum of 150 degrees for total loss of a leg.

At the conclusion of the scheduled hearing, claimant requested and obtained permission to submit a written report from a Dr. Ackerson who had examined the

claimant on September 29, the day before the hearing. The report was submitted but the Hearings Officer refused to reconvene the hearing for the purpose of consideration of questions raised and unanswered by the report of Dr. Ackerson.

The report upon which the Hearing Officer relied recites:

> "I have recently examined Gene Elder on September 29, 1969 and on October 7, 1969 concerning his left knee. The day before yesterday the patient jumped off a small porch, the knee popped, and since the knee has been painful. Later the knee popped again and it quit hurting. It seems that the cartilage is probably loose.
>
> "Movement to the left knee indicates by palpatation that there could easily be a derangement of a semi-lunar cartilage, most possibly the lateral within the knee joint.
>
> "We feel the knee is still unstable and further care, examination and evaluation is indicated before claim closure."

Though the report to be submitted was in relation to a September 29th examination, it is obvious that there is no information in this report concerning the September 29th examination conducted prior to the hearing. The post hearing examination of October 7th reveals a non-industrial incident from jumping off a small porch on October 5th. The diagnosis of derangement of a cartilage is questionable since the inference is that injury was made to a cartilage previously removed by surgery.

The Hearing Officer order requires that the claim be reopened upon such post hearing developments without opportunity of the State Accident Insurance Fund to be heard, without consideration to whether the disability found was caused by the industrial accident and without further inquiry into the nature of further care.

The order of the Hearing Officer is set aside and the matter is remanded for further evidence with relation to the post hearing incident in jumping off of a porch and the need for further medical care which may be attributable to the industrial accident.

No appeal notice is appended pursuant to Barr v. SCD, (90 ADV. Sh. 55) Or App Ct, January 15, 1970.

WCB #69-1071 January 30, 1970

GLENN M. HICKMAN, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability attributable to an accident of April 19, 1967, when the 37 year old sawmill worker caught his left arm in a conveyor belt.

Pursuant to ORS 656.268, a determination issued finding the claimant to have sustained a disability of the loss of use of 95% of the arm. The arm is

not completely useless. He can steady the wheel of an auto though he cannot turn with the affected arm. He can lift a weight up to ten pounds and can pick up and carry items equipped with a handle. The arm also provides body balance. There is thus major, but not complete loss of function.

In the course of treatment, including three operations, the claimant developed peptic ulcers. The employer accepted responsibility for the successful conservative treatment of the ulcer condition.

A further factor has been the psychiatric reaction of the claimant to the rather severe trauma. The claimant has undergone psychiatric treatment and responded favorably. The problem was partly one of lack of patience and anger. It would appear that the psychiatric problems will only be permanent if litigation and contention over the injury are permanent.

The Board concludes and finds that the disability is partial only and does not exceed the 95% loss of an arm heretofore awarded.

The order of the hearing officer is affirmed.

It is noted that efforts in the direction of vocational rehabilitation were abandoned on the basis the claimant was "too fidgety."

This claimant has had a severe injury but at his age and with his inherent abilities, no effort should be spared toward replacing, retraining or relocating this workman as a useful constructive citizen. By this order, the Director of the Workmen's Compensation Board is to forthwith undertake whatever vocational retraining may be available at the expense of the funds of the Board available for such purposes.

WCB #69-1294 January 30, 1970

JAMES E. DAVIS, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of disability sustained by a 54 year old former millwright who fell while pulling on some heavy lumber and injured his low back on August 1, 1967.

Though surgery has been suggested, the claimant has chosen the alternative of seeking lighter work. He is in the process of learning the shoe repair trade on a full time basis, and has been working a second shift in a filling station.

Pursuant to ORS 656.268, a determination of disability of 48 degrees was made against the applicable maximum of 320 degrees. This was increased to 96 degrees by the Hearing Officer.

The Board would be remiss in not taking special notice of the motivation and determination of this claimant to readjust himself within the physical limitations imposed by the injury. It is assumed that there will be some loss of earning capacity from work as a millwright. The Board would also reflect that it is unfortunate that a workman under these circumstances was compelled

or felt compelled, to work approximately 16 hours per day. The fact remains, however, that claimant's disability was not of such severity as to preclude the double stint assumed by the claimant.

The claimant is in the process of being trained as a shoe repairman and therefore the Ryf decision has no application absent earnings data. Taking into consideration the physical impairment, the Board concludes and finds that the Hearing Officer properly increased the award from 48 to 96 degrees so allowed by the Hearing Officer out of an applicable maximum of 320 degrees.

WCB #69-1342 January 30, 1970

JOSEPH M. DELGADO, Claimant.
Request for Review by SAIF.

The above entitled matter involves a claim of left leg and low back injuries sustained April 8, 1969, when the 34 year old claimant fell about four feet while moving a casting.

Pursuant to ORS 656.268, a determination issued July 14, 1969, finding the claimant to be entitled to temporary total disability until July 1, 1969, without residual permanent disability.

The issues upon hearing basically involved the alleged need for further medical care and temporary total disability beyond July 1, 1969. The Hearing Officer found the claimant's condition to be not stationary and ordered the claim reopened for further medical care and for further temporary total disability from July 1, 1969.

The Board concludes and finds conforming to the determination order of July 14, 1969, the claimant's condition had become medically stationary on July 1, 1969. Regardless of any other interpretation which may be placed upon the claimant's quitting the job it was not, by his own version, as the result of being totally disabled. There was work and a shift assignment the claimant sought.

Though the report of Dr. Cherry of September 9, 1969 was based in part upon an inaccurate history from the claimant, it would appear that the evidence would not justify reinstating the temporary total disability prior to September 3, 1969, upon Dr. Cherry's generalized recommendation for conservative treatment.

The Board concludes and finds that temporary total disability was properly terminated July 1, 1969 and modifies the order of the Hearing Officer by reinstating temporary total disability as of September 3, 1969.

The order of the Hearing Officer was in error in allowing an attorney fee to claimant's counsel based upon the medical services and payable by the claimant. The order of the Hearing Officer is further modified to restrict the attorney fee payable to claimant's counsel to 25% of the increased monetary compensation. An attorney fee may be based upon the medical services only in the absence of other basis for such fees.

WCB #68-1657 January 30, 1970

The Beneficiaries of
ROBERT E. BROOKEY, Deceased.

The above entitled matter, as recited in an order of remand of October 8, 1969, involves an issue of whether a workman's death arose out of and in the course of employment. The workman is hereafter termed "decedent."

The matter was heretofore remanded when it appeared that the record of the hearing could not be obtained. The record was obtained prior to further hearing and the Board has again assumed jurisdiction for purposes of review without further hearing in the matter.

The matter is in a peculiar posture in that the proceedings are actually opposed by the beneficiaries of the deceased workman. It may be that in light of Printz v. SCD, 88 Or Adv Sh 311, 453 P.2d 665, the entire issue is moot if the Workmen's Compensation Board cannot validly rule upon whether an accident is compensable if no one is asserting a claim. If the employer had denied the claim under similar circumstances, the Court decision in the Printz case would indicate that there was no claim and a denial by the employer would be a nullity. If the beneficiaries are opposing the matter, it would appear that they are in fact asserting no claim and that the Workmen's Compensation Board could not validly assume jurisdiction to rule that they had a valid, though non-asserted claim.

With this reservation in mind and contemplating that the Board may have valid jurisdiction to rule upon compensibility of the accidental injury, the Board has proceeded to review the matter on the merits.

The decedent was an 18 year old choker setter. On August 1, 1968, the decedent, with three fellow employees, was being transported in an employer owned crummy on a company owned forest access road. At a bridge site the employer had installed a locked iron rail gate to preclude unauthorized use of the road. For some reason, the logic not being apparent, an unsuccessful attempt was made to ford the stream in lieu of crossing the bridge and opening the gate. The crummy then crossed the bridge and with the brakes wet from the attempt to ford the stream the crummy could not be stopped. The decedent had left the crummy and was leaning against the gate when the crummy slammed into the gate with sufficient force to hurl the decedent 65 feet through the air and inflict fatal injuries.

The beneficiaries in effect argue for an exception to the exception to the general rule governing accidents in going to and from work. The general rule is that injuries incurred in travel to and from work are not compensable. One of the exceptions is with regard to such transportation in a company vehicle on company premises. The landmark decision of Lamm v. Silver Falls, 133 Or 468, is in point. The beneficiaries would apply the law of that case to read that if the claimant alighted from the train when the train stopped enroute and was then injured by the train, the incident would not then be in the course of employment. No reading of the Lamm v. Silver Falls case reflects any importance to the employe being within the vehicle of transportation at the precise time of injury. Mr. Lamm was actually injured after he left the train, if one is to construe the facts technically.

The Board concludes and finds that the decedent was killed by accidental injury arising out of and in course of employment.

The order of the hearing officer is affirmed.

WCB #69-1495 February 3, 1970

LLOYD FELLON, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained September 8, 1968, by a 51 year old millwright when he exacerbated a low back injury dating back to 1965.

The claimant underwent disc surgery which was largely successful. By March of 1969, the claimant had been back to work for four months and was basically asymptomatic. The claimant's return to work in the plywood industry reflects no loss of earning capacity.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 32 degrees against the applicable maximum of 320 degrees and upon the basis of a comparison of the workman to his pre-injury status.

Upon hearing, the award was increased to 80 degrees, apparently largely upon the basis of reports solicited from a Dr. Kunz of Tacoma, Washington and Dr. Arthur Jones of Portland. The reports of both doctors are significant upon the apparent lack of knowledge or consideration of the continuing part played by pre-existing disability. Dr. Kunz of Tacoma, Washington is not qualified as an authority on rating of disabilities under the Oregon law, conspicuously makes no recitation of findings on his examination in February of 1969 on the Pierce County physical examination and belies his conclusions by a general statement that the claimant has "few problems now relative to his low back." It is obvious that both doctors' reports are largely based upon self serving subjective history of ailments recited knowingly by the claimant with the prospect that any report based thereon would be a factor in the pending litigation.

The treating doctors' reports in November of 1968 reflect no residual disability. The report of Dr. Parsons of April 14, 1969 also reflects no disability.

The work record, the wage record and the reports of the doctors best qualified to evaluate the problem all indicate no disability or only a minimal disability.

The Board concludes and finds that the disability does not exceed the 32 degrees found upon the original determination.

The order of the Hearing Officer is set aside. The award of disability is set at 32 degrees.

WCB #69-852 February 3, 1970

EARL L. WEEDEMAN, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 44 year old furniture mover and truck driver as the result of an injury to his back incurred on November 29, 1967, while lifting a davenport.

The claimant's injury was diagnosed as chronic low back strain superimposed upon pre-existing osteoarthritic changes. The medical evidence substantiates that the claimant had severe and well advanced osteoarthritic changes in the lower dorsal and lumbar spine which were of long standing. Although the claimant sustained a prior compensable injury to his low back in 1962, he sustained no permanent disability as a result of that injury.

The determination order entered in this claim pursuant to ORS 656.268 evaluated the claimant's permanent disability at 64 degrees against the maximum of 320 degrees for unscheduled disability, based upon a comparison of his condition after the injury with his condition before the injury and without the disability. The determination order was affirmed by the order of the hearing officer.

The claimant's request for review states that the reason for review is to establish that the claimant has permanent disability in excess of that awarded to him by the order of the hearing officer.

The 1967 amendment of ORS 656.214(4) provides that permanent partial disability for unscheduled injury shall be determined by a comparison of the workman's condition after the injury with the workman's condition before the injury and without the increased disability.

The award of permanent disability in this matter must, therefore, be based upon the claimant's present condition and his entire present disability compared to his prior condition including his pre-existing disability, and the compensation award limited to the increase in permanent disability attributable to the accidental injury.

The medical evidence reflects that the claimant's entire present permanent disability is of a moderate degree. Not all of the claimant's present disability is due to his present injury. The medical evidence is clear that the severe and well advanced osteoarthritic condition of long standing represents a substantial factor in the claimant's present permanent disability, and that the additional disability which may properly be attributed to his current injury accounts for only a minor portion of his presently existing permanent disability.

All of the medical evidence indicates the inadvisability of the claimant returning to employment involving heavy manual labor, precluding his return to his former employment as a furniture mover. The claimant's capability to perform heavy employment was limited prior to his present injury by reason of the degenerative condition of his spine. Knowledge of the degenerative condition prior to the occurrence of the present injury would have resulted in medical advice to the claimant to avoid heavy manual labor such as involved

in employment as a furniture mover. The necessity to refrain from employment of a heavy nature is the result of the pre-existing degenerative back condition rather than the result of the present injury. The present injury merely brought to realization the knowledge that the claimant's back was susceptible to injury.

The claimant has been substantially overweight for many years. Since his injury he has gained an additional fifteen to twenty pounds. At the time of a physical examination following his injury he was five feet nine inches in height and weighed two hundred and twenty-five pounds. His physique was characterized by a large and protruding abdomen. The claimant has been medically advised that his weight should be reduced by sixty to seventy pounds. The claimant has indicated a lack of motivation to follow the medical advice with respect to the reduction of his weight. The reduction of his weight to an acceptable level is the sole responsibility of the claimant since it is a matter which lies wholly within his personal control. By his failure to follow reasonable medical advice in remaining substantially overweight, the claimant is contributing in a substantial degree to the continuation of his low back problems and to the perpetuation of his disability.

The claimant was referred to the Physical Rehabilitation Center maintained by the Workmen's Compensation Board for vocational rehabilitation evaluation. The reports of that facility reflect that the claimant's entire present physical disability is of a significant degree, making him eligible for vocational rehabilitation, although he is psychologically a poor candidate for rehabilitation. At the time of hearing, the Department of Vocational Rehabilitation was in the process of counseling the claimant with respect to vocational training, and no final determination had yet been made as to whether retraining would be necessary to assure the claimant's return to suitable gainful employment.

The Board finds that the claimant will not sustain any permanent loss of earning capacity as a result of the disability attributable to his compensable injury, since the necessity for his refraining from his former employment as a furniture mover and engaging in a lighter form of employment is due primarily to his pre-existing degenerative condition. For the reason that the claimant has not returned to work, post-injury wage data is unavailable for consideration by the Board.

The Board, from its de novo review of the record in this matter, finds and concludes that the claimant has sustained some additional permanent disability as the result of his accidental injury, and that the additional disability determined on the basis of a comparison of the claimant's present condition with his condition before the injury and without the increased disability does not exceed the 64 degrees awarded by the determination order and affirmed by the order of the hearing officer.

The order of the hearing officer is therefore affirmed.

WCB #69-1110 February 4, 1970

ALVIN FENN, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether an accidental injury occurred in going home from work was compensable under a factual situation where, by union contract, the claimant received an additional "travel" allowance of $3.30 per day regardless of whether he was required to travel and regardless of the distance he travelled.

The claim was not initiated until almost a year following the accident. Even the Workmen's Compensation Board is not unanimous in its conclusion with respect to whether the accident arose in the course of employment. The delay is deemed reasonable and non-prejudicial to the employer.

The employer was engaged in building a high power electric transmission line from Silverton to Marcola. Pursuant to the union contract, reporting headquarters were established at Silverton, Sublimity, Scio, Lacomb and Marcola. In addition to "reporting" headquarters, the contract provides for a "job" headquarters. When Sublimity was the "reporting" headquarters, Salem was designated as "job" headquarters. The eleven miles distance between Salem and Sublimity entitled every workman to $3.30 extra payment per day without regard to whether he ever travelled between Sublimity and Salem, without regard to whether he travelled say 60 miles in some other direction and without regard to whether he lived in a trailer on the jobsite and travelled zero miles.

Under these circumstances, the claimant, a long time resident of Albany, was commuting with three fellow employes to and from Albany--a distance of at least 25 miles from Sublimity. It is coincidental that at a point about 11 miles from Sublimity toward Albany, the claimant was injured when the car in which he was riding and driven by a fellow employe was involved in a wreck.

The majority of the Board in its conclusions recognizes the broad principles with regard to liberal interpretation of the Workmen's Compensation Law. The Board also recognizes that when all of the liberal interpretations have been applied, there will remain situations in which the facts present close questions which should be resolved as not compensable instead of resorting to the proposition that "if it's close it's compensable."

The problem arises from exceptions which have been applied to basic principles of workmen's compensation. One starts with the basic proposition that injuries incurred in travel to and from work are not compensable. The fact that the workman is going to or from work may be said in the great majority of cases to meet the "arising out of employment" test. To be compensable the accident must meet two co-existent factors, the other of which is that the accident must arise in the course of employment.

There would be no question in the instant case if the employer was transporting the claimant to Albany in a conveyance of the employer. The situation would come closer to the line but would probably be compensable if compensation was attached to the specific travel involved though many of the cases so holding have apparently lost sight of the principle of "course of employment" on a theory that if there is some association with employment it is per force "in course of employment."

The majority of the Board conclude and find in agreement with the Hearing Officer that the $3.30 per day negotiated by the union and payable without regard to whether a workman travelled or lived at the jobsite did not serve to retain workmen who did travel "in the course of employment" until they reached home. Regardless of being denominated "mileage" and "reimbursement for travel time" in the union contract, it is obvious that by paying everyone the same extra pay without necessity of travel the payment is in fact neither mileage nor travel time.

The majority of the Board therefore concludes and finds that the claimant was not injured in the course of employment. The order of the Hearing Officer is affirmed.

/s/ M. Keith Wilson, Chairman
/s/ James, Redman, Commissioner

Mr. Callahan, dissents, as follows:

"The Hearing Officer was correct in finding that the claim was not barred by reason of late filing. However, there are some matters that require comment.

ORS 656.002 (5) provides: '"Claim" means a written request for compensation from a subject workman or someone on his behalf, or any compensable injury of which a subject employer has notice or knowledge.' (Emphasis supplied)

"The employer had knowledge of the claimant's injury. Testimony at the hearing showed that an employer representative visited the claimant in the hospital shortly after the injury.

ORS 656.262 (1) provides: 'Processing of claims and providing compensation for a workman in the employ of a contributing employer shall be the responsibility of the department, and when the workman is injured while in the employ of a direct responsibility employer, such employer shall be responsible. However, contributing employers shall assist the department in processing claims as required in ORS 656.001 to 656.794.' (Emphasis supplied)

"The employer in this case should have acted because he had knowledge of the workman's injury. It can only be presumed that the employer was ignorant of the duties imposed upon him by the statute. This ignorance of the employer does not nullify the workman's right to benefits as provided by the Workmen's Compensation Law.

"It appears from the record that the workman was as ignorant as the employer, but it is more understandable that he should be. The claimant applied for benefits from U.S.F. & G. (Tr 19) and was told to file a claim for workmen's compensation benefits.

"Ignorance on the part of the workman and the employer delayed the report to the insurance company. However, the workman has no duty to notify the insurance company; that is the employer's duty. If the employer has knowledge of the workman's injury, a claim has been established (ORS 656.002 (5).

"There is no indication that the employer unreasonably delayed or unreasonably refused to pay compensation, so there would seem to be no reason to invoke the penalty provided in ORS 656.202 (8). Failure to act as provided by law would seem to be due to the employer's ignorance, rather than a deliberate lack of action. The statute is clear about the responsibilities of a Direct Responsibility Employer.

> ORS 656.401 'Obligations of direct responsibility employers. (1) A subject employer who is certified as a direct responsibility employer under ORS 656.413 directly assumes the responsibility for providing compensation due his subject workmen and their beneficiaries under ORS 656.001 to 656.794.'

"Part of the responsibility is to know what the law requires him to do. Purchase of an insurance policy is for the purpose of showing financial responsibility. This does not relieve the employer of any of the responsibilities imposed upon him by the law.

"The claimant did not realize that his injury was compensable, but this ignorance does not make his injury less compensable. He did give a notice within the year and the reason for late notice was because of his ignorance which is good reason for the late notice. ORS 656.265 (4) does not bar this claim because the employer had knowledge of the injury; for that reason the employer could not have been prejudiced. The employer must assume the responsibility for the delay, but because there does not appear to be an unreasonable act by the employer no penalty should be assessed.

"It is ordinarily accepted that a workman travels to and from his place of employment at his own risk. This is because a very high percentage of workmen are employed at fixed and permanent places of employment. A permanent place of employment will attract workers. The employer will not have a problem in getting persons to do the work.

"Some types of employment, particularly in the field of construction, must be where the project is located and regardless of whether or not there is a supply of labor of the skill necessary to perform the work. Employment will only last until the completion of the job. The employer cannot find workmen, skilled in the work to be done, in the area close to the work. There may be some, but not enough. Workmen possessing the required skills must be brought to the job for the duration of the work. When the work is completed there is no more employment at that location for workmen of that special skill.

"It is of benefit to the employer to get skilled workmen. If the employer was required to use unskilled workmen he would go broke, if he got the job done at all.

"Sometimes a camp is established, but with improved transportation there is much less of this than formerly. As of today, camps are established only where it is impractical to transport workmen to and from the jobsite daily. The 'bunkhouse' rule recognized living in a camp as a benefit to the employer in getting the work done. Injuries sustained in camp, even at night, are compensable.

"In the instant case a power line was being constructed requiring workmen possessing certain skills. It could not be expected that skilled workmen would be found at the site of construction or even that enough of them would be found in the surrounding area. The employer did not provide a bunkhouse because it was more practical to have the workmen utilize lodging of their choice. The employer did not provide transportation to and from the Reporting Headquarters because he found it more practical to have the workmen furnish transportation to suit themselves.

"Workmen's compensation is founded upon the doctrine that occupational injuries are a cost of the employer in producing a product or rendering a service, regardless of fault of either party.

"Materials and labor and the use of equipment are costs in the construction of any project. The cost of bringing equipment to the jobsite and of returning the equipment is a cost of getting the job done. Repair of damage to the equipment is a recognized cost. The cost of treatment for occupational injuries is as much a cost of getting the job done as repairs to equipment.

"Because workmen had to be brought to the job in order for the employer to get the work done, travel to and from the Reporting Headquarters was a benefit to the employer. Injuries sustained during travel to and from the job are compensable because such travel was necessary to get the work done and was a benefit to the employer. Payment for this travel by the employer is proof that the employer recognized travel to and from the Reporting Headquarters as being of benefit to him. For this part of getting the job done the employer paid each man $3.30 per day and left it up to each man as to how he got to the Reporting Headquarters. If a workman chose to move a trailer to the site he was paid the same amount because he chose to come to the job that way.

"The Employer Association and the union representing the workmen mutually arrived at a simple formula for compensating the workmen for getting to and from the Reporting Headquarters, at which the employer's transportation took over and hourly pay began.

"It was recognized that while some qualified workmen might be found within the driving range of the Reporting Headquarters it would be necessary to bring workmen from a distance too far for daily travel. A place where suitable lodging and meals could be had was to be negotiated. The distance from the center of this city to the Reporting Headquarters was to be determined and 30¢ for each mile of distance was to be paid each day for travel time and transportation. In this case the payment for travel time and transportation both ways was to be $3.30 per day. Any member of the union living within driving range of the Reporting Headquarters was to be paid the same amount for travel time and transportation regardless of where he lived. This arrangement provided a simple accounting method for the employer and was accepted by the employer. The employer would not have negotiated such an agreement if it was not a benefit to the employers to do so.

"Employer's counsel contends that the $3.30 paid each workman was not for travel time. Defendant's Exhibit 2 is a copy of the agreement between the Employer's Association and the Union.

> "Page 37, 5.4 (a) provides: 'All men working out of a Reporting Headquarters shall be reimbursed for Travel Time at the rate of thirty cents (30¢) per mile one way. Reimbursement for travel time shall be computed on the distance one way from the center of the city or town which is qualified to be a Job Headquarters to Reporting Headquarters where workmen will report at the beginning of the work day.' (Emphasis supplied)

"How could it be more plain and clear? All men working out of the Reporting Headquarters, which means all of the men on the job, are to be paid for travel time at 30¢ for each mile the Reporting Headquarters is distant from the city or town where workmen from a distance can find proper living facilities. Employer's counsel contends that because all workmen are to be treated equally, this is not payment for travel time. Counsel contends that to pay all men equally somewhow makes this payment something other than travel time. The plain words of the agreement must stand despite counsel's contentions.

"Because the amount of money to be paid for travel time was to be computed on the distance one way from Salem to the Reporting Headquarters there is the contention that travel time was paid for only one way; to the Reporting Headquarters. This was only for computing the amount of money to be paid. The agreement clearly states it is for Travel Time. There is no qualification of travel time, so it applies to all travel time. If common sense and logic is used it would be realized that 30¢ is too much to pay for a mile of travel time.

"Employer recites in his brief that this arrangement allowed a man to live in Portland and drive back and forth. That is possible, but not probable. A workman could possibly live in Pendleton or Medford and fly a plane back and forth but it is not probable. It was also said that the $3.30 was not payment for travel time and transportation but was a lump sum paid as an inducement to get men to come to the job. Payment for travel time and transportation is an inducement to get workmen to come to the job. Payment of a uniform sum to each man does not make it anything other than payment for travel time and transportation. It must be remembered that travel both ways was necessary.

"Some men travelled farther than others, but the agreement specified that all were to be reimbursed the same amount. This agreement was made by persons fully competent to make such an agreement. The agreement is controlling. It is also proof that the $3.30 per day was paid for Travel Time.

"The employer accepted these workmen from whereever they came. The employer did not dictate the form of transportation. He did not choose to exercise direction and control over the transportation, but he could have done so. Whether the claimant was headed for Albany is not relevant. He was headed for home.

"Because workmen could not stay over night at the jobsite it was necessary that they return home after work. The employer provided no bunkhouse, but paid these workmen for travel to and from the jobsite. Returning home after work is as much a part of getting the job done as to go to work. Machinery and equipment must be brought back after completion of the job. Workmen having no facilities for staying at the jobsite need to return home after work each day. It is all part of getting the job done. Injuries sustained in getting the job done are a cost of the job and are compensable.

"The injury occurred as the result of the driver of the car violating a traffic rule. Fault of a fellow workman is not a bar to workmen's compensation.

"The Hearing Officer is in error in finding that the injury did arise out of and in the course of employment. The Hearing Officer should be reversed. The claim is compensable."

/s/ Wm. A. Callahan, Commissioner.

WCB #69-715 February 5, 1970

HAROLD BUTLER, Claimant.

The above entitled matter involves an issue of the extent of permanent disability attributable to an accident of August 2, 1966, when a wrench slipped while the claimant was pulling on the wrench. The claim was accepted and first closed pursuant to ORS 656.268 without award of permanent partial disability on May 17, 1967. The claim was reopened and again closed October 29, 1968 with an award of 19.2 degrees against the then applicable maximum for unscheduled injuries of 192 degrees. Upon hearing, the award was increased to 30 degrees.

The evidence is somewhat clouded by references to a prior knee injury in May, 1965 and a subsequent Idaho injury in July of 1938 to claimant's head and neck. A Dr. Kimberley concluded that the claimant's permanent disability is attributable in part to both injuries. Regardless of various measurements of motion, all of the medical reports reflect that both accidents exacerbated the underlying degenerative condition. There is no opinion by Dr. Douglas that the impairment or disability is attributable only to the accident at issue. Dr. Douglas leans strongly to arbitration of the issues which is in itself an admission that the accident at issue is not responsible for all of the disability.

The Board concludes and finds that the disability does not exceed the 30 degrees allowed by the Hearing Officer and notes that under the circumstances only a liberal application of the benefit of the doubt warrants the increase in disability above that of the original determination. This is particularly true in light of the fact that the record reflects little effect from the accident with respect to the claimant's ability to work.

The order of the Hearing Officer is therefore affirmed.

WCB #69-1549 February 5, 1970

ZELLA M. GARVIN, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 60 year old school custodial worker who slipped and fell upon a cement floor on October 18, 1967.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 32 degrees against the maximum of 320 degrees applicable to unscheduled injuries and based upon a comparison of the workman to her pre-accident status.

The Hearing Officer increased the award of unscheduled disability to 80 degrees and made a further award for injuries to the right leg of 40 degrees against the applicable maximum of 150 degrees for disability to a leg.

Upon review the State Accident Insurance Fund asserts the awards are too high and that there is no basis for award based upon the leg. No request for review or cross-review was filed by the claimant but claimant's brief asserts the disability should be rated as permanently and totally disabled.

The record is quite clear that the exacerbation of claimant's underlying progressive degenerative arthritis precludes the claimant from returning to work as a school janitor. The Board, however, concludes and finds that the disability does not preclude the claimant from working regularly at a gainful and suitable occupation.

A claimant may receive a relatively minor injury which is the so-called straw combined with prior factors to produce compensable total disability or death. The citation in claimant's brief is not to be interpreted as meaning that a claimant with 50% pre-existing disability is to receive an award of 55% for a 5% additional disability to be followed by an award of 60% for the next 5% additional etc. Basically, the question is how much disability is attributable to the accident at issue?

In the instant claim the claimant had a degenerative asymptomatic process. The trauma which produced a permanent degree of disabling symptoms certainly warrants a greater measure of permanent disability than if the degenerative processes were already manifesting themselves prior to the injury. The Board concludes and finds that the unscheduled disability justifies the award by the Hearing Officer of 80 degrees.

The State Accident Insurance Fund, as noted, also questioned the separate award for the leg. The Board concludes and finds from the weight of the evidence given by the claimant and corroborated by the medical evidence that there is an independent disability in the leg resulting from the accident and that this disability is properly evaluated at 40 degrees.

The order of the Hearing Officer is therefore affirmed.

Pursuant to ORS 656.382 (2), claimant's counsel is allowed an additional fee of $250 payable by the State Accident Insurance Fund for services rendered in connection with this review.

The members of the Board, in executing this order, verify that they have individually reviewed the entire record certified from the Hearing Officer and the briefs of the parties.

WCB #69-768 February 5, 1970

The Beneficiaries of
EARNEST A. PEARSON, Deceased.
Request for Review by SAIF.

The above entitled matter involves the compensability of a fatal heart attack sustained by a retail grocer who was president of the corporation which conducted the business. No question is raised concerning his status as a workman. The issue is whether the evidence supports medical and legal causation between decedent's work effort and his death.

The claim was denied by the State Accident Insurance Fund but ordered allowed by the Hearing Officer. There is conflicting medical evidence but none from the specialized field of cardiology.

On the day of the attack the decedent had apparently moved milk cases making a number of trips in and out of a cooler maintained near freezing from the normal temperature of the store. He was found slumped over his desk shortly after noon. He had not had his lunch.

Some problem is actually created by a portion of the theory presented by the beneficiaries with respect to long term "worries" and concerns stemming from the business venture. To some extent, as owner of the business, these may not have a relation to the concept of employment. The Workmen's Compensation Board has interpreted the exclusion of corporate officers from classification as subject workmen to not apply to the actual work performed by corporate officers. In other words, a working corporate officer is deemed a subject workman for injuries arising from such work despite ORS 656.027 (8).

The Board has primarily directed itself to resolve whether the evidence supports a conclusion that there is medical and legal causation arising from the physical efforts of the decedent. The background and expertise of the doctors whose divergent opinions are of record appear to be equal. In an area where there is an honest difference of opinion, any opinion is better if it recognizes the validity of such differences without being dogmatic. Whether the remark by the one doctor was facetious, reason and experience indicates that compensability of heart cases is somewhat short of the effort required to climb Mt. Everest.

From its review of the record the Board concludes and finds that it was the work effort the morning of the coronary attack in lifting milk containers and exposing himself to temperature changes which precipitated the attack.

The order of the Hearing Officer is therefore affirmed.

Pursuant to ORS 656.382 (2) and 656.386, claimant's counsel is allowed an additional fee of $250 payable by the State Accident Insurance Fund for services rendered in connection with this review.

SAIF Claim No. AB 109567 February 5, 1970

DONIVAN L. ESPLIN, Claimant.

The above entitled matter involves an injury to the claimant's right great toe sustained in March of 1965.

Pursuant to ORS 656.278 the matter was brought to the attention of the Workmen's Compensation Board with respect to an alleged aggravation of the injury. The claim was originally closed by the then State Industrial Accident Commission with an award of disability of 10% loss of function of the toe.

The Workmen's Compensation Board has reviewed the matter and finds that the claimant is not now in need of further medical care but that the disability is such that it should properly be evaluated in terms of disability to the foot proper. The disability is found to be a 10% loss of use of the foot, an increase to 10 degrees from the previous award of 1.8 degrees.

Counsel for claimant has been of assistance to the claimant in the matter and is therefore allowed a fee of $50 payable from the increased compensation as paid.

No notice of appeal is appended with respect to the claimant pursuant to ORS 656.278. The award is basically in keeping with the findings of Dr. Pasquesi which the State Accident Insurance Fund has approved of record.

SAIF Claim No. B 135780 February 5, 1970

FRANCIS E. SNELL, Claimant.

The above entitled matter involves the claim for a back injury incurred subject to the Workmen's Compensation Law in 1965 under the jurisdiction of the then State Industrial Accident Commission.

Pursuant to ORS 656.278, the Workmen's Compensation Board on October 16, 1968, assumed own motion jurisdiction to find that the claimant's condition had become aggravated and to direct the now State Accident Insurance Fund to reopen the claim for such further medical care and compensation as were associated with the aggravation diagnosed as postoperative arachnoiditis.

It now appears that the State Accident Insurance Fund has provided further medical care and that essentially there has been no compensation payable for temporary total disability associated therewith.

It further appears and the Board finds that the medical condition is now such that further medical care is not required. There is a possibility of future exacerbation and, if associated and required by the accident, the matter may be administered by the State Accident Insurance Fund pursuant to ORS 656.245 without technical reopening and reclosing of the claim.

It further appears and the Board so finds that there is no permanent partial disability in addition to that heretofore awarded. The claim is therefore closed.

As an own motion proceeding, no notice of appeal is attached pursuant to ORS 656.278.

WCB #69-667 February 6, 1970

RICHARD PETERSON, Claimant.
Request for Review by Claimant.
Cross Appeal by Employer.

The above entitled matter involves the issues of whether the claimant is entitled to compensation for temporary total disability at the rate prescribed by law for a married man with three children and if so, whether the delay in making payment for a third child was unreasonable so as to warrant imposition of penalties. The claimant initiated the review and the employer's appearance was by way of cross appeal.

The claimant was injured June 10, 1968, and his report of injury listed only his own two children. At the time of the accident claimant and his wife had had the custody of a 15 year old sister. This child's mother was gravely ill from kidney disease. On June 19, 1968, the day before her death, the child's mother and father executed a writing expressing the wish that Neva Jo Peterson, claimant's wife, have complete control and custody of the girl. The claimant then sought the increase in benefits.

The document executed by the girl's mother and father was after the date of claimant's accident and the document purports to relate to the future event of the mother's death. However, the evidence is clear that the claimant and his wife had in fact assumed complete custody and responsibility of the child for almost four weeks prior to the claimant's accident.

Claimant's counsel declined to file a brief upon review but the Board notes the following citation from a brief at the hearing level:

> "The term 'in loco parentis,' according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties." Niewiadomski v. United States, 159 F 2d 683, 686 (CA 6, 1947).

The Board accepts this meaning of loco parentis for the purpose of the issue before the Board and deems the factual situation to constitute the claimant's relation to the girl as one of loco parentis.

The action of the employer under the circumstances is not deemed unreasonable. Penalties and attorney fees for alleged unreasonable resistance to payment of compensation are not justifiable.

The order of the hearing officer is affirmed.

WCB #69-217 February 6, 1970

CLIFFORD EDWARDS, Claimant.
Request for Review by Claimant.

The above entitled matter involves the primary issue of the extent of permanent partial disability. An alternative issue involves the need for further medical care and treatment and further temporary total disability compensation. Two additional issues involve whether the claimant incurred travel expense to obtain medical care for which he is entitled to reimbursement, and whether the employer made an over-payment of temporary total disability compensation for which it is entitled to a set-off against unpaid compensation awards.

The claimant, a 59 year old section hand on a logging railroad, sustained a low back injury on March 22, 1968, as a result of stepping off of a slow moving railroad "speeder."

The determination order entered pursuant to ORS 656.268 determined that the claimant was entitled to an award of permanent partial disability of 48 degrees of the maximum of 320 degrees for unscheduled disability on the basis of a comparison of his present condition with his condition before the injury and without such disability. The order of the hearing officer increased the award of permanent partial disability to 96 degrees.

The claimant's primary contention on review is that the extent of his permanent disability is greater than that awarded by the order of the hearing officer.

The claimant's injury was diagnosed as a low back strain for which he was treated conservatively. Surgery was not indicated as the result of the negative findings of a repeat myelogram and an electromyogram. The medical reports reflect that the claimant's condition is medically stationary and that no further medical treatment is required.

The claimant has made no attempt to return to work since his accidental injury although the medical evidence indicates that he is capable of light-medium work. It has been indicated that he should avoid employment involving heavy manual labor which precludes his return to his former employment as a railroad section hand.

The claimant's prior history consists of a logging accident in 1949 as a result of which he sustained a fractured left pelvis. He made a satisfactory recovery from this injury and was ultimately able to resume employment as a railroad section hand, in which employment he remained until the time of his present injury, although he retained some residual permanent disability as a result of this injury.

Following the request for review by the Board of the order of the hearing officer, the Board, with the consent of the parties, referred the claimant to the Physical Rehabilitation Center for further examination and evaluation. The reports of this facility have now been received and reflect that while the claimant's aggregate permanent disability is of moderate degree, that it encompasses the disability attributable to the 1949 accident as well as the disability attributable to the present accident. The reports further indicate

that most of the present permanent disability is the result of the residual disability from the 1949 accident, which was temporarily aggravated by the 1968 accident, and that only minimal permanent disability is attributable to the present accidental injury. The earlier report of Dr. Robinson, the treating orthopedic surgeon, is consistent with the Center's evaluation of the claimant's disability. Dr. Robinson also found residual permanent disability attributable to the 1949 incident. It was his opinion that there was a measurable amount of disability that can be related to the present injury.

The 1967 amendment to ORS 656.214(4) requires that the extent of unscheduled permanent partial disability be determined by a comparison of the workman's disability before and after the accident and that the award of compensation for permanent partial disability be limited to the increase in disability which is attributable to the present accidental injury.

Temporary total disability compensation was paid to the claimant on the basis of his having a wife and a child under the age of 18 years. The employer contends that its obligation was to pay temporary total disability compensation on the basis of the claimant having a wife, but no child under the age of 18 years, and that it is entitled to a set-off of the overpayment against the permanent partial disability compensation awarded but not yet paid to the claimant. The facts are undisputed. The child in question is 32 years of age, has been an invalid since birth, and is dependent upon the claimant for support. Determination of the issue is controlled by the proper statutory construction to be placed upon the provisions of ORS 656.210 (11). The recent case of Leech v. Georgia Pacific Corporation, 89 Or Adv Sh 127, 581, 458 P.2d 438, decided since the order of the hearing officer was entered herein, held that an invalid child over the age of 18 years could not be treated as if it were a child under 18 years of age for the purpose of computing a widow's compensation under the analagous but not identical provisions of ORS 656.204. The Board is of the opinion that the decision in the Leech case requires that ORS 656.210 be construed as not entitling the claimant to receive additional temporary total disability compensation for his invalid child over the age of 18 years, and that the decision of the hearing officer to the contrary is in error and must be reversed. The Board is of the further opinion, however, that ORS 656.313 precludes either the repayment of such compensation by the claimant, or the set-off of such compensation against compensation awards which are payable but not yet paid to the claimant.

The claimant contends that on fifteen occasions he was required to drive his family vehicle a distance of 21 miles to obtain medical treatment for his condition from his family doctor. He seeks reimbursement of this travel expense from the employer. The evidence in support of the claimant's position consists only of his own testimony in which neither the dates, nature, or necessity of the treatment or other pertinent information is indicated. The Board concurs with the Hearing Officer in finding that the claimant has failed to sustain the burden of proof of establishing a prima facie case with respect to the incurring of travel expense to obtain medical treatment sufficient to entitle him to reimbursement therefore from the employer.

The Board finds and concludes from its de novo review of the record herein, that although the claimant's aggregate permanent disability may approach the 96 degrees awarded by the order of the hearing officer, that the additional permanent partial disability attributable to this accidental injury does not exceed the 48 degrees awarded by the determination order.

The order of the hearing officer is therefore reversed and the determination order is reinstated.

WCB #67-1294 February 6, 1970

R. L. CLOWER, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 57 year old logger who was injured January 17, 1966, when thrown into the air by the force of a log striking the log on which he was standing. The particular issue is whether the disability is partially or totally disabling as a result of the accident. The matter was heretofore before the Board following an order of the Hearing Officer finding the claimant to be permanently and totally disabled.

The claimant had a prior industrial back injury in December of 1965 which was not subject to the compensation law. The claim at issue was first considered as a leg injury but was extended to include the back for whatever new injury or exacerbation may have been attributable to the January accident.

The matter was remanded to the Hearing Officer on February 4, 1969 for the production of further medical evidence bearing upon the extent of disability. Following further hearing, an order again issued finding the claimant to be permanently and totally disabled.

It was the conclusion of the examining doctors associated with the facilities maintained by the Workmen's Compensation Board in a physical rehabilitation center that the claimant was capable of working regularly at light work in the tavern he operates. The claimant has other business interests which require some management. It would be virtually impossible to obtain earnings data which would be separable from income allocable to capital investment instead of physical earning capacity.

The Board is not unanimous in its decision. The majority of the Board concludes and finds that the claimant is physically capable of working regularly in his tavern on a regular basis and that this constitutes a suitable employment. It is not necessary that the claimant be able to lift kegs of beer in order to follow a satisfactory course of endeavor.

The only doctor who expressed the words permanent and total disability did not conclude that the claimant would be unable to do the light work associated with a tavern. The conclusion was a generality based upon the claimant no longer being able to work as a logger.

The majority of the Board therefore concludes and finds that though there is permanent disability, such disability is only partially disabling and does not exceed the 115.2 degrees heretofore awarded against the applicable maximum of 192 degrees.

The order of the Hearing Officer is therefore set aside and the original determination order awarding 115.2 degrees is reinstated as of the date of this order.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan dissents as follows:

This is a question of whether or not claimant is entitled to an award of permanent total.

It is fundamental that workmen's compensation applies equally to workmen regardless of financial position. A workman may have substantial property holdings or business interests but if he is physically unable to regularly perform work at a gainful and suitable occupation he is permanently and totally disabled. Clipping coupons, collecting rents or overseeing a business not related to the claimant's employment is not a bar to workmen's compensation.

Employer's brief states that claimant spends several hours per day at the tavern, that the lease of the real property, and the license to operate the tavern is in the name of the claimant. Owning a tavern and being present to see that all goes well is far different from doing the actual work or holding down a job as a bartender. A bartender is expected to handle cases and kegs of beer; he must serve his customers whenever they come, even during rush periods; he cannot take "time out" when there are customers to serve.

The report of the Back Clinic states:

> "We feel that this patient should be able to carry out light work such as helping in his tavern."

No doubt the claimant could serve a few glasses of beer and being the owner could go sit down when he got tired. This is not "regularly performing work at a gainful and suitable occupation."

Dr. Bolton in his report of March 6, 1969 recites:

> "I feel that with his educational background and the present problems he has with his back that he is not employable in the kind of work that is suitable for him, and therefore must consider him to be totally permanently disabled."

The Hearing Officer should be affirmed.

/s/ Wm. A. Callahan, Commissioner.

WCB #69-1228 February 9, 1970

JOHN H. MARDIS, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether a 47 year old sheet metal worker sustained a permanent injury on July 22, 1968. In bending over to pick up some scrap steel, his back went out and he was unable to straighten up. The claimant had prior problems with kidney stones and hernias and it was first thought the claimant was having a recurrence of one of those conditions. Among the claimant's pre-existing problems was a spondylolisthesis which had been asymptomatic.

Pursuant to ORS 656.268, a determination issued finding the claimant to have sustained no permanent disability. Following a hearing, an award was made of 25 degrees for unscheduled disability against the applicable maximum of 320 degrees on the basis of comparing the workman to his pre-accident status.

The claimant seeks an increased award but one member of the Board has concluded that the claimant sustained no permanent disability and is dissenting to the decision of the majority which affirms the Hearing Officer.

The majority conclude and find that there is some permanent disability though essentially the claimant has returned nearly to his pre-accident status. The disability approaches the minimal range and does not exceed the award of 25 degrees allowed by the Hearing Officer.

The record reflects a workman whose earnings have actually increased. This does not preclude an award for true physical impairment but certainly eliminates any consideration of loss of earning capacity as a factor in the award. The claimant now wears a brace but this is not due to the injury per se but to protect the pre-existing infirmity from further traumatic insults.

The majority recognize that Dr. Groth has characterized the spondylolisthesis as pre-existing and has attributed any possible need for surgery as basically due to the pre-existing condition. To the extent the accident at issue contributed to the problem, it is proper to make an appropriate award of compensation.

The majority therefore affirm the award of the Hearing Officer.

/s/ M. Keith Wilson
/s/ Wm. A. Callahan

Mr. Redman, dissenting, concludes that at best the claimant had a temporary exacerbation of the underlying back degeneration. The accident at issue was such that the first diagnosis associated the problem with some of the claimant's other problems. The hernias, the kidney stones, the epidiymitis are all unrelated to this claim. The claimant demonstrates no disability attributable to the incident at issue. The incident merely alerted the claimant and the doctors to protect the back against future injury. It is manifestly unfair to charge employment with the degenerative back when employment has not basically contributed to the problem or even produced demonstrable impairment.

/s/ James Redman

WCB #69-978 February 9, 1970

WILLIAM C. ROWLAND, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of whether the 43 year old claimant sustained any permanent injury as the result of an unwitnessed accident of October 15, 1968, when the claimant allegedly slipped and fell on his back. He arose immediately and was able to work the remainder of the day but his back became stiff as he was resting that evening waiting for supper to be served. He was given conservative treatment and on November 15, 1968, returned to his former occupation of truck driving.

Pursuant to ORS 656.268, the claim was closed January 30, 1969 with a determination that the claimant had sustained no permanent disability. Request for hearing was not filed for nearly four months. Upon hearing, the determination finding no permanent disability was affirmed.

It is important to note the chronology of events. One month following the accident the claimant was able to undertake driving large truck-trailers. This ability was terminated on December 23, 1968, when the rig he was driving in Pennsylvania jack-knifed on an icy road, ran into a ditch and collided with an overpass. The impact was of sufficient violence to cave in the right side of the cab and generally cause in excess of $1,600 damage to the truck (Tr. 46). The claimant visited an unidentified doctor in Chicago. The claimant contends there is no evidence of injury from this accident. He does admit the Chicago doctor told him to get "on an airplane and go home fast as you can." When he got home he immediately went to a doctor with complaints of back injury but failed to tell the doctor about the truck crash he had just experienced. There is in evidence also testimony of an investigator of an admission by the claimant that he "sprung his back" in the Pennsylvania truck accident.

There is further question concerning whether the claimant has any real physical disability. The evidence from Doctors Edward Lebold and Dr. John White reflects a functional, non-physiological and hysterical type of complaint. Even if related, there is no evidence of permanence.

The total picture is one of a relatively minor industrial accident with only temporary disability followed by a highly traumatic non-industrial injury. If there is any cause and effect between trauma and claimant's functional, non-physiological and hysterical complaints, logic compels a conclusion that these symptoms arose from losing control of his truck on an icy road with a sliding jack-knifing course into the ditch and violently against the bridge. Until that episode he was able to handle one of these cross country juggernauts.

There is no basis for any conclusion that the Hearing Officer conducted the hearing or arrived at his decision on any bias. The Board from its review reaches the same conclusion as the Hearing Officer. The order of the Hearing Officer is therefore affirmed.

WCB #69-236 February 9, 1970

LORANCE D. YONKERS, Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue raised by the State Accident Insurance Fund with respect to whether additional compensation should have been allowed for unreasonable delay in payment of certain temporary total disability compensation. The claimant, by cross appeal, questions the adequacy of the award of permanent disability.

The claimant is a 33 year old miner whose right arm and shoulder were jerked violently by a pulley belt on February 27, 1967. Medical treatment was conservative and pursuant to ORS 656.268 the claim was first closed September 21, 1967, with a determination that the claimant's condition was medically stationary as of September 6, 1967, and that the claimant had sustained a disability of 14.5 degrees for a 10% loss of use of the arm applicable to an injury of February, 1967.

The closure proved to be premature and the claim was reopened upon the basis of the request of Dr. Gambee who advised that the shoulder condition required surgery.

The difficulty over the delay in compensation arose over a chain of circumstances. First the State Accident Insurance Fund was not informed until March 29, 1968 that surgery had been performed on January 4, 1968. On April 1, 1968, Dr. Gambee apparently executed a return postcard type of form sent to the State Accident Insurance Fund which indicated over the signature of the claimant, a checked answer "yes" to the question whether he was able to work. The Doctor indicated a date of March 18, 1968 as the date the claimant had been released to work though further treatment was of indefinite duration. On March 27, 1968, however, Dr. Gambee had forwarded to the State Accident Insurance Fund a rather complete two page report which indicated claim closure was still some 30 - 60 days away and also indicated the need to exercise until he could return to any type of heavy work. This was followed on May 20, 1968 by another letter from Dr. Gambee reflecting a very sore shoulder on May 17, 1968 from an attempt to return to heavy work setting a prospective claim closing at 60 - 90 days. The State Accident Insurance Fund submitted the claim to the Workmen's Compensation Board for redetermination pursuant to ORS 656.268. The Workmen's Compensation Board refused to make such a determination upon this state of the record and there is an indication the State Accident Insurance Fund either overlooked Dr. Gambee's report or overlooked the implications of the report.

In this instance the postcard of April 1 from Dr. Gambee was apparently utilized without regard to the information and opinions contained in detailed reports. When payments were instituted on August 2, 1968, they were not for the amounts past due and over a month later the compensation accrued was four months in arrears. Processing claims and providing compensation was the responsibility of the State Accident Insurance Fund in this case, (ORS 656.262). There are explanations and excuses but the delay in payment, in the final analysis, was unreasonable. The Board concludes and finds that the Hearing Officer properly decided that the delay in compensation was not in keeping with the responsibilities placed upon the State Accident Insurance Fund with

regard to prompt payment of compensation. The order of the Hearing Officer as to the assessment of increased compensation for unreasonable delay is therefore affirmed.

The last evaluation of permanent disability is the issue, as noted, raised by claimant's cross appeal. Pursuant to ORS 656.268, the disability was evaluated at 29 degrees on November 27, 1968 on the basis of a loss of use of 20% of the arm. The Hearing Officer found a loss of use of 35% of the arm. His order directed payment of 50 degrees of disability. Upon the disability found the degrees payable are 50.75 degrees.

The claimant seeks award of 100% loss of use of the arm which is completely unrealistic in light of the substantial use of the arm retained by the claimant. There is a limitation upon work directly overhead but the arm in most other respects is equal to the uninjured arm. The Board concludes and finds the evaluation of disability as properly converted to 50.75 degrees is proper.

The order of the Hearing Officer is therefore affirmed in all respects.

Counsel for claimant is entitled to the further fee of $250 for services upon review and payable by the State Accident Insurance Fund.

WCB #68-1888 February 9, 1970

LOYCE C. STALLINGS, Claimant.

Workmen's Compensation Board Opinion:

The above entitled matter involved claims of occupational disease with relation to claimant's knees and right elbow and also a claim for alleged occupational disease for loss of hearing. The varied medical problems required the creation of two separate Medical Boards. The findings of the Medical Board of Review with respect to the knee and elbow condition were heretofore filed October 8, 1969.

The Workmen's Compensation Board is now in receipt of the findings of the Medical Board of Review established to determine the issue of the loss of hearing. Copy of those findings are attached and by reference made a part hereof and declared filed as of January 30, 1970.

It appears the Medical Board has found the claimant to have sustained an occupational disase by long term acoustical trauma and has established the degree of hearing loss.

The Board normally limits its function in Occupational Disease matters following a Medical Board finding to the filing of the report. However, the instant claim was denied by the employer and by findings of the Medical Board is now compensable. Claimant's attorney fees are payable by the employer in such cases. The Workmen's Compensation Board assumes jurisdiction of the matter for the purpose of hereby ordering the employer to pay claimant's counsel the sum of $600 for services in connection with the matter.

The Board also notes that the Medical Board of Review found a compensable binaural hearing loss of 27.5%. Pursuant to ORS 656.214 (2) (g), the award, in degrees of disability, is 52.8 degrees for an award value of $2,904.

Pursuant to ORS 656.814 the findings of the Medical Board are declared final and binding upon the parties and no notice of appeal is attached.

Medical Board of Review Opinion:

On December 15, 1969 a Medical Board of Review was held as requested. Members of the Board were: Dr. Philip J. Huewe of Salem representing the patient, Dr. George E. Chamberlain of Portland representing the Workmen's Compensation Board, and Dr. David D. DeWeese of Portland chosen by Doctor Huewe and Doctor Chamberlain to be the third member of the Board.

Prior to examination of the patient, each member of the Board familiarized himself with the findings of the hearing which was held on October 8, 1969. We then discussed the matter with the patient, and he described his symptoms of hearing loss and ringing in each ear which have been present for about six years and which he feels are directly related to working for 22 years as a boxcar loader.

His ear, nose and throat examination was essentially normal except for hearing. An audiogram was done, and it showed a perceptive hearing loss in each ear, worse in the left ear.

The patient described his working conditions in detail, telling the approximate time that he worked inside a boxcar and the amount of time he worked outside a boxcar. We discussed the loud noise that is made by a flat piece of lumber striking the floor of the boxcar or striking another piece of lumber as it is loaded in. Because of the patient's history, his audiogram, and the fact that we have no good idea of the noise level involved, the Board recommended that sound level studies be made at the mill involved, both inside the boxcar and outside and using different types of lumber.

This study was undertaken on December 18, 1969 and the report was reviewed by each member of the Board. It has supplied the information we required and we have agreed on the following answers to the specific questions as the attached sheet will show.

/s/ George E. Chamberlain, M. D.
/s/ Philip J. Huewe, M. D.
/s/ David D. DeWeese, M. D.

WCB #69-1010 February 11, 1970

BOBBY GENE PHILIBERT, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of whether a 35 year old ripsaw operator sustained any permanent injury as the result of a low back injury while pushing a transmission onto a truck on May 22, 1968.

Pursuant to ORS 656.268, a determination issued finding there to be no permanent disability. Upon hearing, however, an award was made finding 32 degrees of disability against the maximum of 320 degrees applicable to unscheduled injuries.

Concurrent requests for review were received October 22, from the employer urging there to be no permanent disability followed on October 23 by a request from the claimant urging an increase in the award.

The claimant presents a history of back injuries dating from at least 1959 when he was struck on the head by a falling hoist. Compound fractures of back vertebrae were sustained in 1964 when struck by a large falling door. Five months before the accident at issue the claimant had testified in another matter to being advised by doctors to stop working due to leg and back complications. The record also reflects that some current symptoms were first noticed during current employment and that the claimant has had an additional non-industrial accident at home.

The Hearing Officer notes that he had reason to doubt the claimant's veracity. This, in turn, raises doubts about any medical opinion which might be favorable to the claimant since it may well be based upon inaccurate history from the claimant. The Board is particularly impressed by Dr. Serbu's report of October 22, 1968. Dr. Serbu notes that he had examined the claimant many times from a period dating 15 months before the accident at issue. Dr. Serbu concludes the condition has not changed in that period of time.

The Board concludes and finds that at most the claimant sustained a temporary exacerbation of his problem by the accident at issue and further finds that the claimant sustained no additional permanent injury. The order of the Hearing Officer is therefore set aside and the claimant is found to have no compensable disability associated with this accident.

The claimant raises the post hearing issue with regard to the fact that the order of determination found no temporary total disability due beyond February 1, 1969. This was affirmed by the Hearing Officer, but the employer had paid temporary total disability until May 6, 1969. Pursuant to ORS 656.268 (3), adjustments may be made where compensation has been erroneously paid for one class of disability.

Pursuant to ORS 656.313 any compensation paid pursuant to the order of the Hearing Officer is not repayable. The Board assumes the claimant is further overpaid with respect to both temporary total disability and permanent partial disability but that any such overpayment is not now recoverable. The situation certainly does not cast a further burden on the employer.

WCB #69-708 February 11, 1970

ELAINE E. PATRAW, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of whether the 49 year old former aluminum siding applicator has sustained a compensable aggravation of disabilities resulting from being struck on the head on April 8, 1966, by a section of wooden gutter which fell some 20 to 30 feet.

Pursuant to ORS 656.268, a determination order issued June 13, 1967 finding the claimant to have sustained a disability of 9.6 degrees against the then applicable maximum of 192 degrees for unscheduled disabilities. That determination was modified by a Hearing Officer who increased the award to 28.8 degrees on April 18, 1968.

The present proceedings were instituted by a claim for aggravation filed with the Workmen's Compensation Board on April 22, 1969 and also served upon the State Accident Insurance Fund seeking hearing before the Workmen's Compensation Board if the State Accident Insurance Fund did not reopen the claim. That request by the claimant was supported by a two page medical report of Dr. Richard Berg of April 15, 1969 which concludes with the following comment:

> "Under the circumstances, I think that her ability to carry out heavy work is very definitely curtailed at this time. I think that she can do light work such as Bar-Tending and probably could get along fairly well, but if she is forced to return to work she was doing before, I think she would have considerable difficulty and probably be unable to continue in that field."

No action was taken by the State Accident Insurance Fund and the matter went to hearing on June 9th and the proceedings were concluded October 8, 1969 upon receipt of the deposition of Dr. Berg. The State Accident Insurance Fund's resistance to the claim is based upon the conclusions of Dr. Rosenbaum that there is no causal relationship between present symptoms and the injury of April 8, 1966. The Hearing Officer found that an alleged loss of sensation over the right side of the body and right extremities was not shown to be related to the accident, but ordered the claim reopened on the basis that there was need for further medical care for conditions arising from the accident.

It would appear to the Workmen's Compensation Board that aside from applying the processes of a claim for aggravation the matter also comes within the duties imposed upon the State Accident Insurance Fund by ORS 656.245. Further medical services for conditions resulting from the injury for such period as the nature of the injury and process of recovery require are required to be provided even after a determination of disability.

The questions are thus reduced to whether the further conservative treatment suggested by Dr. Berg is required as a result of the injury and, if so, whether the failure of the State Accident Insurance Fund to provide such care constitutes the basis for assessment of attorney fees. If there is no other compensation payable claimant would be required to pay her own attorney fee based upon a percentage of the medical services obtained.

The Workmen's Compensation Board has been directing payment of attorney fees by the employer where a claim of aggravation is denied. Here there was a resistance to an allowance of the claim but no acceptance or denial. A claim in the first instance must be allowed or denied within 60 days. A claim of aggravation has been defined by the Courts as having the dignity of a claim in the first instance. The Board has applied to aggravation claims the same employer's responsibilities attached to original claims once the aggravation claim is supported by the required medical opinion.

The Board concludes and finds that the conservative medical care should have been extended to the claimant. If such care had been rendered before claim closure, no dispute would have arisen. The technical closure of the claim should not be used as a barrier to continued medical services, particularly in light of ORS 656.245. The Board also concludes under the circumstances that the assessment of attorney fees under the state of facts was proper. The order of the Hearing Officer is therefore affirmed.

Pursuant to ORS 656.382 (2), counsel for claimant is entitled to a fee payable by the State Accident Insurance Fund for services in connection with this review. No brief having been filed by counsel for the claimant, the fee is set in the sum of $150.

WCB #69-1417 February 11, 1970

JERRY L. DAWSON, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the causal relationship of an alleged neck and cervical spine injury to a compensable accident of August 19, 1968.

The claimant, a 27 year old laborer for a concrete contractor, sustained an admittedly compensable low back injury as a result of said accident when he and another workman lifted a heavy concrete form onto the bed of a truck.

The State Accident Insurance Fund, coincidental with its request for determination of the claim pursuant to ORS 656.268, denied responsibility for any injury involving the neck or cervical spine, basing the denial upon the lack of a causal relationship between such injury and the compensable accident.

The order of the hearing officer affirmed the State Accident Insurance Fund's denial of responsibility for the alleged neck and cervical spine injury, from which order the claimant has requested this review by the Board.

The Board attaches great weight to the initial medical report of Dr. Bryson, a chiropractic physician who treated the claimant during the period immediately following his accident. Although the claimant maintains that he commenced to experience symptoms in his neck and cervical spine within one or two hours following his accident, Dr. Bryson reported on August 20, 1968, that there were no symptoms referable to the cervical spine. Dr. Bryson subsequently confirmed the absence of symptoms in the cervical region at the time of his treatment of the claimant by his response to an inquiry in

July of 1969 to the effect that his records did not disclose any mention of a cervical injury at the time he treated the claimant.

The claimant's written report of occupational injury provided to his employer on August 22, 1968, described the location of his injury as being confined to the lower back. The claimant's injury report form contains no indication of injury to the neck or cervical spine.

Dr. Degge, the treating orthopedic physician, initially and during the course of his treatment of the claimant, diagnosed an apparent mild strain of the cervical spine. Following an extensive examination of the claimant just prior to the hearing with particular reference to his neck and cervical complaints and their relationship to the accident, Dr. Degge in a letter of September 25, 1969, essentially retracts and repudiates his earlier diagnosis. In this letter he acknowledges that his earlier diagnosis was based primarily upon the claimant's subjective complaints and was influenced by his desire to give the claimant the benefit of the doubt relative to the existence of a cervical strain, although the objective findings were essentially negative. It is noted that Dr. Degge had earlier been of the opinion that considerable emotional overlay was involved. His letter reports that the claimant continued to resist all efforts to bend his neck. He concludes that the nature and circumstances of the incident are inconsistent with an injury to the cervical area and finds it difficult to understand how a cervical strain of the severity claimed could be related to the initial injury, causing him to feel that the claimant is exaggerating his symptoms for the purpose of secondary gain.

The claimant was enrolled in the Physical Rehabilitation Center of the Workmen's Compensation Board for a period of approximately one month for evaluation. The reports of this facility, although containing a history of continuing complaints of headaches and stiffness in the neck, reflect no objective evidence of any injury to the neck or cervical spine.

The order of the hearing officer contains a succinct statement of the opinion of the hearing officer which is adopted by the Board as accurately reflecting its own opinion in this matter:

> "Neither the mechanics, the initial history, nor the objective physical findings are consistent with a causal relationship between the alleged upper injury and the accident."

The Board finds and concludes from its de novo review of the record and briefs that the alleged neck and cervical spine injury is not causally related to the the compensable accident of August 19, 1968.

The order of the hearing officer affirming the State Accident Insurance Fund's denial of responsibility for any injury involving the neck or cervical spine upon the ground of lack of causal relationship to the claimant's accident is therefore affirmed.

WCB #69-1048 February 13, 1970

ALTA M. LILES, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of whether a then 49 year old nurse's aide sustained any permanent injury as the result of an exacerbation of a pre-existing hiatal hernia on July 9, 1968. The claimant experienced a pain in her stomach while attempting to prevent a patient from falling.

The claimant has had the benefit of a surgical repair of the pre-existing hernia performed September 19, 1968. The claimant returned to her regular work March 15, 1969. Nearly three months later she underwent a hysterectomy, unrelated to the industrial claim.

Pursuant to ORS 656.268 a determination issued finding there to be no permanent disability from the accident. The claimant's condition with respect to the hernia was actually improved since the pre-existing hernia was surgically repaired. The Hearing Officer affirmed this finding of no permanent disability.

The provisions of ORS 656.214 (4) require that any rating of disability be made with reference to the claimant's pre-accident status. The pre-accident status of this claimant reflects a claimant with a symptomatic hiatal hernia. That hernia has now been repaired and the minimal symptoms which might possibly be causally related are no greater in degree than those the claimant had prior to the incident at issue. Any disability arising from the hysterectomy is of course not compensable.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has sustained no compensable permanent disability.

The order of the Hearing Officer is affirmed.

WCB #68-274 February 13, 1970

THEODORE W. COULTER, Claimant,
now Deceased, by Widow as Survivor.
Request for Review by Claimant's Widow.

The above entitled matter involved an issue of the extent of permanent disability sustained by a 53 year old tallyman as the result of an injury to his right foot incurred on June 15, 1966.

Pursuant to ORS 656.268 a determination order was entered finding the claimant to be entitled to an award of permanent partial disability of 25 degrees against the applicable maximum of 100 degrees provided for the complete loss of use of a foot.

Subsequent to the filing of a request for hearing and before the hearing could be held, the claimant died of causes unrelated to the injury involved in this matter. The claimant's widow now seeks to proceed with the hearing to urge the inadequacy of the award of permanent partial disability granted by the determination order.

The order of the hearing officer dismissed the proceeding upon the authority of the decision in the recent case of Fertig v. State Compensation Department, 88 Or Adv Sh 505 (455 P.2d 180) (May 28, 1969).

The review by the Board of the order of the hearing officer was continued pending the granting or denial of a petition for rehearing in the Fertig case. Rehearing has now been denied. Fertig v. State Compensation Department, 89 Or Adv Sh 75 (458 P.2d 444) (September 20, 1969).

The Board construes ORS 656.218 as interpreted by the decision in the Fertig case to condition the survival of permanent partial disability compensation upon the making of an award to the workman, and to limit the survival of permanent partial disability compensation to the award made to the workman prior to the time of his death.

The Board finds and concludes from its de novo review of the record and briefs that the claimant's widow is limited to the permanent partial disability compensation awarded to the claimant by the determination order entered prior to his death.

The order of the hearing officer dismissing the matter is therefore affirmed.

WCB #69-1254 February 13, 1970

THOMAS D. CAWARD, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 31 year old mechanic. The claimant had previously lost part of the right leg below the knee. The caterpillar tractor on which he was working on August 24, 1967, slipped and rolled forward crushing claimant's artificial leg. No new injury resulted to the leg proper but the claimant did sustain injury in the upper back and neck.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 16 degrees against the applicable maximum of 320 degrees. Upon hearing, this disability was increased to 48 degrees.

The claimant has returned to his former employment and has been able to perform his work satisfactorily. The claimant feels that he has some restriction upon his former abilities but this is not apparent to his supervisors.

The Hearing Officer expressed findings in terms of work "capacity." The choice of words may be largely one of semantics. In terms of "capacity" there is no obvious decrease in the claimant's ability to perform his work. An award must be founded upon permanent disability causally related to the accident at issue. It would be unrealistic to utilize the claimant's abilities at age 21 before he had lost his leg. The disability must take into consideration the previous loss of the leg and any associated problems. There apparently are some problems in the area of the neck which the doctor advises the claimant must "learn to live with." To the extent these symptoms constitute a disability they serve as the basis for an award.

The Board concludes and finds that any permanent disability attributable to this accident rates as little above minimal and does not exceed the 48 degrees heretofore found by the Hearing Officer.

The order of the Hearing Officer is therefore affirmed.

WCB #68-1656 February 16, 1970

WILLIAM SHARP, Claimant.
Request for Review by SAIF.

The above entitled matter involves issues of disability arising from a coronary occulusion sustained on October 7, 1966. After the claim was first denied, it was ordered allowed and, pursuant to ORS 656.268, a determination issued November 9, 1967 finding the condition to be medically stationary with a permanent disability evaluated as equal to the loss by separation of 50% of an arm.

The present proceedings were instituted nearly a year later on October 10, 1968, urging that claimant's partial disability was greater or, in the alternative, that the disability was totally disabling.

Some of the problems presented to the Board on review appear to be associated with the fact that the order was issued by a former Hearing Officer on the day before his employment was terminated. The matter had been pending for some months awaiting deposition of certain witnesses. It is not to the credit of the Hearing Officer or parties that the matter was thus delayed.

The Hearing Officer found the claimant to be permanently and totally disabled but his order significantly fails to relate such a condition to the accidental injury at issue.

There are two reports obtained by the claimant from a Dr. Boicourt under dates of October 14, 1968 and November 21, 1968. The first such report clearly indicates that the claimant is not precluded from regularly working at a gainful and suitable occupation by reason of his heart injury. The second report does not "clarify" anything. It is confusing and without reference to other problems is a poor effort to detract from the doctors' medical findings.

The Board is more impressed by the findings and conclusions of Dr. Semler whose reports of October 23, 1967 and December 17, 1968, present a good picture of the chronicle of events from the original claim closing to the present condition. The claimant now has a chronic lung disease, pulmonary emphysema and symptoms of a hyperventilation syndrome unrelated to the heart condition. The claimant is described as having recovered from the "heart attack."

The Board concludes and finds that the claimant is not precluded from working regularly at a gainful or suitable occupation as the result of the heart attack. The Board does find, however, that the disability is permanent and is partially disabling to the extent of 192 degrees, the maximum allowable for unscheduled disabilities at the time of the accident and compared to the

loss by separation of an arm. With substantial abilities remaining in both uninjured arms, there are many occupations the claimant may follow which would be impossible to perform had the claimant in fact lost an arm by amputation.

The order of the Hearing Officer is modified to reduce the findings of disability from permanent total disability to permanent partial disability of 192 degrees.

Claimant's counsel's fees remain at 25% of the increase in compensation based upon and payable from an increase in award from 96 to 192 degrees. Counsel for claimant is authorized to collect a further fee of not to exceed $125 from his client for services rendered on a review where the award of compensation is reduced.

WCB #69-1476 February 16, 1970

RICHARD BLAKE, Claimant.
Request for Review by Insurer.

The above entitled matter involves the issue of whether the delay in the payment of temporary total disability compensation constituted unreasonable delay and resistance to the payment of compensation entitling the claimant to increased compensation and the claimant's attorney to attorney's fees.

The claimant sustained a hernia requiring an operation and resulting in his being temporarily totally disabled for a period of three weeks for which compensation was timely paid. Following his resumption of employment for a short period, the claimant suffered a recurrence of the hernia on July 13, 1969, requiring a second operation, and resulting in his being temporarily totally disabled for a period of eight weeks. Payment of compensation for the first two weeks of disability from July 13th to July 27th was made on August 13th. Payment of compensation for the final six weeks of disability from July 27th to September 7th was made on September 8th.

The hearing officer found that the delay in the payment of the temporary total disability compensation constituted unreasonable delay and resistance to the payment of compensation and that pursuant to the provisions of ORS 656.262 (8) claimant was entitled to increased compensation and claimant's attorney was entitled to attorney's fees. The order of the hearing officer directed that claimant be paid an additional 25 percent of the temporary total disability compensation for the period from July 13, 1969, to September 7, 1969, and that claimant's attorney be paid an attorney's fee in the amount of $600.00.

The State Accident Insurance Fund requested a review by the Board of the order of the hearing officer. It contends that the claimant was derelict in his responsibility to give notice and provide information to the State Accident Insurance Fund relative to the necessity for the re-opening of his claim and for the payment of additional temporary total disability compensation.

ORS 656.262 (3) provides that a contributing employer is obligated to promptly report to the State Accident Insurance Fund all accidents and injuries

which may result in a compensable injury claim. ORS 656.262 (1) (2) provides that with the assistance of the contributing employer, the State Accident Insurance Fund has the responsibility of processing claims and paying compensation due claimants not later than fourteen days after the employer has notice or knowledge of a compensable injury. The State Accident Insurance Fund is charged with the knowledge possessed by the contributing employer and assumes the responsibility for unreasonable delay in the payment of compensation due the person entitled thereto, including liability for increased compensation and attorney's fees caused by the delay or inaction of an offending employer.

The Board finds from its review of the record that the employer had knowledge of a compensable injury claim requiring that it report the same to the State Accident Insurance Fund. As a result of the employer's failure to make the required report, the State Accident Insurance Fund in turn failed to fulfill its responsibility in the expeditious adminstration of the law relative to the processing of the claim and the payment of compensation. By reason of the delay in the payment of compensation, the claimant was required to seek the assistance of counsel to obtain the compensation to which he was entitled under the law.

Taking the record as a whole, the Board deems the delay in payment of compensation by the State Accident Insurance Fund, in light of the knowledge of the facts possessed by the employer, and the ensuing chain of circumstances, to constitute an unreasonable delay and resistance to the payment of compensation.

The Board acknowledges that the liability of the State Accident Insurance Fund for the increased compensation and attorney's fees in this matter reflects no criticism of its adminstration of the law but reflects the failure of its contributing employer to provide the assistance required for the proper administration of the law. The remedy of the State Accident Insurance Fund is through reimbursement from the offending employer.

The Board finds and concludes from its de novo review of the record and briefs that the State Accident Insurance Fund must be held to have filed within the time limited by statute to assume its responsibility for providing compensation to the claimant, and that the consequent delay in the payment of the compensation to which the claimant was entitled under the law is within the contemplation of the statute providing for increased compensation and attorney's fees for unreasonable delay and resistance.

Pursuant to ORS 656.382(2), the State Accident Insurance Fund is ordered to pay counsel for claimant the further sum of $250.00 for legal services in connection with this review.

The order of the hearing officer is affirmed.

WCB #69-951 February 18, 1970

DORIS THOMPSON, Claimant.

The above entitled matter involves an issue of whether the claimant has sustained a worsening of a back injury incurred July 27, 1967.

A determination issued May 15, 1968 pursuant to ORS 656.268 finding there to be no permanent disability.

A request for hearing was not filed until May 12, 1969. The matter was confined from time to time. No reply was made to three letters from the Hearings Division under dates of July 18, 1969, October 22, 1969 and December 9, 1969. The December letter advised the matter would be dismissed within 15 days in the absence of definite information with respect to proceeding with the matter.

No further information having been received the matter was dismissed on January 8, 1970.

A request for review was filed with the Workmen's Compensation Board February 9, 1970. It does not appear to have been served upon the other party as required by law nor does the record yet reflect any medical information to support any claim that the claimant's physical condition has worsened or become aggravated.

If the claimant's condition has in fact become aggravated and if a medical report is submitted containing medical opinion supporting such a finding the claimant will be entitled to a hearing and a decision on the present state of the record will not preclude such further application and hearing.

Upon the state of the record the Board concludes and finds that the matter was properly dismissed.

The order of the Hearing Officer is affirmed.

WCB #69-648 February 18, 1970

RANDY R. ROBERTS, Claimant.
Request for Review by Insurer.

The above entitled matter involves the primary issue of whether the claimant sustained a compensable low back injury. The State Accident Insurance Fund, as the insurer of the employer, denied the claim. The hearing officer found that the claimant's injury was compensable and ordered the claim allowed.

This matter also involves the issue of whether the denial of the claim was unreasonable and constituted an unreasonable refusal to pay compensation entitling the claimant to increased compensation. The hearing officer found that the State Accident Insurance Fund's denial of the claim was unreasonable and resulted in an unreasonable refusal to pay compensation and ordered the payment of increased compensation to the claimant.

The claimant is a 19 year old steel foundry worker. His duties involved the pouring of steel into molds, and the removal and loading of the heavy steel molds. As a result of this employment he commenced having occasional difficulty with his back in January of 1969. On February 12, 1969, he experienced severe low back pain, for which he received treatment at the employer's first aid station. He was absent from work on February 13 and 14, 1969. He notified his employer that his absence was due to an injury to his hip sustained while working on his automobile. On February 17, 1969, he again experienced severe low back pain during his employment which was treated at the first aid station. Thereafter on March 4, 1969, the claimant sustained the low back injury in issue while pulling on a steel mold with a hook.

The claimant subsequently disclosed at the hearing that he was married during his two day absence from work and that he claimed to have been injured while working on his automobile to better justify his absence from work.

The State Accident Insurance Fund based its denial of the claim upon its belief that the off-the-job injury claimed to have been sustained by the claimant to account for his absence from work in order to be married was the cause of his subsequent back problem, and asserts that the claimant's untruthfulness in this regard requires that his testimony be rejected as untrustworthy and incapable of sustaining his burden of proof relative to the compensability of his injury.

The hearing officer, who had the beneift of seeing and hearing the claimant during his testimony at the hearing, found that the claimant's candid acknowledgement of his mistake in failing to give the true reason for his absence from work, removed any possible basis to distrust his testimony, and concluded that his testimony was completely truthful and honest and entitled to be given full weight. The hearing officer's evaluation of the credibility of the claimant's testimony is entitled to be accorded great weight. Moore v. U. S. Plywood Corporation, 89 Or Adv Sh 831, 462 P.2d 453 (1969).

The record in this matter contains substantial evidence and tesimony in addition to the claimant's testimony, which supports and documents the occurrence of the accidental injury in issue and its causal relationship to his employment.

The Board finds and concludes from its review of the record and its own evaluation of the claimant's credibility, coupled with the weight which it gives to the hearing officer's evaluation of the credibility of the claimant, that the totality of the evidence overwhelmingly establishes that the claimant did sustain a compensable low back injury on March 4, 1969.

A determination by a hearing officer that the denial of a claim was in error and that the claim is compensable, does not as a matter of course support a finding that the denial was unreasonable and constitutes unreasonable delay or refusal in the payment of compensation justifying an award of increased compensation to the claimant.

To invoke liability for increased compensation pursuant to ORS 656.268(8) the evidence must establish either that there was no reasonable basis for the denial, or that there was a continued denial after subsequent knowledge disclosed the lack of justification for the initial denial, and that the

unreasonable denial of the claim resulted in unreasonable delay or refusal in the payment of the compensation to which the claimant was entitled under the law.

The record in this matter reflects that as a result of the claimant's deception with respect to the occurrence of an off-the-job injury in the repairing of his automobile, sufficient doubt was cast upon his subsequent injury in light of the information then available and actually possessed by the State Accident Insurance Fund at the time of its denial and up to the time of the hearing, to provide it with a reasonable, although erroneous, basis for its denial of the claim.

The Board finds and concludes that the denial of the claim by the State Accident Insurance Fund was not unreasonable and that the imposition of increased compensation under ORS 656.262(8) was not warranted.

Pursuant to ORS 656.386, counsel for claimant is entitled to a reasonable attorney's fee payable by the State Accident Insurance Fund for legal services rendered at the hearing and upon the review of a denied claim. The Board deems the sum of $950.00 set by the hearing officer as an attorney's fee for the legal services of counsel for claimant at the hearing to be greater than is either customary or reasonable after due consideration of the nature and extent of the legal services rendered in connection with the hearing, but that the sum of $950.00 is a reasonable attorney's fee for the legal services rendered by claimant's counsel in connection with both the hearing and this review. A reasonable attorney's fee payable by the State Accident Insurance Fund to counsel for claimant for legal services rendered at the hearing and at this review is set by the Board in the sum of $950.00.

The order of the hearing officer is therefore modified to affirm the allowance of the claim, to reverse the award of increased compensation, and to modify the award of attorney's fees by setting the sum of $950.00 as a reasonable attorney's fee payable by the State Accident Insurance Fund to counsel for claimant for legal services rendered at the hearing and the board review.

WCB #69-585 February 18, 1970

RAY D. NORRIS, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a then 27 year old green chain worker as the result of injury to his low back incurred February 21, 1963, when the claimant was jerking on a piece of lumber. The diagnosis was of acute lumbosacral sprain superimposed upon a pre-existing spondylolisthesis.

The claim was allowed by the then State Industrial Accident Commission and has been adminstered in succession by the State Compensation Department now known as the State Accident Insurance Fund. The back has been the subject of three surgeries without obtaining successful fusion of the lower lumbar-sacral segments of the spine.

The first evaluation of disability was made by the State Compensation Department finding an unscheduled disability equal to the loss of use of 60% of an arm. The claimant having later elected the procedures of the 1965 Act, the matter was submitted pursuant to ORS 656.268 and a determination issued finding the disability to be equal to the loss of use of 65% of an arm. Upon hearing, the award was increased to 145 degrees, the maximum award applicable for unscheduled injuries as of the date of the accident.

Upon review, the claimant asserts that the award should be increased to a permanent and total disability alleging that the claimant at age 34 is now precluded from ever again being able to work regularly at gainful and suitable work.

The Board recognizes that the medical experts have been unable to obtain a successful stabilization of the lower spine and that the claimant is faced with living within the limits imposed upon him by the strain imposed upon his degenerative spine. The Board also recognizes that with the passage of time the claimant may have adjusted himself mentally into accepting a lifetime without constructive work. The question becomes simply one of whether a claimant who is able to do light work is entitled to be classified as totally disabled because he is motivated not to work.

The contrast in interest and physical capabilities becomes more apparent when the subject matter is one of hobbies and sports as contrasted to work.

A further factor is one of alleged functional illiteracy. A claimant asserts he cannot do more than write his name though he had been advanced to the seventh grade before leaving school. Regardless of whether the claimant's training is thus limited, there are facilities available to enable such persons to learn and function in work situations. One of these facilities is known as the Laubach Clinic.

The approach to vocational rehabilitation to date with this claimant has not succeeded. This does not justify rating the disability as total when the claimant obviously has some remaining work capabilities. These, as noted, are more obvious when the claimant discusses certain things he does or would like to do.

The Board concludes and finds that the claimant sustained the maximum unscheduled permanent partial disability. The order of the Hearing Officer is affirmed.

The matter is, however, referred to Mr. R. J. Chance, Director of the Workmen's Compensation Board, to initiate a comprehensive program toward vocational rehabilitation and placement, including, if necessary, reference to a facility such as noted for the purpose of augmenting the claimant's basic deficites in ability to communicate.

WCB #68-1036 February 18, 1970

ERNEST W. MARTIN, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of whether a 30 year old meat cutter sustained a compensable injury to his low back on January 11, 1968, while lifting a case of bacon.

The claim was denied by the employer but ordered allowed by the Hearing Officer on January 8, 1970.

Request for review was filed with the Board by the employer on February 9, 1970.

The request for review was withdrawn by letter filed February 11, 1970.

There being no other matter before the Board, the request for withdrawal is allowed and the matter is therefore dismissed.

WCB #69-700 February 18, 1970

JAMES H. LOWERY, Claimant.
Request for Review by SAIF.

The purpose of the order of remand issued in the above entitled case on January 30, 1970, was to require the introduction of further evidence and in light of the entire evidence from both hearings to have such further order issue as may be justified by the totality of the evidence.

The record of the first hearing is a part of the record to be considered by the Hearing Officer and the parties are not required to re-submit evidence admitted at the first hearing.

The Hearing Officer is at complete liberty to make and enter whatever order he may deem justified by the record as amplified upon further hearing.

WCB #69-1779 February 19, 1970
WCB #69-1756
WCB #69-1757

MARY EVANS, Claimant.
Request for Review by Claimant.

The above entitled matter appears at best to involve a question over compensability of a minimal condition in early of June of 1969, when the claimant had some trouble with both breasts swelling. A notice of injury was signed by the claimant June 19, without specifying a date of injury. The claimant visited a Dr. Gilbert, D.C., in Cedarville, California on June 13, 1969.

According to the claimant (Tr 26), she was given some pills which she took for three or four days. She worked until June 17th and the testimony at Tr 19

indicates any inability to work stems from a back injury which has been allowed.

There is no notice or other document by the claimant setting forth the breast injury as June 4, 1969, but the State Accident Insurance Fund denied the claim as having been made for a June 4th injury. The claimant's testimony at Tr 26 places the matter at "the first part of June."

There are two claims for back injuries allegedly incurred on October 30, 1968 and May 7, 1969. Both of these claims were allowed but all three claims were involved at the hearing. The Hearing Officer ordered the State Accident Insurance Fund to reopen both back claims and, as noted, the only issue is the Hearing Officer denial of the very minimal matter of whether the claimant compensably injured her breasts.

The claimant asserts on review that it is important when the claimant was injured or whether she advised the employer of the date. One problem with her breast claim is that she relies upon a visit to Dr. Gilbert, D.C., of Cedarville, California on June 13, 1969. The only medical evidence with respect to that visit is a history of an accident of May 7, 1969, which recites, "hurt back and also chest hurts." That report refers to claim SC 182964 which was allowed by the State Accident Insurance Fund. It hardly seems reasonable that Dr. Gilbert's report of July 3rd which supports a claim of an accepted claim of May 7th should be proof of an injury of June 4th when no mention of a June injury is included.

The Board hesitates to call attention to further confusion in dates, but the notice of injury signed May 8, 1969, alleges an injury "approx 12 weeks ago." Did the claim of alleged May 7th actually originate 12 weeks before? The claim was accepted, as noted, as an accident of May 7th. Dr. Marshall reports an injury of May 2, 1969 with first treatment on May 5, 1969, further adding to the confusion since none of the claims set this as a date of injury.

Whatever claim the State Accident Insurance Fund denied was for a minimal condition which would nevertheless require a medical substantiation. The swelling of both breasts by a woman who has been taking hormones "all her life" is not a condition necessarily associated with a straining type trauma.

The entire matter is trivial in light of the fact that her real problems associated with compensable claims are being compensated. The request for review probably is motivated by penalties accompanying allowance of a denied claim.

The majority of the Board therefore conclude and find that any claim for swelling of the breasts was properly denied. The order of the Hearing Officer is affirmed.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan dissents for the following reasons:

> At the time of the hearing, the claimant had an open claim from an injury in May, 1969.

The claimant worked until June 11. She sought medical treatment from Jack Gilbert, M.D., June 13, 1969. Dr. Gilbert's report (Ex. C 2) gives the claimant's statement to him as: "Lifting boards and pulling on box rejects and hurt back and also chest hurts." Dr. Gilbert's diagnosis was: "Severe lo-back strain. Muscle strain left chest wall." Under remarks the doctor recited: "We are requesting a consultation on this patient." Claimant was referred to Dr. Donn McIntosh, an orthopedist.

When the claimant submitted a form 801 to the employer, item 9 was filed in: "Breasts swell both." At item 21 claimant wrote, "Using my arms to lift strained the muscles leading into my breast."

Apparently the Department, now the State Accident Insurance Fund, seized upon the words: "Breasts swell both," and denied the claim, overlooking the claimant's statement, "Using my arms to lift strained the muscles leading into my breast." The claimant is not competent to diagnose her injuries. Diagnosis of injury is for the physician. His diagnosis was: "Severe lo-back strain. Muscles strain left chest wall." This would be perfectly consistent with the claimant's statement of using her arms, plus the injury of May, 1969, a short time earlier. Dr. Gilbert reported that the injury was serious enough to prevent working and that claimant required further treatment. He also referred claimant to an orthopedist. There is not one word in the medical reports admitted into evidence that either Dr. Gilbert or Dr. McIntosh treated claimant for anything that was not reasonably related to an on-the-job injury.

In this matter the denial by the Department was confusing, see exhibits C 3 and C 4. The first denial order was issued August 11, 1969 for an injury of June 4, 1969. The reason given was:

> "The Department having been advised claimant suffered no disability and that the injury required no medical treatment, claim is not compensable."

How the Department could arrive at that conclusion after receipt of Dr. Gilbert's report is a mystery.

The matter was further confused when, under date of August 12, 1969, one day after the order of denial described above, the Department issued another denial order. <u>There is no date of injury</u>. The claim number may have been legible on the copy sent to the claimant, but on the copy presented as Defendant's Exhibit C 4 the claim number is illegible. Even if the claim number was legible the claimant could not be expected to know from the number which claim was being denied. The Department has an obligation to provide more explicit identification when a denial is made.

The reason given for denial was the Department's stock statement which really tells a claimant nothing:

> "There is insufficient evidence that said workman sustained accidental personal injury within the provisions of the Oregon Workmen's Compensation Law."

When the claimant received the denials she did as any workman could be expected to do. She sought the services of an attorney because her claim had been denied. The denial prompted the hearing. See request for hearing.

At the hearing the attorney for the State Accident Insurance Fund emphasized the "breats (sic) swell," ignoring the muscle strain, as also reported by the claimant. Apparently there was too much attention drawn to the "breast" and the Hearing Officer was impressed to such extent that he erroneously upheld the denial. The Hearing Officer should be reversed as to the affirmation of the denial. The claimant's attorney fee should be ordered paid by the State Accident Insurance Fund for an improper denial. The Hearing Officer was correct in ordering medical treatment any payment for temporary total disability from June 13, 1969.

/s/ Wm. A. Callahan.

WCB #69-940 February 19, 1970

LEROY J. VOELKERS, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issues of the extent of scheduled and unscheduled permanent disability sustained by a 38 year old construction laborer and carpenter's helper as a result of an accidental injury on January 11, 1968, when the scaffold on which he was working collapsed, dropping him a short distance to the ground. His injuries were caused when the end of the joist he was carrying came down on top of him striking his left foot.

The determination order entered pursuant to ORS 656.268 granted the claimant an award of permanent partial disability of 15% loss of the left leg, or 22.5 degrees of the 150 degrees provided for the complete loss of a leg. This determination of the claimant's permanent disability was affirmed by the order of the Hearing Officer.

The claimant asserts on review that the permanent disability to his left leg is substantially greater than that awarded and that he has additionally sustained permanent disability to his back for which he is entitled to an award of compensation.

The initial injuries to the claimant's left foot were of substantial severity, consisting of compound, comminuted fractures of the mid-shafts of the second, third and fourth metatarsal bones, and severe crushing of the soft tissues. As a result of the surgical repair of his foot, the claimant has made a satisfactory recovery enabling him to resume his former strenuous employment as a construction laborer and carpenter's helper. Disability evaluations are predicated upon the resultant loss of physical function after the workman has been restored as near as possible to his former condition as a self-supporting and able-bodied workman, rather than upon the severity of the initial injury. Although it is recognized that the claimant has sustained some adjustment and tolerance in the performance of his work, nevertheless he retains extensive use of his left foot and an essentially full work capability.

In addition to the injuries to his left foot the claimant sustained some injury to his left knee as a result of which there is some residual disability which appears to consist of a mild chronic synovitis or arthritic condition in the knee joint. This impairment of the knee serves as the basis upon which the award of permanent disability is made upon the loss of a leg.

The initial diagnosis of the claimant's injuries noted a slight strain of the lumbar spinal muscles and ligaments. No further mention of the back condition is found in the medical reports. There is no indication in the medical reports that the strain of the back muscles and ligaments required treatment or resulted in permanent disability to the back. Almost a year after the claimant resumed employment he indicates that he commenced experiencing low back pain, resulting in the issue of unscheduled disability involving his back being raised for the first time at the hearing. The claimant sustained a low back injury four or five years earlier for which he received an award of permanent disability equal in degree to the loss of 40% of an arm. In January of 1969 the claimant was involved in an automobile accident as a result of which he was fortunate that his injuries were limited to various cuts and bruises and a cracked rib. The nature of the injury to his back, the prior history of back injury, the subsequent automobile accident, the absence of medical evidence other than the initial diagnosis, and the length of time that elapsed before his back became symptomatic, are all factors which preclude finding that the accident in issue has produced permanent disability to the claimant's back.

Pursuant to the stipulation of the parties and the evidence adduced at the hearing, the order of the Hearing Officer amended the determination order to eliminate the award of compensation for temporary partial disability from October 25, 1968, to April 29, 1969. The Board also finds and concludes from its review of the record that the claimant was not entitled to the award of temporary partial disability.

The Board finds and concludes from its de novo review of the record and briefs that the claimant has sustained no compensable permanent disability to his back, and that the 22.5 degrees awarded to the claimant by the determination order and affirmed by the order of the Hearing Officer correctly evaluates the claimant's permanent partial disability to his left leg.

The order of the Hearing Officer is therefore affirmed.

WCB #68-1998 February 19, 1970

The Beneficiaries of
DWIGHT ALLEN, Deceased.

The above entitled matter involves an issue of the compensability of a fatal myocardial infarction sustained by a lumber mill sawyer on August 4, 1968.

The claim was denied but upon hearing, the claim was ordered allowed.

The hearing was conducted in two separate sessions and transcript of the first session has been obtained. The records of the second session were lost in a fire which destroyed some of the reporter's records.

The matter is therefore incomplete and cannot be reviewed by the Board.

Pursuant to ORS 656.295 (5), the matter is remanded to the Hearings Division for such further hearing as may be required to re-establish a record and for such further order as may be warranted upon the evidence following further hearing.

Pursuant to Barr v. SCD, Or App 90, Or Adv Sh 55, 463 P.2d 871 (1970) no notice of appeal is appended.

WCB #69-109 February 20, 1970

FRANK CORRADINI, Claimant.

Workmen's Compensation Board Opinion:

The above entitled matter involves the issue of whether the claimant incurred a compensable occupational disease from working in close quarters and breathing a heavy concentration of hay dust over a period of time.

His claim was denied by the State Accident Insurance Fund as insurer of the employer. Upon hearing the claim was ordered allowed. Pursuant to ORS 656.808 the order of the Hearing Officer was "rejected." A Medical Board of Review was then empanelled.

The Board is now in receipt of the findings and conclusions of the Medical Board of Review, copies of which are attached and by reference made a part hereof and declared finally filed as of February 9, 1970. The findings in this instance consist of a three page report of January 21, 1970 by Dr. A. Dale Brandt, with answers to the questions to ORS 656.812 attached; also a two page report of January 21, 1970 by Dr. Jules Bittner whose answers to the questions of ORS 656.812 are embodied in his report; and also, a six page report from Dr. Augustus Tanaka under date of January 13, 1969.

Though the function of the Workmen's Compensation Board appears to be primarily ministerial, it is the interpretation of the Workmen's Compensation Board that the Medical Board of Review has found the claim to be compensable without residual permanent disability.

Pursuant to ORS 656.814 the findings of the Medical Board are declared final and binding.

No notice of appeal is deemed applicable.

Letter of Doctor Bittner:

Gentlemen:

This 58-year-old man states he was last well in the summer of 1968 at which time he was employed by the Vale Livestock Company. He was feeding cattle. He was using a tractor with a lift dump in front and was unloading haydust, which is essentially chopped hay (very fine material) and working inside a shed. He would fill the loader on

the tractor, then dump it into a truck and drive the truck to the mangers and unload it on an automatic feeder basis. However, during this time, the dust was very thick in the cab of the truck. As he was loading the truck, he would make eight or nine trips into the building. He distributed four truckloads in the morning and four again in the evening, accounting for approximately 50-60 trips into the dusty area per day.

Over a three-to-four-month period, his symptoms appeared and were those of wheezing, especially at night, and the raising of yellow phlegm, six to eight tablespoons a day. He also sorted cattle. At one time he was hit by a cow in the right shoulder and this injured his back, causing him pain in the region of the cervical spine. He consulted Doctor Yoguchi, a chiropractor in Ontario. He tried the match test and at 3-4 fee was unable to blow the match out. He was then sent to Dr. Maulding in September of 1968. After checking and treating him for a short period, he referred him to Dr. Flanagan in January of 1969. When he would cough he would spit up the alfalfa dust. He was advised he had walking pneumonia which was from the dust. Dr. Flanagan treated this man with medications including Iodine preparations and more recently Choledyl and his breathing has improved ever since he started this therapy. He has seen Dr. Reed, a chest specialist in Caldwell, as well as Dr. Tanaka.

He states he worked 12 to 18 hours a day doing ranch work and has for over 20 years. He has never had any trouble breathing. He has since had exposure to hay and it has not bothered him because it was baled hay. He had no whooping cough as a child. He did have measles. He has had his appendix removed and his left leg fractured.

At the present time he states he could load a 100 bales of hay if it became necessary and his breathing would be all right. It is only his back which gives him trouble. This is the area which was kicked by the cow, and Dr. Baranco stated this triggered an arthritic process in his neck. His right shoulder and the right side of his neck aches occasionally at night. He has had several normal electrocardiographs and numerous breathing tests.

He had a cold in June and this caused him some difficulty with his breathing. Blood pressure was 134/80. Pulse 88 and regular. Respirations 18. Head and neck normal. Neck veins were distended but did not fill from the bottom. There was no wheeze. He had a few coarse rales at both bases which tended to clear with deep breathing or coughing. Diaphragmatic excursion was adequate. Chest was slightly increased in its anterior-posterior diameter. Heart tones were normal, no murmurs. Heart was of normal size, sinus rhythm. Thyroid negative. Carotids normal. Ears, nose and throat otherwise negative. Abdomen negative. Genitailia normal. No clubbing of the extremities. Neurological survey within normal limits. Rather marked tenderness in the cervical spine area as well as in the right supraclavicular and superscapular areas.

Discussion: In response to the history and physical examination, and the five questions that are to be answered, we feel that (1) The claimant does suffer from an occupational disease; this was exposure to chopped haydust. (2) This was contracted three or four months prior to his

consulting Dr. Yoguchi, a chiropractor in Ontario, and continued his work period. The exact termination of the illness cannot be stated with any degree of certainty. (3) This did arise out of his regular employment or industrial process; that of working in and around large concentrations of haydust and a closed environment. (4) This disease was disabling to the claimant while he was exposed to it and for a time until his lungs had recovered from the allergic response. (5) The patient was totally disabled during the period of time he was exposed and unable to work; however, there is no residual permanent disability. There could have been some aggravation of a pre-existing disease, pulmonary emphysema; however, it is impossible to state whether there has been any permanent worsening of the emphysema because of the bout of occupational disease arising out of his exposure to the haydust. Most certainly, in the future, he should not be permitted to work in the closed environs where there is exposure to such noxious agents.

/s/ Jules F. Bittner, M. D.

WCB #69-1587 February 24, 1970

QUINTON FRAZIER, Claimant.

The above entitled matter involves a claim for low back injury alleged to have been sustained February 28, 1967.

The alleged incident was unwitnessed and it is disputed whether the claimant orally advised the employer shortly following the incident.

It is without dispute that no written notice of claim was made to the employer for over two years.

ORS 656.265 bars a claim unless the notice is given within 30 days. There are several exceptions but it does not appear that the employer had actual knowledge of a compensable injury, or that any payment of compensation was begun, or that the notice was given within a year and it further appears that the employer was prejudiced in defense of the matter by the untimely delay.

It further appears that pursuant to ORS 656.319(1) the claimant had lost all right to hearing one year following the alleged accident. The claimant contends that the employer's denial of an untimely filed claim gives rise to a hearing upon the merits in light of ORS 656.319. If the employer had not given the claimant a denial, it is quite clear that the claimant would not have been entitled to a hearing.

In any event a hearing was granted and on December 16, 1969, the Hearing Officer found on the merits that the claimant had not sustained a compensable injury. The Board received a communication from the claimant on January 9, 1970 in which the claimant related that he wanted another hearing. Against the possibility the communication was in the nature of a request for Board review, the Board on January 14, 1970, advised the claimant of the procedures required to obtain such review. Nothing further has been heard.

The Board concludes and finds that the claim was barred for failure to give timely notice, that the claimant had lost the right to hearing and that the claimant failed to meet the procedural requirements to obtain a Board review in any event.

The order of the Hearing Officer, for the reasons set forth in his order and for the further reasons herein set forth, is therefore affirmed and the matter is hereby dismissed.

WCB #69-434 February 25, 1970

The Beneficiaries of
ALBERT TOMHAVE, Dec.
Request for Review by Beneficiaries.

The above entitled matter involves the issue of whether there was a medical causation between the decedent's work efforts and his death from an occlusion of his coronary arteries on January 7, 1969.

The decedent had a pre-existing heart condition which was characterized by one of the cardiologists as being so close to some terminal event that it was basically immaterial what the decedent did or did not do. The decedent expired while working in a 30 inch culvert loosening soil with a small hand type jackhammer.

The Board is cognizant of the Supreme Court's words of caution concerning line between medical possibilities and probabilities. The Board recognizes that in a proper case a claim supported by no more than an expert's possibility may be allowed. Medical experts in this case have honestly recognized the possibility of some causal relation. Their combined opinions, however, do not reflect that they believe there was in fact a causal relation. There are many variations of "heart attacks." The compensability of one may have no bearing upon another. The particular mechanics of the attack in this case distinguishes the case from cases more dependent on stress.

The Board in this instance has carefully weighed the evidence from Dr. Elmer Zenger, a general practitioner; Dr. Wesley Jacobs, a cardiologist; and Dr. Donald Sutherland, also a cardiologist. The Board concludes and finds, as did the Hearing Officer, that the weight of the evidence in this case supports a finding that the decedent's death was not causally related by the work effort. The work effort did not materially contribute to the fatal hemorrhage.

The order of the Hearing Officer is therefore affirmed.

WCB #69-321 February 25, 1970

CLYDE R. STAIGER, Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of disability sustained by a 49 year old logger when struck across the back, neck and head by a limb on November 28, 1967.

Pursuant to ORS 656.268, a determination issued February 6, 1969, finding the claimant's condition to be stationary without residual disability. Upon hearing, an order issued finding the claimant to be so badly disabled from the injury that he can never again engage regularly at a suitable occupation. There was no contention in the request for hearing that the claimant was thus disabled.

Though the State Accident Insurance Fund requested a review, the Board has not been favored with any briefs. The Board is unable to reconcile the hearings proceedings with either the transcript or the Hearing Officer order. The index of exhibits reflects defendant's exhibits 1-22 inclusive, claimant's exhibits 1-7 inclusive and Hearing Officer exhibit 1. The record contains a Hearing Officer exhibit 2 which appears to have been received by the Hearing Officer more than two months following the hearing without agreement of the parties and without further hearing. The Hearing Officer also relies for some of his conclusions on a letter from a Dr. Kjaer of September 18, 1969, which is not in the transcript and appears to be another excursion by the Hearing Officer from the regularity of hearings procedures.

The Hearing Officer who issued the order terminated his services the day following the order. The order is one of several so issued by the former Hearing Officer in apparent haste and disregard of the rights of the parties.

Because of the apparent irregularities in the procedures the Board has no alternative but to remand the matter as improperly heard.

The Board notes that one of the issues is the extent to which some symptoms are real. The claimant carries his left shoulder high with his head tilted toward that shoulder. A number of doctors have described this posture by the claimant as involuntary. The Board notes in the report of Dr. Paxton of November 12, 1968, Dr. Paxton is associated with the Division of Neurosurgery of the University of Oregon Medical School. The doctor's physical findings do not support the claimed limitations of motion. Furthermore, the doctor made some observations of this claimant as he left the doctor's office as follows:

> "It is noteworthy that when this patient left my office, which is on the second floor, he walked directly down the sidewalk to a fountain which squirts water into the air to a height of approximately 25 feet. The patient and his wife walked arm in arm past this fountain to the left side and as they became exactly parallel to the fountain, his wife spoke to the patient and both of them turned the head up and far to the right side and looked at the water as it came beautifully up into the air. He then brought his head down into a normal position and appeared to be moving it during the course of the conversation in an entirely normal fashion and went on to his vehicle."

The weight of the evidence under these circumstances does not warrant any conclusion of permanent disability.

The matter, as first noted, must be remanded as being improperly heard. Upon further hearing the Board requests that further evidence be adduced on the extent of claimant's physical disabilities, upon the psychiatric implications of the case and, assuming Dr. Paxton's observations are accepted, the opinions of the other doctors with respect to whether the symptoms represent any disability causally produced by the accident.

The order of the Hearing Officer is therefore set aside and the matter is remanded to the Hearing Officer for further hearing and for such further order as the totality of the evidence from both hearings shall warrant.

No notice of appeal is deemed applicable.

WCB #68-2099 February 25, 1970

EUGENE L. LYMAN, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of whether a 31 year old workman sustained a compensable injury to his back and left arm on October 31, 1968. The claimant had a prior compensable injury to the lower cervical and upper and middle dorsal areas of the back in September of 1966.

The claim was denied by the State Accident Insurance Fund and this denial was upheld by the Hearing Officer.

Upon review, claimant's counsel urged that a medical report known as WCB Form 827 had been submitted to the State Accident Insurance Fund by a Dr. Colgan, a chiropractic physician who has treated the claimant for periods prior and subsequent to the alleged incident of October 31, 1968.

The Board arranged for oral argument and counsel for the State Accident Insurance Fund concedes that it has such a report and that the report is in such form that some question exists whether all entries are those of the doctor. The State Accident Insurance Fund also urges that the claimant had the burden of making a prima facie case and should not now be heard to complain of his own failure to produce convincing evidence.

The Board notes that the absence of any corroboration concerning the claimant's visit to his doctor on November 1, 1968 was a substantial factor in making the decision to uphold the claim denial. The destiny of a compensation case, though adversary in nature, is not entirely dependent upon the skills of the adversaries. Omissions are not fatal and the Workmen's Compensation Board by ORS 656.295 may remand a case for further evidence taking if a matter has been incompletely developed or heard.

The only report from Dr. Colgan is under date of February 26, 1969. This report is quite unresponsive to what history Dr. Colgan obtained on November 1, 1968 and is of no value from a standpoint of whether there was evidence of a new injury at that time.

The controversy is over a Form 827 purportedly executed by Dr. Colgan. The Board, in remanding the matter, is primarily concerned with what Dr. Colgan observed and was told on that date. The best evidence would be the sworn testimony of the doctor. In compensation practice the written reports are commonly accepted without examination of the doctor. Without either sworn testimony or a copy of the report in question the Board deems the matter incompletely heard. A critical link in the chain of circumstances is missing. It is possible that the report or testimony of Dr. Colgan will not affect the outcome of the case. With the report or testimony, however, the matter will have been completely heard.

The matter is therefore remanded to the Hearing Officer for taking further evidence with particular directions to obtain the testimony or report of Dr. Colgan with reference to the claimant's visit to the doctor on November 1, 1968. The Hearing Officer is further directed to issue such further order as the totality of the evidence from the first hearing and further hearing shall warrant.

Pursuant to Barr v. SCD, Or App 90, Or Adv Sh 55, 463 P.2d 871 (1970), no notice of appeal is attached.

WCB #68-1086 February 26, 1970

JAMES MELVIN JOHNSON, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a now 53 year old dump truck driver on July 19, 1966, in a headon collision between the dump truck being driven by claimant and a log truck.

A previous hearing ruled adversely to claimant's contentions of allegedly related low back and neck symptoms. No appeal having been taken from an order of June 21, 1968, it was inappropriate to attempt to re-litigate those issues in this proceeding.

The issues were restricted to disabilities of the right hand and right leg. The Hearing Officer found there to be no disability in the right leg.

Pursuant to ORS 656.268, a determination had issued finding a disability of 15% loss use of the forearm (18.15 degrees). This was increased to 25% of the forearm (30.25 degrees) by the Hearing Officer.

The claimant has requested a review but has not favored the Board with a brief or any representation with respect to claimant's position in the matter.

In making a de novo review, the Board in each instance makes a de novo determination. A claimant seeking an increased award or an employer seeking a decreased award opens the merits of the matter for reconsideration. If the Board concludes on a claimant's appeal that the disability is less than awarded, the Board will so find. If the Board concludes on an employer appeal that the award is inadequate, the Board will so find. The Board deems this authority

to be inherent and it is immaterial whether a modifying order issue on review or pursuant to the continuing jurisdiction of the Board vested by ORS 656.278.

The Board in this instance notes the request for review was made by the claimant. However, the Board does not concur with the findings of the Hearing Officer that the original determination was in error.

Dr. Thomas Edwards is the author of the most recent medical examination under date of April 19, 1969, following an examination of April 14th, Joint Exhibit 26. Dr. Edwards reports "rather little in the way of abnormality; such as deformity, any definite weakness or loss of sensation or restriction of motion" with reference to the forearm. The doctor suggests "a mild degree of permanent partial disability" with regard to the right hand.

The testimony of the claimant with respect to the hand was so general and vague that it should hardly have been substituted for the careful clinical report of Dr. Edwards. It is obvious that the claimant considered the hand a minimal part of his problem. The Hearing Officer was precluded from reopening other areas and appears to have increased the award on the forearm accordingly, but without evidence supporting a loss of use of 25% of the member.

The order of the Hearing Officer is accordingly set aside and the claimant's permanent disability is determined to be not in excess of the loss of use of 15% of the right forearm.

Pursuant to ORS 656.313 no compensation paid by virtue of the Hearing Officer order is repayable.

WCB #69-1657 February 26, 1970

JOHN E. CARROLL, Claimant.
Request for Review by SAIF.

The above entitled matter involves issues of whether the claimant sustained a compensable aggravation of injuries sustained April 17, 1967 and, if so, whether the claimant is entitled to have his attorney fee paid by the State Accident Insurance Fund on the basis of a claim denial rather than the fee being payable from increased compensation.

The 54 year old business manager of the Hod Carriers Union was knocked down when struck on the rear of his hard hat and shoulder by a falling 2 x 12 plank. The original diagnosis was a soft tissue strain of the cervical and upper dorsal area and contusion of the left hip. An inguinal hernia was repaired.

Pursuant to ORS 656.268, a determination issued April 22, 1968, finding there to be no residual permanent disability.

A request for hearing with respect to an aggravation claim was filed September 12, 1969. The State Accident Insurance Fund had been advised by Dr. Marxer on July 18, 1969 of a diagnosis of cervical arthritis and recommendation of physical therapy. On August 12, Dr. Marxer further advised the State Accident Insurance Fund that the claimant was being directed to stop

working for a week on a trial basis. The State Accident Insurance Fund was also provided with a four and a half page detailed report by Dr. Marxer dated September 16, 1969 with copy provided to the State Accident Insurance Fund on September 19, 1969. Dr. Marxer's September 16th report contains a recitation of facts and opinion reflecting an aggravation with causal relationship to the accident at issue. The State Accident Insurance Fund obtained a report from a Dr. Dennis the day before the hearing which mentions other physical problems unrelated to the accident but actually supports a conclusion of a compensable aggravation.

The State Accident Insurance Fund argues that there is a degree of conjecture in the case. This is true of most cases but when various medical opinions relate the current increase in symptoms to the accident it cannot be said that a decision rests solely on speculation.

The Board concludes and finds that the evidence clearly supports the Hearing Officer decison finding there to be a compensable aggravation. The State Accident Insurance Fund, in refusing to accept the claim, had no medical substantiation for such refusal.

The order of the Hearing Officer is affirmed including the allowance of attorney fees, the claim being treated as one of the dignity of a claim in the first instance.

Pursuant to ORS 656.382 (2), counsel for claimant is awarded the further fee of $250.00 for services in connection with this review and payable by the State Accident Insurance Fund.

WCB #69-888 February 26, 1970

LEONARD L. APLET, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 35 year old millwright who injured his right arm in February of 1966, when he fell into a conveyor.

Pursuant to ORS 656.268 a determination issued March 17, 1969, finding the claimant to have sustained a loss of use of 20% of the arm and an award of 38.4 degrees was made.

Upon hearing the determination was affirmed.

The claimant has returned to his former employment and has been able to log many hours of overtime in the past couple of years in addition to the regular time. The claimant is no longer a lead man, but this is in nowise due to any permanent physical disability. The loss of the position was an indirect result of the injury but that factor does not warrant an increase in the award of disability.

The claimant retains an effective ability to use the many tools of his trade. There are occasions when he experiences some pain or discomfort and there is some indication of moderate reduced efficiency when using a hammer

for prolonged periods of time. These factors appear to have been properly weighed. If there was in fact no disability, the award given would be unwarranted. The award is in recognition of the moderate disabilities shown by the record.

The Board concludes and finds that the weight of the evidence supports the findings of the Hearing Officer.

The order of the Hearing Officer is therefore affirmed.

WCB #69-613 February 26, 1970

MARVIN L. ROSENSTENGEL, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 47 year old warehouseman and truck driver as the result of falling some 15 feet and landing on his head and shoulder on December 10, 1964.

The claim is one based on aggravation, the claimant contending that his condition resulting from the accident has deteriorated to the point that he is no longer able to engage regularly in a gainful and suitable occupation.

The orbital floor of the left eye was shattered and the evidence supports a conclusion that there was also some brain damage. The result was a double vision and a loss of fusion of the images received by the eyes.

The claimant returned to work on a regular basis in about October of 1965. His vision had deteriorated to the point in February of 1969, that the claimant was discharged from his employment.

Upon hearing an additional award was granted to the claimant of 145 degrees, the maximum applicable to unscheduled injuries on the theory that there was a brain injury which should be separately evaluated. The Board concludes that if there is an injury to the brain stem or brain proper from which the only disability is a visual loss, the disability rating would be limited to a rating on the loss of vision. If there is no other disability, there is no basis for an unscheduled award. The unscheduled award is further subject to question in the claim of aggravation. If there was unscheduled disability, it existed from the inception of the claim and did not arise independently as a spontaneous aggravation.

The Board's approach to the problem presented in this claim has been in light of Boorman v. SCD, Or App, 89 Adv Sh 427, 433, 459 P.2d 885 (1969).

If the claimant's practical loss of useful eyesight due to the injury is such that he cannot engage in a gainful occupation involving the use of vision, he is entitled to a total permanent disability award.

The Board is faced with an unusual situation. By ordinary standards the claimant has not lost the complete use of either eye. Yet he cannot use both eyes in unison nor can he tolerate the process of patching one eye which is

often the solution in such cases. If patching one eye was successful there would be a basis for concluding that there was a loss of vision equal to the loss of one eye without regard to identification as left or right eye.

The Board recognizes that fact that the claimant has some useful vision. The claimant is able to get about on foot without assistance though he can no longer operate a vehicle. He is able to go out camping, etc. The employer retained the workman until his efforts at even routine matters became so inefficient that the employment was terminated.

The Board finds that under the rule of the Boorman case, the claimant herein has a practical loss of useful eyesight precluding work in a gainful occupation involving the use of vision. Upon that basis the claimant is entitled to award as permanently and totally disabled.

The case is unusual and it may be that the condition may resolve itself at some future point in time where the claimant's vision and associated problems of balance and dizziness improve to the point that the disability may be only partially disabling. In that eventuality the Board may re-examine the matter pursuant to ORS 656.278. It is the Board's hope that the claimant will, at some time, be able to again engage at a regular employment dependent upon useful vision. The avenues of vocational rehabilitation remain open.

It is now over five years since the injury. The increase in disability in that period requiring cessation of employment, as noted above, warrants increase in disability award to one of permanent total disability.

It is accordingly ordered that the finding of the Hearing Officer of unscheduled disability is set aside and the now State Accident Insurance Fund is ordered to compensate the claimant as permanently and totally disabled.

The attorney fees payable from the award are set at 25% of the increased compensation payable therefrom but not to exceed $1,500 including such fees as may have been paid pursuant to order of the Hearing Officer.

WCB #70-18 February 26, 1970

JIMMIE BROOKS, Claimant.

The above entitled matter involves a procedural issue with respect to whether the claimant made a timely request for hearing following a denial of his claim.

The claimant allegedly injured his low back on the afternoon of Friday, April 25, 1969. The employer was not advised of the alleged accident until the following Monday. The State Accident Insurance Fund, as the employer's insurer, first allowed the claim but on October 10, 1969, issued a denial of the claim with the following notice to the claimant of his appeal rights:

> "NOTICE TO CLAIMANT: If you are dissatisfied with this order, decision, or award, you may file with the Department an application for rehearing within 60 days from the date <u>on which the order was mailed to you</u>. If you do apply for a rehearing and the Department takes no action upon your application within 60 days from the time you filed it, the application

for rehearing is denied. You may then appeal to the circuit court and your appeal must be filed within 90 days from the date you first filed your application with the Department.
FAILURE TO APPLY TO THE DEPARTMENT OR TO APPEAL TO THE COURT WITHIN THESE TIME LIMITS WILL RESULT IN THE LOSS OF YOUR RIGHT TO APPEAL."

It is obvious that the State Accident Insurance Fund utilized a form applicable to injuries occurring prior to January 1, 1966. No information with respect to seeking a hearing from the Workmen's Compensation Board is contained in the notice. ORS 656.262(6) requires that any such denial inform the workman of his hearing rights under ORS 656.283.

The claimant first addressed a request for hearing to the State Accident Insurance Fund which was received by that agency on December 3, 1969. That request was returned by the State Accident Insurance Fund to claimant's counsel with the result that the request for hearing did not reach the Workmen's Compensation Board until December 23, 1969, some two weeks beyond the 60 days permitted for request for a hearing following a claim denial.

The Hearing Officer dismissed the request for hearing as untimely filed. Claimant seeks to have the service of the request for hearing on the State Accident Insurance Fund as valid notice to the Workmen's Compensation Board. Notice or service upon one state agency is not notice to all agencies or to a specific agency sought to be notified but not served with notice. The claimant, in the alternative, seeks waiver of the notice requirement on the grounds that the mailing to the State Accident Insurance Fund was "inadvertent and excusable."

If the State Accident Insurance Fund had noted and corrected its order of denial within a reasonable time following the denial, the Board would deem it proper to adhere to the initial limitation of 60 days. Here, however, the State Accident Insurance Fund failed to comply with the law in the first instance and gave improper advise with respect to the appeal rights.

Under these circumstances, the Board deems the request for hearing to be timely filed with the Workmen's Compensation Board.

The order of the Hearing Officer is set aside and the matter is remanded to the Hearing Officer for hearing on the merits of whether the claimant sustained a compensable injury.

The usual appeal notice is appended due to the jurisdictional issue, though the Board questions whether appeal lies from this order of remand in light of Barr v. SCD, Or Ap, 90 Or Adv Sh 55, 463 P.2d 871 (1970).

WCB #69-1056 February 26, 1970

DOUGLAS WIESE, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 30 year old mill worker who slipped and injured his back on January 23, 1968.

The diagnosis was of a herniated intervertebral disc. However, the treatment was conservative and a back brace was prescribed.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 64 degrees comparing the workman to his pre-accident status. This evaluation was affirmed upon hearing, but the Hearing Officer also found there to be a permanent disability of 30 degrees or 20% loss of a leg for associated problems with the right leg.

The employer questions the propriety of the award for the leg.

It should be noted that the claimant has been vocationally retrained as a welder. At the time of hearing the claimant had not completed the course and no earnings factors otherwise applicable can be utilized at this state of the record. The claimant, a divinity student, continues to daily serve parishioners with volunteer church services and Sunday sermons.

The Board concurs with the Hearing Officer in finding that there is a sciatic nerve injury reflecting a separable injury to the leg with a disability not encompassed within the award for unscheduled disability. To the extent that more than one disability is evidenced, care is always required to assure that there is no duplication in making separate awards. It is not safe to assume that the prior determination did not measure the entire disability since the issue of whether the disability is separable is not always easy to resolve.

There is some indication that the claimant's disability is not as severe as he contends. The claimant is not fully cooperative either with respect to use of the prescribed back brace or in following prescribed exercises designed to strengthen his back.

Despite this factor, the Board concludes that the disability certainly does not exceed the awards made, but the Board does conclude that the claimant's permanent disabilities are as found by the Hearing Officer.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382(2), counsel for claimant is awarded the further sum of $250 payable by the employer for services on this review.

WCB #68-966 February 27, 1970

FERDINAND RUE, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a then 61 year old plywood mill worker as a result of an accidental injury on January 7, 1966. While descending a ladder into a conveyor pit, the claimant slipped on the bottom rung of the ladder and fell backward to the bottom of the pit, incurring an injury to his low back.

The order of the Closing and Evaluation Division of the Board entered pursuant to ORS 656.268, determined that the claimant was entitled to an award of permanent partial disability equal to 20% loss of an arm by separation for unscheduled disability, or 38.4 degrees of the then applicable maximum of 192 degrees.

The claimant asserts on review that he is entitled to a substantially greater award of permanent partial disability or to be found to be permanently and totally disabled.

The claimant prior to this accident had suffered other accidents involving back injuries, but at the time of this accident and for a number of years prior thereto, was able to perform his work in the plywood mill without difficulty. The claimant additionally had a pre-existing degenerative disease in his back which at the time of said accident was a latent and non-disabling condition.

Treatment of the claimant's injury consisted of an extended course of conservative therapy. Following his accident and a short period of treatment, the claimant resumed his employment as a patching machine operator in the plywood mill and continued to work, except while hospitalized for traction on one occasion, for a period of approximately one and a half years until the summer of 1967. At that time he was medically advised to discontinue work involving extensive physical exertion, precluding the continuation of his employment in the plywood mill. The medical evidence clearly indicates, however, that he is capable of performing work of a less strenuous nature, and that he is not permanently and totally disabled from performing any work at a gainful and suitable occupation. The clamant's age and pre-existing degenerative condition are also factors which prompted the medical advise to refrain from employment requiring a great deal of physical exertion.

The claimant, who is now 66 years of age, has reached and passed the usual age of retirement. It is apparent that the claimant's motivation is directed toward retirement rather than toward continued employment, and that his failure to resume employment may be attributed primarily to factors other than physical disability precluding employment. The claimant is obviously content to retire to his small acreage where he devotes his efforts to his yard, garden, fruit trees and a few head of cattle.

By reason of the fact that the claimant is past the customary retirement age of 65 years, and is now in retirement, the Ryf v. Hoffman Construction Company consideration in the evaluation of disability of loss of earning capacity would appear to be inapplicable.

The medical evidence reflects that the claimant has sustained some permanent disability as a result of the accident in issue, primarily due to aggravation of the pre-existing degenerative condition of his back. To the extent that his degenerative condition was made symptomatic by the accident, the claimant has sustained compensable permanent disability. An employer takes a workman as he finds him and is responsible for the resulting permanent disability from an accident which aggravates a pre-existing but non-disabling latent degenerative condition, however, this responsibility is limited to the disability attributable to the accident. Not all of the claimant's present disabilities are due to the accidental injury.

The medical evidence fails to substantiate either that the claimant has sustained substantial permanent partial disability or that he is permanently and totally disabled. The inconsistency between the subjective symptoms and the objective medical evidence requires the exercise of some caution in the assessment of the claimant's complaints.

The Board finds and concludes from its de novo review of the record and briefs that the award of permanent partial disability made by the order of the Hearing Officer of 67 degrees is a liberal evaluation of the claimant's disability, and that the permanent partial disability attributable to the accidental injury involved herein does not exceed the award granted by the order of the Hearing Officer.

The order of the Hearing Officer is accordingly affirmed.

WCB #67-1060 February 27, 1970

ADLORE E. PING, Claimant.
Request for Review by Claimant.

The above entitled matter was heretofore before the Workmen's Compensation Board and the Circuit Court with reference to whether the claimant was procedurally entitled to a hearing. That issue has been resolved in favor of the claimant.

The present issue is whether the claimant's condition is medically stationary and, if so, the extent of permanent disability resulting from the amputation of the distal phalanx and fracture of the proximal phalanx of the left thumb on March 22, 1965.

Pursuant to ORS 656.268, a determination issued finding a disability of 50% of the left thumb and disability awards for uninjured fingers on the basis of loss of opposition of 20% of the index and middle fingers, 10% of the ring finger and 5% of the little finger. Upon hearing, these awards were increased respectively to 75% of the thumb, 30% of the index and middle fingers, 20% of the left ring finger and 10% of the little finger.

At this point it should be noted that if the claimant had lost the entire thumb, the scheduled award is 48 degrees. The cumulation of awards made despite an obviously useable thumb exceeds 52 degrees. The provisions of ORS 656.214 (3) with respect to awards for loss of opposition is interestingly distinct in that it uses the discretionary work "may" and is obviously intended for unusual situations. It does not appear to warrant exceeding the scheduled award of 48 degrees for the thumb since all loss of opposition is inherent in the complete loss of the thumb.

The claimant has urged further medical care and time loss. There is no medical substantiation for this position. The claimant did undergo several surgeries but the record indicates the claimant has now achieved the maximum recovery reasonably to be expected.

The claimant also seeks a disability rating on the arm on the basis of an occasional radiation of pain which appears to have an obscure causal relation. There appears to be no compensable disability with respect to this occasional symptom and the matter should properly be evaluated with respect to the digits.

Claimant's counsel is quite critical of the doctors whose reports are of record and complains that it is the responsibility of the State Accident Insurance Fund to provide other doctors. Claimant takes comfort from reports

such as that of Dr. Hockey when the report comforts, but appears somewhat put out when the able neurosurgeon concludes the disability is somewhat exaggerated. As Dr. Larson notes, the disability is "primarily related to the discomfort from prolonged use of the thumb and from the loss of the distal phalanx of the thumb." In the face of medical finding of discomfort from use of the thumb, the claimant's brief asserts there is in effect no use of the thumb. Dr. Eckhardt anticipates that with use the discomfort will gradually lessen.

The Board cannot concur that this claimant has a disability in excess of that of a workman whose entire thumb has been lost. The award by the Closing and Evaluation Division recognized the obvious loss of 50% of the thumb and exercised the discretion of evaluating some disability in the remaining uninjured digits. The total evaluation thereby obtained of 34.5 degrees appears to be in keeping with the relative value assigned the total loss of use of a thumb.

The order of the Hearing Officer is therefore set aside and the order of determination is reinstated. The disability is evaluated at 50% of the thumb, 20% of the index and middle fingers, 10% of the ring finger and 5% of the little finger.

No increase in compensation paid pursuant to the order of the Hearing Officer is repayable pursuant to ORS 656.313.

SAIF Claim No. EB 84579 March 5, 1970

GLENDA L. McLARNEY, Claimant.

The above entitled matter involves the claim of a legal secretary who sustained a pain across her mid back on September 28, 1964, as she leaned over and had difficulty pulling open a desk drawer with both hands.

The claim was allowed by the then State Industrial Accident Commission for medical services only, it appearing that those medical costs were limited to $28.

The claimant continued to work and did not again seek medical care for a back problem until March of 1968. The claimant's condition then worsened to the point that surgery was performed September 10, 1969. A protruded intervertebral disc was removed. The relation of the 1968-69 condition to the 1964 accident is at issue.

The matter was brought to the attention of the Workmen's Compensation Board for possible exercise of the continuing jurisdiction of the Workmen's Compensation Board pursuant to ORS 656.278. The Board referred the matter to a Hearing Officer for the purpose of taking evidence on the issue for consideration by the Board.

The testimony of the claimant was taken. In addition the Board has the reports of Dr. Lawrence J. Cohen under dates of April 9, 1969 and October 22, 1969. Dr. Cohen relates the 1968-69 problems to the injury of September 28, 1964. There is no medical evidence supporting the position asserted by the Director of the Claims Division of the State Accident Insurance Fund that the minor injury of 1964 could not be related to the current problem.

The Workmen's Compensation Board concludes and finds that the need for medical attention in 1968 and 1969 including the surgery in 1969 was causally related to the 1964 injury.

The State Accident Insurance Fund is accordingly directed to accept responsibility for the medical care and associated time loss. The State Accident Insurance Fund is further directed to submit the matter in the manner prescribed pursuant to ORS 656.268 for a recommendation by the Closing and Evaluation Division of the Workmen's Compensation Board with respect to determination of disability.

Counsel for claimant having rendered services equivalent to those normally entailed in contested matters, is allowed the usual fee of 25% of the compensation payable for temporary total disability.

The matter being on own motion, no appeal notice is deemed applicable to the claimant. The Workmen's Compensation Board assumes that the State Accident Insurance Fund has appeal rights pursuant to ORS 656.278 and the following notice of appeal applies only to the State Accident Insurance Fund.

WCB #69-954 March 5, 1970

MARK TAYLOR, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 20 year old workman whose left foot was struck on July 19, 1967, by a falling pipe with a resultant undisplaced fracture of the medial malleolus of the ankle.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent loss of 10% of the left foot above the ankle joint for an award of 13.5 degrees.

This award was affirmed by the Hearing Officer. The claimant asserts that in evaluating the claimant's disability the Hearing Officer erred, (1) in overlooking "that claimant was married with one child (now two children) and the main breadwinner of the family." There is nothing in the compensation law granting a married man, or a married man with children, a greater evaluation for permanent physical disability than a single man. Compensation for temporary disability and permanent total disability varies with the number of beneficiaries or dependents. Permanent partial disability is evaluated for physical loss of function. The claimant further urges, (2) that the Hearing Officer erred in not allowing increased disability based upon claimant's lack of special training and education limited to high school. Claimant contends that Jones v. SCD, 86 Or Adv Sh 847, 250 Or. 177, 441 P.2d 242) involved a claim for permanent total disability. The claim may have been for permanent total, but the Court firmly adhered to the longstanding interpretation that the peculiar circumstances of the individual do not enhance the measure of loss of function. The illustration of the ditch digger's and violinist's fingers utilized in Kajundzich was reaffirmed as settled rule. The same authority disposes of claimant's third challenge with respect to claimant's life expectancy. The fifth objection is akin to the same proposition. The claimant

seeks to speculate and conjecture over whether the disability will be greater in 5 to 20 years. This is not a basis for present award. Any such development must await the reality and then be compensated pursuant to ORS 656.271 or 656.278. Claimant's objection 7 concerns the need for a foot support or small wedge on the outside of the foot. This is a matter governed by ORS 656.245 and does not enter into the rating of disability per se. Claimant's objections 4, 6, 8, 9 and 10 relate to the effects of pain, the occasional use of aspirin and the recitations of the conditions upon which disability is based. A measure of the merits of the many contentions is obtained in objection 10 where claimant recites, "The opinion overlooks the fact that claimant is suffering from discernable crepitus in the forcible flexion of the ankle." The claimant's brief failed to include the key words of the doctor who actually reported, "He barely has discernable crepitus" etc.

The Board will not belabor the facts or legal issues any further. The Ryf decision, whatever implications are involved, was restricted to unscheduled disabilities.

The Board concludes and finds that the claimant does have some permanent disability but that this disability does not exceed the 13.5 degrees allowed for the loss of 10% of a leg below the knee.

WCB #68-1698 March 6, 1970

AARON G. WILSON, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability sustained by a 54 year old timber faller and bucker who was injured when pinned between two logs on May 10, 1966. The left hip was dislocated with a severe acetabular fracture. Pursuant to ORS 656.268 a determination issued finding the claimant to have lost the use of 30% of the left leg, (33 degrees). Upon hearing the award for the left leg was increased to 75% (82.5 degrees) and, in addition, a further award was made for "other injuries" comparable to the loss by separation of 60% of an arm, (115.2 degrees).

The claimant asserts that he is now precluded from ever again engaging regularly at a gainful and suitable occupation.

The permanent effects of the accident are basically restricted to the leg and to that portion of the adjacent structures of the body, the function of which is related to the leg. If the disability was clearly restricted to the leg per se, no award could be made in excess of 100% of the leg. Jones v. SCD, 86 Or Adv Sh 847. The claimant's disability is not great as that of a workman who has lost the entire use of a leg. Yet the awards of disability by the Hearing Officer total 197.7 degrees--equal to the awards payable for complete loss of use of one leg and 60% of the use of the other. This claimant is able to use the injured leg though he does use a cane a substantial part of the time.

The Board also notes that some contention is made over the possibility of some future degeneration in the femoral head of the injured leg. Any such speculation should not serve as the basis for present award. If the possibility of degeneration occurs, the disability may be re-evaluated.

The Board concludes that the initial determination limited to 30% of a leg was inadequate, in large part due to information not available to the Closing and Evaluation Section of the Workmen's Compensation Board at the time of that evaluation. The Board finds the injury is not totally disabling.

The majority of the Board now concludes and finds that the disability to the workman is partial only to the extent of a loss of use of 50% of the leg and 35% of the maximum 192 degrees applicable for structures separate from, but related to, the leg. It should be noted that this award totals 122.2 degrees, some 12.2 degrees greater than for the total loss of use of a leg.

The award of the Hearing Officer is accordingly modified by reducing the evaluation of disability for injury to the leg to 50% of the leg and by reducing the evaluation for unscheduled or other injuries to 67.2 degrees against the applicable maximum of 192 degrees.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan dissents for the following reasons:

I cannot agree with the majority of the Board in this case.

The determination by the Closing & Evaluation Division of the Board was made soon after the examination and report of Dr. Cottrell and seems to be based on that doctor's findings.

Dr. Cottrell's report would account for the rating of disability determined by Closing & Evaluation. Other doctors, after Closing & Evaluation had made its determination, felt that the claimant was much more disabled than did Dr. Cottrell.

The report of the Physical Rehabilitation Center shows the finding of significant disability. Dr. Fagan believes claimant is entitled to 100% loss of a leg. I am not quite certain if Dr. Fagan would have part of this apply to unscheduled disability or not.

Dr. Kiest finds claimant to be permanently and totally disabled. This does not agree with the claimant's testimony or the findings of other doctors. The claimant believes there is work he can do. The Hearing Officer heard and saw the claimant. She did not find the claimant to be permanently and totally disabled.

The workman has disability in his back, as found by Dr. Storino. Mor importantly, claimant had a fracture of the acetabulum requiring internal fixation by means of screws. The acetabulum is a part of the pelvis, and as such a disability found in the acetabulum is an unscheduled disability.

Dr. Kiest finds a aseptic necrosis of the acetabulum, a developing cyst at the femoral head, plus arthritic development.

This claimant has both scheduled and unscheduled disabilities. The order of the Hearing Officer should be affirmed.
/s/ Wm. A. Callahan.

WCB #69-2043 March 6, 1970

JOSEPH J. NICHOLAS, Claimant.

The above entitled matter involves a request for review based upon an order of the Hearing Officer requiring a pre hearing discovery deposition.

Unfortunately, the Hearing Officer appended a notice advising the parties that they had a right to request a Board review of the order.

The principle applied by the Court of Appeals in Barr v. SCD, 90 Or Adv Sh 55, 463 P.2d 871 (1970), should extend to proceedings before the Hearing Officer. Only the final order of the Hearing Officer should be subjected to review and appeal. The proceedings should not be fragmented to make every interim ruling the subject of review of the final order.

The request for review of the order requiring a pre hearing discovery deposition is denied.

The matter is remanded to the Hearing Officer for completion of the proceedings pending before the Hearing Officer and for such final order as the Hearing Officer may thereupon find to be warranted by the record before him.

No notice of appeal is deemed applicable to this order of remand.

WCB #69-1323 March 6, 1970

H. DUANE GALLAND, Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 24 year old workman on December 27, 1967 as the result of engaging digits of his right hand in a cut off saw. One third of the distal phalanx of the thumb was severed and substantial damage done to the index finger.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an injury of 30% loss of the thumb and 80% of the right index finger. Upon hearing, the disability evaluation was made on the basis of an injury at or about the wrist joint and an award was made on the basis of a disability of slightly over 47% loss of the forearm.

There was no injury to the arm at or above the wrist. It is the claimant's contention that when a surgeon utilizes a structure at or above the wrist in restoring function to the fingers, that there must be a disability per se to the arm at or above the wrist. Several surgeries were performed with success from the standpoint of increasing the usefulness of the digits. Unless the entry into the arm for surgical purposes created a disability otherwise not existent in the forearm, the Board fails to comprehend how that surgery, reducing disability, should serve as the basis of an increased award of disability.

The Hearing Officer notes no basis for finding a disability at or above the wrist. The medical reports confine their discussion of loss of function

to the fingers and hand. For purposes of evaluation the metacarpal bones of the fingers and adjacent soft tissue which constitute the palm of the hand are by law defined as part of the digit.

The Board is sympathetic with any workman who loses portions of fingers. The limit of compensation is set by the legislature. The injunction to construe the law liberally does not warrant seeking out a greater member of the body on which to base an evaluation when the disability is clearly limited to the lesser member.

The Board finds that the disability does not exceed the original determination of a loss of 30% of the thumb and 80% of the index finger. The order of the Hearing Officer is therefore set aside and the determination order of June 19, 1969, is reinstated.

Pursuant to rule 10 of attorney fees, counsel for claimant is authorized to collect a fee from the claimant of not to exceed $125.

WCB #69-412 March 6, 1970

JOHN F. KOCH, Claimant.

The above entitled matter involves a claim of aggravation which was dismissed for lack of a supporting medical opinion from an Oregon doctor.

The claimant, now a 37 year old educator at Walla Walla Community College, sustained an injury on May 7, 1965 when he caught his leg and raised up only to strike his head.

In a previous proceeding involving extent of disability the claimant sought to introduce evidence dveloped following the hearing which was refused consideration upon appeal to the Circuit Court.

The order subjected to prior review and appeal was issued by the Hearing Officer on May 14, 1968. The claimant sought to introduce the August 5, 1968 report of Dr. Donald Smith of Walla Walla, Washington.

The claimant then initiated a claim for aggravation with a request for hearing filed with the Workmen's Compensation Board on March 7, 1969. This proceeding was not resolved until the Hearing Officer order of December 26, 1969, which dismissed the claim on the basis that the law requires a supporting medical opinion from an Oregon doctor. The only medical opinion before the Hearing Officer at the time of his decision was the August 5, 1968 report of Dr. Smith.

The Supreme Court in Larson v. SCD, 87 Adv 197, 445 P.2d 486, ruled that a medical report is required reciting facts from which it appears there is a reasonable basis for an aggravation claim. Regardless of whether such a report from an out of state doctor satisfies the requirements of the statute, the report in this instance is insufficient for other reasons. There is no indication of any compensable aggravation between May 14 and August 8, 1968. In some respects the doctor recites improvements from his prior examination. The report contains some speculation about possible future reference to a

neurosurgeon. By December of 1969, any conjectural medical report from August of 1968 falls far short of the legislative intent that a claim for aggravation be supported by a prima facie medical opinion.

The out-of-state doctor issue may have been affected by Ch 447, O.L. 1969. The Board notes that the Legislature did not change the definition of doctor in either ORS 656.002 or 656.271. Furthermore, the implementation of Ch 447 contemplates deposition and interrogatories of the out-of-state doctor which requires some hearing process and is thus inconsistent with the concept of a medical report which per se entitled the claimant to a hearing.

The order of the Hearing Officer is affirmed for the further reasons that the tendered report is too remote in time to support the entitlement to a hearing and that the report does not contain facts from which it can be said that there is a reasonable basis for the claim of aggravation.

This matter has been reviewed without transcript of the proceedings other than a review of the claim for aggravation and the only medical report tendered by the claimant as noted. The Board deems the state of the record sufficient without further briefs to resolve the legal issue.

WCB #67-1449 March 9, 1970

CLARENCE C. KERINS, Claimant.
Request for Review by SAIF.

The above entitled matter involves the compensability of a non-fatal myocardial infarction sustained by a 47 year old truck driver on August 27, 1967.

The matter has been delayed in the administrative process, having been partly heard by a Hearing Officer who left employment with the Workmen's Compensation Board.

The claim was denied by the State Accident Insurance Fund as insurer of the employer. The question of medical and legal causation between work effort and the infarction is again beset by conflicting views of the medical witnesses. There is no evidence from a cardiologist but the doctors whose opinions are of record are both internists with substantial practice involving heart patients.

There was some dispute over the continuity of work and alleged lack of sleep which appears to have been resolved in favor of the proposition that the claimant had a substantial rest period prior to the incident at issue. The respective medical witnesses were obviously hampered by the efforts of counsel to bring the medical testimony within certain semantic legal boundaries. The claimant's theory of causation extends beyond the work effort and stress immediately preceding the infarction and includes the claimant's work activities over a period of two or three weeks.

The Board is not in agreement on the issue.

The majority conclude, with the Hearing Officer, that the work effort on the day in question involving unloading a truck by shovelling sawdust and manure and later driving a truck on an exceptionally warm day was a material factor in production of the myocardial infarction.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382(2) counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services rendered on review.

/s/ M. Keith Wilson
/s/ Wm. A. Callahan

Mr. Redman, dissenting, relies upon the conclusions of Dr. Bittner that the work was not a material factor. Dr. Bittner concedes that there is a possibility but that the record in this case does not support a conclusion that the work effort in fact materially contribute to the infarct.

The claimant was overweight and had smoked heavily for years. There is no basic dispute in the medical field over the contribution of these factors to an infarct. The claimant obviously had the onset of his problem at home and while at rest on the morning of the day at issue. It is obvious that the onset of the claimant's problems is more in keeping with Dr. Bittner's concept of an onset at rest from a sludging action of the circulation of the blood rather than from effort. With all of the evidence concerning effort over a period of two or three weeks, logic would indicate that if work effort was to be productive of an infarct, it would have first manifested itself at a time closely associated with effort.

/s/ James Redman.

Claim No. C604-5691 HOD March 9, 1970

EINO J. MACKEY, Claimant.

The above entitled matter involves an injury to the upper back of a now 64 year old claimant sustained on May 27, 1966, as a result of striking his back against the under side of a sawdust conveyor in a sawmill. Following a ahort period of conservative treatment for a severe contusion to the upper back, the claimant's condition was reported to have become medically stationary without permanent impairment and he was released to return to work on June 20, 1966.

The determination order issued pursuant to ORS 656.268 on October 5, 1966, awarded the claimant temporary total disability to June 20, 1966 and no permanent partial disability. No hearing on the determination was requested by the claimant within one year of the mailing of the order.

Proceedings were thereafter instituted by the claimant by way of an aggravation claim, which after being denied by the employer's insurer and allowed by the Hearing Officer, was ultimately denied by the Board on the basis that the evidence failed to establish aggravation, and that the aggravation procedure utilized by the claimant was essentially directed toward the impeachment of

the determination on which the right to request a hearing had expired. No appeal was taken by the claimant from the Board's order on review and this order is now final pursuant to ORS 656.295(8).

The claimant has now requested that the Board exercise its own motion jurisdiction under the provisions of ORS 656.278 to grant him further medical treatment and compensation for his upper back condition. He contends that his condition was not medically stationary at the time of claim closure, and that he now has permanent disability attributable to the May 27, 1966 accident.

The Board has now reviewed the record made at the hearing on the claim of aggravation for the purpose of determining whether in its opinion the evidence justifies the exercise of the continuing power and jurisdiction vested in the Board under ORS 656.278 to modify or change the determination order of October 5, 1966 on its own motion.

The sole purpose of this order is to formally recite that based upon the Board's re-examination of the record of the hearing of the aggravation claim pursuant to its continuing jurisdiction under ORS 656.278, the Board is of the opinion that the present state of the record does not justify the exercise of its own motion jurisdiction in this matter.

No notice of appeal is appended or deemed applicable.

WCB #69-1081 March 9, 1970

LEO W. LANGAN, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent partial disability sustained by a 63 year old truck driver for a retail grocery chain as a result of an accidental injury on December 21, 1967, when he slipped and fell because of snow and ice conditions, while preparing to pull his truck from an unloading dock, causing an injury to his neck.

Pursuant to ORS 656.268, a determination issued finding the claimant to be entitled to an award of permanent partial disability of 16 degrees against the applicable maximum of 320 degrees for unscheduled injury. Upon hearing this determination was affirmed by the Hearing Officer.

The claimant has requested Board review of the order of the Hearing Officer. The review of this matter by the Board is made without the benefit of briefs from either party.

The claimant's injury was diagnosed as acute cervical neck strain superimposed upon degenerative arthritic changes. X-rays of the cervical spine reveal pre-existing degenerative changes particularly in the mid and lower cervical area.

Following a short period of conservative treatment including brief hospitalization for traction, the claimant's condition improved sufficiently to permit the resumption of his employment as a truck driver on January 15, 1968, although intermittent conservative treatment continued for an additional six months.

The concluding medical reports of the treating orthopedic physician, Dr. Boyden, reflect objective findings of approximately 30 degrees limitation of rotation of the neck to the right and some tenderness in the mid cervical region on the right side. His reports additionally note the claimant's statements relative to pain or discomfort in the neck after prolonged driving. Predicated upon these findings, Dr. Boyden was of the opinion that the claimant had sustained some permanent disability.

The claimant's testimony at the hearing, which the Hearing Officer found to be most candid and honest, discloses that the previous limitation of rotation of his neck has disappeared, and he now has a full range of motion in his neck. He continues to experience some pain and discomfort in his neck on an average of twice a week, which he treats with hot packs or a heating pad and by taking hot showers. He works full time without difficulty and without any adverse effect on his wages. His seniority has enabled him to minimize his neck discomfort by driving shorter and level routes.

As noted by the Hearing Officer, the claimant's present physical impairment is considerably less than the impairment reflected in the medical reports upon which the initial determination of permanent disability was predicated, to the point where he now has a full range of motion in his neck. The remaining difficulty is essentially the occasional slight pain and discomfort in the neck which from the evidence does not appear to result in either the loss of employment capability or the loss of physical function. Non-disabling pain and discomfort is, under the law, not compensable. Such disabilities as may be reflected in the record are fully recognized in the existing award of permanent partial disability.

The Board finds and concludes from the clear and concise evidence of record in this matter that the permanent partial disability attributable to the accidental injury involved herein does not exceed the 16 degrees heretofore awarded.

The order of the Hearing Officer is affirmed.

WCB #69-1252 March 9, 1970

LOUIS H. FULLER, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 43 year old choker setter whose pelvis and right hip bone was fractured June 3, 1968, when struck by a log.

Pursuant to ORS 656.268, a determination issued finding a disability of 16 degrees against the applicable maximum of 320 degrees on the basis of a comparison to the workman prior to the accident and without the disability.

Upon hearing, the award was increased to 64 degrees and the employer has appealed. Though the claimant has expressed complaints with respect to the right leg he has not sought review upon the matter. With the disability basically in the unscheduled area, the factor of earnings loss pursuant to the recent Ryf decision would appear to be pertinent. At the time of hearing the claimant was not working. However, he had worked for short periods at his former occupation.

The medical evidence indicates a good recovery from the fractures and only minimal objective evidence of physical impairment. Upon the basis of the medical evidence, it appears that the minimal evaluation by the Closing & Evaluation Division was proper.

If the disability is such, however, that the claimant has sustained an earnings capacity loss, further evidence upon that factor should be obtained. The Board deems the record incomplete with respect to possible application of the Ryf case.

The order of the Hearing Officer is accordingly set aside and the matter is remanded for further evidence regarding possible loss of earnings capacity by the claimant. Any compensation paid pursuant to the Hearing Officer order is not repayable pursuant to ORS 656.313.

This order is not final and the remand is but a continuance of the process of determining extent of disability form which further order will issue by the Hearing Officer subject to review and appeal.

No notice of appeal is deemed applicable.

WCB #69-959 March 9, 1970

BYRON SIZEMORE, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent partial disability sustained by a now 49 year old burner and weigher of scrap iron and steel as the result of a low back injury caused by wrenching and twisting his back on November 11, 1967, when he slipped as he stepped down from a railroad car.

The determination order of the Closing & Evaluation Division of the Board issued pursuant to ORS 656.268, granted the claimant an award of permanent partial disability equal to 25% loss of the workman for unscheduled disability, or 80 degrees of the applicable maximum of 320 degrees. The order of the Hearing Officer affirmed the determination order.

The claimant has consistently contended at the hearing and on review by the Board that the award of permanent partial disability should be increased to 50% loss of the workman for unscheduled disability or 160 degrees.

The claimant sustained a prior injury to his low back on September 28, 1966, as a result of being struck in the back by a piece of steel. Only medical treatment was required for this injury. He lost no time from work and sustained no permanent disability. Following this injury, however, he commenced to experience low back pain which continued until the occurrence of the present injury.

The claimant had a pre-existing degenerative arthritic condition which the medical evidence indicates and the ensuing pain confirms was probably exacerbated by the 1966 injury, however, it remained an essentially latent and non-disabling condition until the occurrence of the present injury.

Following the accident the claimant continued working for a period of approximately six months, while receiving conservative treatment. During this period his primary complaint involved low back pain with bilateral posterior leg radiation, particularly in the right leg to the knee. His condition remained essentially unchanged during the course of this conservative treatment.

In April of 1968, the State Accident Insurance Fund medical examiner referred the claimant to Dr. Kunzman, an orthopedic specialist, for examination and treatment. A lumbar myelogram performed in June revealed a large protruded intervertebral disc at L4-5 and L5-S1. In July, a bilateral laminectomy at both levels was performed by Dr. Kunzman.

Dr. Kunzman observed that the claimant's post-operative recovery was quite good and that he showed marked improvement over his previous condition. Dr. Kunzman's observations are confirmed by the claimant's statement that he felt better than he had for years.

In November of 1968, the claimant returned to his former employment. Since that time he has worked regularly and full time at this employment. He evidences some limitation in ability to perform the heavier and active aspects of his work and greater fatigue following a full day's work precluding some overtime work. He speculates that his promotional opportunities have been reduced. He now wears a corset type back support regularly. He commenced wearing a back support following his 1966 injury, although on a less frequent basis. His present low back pain is substantially identical to the pain that he experienced following his prior injury. The evidence adduced relative to his earnings for the first six months of 1969 shows no reduction in wages over his pre-accident rate of pay and accordingly, no impairment of earning capacity.

In his concluding medical report, Dr. Kunzman attributes the claimant's ruptured disc to both the 1966 and 1967 accidents. In his opinion permanent disability has resulted from the rather extensive surgical procedure and the degenerative arthritis of the lumbar spine. His prognosis is that some discomfort in the low back region will probably continue which can be controlled by medication. He recommends avoidance of heavy manual labor, but acknowledges that claimant has evidenced the capability to perform his former employment, although it results in some discomfort and necessitates the wearing of a lumbosacral corset.

The final report of Dr. Puziss of his examination of the claimant for the purpose of evaluation of disability, reflects objective findings indicative of a good recovery from the surgical procedure. He found the claimant's present condition to be essentially normal with the exception of a slight limitation of motion and some discomfort in the lumbosacral area. In his opinion the claimant has sustained permanent partial disability of the extent normally expected as a result of a laminectomy.

The Board finds and concludes that the award of permanent partial disability made by the determination order and affirmed by the order of the Hearing Officer properly evaluates the claimant's permanent disability attributable to the November 11, 1967 accidental injury.

The order of the Hearing Officer is therefore affirmed.

WCB #69-533 March 9, 1970

IVAN E. HUNTER, Claimant.

Workmen's Compensation Board Order:

The above entitled matter involves the issue of whether the chronic emphysema and respiratory infections of seven years duration sustained by a 58 year old aluminum plant employe constitutes a compensable occupational disease by virtue of respiratory irritants at work which aggravate symptoms of the underlying disease process.

The claim for Occupational Disease benefits was denied by the employer but ordered allowed by the Hearing Officer. Thereupon the employer rejected the order of the Hearing Officer to effectuate an appeal to a Medical Board of Review pursuant to ORS 656.808.

The Workmen's Compensation Board is now in receipt of the findings of the Medical Board of Review which are attached, by reference made a part hereof and declared filed as of March 5, 1970. It is the conclusion of the Medical Board that the claimant does not suffer from an occupational disease or infection.

Pursuant to ORS 656.814, the findings are declared final and binding.

No notice of appeal is deemed appropriate.

Medical Board of Review Opinion:

Re: Mr. Ivan E. Hunter
WCB Case No. 69-533

Mr. Ivan E. Hunter was examined at 1216 S. W. Yamhill Street on February 27, 1970 by Dr. Morton J. Goodman, Dr. James T. Speros, and Dr. Merl L. Margason. A transcript of proceedings of the hearing before the Workmen's Compensation Board Friday, July 25, 1969 was reviewed along with reports from doctors who had previously examined Mr. Hunter.

Mr. Ivan E. Hunter states that he developed shortness of breath at about fifty years of age. He first noticed difficulty being short of breath while playing "catch" with his son. About this same time, he began to have to stop and rest when mowing his lawn. He consulted his family physician who informed him his trouble was due to "bronchitis." He states he never had any cough except when he was in a dusty atmosphere when at work. On one occasion, he had to leave a union meeting because of the irritation from the smoke in the room. He has experienced "colds" but didn't miss any work because of them. In 1966, his doctor said he had emphysema. He had an acute upper respiratory infection the end of November, 1969 which caused inreasing difficulty with breathing and he was finally hospitalized for three weeks in January, 1970. While in the hospital, he experienced considerable relief from the use of the Bird Inhalator. Since then, he has been using a Bennet Machine in his home. He raises some "grayish" sputum usually "stringy," occasionally containing some "clumps". He estimates that he raises a "good teaspoonful" of sputum in a twenty-four hour period. He hasn't smoked since 1964. Before that he smoked "one half to one package" daily. He last worked on December 30, 1968.

The patient is alert and cooperative. His color is good. His pulse is 96 and there is a regular sinus rhythm. His blood pressure in the right arm is 156/76 and in the left arm is 154/80. His heart tones are clear. No murmurs were heard. The chest is resonant and symmetrical. The diaphragm is low and moves with respiration. There are a few crepitant rales in the right anterior chest and in the anterior axillary line. There are a few sonorous and sibilant rales at both bases.

The chest x-ray was reported by Dr. Wayne G. Ericksen as follows: The mediastinal silhouette appears normal. The lungs are clear. Pulmonary function studies show severe obstructive impairment of ventilatory function typically seen in emphysema and/or chronic bronchitis.

DIAGNOSIS: Chronic bronchitis.
Emphysema.

/s/ James T. Speros, M.D.
/s/ Dr. Morton J. Goodman
/s/ Dr. Merl L. Margason

WCB #69-1352 March 10, 1970

DEWANE L. FILBECK, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of whether a 21 year old sweeper is entitled to further temporary total disability and particularly whether he is entitled to temporary total disability for an indefinite period of time dependent upon the changing whims of the claimant with respect to possible surgery and also dependent upon the claimant's cooperation with his doctors. Instead of losing 40 pounds as advised, the claimant increased to 70 pounds overweight.

The claimant injured his low back and left inguinal area on February 9, 1968, while lifting a sack of beans. The mechanics of the unwitnessed injury vary. The hospital admission records (Joint Exhibit 3) reflect he slipped and fell with the sack in his lap. The Tr, p 10 reflects he was caught in the chest and bent over another sack. In Joint Exhibit 5, Dr. Rask records the sack fell on him on the left side of his back.

Pursuant to ORS 656.268, claimant was found to have a permanent disability of 16 degrees against the applicable maximum of 320 degrees.

The Hearing Officer was faced with the dilemma of a grossly overweight young man who professed to unusual physique and feats of strength prior to the accident. Claimant's brief belabors the principle that the employer takes the workman as he finds him. The issue is not how the employer found him. The issue is whether the workman is entitled to continuing benefits when he subsequently impedes his own recovery. Claimant's counsel conjectures about possible glandular or other causes but submits no medical evidence. The medical evidence reflects that the claimant should reduce. ORS 656.325(2) shows a legislative intent that claimants are required to cooperate in these matters.

The Hearing Officer solved the dilemma posed by the vacillations over proposed surgery and the weight problem by leaving the responsibility up to the claimant. When he reports for surgery, the compensation will be reinstated. If the claimant does not so report within six months, the employer may resubmit the matter pursuant to ORS 656.268 for possible redetermination depending upon the facts at that time.

The Board concludes that the Hearing Officer made a proper disposition of the matter. The order of the Hearing Officer is affirmed.

WCB #68-2083 March 11, 1970

The Beneficiaries of
ROGER C. BOLT, Deceased.

The above entitled matter was heretofore before the Board and was remanded on October 9, 1969, due to inability to obtain a transcript of the proceedings. The issue is whether the mother of a deceased 23 year old workman was a dependent for purposes of the Workmen's Compensation Law.

The order of remand contained the following directions:

> "The matter is therefore remanded to the hearing officer as incompletely developed and heard. The Board notes that the hearing officer did not make a finding on the extent of dependency and took into consideration a future anticipated factor of dependency. Dependency compensation is computed upon the record of the year preceding the injury. Upon further hearing, if dependency is again found, the hearing officer should make findings pursuant to which any compensation payable pursuant to ORS 656.204(5) may be determined. It is not an adequate disposition to order that dependents are entitled to 'all the benefits provided by the Workmen's Compensation Law.'"

Apparently the transcript of the first hearing has now been completed. The parties apparently felt the record was adequate and the matter was resubmitted for review without regard to the Board's indication of a need for clarification.

The record, at best, reflects a contribution by the deceased workman of $70 per month for six months toward a household in which he lived with his mother and stepfather and the question is simply whether any material portion of this $420 exceeded the amount required for his own room and board and, if so, whether there were dependents in fact dependent upon such excess amount.

As noted in the order of remand the Hearing Officer apparently took into consideration a prospective surgery upon claimant's mother at which time the family might look to the now deceased for assistance. The statutory qualification for dependency benefits utilized the year prior to the accidental injury as the yardstick. Consideration of a future possible dependency was improper.

It is significant in this case that the only time the decedent made any contribution was while he was a member of the household. When he left for an

interval, no contribution was made. The pattern is clearly one making payments only as a member of the household. It is difficult to conceive how claimant's share of the responsibilities could be less than the amount allegedly paid. The claimants were no more dependent upon the decreased than they would have been to a non-relative sharing accomodations on a room and board basis.

The order of the Hearing Officer is reversed and the claim is denied.

Pursuant to ORS 656.313, no compensation paid pursuant to order of the Hearing Officer is repayable.

WCB #69-1058 March 11, 1970

LINNLEY R. DAWLEY, Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 43 year old truck driver who fractured his left clavicle in a fall from his truck on October 2, 1968.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a loss of 15% of the left arm. This award was affirmed upon hearing.

The matter is another of several hearings wherein the record of the hearing was destroyed in a fire. Since the record is incomplete, it cannot be reviewed. The only alternative is to remand the matter for further hearing.

Pursuant to ORS 656.295(5), the matter is remanded to the Hearing Officer for further hearing and for such further order as may be warranted by the record following such further hearing.

No appeal lies from this order and no appeal notice is appended.

WCB #69-1220 March 11, 1970

EUGENIA RODRIGUEZ, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of an alleged aggravation of disability by a 37 year old woman who had sustained a low back injury on June 17, 1967, while employed as a laborer at a bag factory.

In a prior proceeding a Hearing Officer order found the claimant to have a permanent low back injury disabling on a basis comparable to the loss by separation of 15% of an arm. That order became final by operation of law.

The present proceedings by way of aggravation were heard by the same Hearing Officer. Unless the claimant's condition became compensably aggravated in the interim, she cannot obtain an increase in award in these proceedings The Hearing Officer concluded there was no such compensable aggravation.

The Board questions whether this particular matter should ever have been scheduled for hearing. There was no corroborative report as required by

ORS 656.271 and the Supreme Court interpretation thereof in the Larson case.

There is a complicating factor of an intervening incident in which she reinjured her back while training berry vines for one William Bouser on March 13, 1969.

The Hearing Officer found and the record reflects that regardless of whether the claimant had a subsequent intervening accident, her condition is not now worse than at the time of the former closing and there is therefore no compensable increase in disability.

If there was a temporary exacerbation, it was related to the March 13th injury and not the responsibility of the employer in this case.

The claimant is Spanish speaking. The proceedings appear to have been fairly conducted with the aid of an interpreter.

The Board concludes and finds that the claimant has not sustained the burden of showing a compensable aggravation and further finds that the claimant's condition is not now worse than it was at the time of the former closing of the claim.

The order of the Hearing Officer is affirmed.

WCB #69-1079 March 11, 1970

LELIA GRIGGS, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of extent of disability in the claim of a 32 year old laundry presser who was struck from behind and sprawled forward when struck by a laundry cart after less than two hours work on her first day on the job on September 28, 1967.

The claimant was discharged from employment and the claim was first denied by the employer who contended the claimant had not been injured as alleged. A prior hearing resolved that issue in favor of the claimant.

Pursuant to ORS 656.268, a determination issued finding the claimant to have sustained no permanent disability attributable to the accident. This determination was affirmed by the Hearing Officer.

The matter comes before the Board in a posture of claimant's counsel seeking further diagnostic evaluation of a problem starting nearly two and a half years ago, a problem already subjected to the examination of 13 doctors and a clinical psychologist. Seldom does one see a greater profusion of physical complaints accompanied by such an application of the resources of the medical profession with such minimal objective indication of any injury attributable to the accident.

The claimant has had family and social as well as other physical problems unrelated to the incident. These were complicated further by her concurrent receipt of welfare and compensation benefits while neglecting to advise Welfare of the other income.

Throughout the long history of this claim, there emerges a picture of confusion and hostility with the accident serving as her scapegoat. If there is a concensus to the opinions of the various medical experts, it is to the effect that there is no physical disability attributable to the claim and that only a conclusion of the forum for litigation will serve to bring an end to the complaints. There is no permanent physical disability. There is no medical treatment for the complaints. The doctors do suggest the legal solution of closing the claim.

Among the claimant's problems was an excessive weight of well over 200 pounds. It appears that some progress has been made in weight reduction. Among other problems is a long standing need for a hysterectomy which has been avoided and which undoubtedly contributes substantially to the total picture.

The Board cannot help but express genuine sympathy for a claimant so beset with various problems. The Board concludes and finds that the Closing and Evaluation Division and Hearing Officer properly weighed the evidence and that the claimant does not have any permanent disability attributable to the incident of September, 1967.

The order of the Hearing Officer is affirmed.

WCB #69-958 March 11, 1970

FRANKLIN D. KNOBLOCH, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 36 year old furniture factory worker as the result of a strain and catch in his back incurred on January 5, 1968, while bending over to lay down some lumber.

The problem of evaluating the disability is complicated by a history of some back troubles stemming from military service in Korea some 20 years ago and by an industrial injury claim from a Colorado injury in 1963, followed by surgery in 1964. The problem is further complicated by a myocardial infarction in July of 1968, which has been excluded from any causal relationship to the claim at issue.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 96 degrees against an applicable maximum of 320 degrees. Such awards for unscheduled disability are based upon a comparison to the workman prior to the accident and the award is limited to the additional disability caused by the accident at issue. Any military service involvement of the back is minimized to the point the claimant professes not to remember anything about it. He concedes they found enough to award a 10% disability as a service connected disability. This has now been increased to 40%.

Regardless of the prior history, the claimant's condition was apparently exacerbated sufficiently by the accident at issue to require further surgery. The claimant did return to work following this last surgery. The circumstances surrounding his work capacities on these jobs are in dispute. It would be fair to relate that the claimant after two back surgeries should not engage in heavy manual labor. It is also fair to conclude that the claimant's

limitations are not as great as he professes nor are all of the limitations related to the accident at issue. The extent to which the accident may have affected earning capacity is very questionable in light of the prior and subsequent factors. The claimant's latest occupational direction is toward work as an insurance claims adjuster. The Board finds no basis for possible application of the recent Ryf (890 A.S. 483, 459 P.2d 991) decision.

The Board concludes and finds that the compensable disability attributable to this accident does not exceed the 96 degrees determined by the Closing and Evaluation Division and affirmed by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #69-1568 March 13, 1970

WILLIAM A. PAYNE, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of whether the claimant sustained a compensable injury arising out of his employment.

On July 10, 1969, the claimant had just completed making a delivery of some tires. He was making a phone call to a supervisor when he fainted and fell to the floor. It is apparent that he was in the course of employment.

Upon hearing, the claimant's version of the incident was that he slipped and fell. The Hearing Officer did not believe this version of the incident. If the claimant simply fainted from some cause unassociated with his work, the issue becomes one of whether any injury sustained in falling arose out of employment. Without citation, the Board deems it fair comment to note that the Board and its predecessor, the State Industrial Accident Commission, have allowed claims involving a fall by an epileptic, for instance, if there was a "positional risk" such as falling from a ladder or falling into a piece of machinery. Having ventured into the positional risk theory, the problem becomes one of re-drawing a boundary line between compensable and non-compensable falls where there is no evidence that the fall was in any way caused or produced by the work. In the instant case, the claimant fell upon a concrete floor. Is it significant if the floor is concrete, wood, carpeted or covered with foam mattresses if the end result is an injury unrelated to the work?

The Board is not unanimous in its conclusion. The majority accept the conclusion of the Hearing Officer that the fall was not caused by slipping and further that the claimant did not strike any object other than the floor. The majority disagree with the Hearing Officer on the law and conclude that the rule of law applicable in such cases is that the degree of hardness of the floor is not a factor. The Hearing Officer appears to urge that injury in the course of employment is all that is required. The majority further find and conclude that there was no causal connection between the claimant's work and his fall and injury and that the applicable rule of law is that an unexplained or idiopathic fall to a level floor from fainting is not compensable under the facts in this case. The injury did not arise out of the employment.

The order of the Hearing Officer is therefore reversed.

No compensation paid pursuant to order of the Hearing Officer is repayable conforming to ORS 656.313.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan dissents as follows:

> This is a case of a workman following the instructions of his employer. While making a telephone call to his employer's office, he fell injuring his back when he struck the concrete floor upon which he was standing.
>
> The cause of the fall has not been determined, but it has been called an "idiopathic" fall. Because of being classified as an idiopathic fall, the employer insists that the workman be denied benefits of the Workmen's Compensation Law.
>
> Perhaps there is a certain fascination to this Greek word, "idiopathic." Somehow it seems to command greater attention than if simple words were used to express the same meaning. Too much importance is placed on the fall; too little attention is directed to the simple fact that the workman's injury came from forcibly striking the concrete floor.
>
> If the cause of the fall was a condition personal to the claimant, there is no justification for denying benefits; the employer accepts the workman as he is.
>
> The claimant's work required him to make the telephone call to his employer's office. The concrete floor was part of the surroundings and was a part of the employment environment. The injury resulted from striking the hard, unyielding concrete floor.
>
> The irony of this is that if the workman had been on the first step of a stepladder and had fallen, striking the same concrete floor, there would have been no question about the compensability of the claim.
>
> In the early years many exclusions were written into workmen's compensation laws. Some adjudicators insisted upon such narrow interpretations of the law that it was plainly evident they were dragging common law concepts into their decisions. They were loath to depart from the doctrine of torts in spite of the very essence of workmen's compensation being a complete departure from the common law doctrine of torts in cases of occupational injuries.
>
> Among the exclusions mentioned earlier were: horseplay, assaults even though arising out of the employment, the need for the injury to result from violent and external means, intentional acts, hazards to which the public was exposed, acts of God, idiopathic falls, etc. The only one of these written into the Oregon law was violent and external means, which was removed by the legislature in 1957.

Half a century ago Oregon's Supreme Court established a landmark in Stark v. SIAC. This was a horseplay case in which the Court stated that red-blooded American men must be expected to indulge in horseplay. One by one the others have fallen by the wayside through more logical and reasonable interpretations of the statutes. However, the idiopathic fall has again raised its ugly head. It is high time that the idiopathic fall be laid to rest as has been done with horseplay, acts of God, etc.

There is no need to amend the statutes in order to recognize as a compensable claim an injury resulting from a workman striking a concrete floor in a fall to the same level. There is no logic in denying this claim just because the workman did not slip, trip or was pushed by external and violent means. The 1957 amendment eliminated these occurrences, making an injury compensable if the result was accidental. There is no contention that the claimant made a deliberate attempt to injure himself.

The employer's brief would have us believe that there must be some element in the employment or some condition of the employment that initiated the fall. He does not plainly state so, but the intimation is that it must be something over which the employer had control. He would have the clock turned back, bringing in concepts of common law. Workmen's compensation laws were enacted to provide care for occupational injuries when there was no fault on the part of the employer.

There are no Supreme Court cases in point for the simple reason that injuries such as the instant case have been accepted as legitimate workmen's compensation claims before reaching that far.

A similar case came before the Board in the Matter of the Compensation of Roy Blair Walter. The majority of the Board affirmed the Hearing Officer who had affirmed the denial. I dissented. The case proceeded to the Circuit Court of Washington County. Judge Glen Hieber reversed the Board's decision and ordered the claim accepted. His decision was not appealed to the Supreme Court.

The Hearing Officer is aware of that case and has followed it in his order remanding the claim to the employer and the insurance company to provide benefits to the claimant as may be required by the Workmen's Compensation Law.

The claim is compensable. The Hearing Officer should be affirmed.

/s/ Wm. A. Callahan

WCB #69-1257 March 13, 1970

RICHARD NICHOLS, Claimant.
Request for Review by Claimant.

The above entitled matter involves a procedural issue on the timeliness of notifying the employer concerning the claim as well as an issue on the extent of permanent disability. The claimant sustained a fall on Feburary 14, 1967, while rewinding the hose on a fuel delivery truck. He continued to work and did not seek medical attention for back symptoms until March of 1968.

It would appear that at the time of first seeking medical care in March of 1968, the employer might well have been in a position to resist any hearing on the matter under the provisions of ORS 656.319. However, the employer did not deny the claim but after accepting the claim the employer subsequently requested the Workmen's Compensation Board to make a determination of disability pursuant to ORS 656.268. The workman requested a hearing on the determination of disability and the employer then questioned, for the first time, the jurisdiction of the Workmen's Compensation Board to enter the order on determination of disability. Timeliness of written notice from the workman is set forth in ORS 656.265. In the case before the Board the employer has never questioned the occurrence of the accident, has made payments on the claim and did not give notice on the first hearing. For purpose of ORS 656.265 (5), the Board deems the proceedings under ORS 656.268 to have been the first hearing on the claim before the Board. The employer's citations with reference to loss of jurisdiction do not apply where the legislature has specifically restricted the time at which a jurisdictional issue may be raised. The Board concludes and finds that the claimant's claim is timely and that he is entitled to hearing, review and appeal on the extent of disability sustained.

Upon the merits of the disability issue the order of determination by the Closing and Evaluation Division of the Workmen's Compensation Board found a permanent disability of 64 degrees for unscheduled or other injuries against the applicable maximum of 320 degrees.

Following the claimant's first recourse for medical aid in March of 1968, the claimant underwent a laminectomy for removal of a protruded disc at the L-5, S-1 level of the spine. There has been a recurrence of some of the symptomatology but the claimant has declined any further myelogram.

The claimant's attitude toward the medical profession tends to be abusive. If this was confined to a situation where a patient was disillusioned, greater allowances could be made. The report of the discharge committee of the Physical Rehabilitation Center of the Workmen's Compensation Board under date of July 8, 1969, points out a greater problem. The conclusions of that committee is that the "principal feature in this man's present adjustment pattern is his conscious exaggeration of symptoms for compensation purposes." The claimant was not cooperative in as fundamental a matter as tendered physical therapy designed to aid in his recovery. Under these circumstances, neither further compensation or medical care is appropriate. The recovery is as complete as it can be accomplished with this claimant. Evaluation of disability may properly evaluate the claimant's motivation toward improvement. His disability is either exaggerated or being prolonged.

The Board concludes and finds, as did the Hearing Officer, that under the circumstances the claim was properly closed with an evaluation of a permanent disability of 64 degrees.

The order of the Hearing Officer is affirmed.

WCB #69-1249 March 13, 1970

KENNETH C. RUNNION, JR., Claimant.
Request for Review by Claimant.

The above entitled matter basically involves the issue of the extent of permanent disability attributable to an accidental injury of April 5, 1967. The claimant fell while carrying a mold in a foundry. The residual symptoms are based upon a disability in the rotator cuff of the right shoulder producing an impairment in the use of the right arm.

Pursuant to ORS 656.268, the disability was evaluated at 10% loss of the arm. This determination was affirmed by the Hearing Officer. The claimant, upon review, contends the matter should be resolved upon the claimant's own evaluation of his arm as being "50% weaker."

It is worth noting that the claimant had an automobile accident in 1965 involving the same shoulder and there is medical evidence which reduces the causal pattern to one of conjecture with respect to the two incidents. The Board concludes and finds that regardless of the extent of the pre-existing problem, there was sufficient additional injury imposed by the injury involved in this claim to impose a responsibility upon the employer for the medical care and temporary total disability associated therewith. This does not carry with it, however, the imposition of award for permanent disability for any pre-existing disability.

The legislature has prescribed that the initial determination be made largely upon medical evaluations pursuant to ORS 656.268. Those medical reports are not sacrosanct, but neither should they be cast aside simply because a claimant evaluates his own disability as higher than justified by the findings of those medical reports. At this point it should be noted that there is little difference between the capabilities of the injured arm and the uninjured arm.

The Board concludes and finds that the permanent disability attributable to the accident at issue does not exceed the 10% of an arm by Closing and Evaluation and affirmed by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #69-391 March 16, 1970

LaRENE JOHNSON, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue on review of whether the then 28, and now 31 year old female department stock clerk sustained any permanent disability as the result of an injury to her back caused by lifting boxes of merchandise overhead on August 30, 1966.

Pursuant to ORS 656.268, a determination issued finding the claimant to be entitled to temporary total disability but to have no residual permanent disability as a result of the accidental injury. A second determination awarded the claimant additional temporary total disability and confirmed the initial finding of no permanent disability.

A hearing requested by the claimant resulted in an order of the Hearing Officer finding permanent partial disability equal to 20% of an arm by separation for unscheduled disability to the dorsal back.

The employer requested a review by the Board of the Hearing Officer's order contending that the award of permanent partial disability is not supported by the evidence of record.

The record in this matter reflects that the claimant's back was pre-disposed and susceptible to injury as the result of the underlying degenerative condition of her dorsal spine. The pre-existing condition involved dorsal scoliosis, an abnormal lateral or sideward curvature of the spinal column and increased dorsal kyphosis, an abnormal backward curvature of the spinal column, described as a spinal curve on a spinal curve, or a double curvature of the dorsal spine. The claimant additionally had pre-existing osteophytosis, an arthritic condition of the dorsal spine. These underlying degenerative conditions of the claimant's dorsal spine are wholly unrelated to her accidental injury.

The claimant's injury was initially diagnosed as an acute strain of the mid-dorsal back. The back strain subsequently precipitated myositis and the final diagnosis was post traumatic myositis or fibromyositis. A conservative course of treatment was carried out for the claimant's injuries. Surgery was determined inappropriate as a result of negative myelographic findings.

Based upon medical evidence indicating the claimant's condition to be medically stationary with no objective evidence of disability and moderate subjective back pain, the claim was closed by the initial determination in August of 1967. This determination order awarded temporary total disability to April 1, 1967, and awarded no permanent disability.

Following her injury the claimant became pregnant, which terminated on November 15, 1967, with the birth of her second child. During and following her pregnancy the claimant continued to complain of back pain. Further treatment and claim proceedings were necessarily discontinued during the latter stage of her pregnancy.

Following the birth of her child, the claimant filed a request for hearing. The employer, as a result of negotiation, voluntarily agreed to the reopening of the claim and the reinstatment of the claimant on temporary total disability. Further conservative treatment thereafter ensued until the claimant's condition was again considered medically stationary.

The recent medical reports of Dr. Bolton and Dr. McIntosh and the testimony of Dr. Griffin at the hearing, in which he expressed agreement with the essential findings of these reports, reflect a total lack of objective medical evidence or findings of disability attributable to the accidental injury. The reports and testimony of the doctors attribute the claimant's subjective symptoms of pain in the mid-dorsal area of her back to the scoliosis--kyphosis double spinal curvature and the osteophytosis of the dorsal spine. The medical evidence reflects very minimal, if any, disability related to the accidental injury. Such disability as exists appears to be attributable solely to the pre-existing degenerative condition of the claimant's dorsal spine and not compensable. The weight of the medical evidence supports a finding that the accident involved produced only temporary exacerbation of the claimant's underlying degenerative changes, and that no residual permanent disability was caused as a result of the accident.

The claimant has not returned to work since the occurrence of the accident, however, the record indicates that she is able to work and that her failure to resume employment is not related to her injuries. It is apparent that her immediate desire is to remain at home with her recently born child as she did following the birth of her prior child. It also appears that her employment is influenced by the family economic circumstances which do not at this time require her resumption of employment.

The Board finds and concludes, in the exercise of its judgment in the evaluation of the evidence from its de novo review of the record, that the Hearing Officer's award of permanent disability is contrary to the evidence, and that the weight of the evidence of record clearly reflects that there is no permanent disability attributable to the accidental injury involved herein.

The order of the Hearing Officer is therefore reversed and the determination order is reinstated.

Pursuant to ORS 656.313, such compensation as was paid to the claimant under the order of the Hearing Officer during the pendency of this review is not repayable.

In accordance with the schedule of attorney's fees relative to a review requested by the employer resulting in the reversal of the award of compensation, counsel for claimant is entitled to an attorney's fee of not to exceed $125 payable by the claimant, for such services rendered in connection with the review proceedings.

WCB #69-717 March 17, 1970

DONALD B. WASHTOK, Claimant.
Request for Review by Claimant.

The above entitled matter basically involves a procedural and jurisdictional issue arising out of an automobile accident of February 23, 1968.

Though the automobile accident was known by the employer, it develops that the claimant denied any associated personal injuries to the investigating police officer and also denied any injury in discussions with fellow employes and supervisors.

On March 28, 1968, the employer's insurer denied a purported claim on the basis the claimant never intended to pursue a claim. No request for hearing was made with respect to this denial. If there was in fact no claim at this point, it would appear from Printz v. SCD, 88 Or Adv Sh 311, (453 P.2d 665), that the denial was a nullity.

The claimant first asserted his claim by execution of form 801, Defendant's Exhibit 1, on February 27, 1969, more than a year following the accident. The claim was denied by the employer. The Hearing Officer found that there was no reason established by the claimant for the long delay, that the employer was placed at a disadvantage in light of claimant's prior history of similar complaints and that the claim was untimely in any event.

The consideration of this case should at all times keep in proper perspective the fact that a claim for compensation requires both an accident and an injury. Notice that the vehicle operated by claimant was involved in an accident is not notice of a personal injury by accident. Regardless of whether the first denial of March 28, 1968, was a legal denial, there are inferences which may be legitimately drawn from the claimant's failure to respond to that denial.

The Board concurs with the Hearing Officer and concludes and finds that the claimant did not establish good cause for delay in pursuing the claim. The Board also concludes and finds that the employer was prejudiced by the delay.

There is further reason for affirming the Hearing Officer. The matter should never have proceeded to hearing in any event. Pursuant to ORS 656.319, no hearing shall be granted where no medical services or payment of compensation has been made within one year from the date of injury. Jurisdiction having been lost could not be revived by a denial of a claim on which no hearing could have been granted.

For the reasons stated the order of the Hearing Officer is affirmed.

WCB #69-641 March 17, 1970

CECIL B. WHITESHIELD, Claimant.
Request for Review by Claimant.

The above entitled matter involves procedural issues arising from the claim of a 24 year old workman who was struck in the back by a cable on July 24, 1968. There was a large hematoma which was drained. His doctor authorized his return to work August 19, 1968 and on August 23, 1968 reported the claimant to have no difficulty with his back but did have some epigastric problems which appeared due to an ulcer.

Pursuant to ORS 656.268, a determination issued September 18, 1968 finding the claimant to have no permanent disability and to have sustained temporary total disability only to August 19, 1968.

On April 11, 1969 a letter from the claimant was deemed a request for hearing with respect to the determination order.

Upon hearing the issue was raised whether a claimant whose condition worsens during the year following a determination pursuant to ORS 656.268 is required to establish a right to compensation as a claim of aggravation pursuant to ORS 656.271.

The procedure prior to January 1, 1966 (ORS 656.284 repealed) required a claimant to seeking rehearing within 60 days or be bound by the closing order. It was found that many requests for rehearing and appeal were filed due to the workman's uncertainty about his condition immediately following claim closure. In the legislative process the time for challenging claim closure under ORS 656.268 was extended to a full year. The concept was not one of requiring a claimant to prove that the order was in error by evidence of the claimant's condition as of that date. The test is whether the order was proper by the evidence as of that date as amplified by the claimant's experience within one year from the date of that order. A claim could be processed as one for aggravation within that period but the claimant is not required to do so in order to establish the right to hearing. The hearing, in this instance, should have proceeded upon the merits of whether the claim should be reopened. The Hearing Officer was not made award of this legislative history.

The claimant also urges that he should be provided diagnostic services of a physician at the expense of the employer. In this claim it appears the claimant was in a violent one-car accident which totalled out the undercarriage of the car. This followed the claim closure which was supported by a medical report reflecting that the claimant had recovered from his back injury. The claimant asserts his only injury was being cut on glass while crawling out of the wreck. If a hearing upon the merits determines finally a further responsibility of the employer, it will be proper to order payment for medical services reasonably related to the accident. It is not the continuing liability of the employer to provide diagnostic services in areas of questionable liability.

To the extent the ruling of the Hearing Officer may have adversely influenced the claimant's presentation of the matter, the Board deems it proper

to remand the matter for further evidence and ruling upon the merits of the determination order in keeping with this order of the Board.

The matter is therefore remanded for further hearing and order on the merits.

No notice of appeal is deemed applicable.

WCB #69-1789 March 19, 1970

JERRY JOHNSON, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of whether the claimant's injury arose out of and in course of employment.

At the time of the injury the employer had failed to assure that his workmen would receive compensation as required by ORS 656.016. The status of the employer was found to be non-complying. If the claim is compensable, compensation is payable as provided by ORS 656.054 and recoverable by the State Accident Insurance Fund from the employer as therein provided. As noted above, the employer on review urges only that the claimant was not in the course of employment when injured.

The undisputed facts are that the employer Decker owned two gravel trucks. The claimant Johnson and a Mr. Suess were drivers of the two trucks being paid $9 per trip to haul loads of gravel. Upon one trip, the truck operated by Johnson incurred three or four flat tires and was abandoned by the claimant since it was inoperable. The claimant then hitched a ride with Suess. The Suess truck, with claimant as a passenger, was wrecked and claimant sustained injuries.

It is the contention of the employer Decker that the claimant was simply enroute home from his job and that claimant was only a guest passenger in the employer's other truck. There is a dispute about whether the claimant was enroute to phone the employer who was in Yakima and obviously unavailable to relieve the emergency. The testimony also indicates that the employer seldom had more than one or two extra tires available at home or at camp. The Board considers the entire contention over the claimant's possible intention to go home to be beside the point. It is conceivable that a truck driver could decide with four flat tires and no spares that he was through with the job and was going home. Even this unilateral mental reservation would not terminate his course of employment.

In proper perspective the employer's vulnerable equipment placed the claimant out at the end of nowhere unable to continue work or do anything except to go home or get repairs for the truck. It is immaterial whether he was going home or going for help. The work situation placed the workman in the situation. It is even immaterial whether the workman was injured afoot, hitchhiking in a stranger's vehicle or, as in this case, riding in another vehicle of the employer.

This is not a routine case of going and coming from work which is ordinarily not deemed within the course of employment. When the truck became inoperable it was 35 miles from where it would normally be left (Tr. p. 20-21) It is inconceivable that a workman would be deemed on his own and no longer in the course of employment when his employer's truck becomes inoperable and must be left 35 miles from where it was usually parked.

The Board concludes and finds that the claimant's injury arose out of and in course of his employment. The order of the Hearing Officer is affirmed.

Counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund from the employer pursuant to ORS 656.386 and 656.054.

WCB #69-1256 March 19, 1970

MARCELLA V. MOORE, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 50 year old real estate saleslady who injured her neck and low back in an automobile accident on January 8, 1968.

Pursuant to ORS 656.268 a determination issued finding the condition to have become stationary on June 14, 1968 without residual permanent disability. The Hearing Officer affirmed this finding but did order payment of certain medical expenses incurred following August 2, 1968.

One procedural question arose on review concerning the reference by the Hearing Officer to "reports of Dr. Robert Zimmerman (Exhibits A and C)." A careful search of the record reflects but one report tendered and received and the recital is deemed a reference to the fact that the single report bears a separate identification for each page. Dr. Zimmerman's report concludes as follows:

> "I believe from the history that Mrs. Moore may well have suffered a strain of the cervical and lumbar spine, and she has had pre-existing arthritis, as evidenced by the x-rays. She certainly at this time has several symptoms which would be considered coming from an anxiety basis, such as the easy fatigue and vagueness of all of her complaints. I feel that with some instruction in posture and encouragement, Mrs. Moore should have no permanent problems with her back."

Dr. Grewe, neurosurgeon, concluded as follows:

> "There is no evidence of any persistent neurological change and I find no evidence of any significant permanent disability attributable to her accident. Her vagueness about details is not believed to be related to her injuries. If the latter problem becomes worse, probably further investigation should be considered."

The claimant, now past 50, appears beset with the normal degree of deterioration from the prime of life to be expected at this age. She has had the benefit of the treatment and diagnosis of capable physicians. Her complaints are characterized as vague and the physicians conclude that there is no significant disability attributable to the accidental injury.

The Board, concurring with the Hearing Officer, also concludes and finds that there is no compensable permanent disability attributable to the accident.

The order of the Hearing Officer is affirmed.

SAIF Claim No. SA 317553 March 19, 1970

DOROTHY VICTORY, WIDOW OF
WALTER VICTORY, deceased.

The above entitled matter involves the claim of a widow of a workman whose claim dates from her husband's accidental death September 15, 1952.

The widow remarried November 8, 1956 and lived with this marriage partner for 12 years until his death September 30, 1967.

Following the death of the second husband, it was discovered the marriage was probably void from the beginning.

The State Accident Insurance Fund reinstated benefits as of the date of the death of the second husband. The claimant seeks to be paid as a widow for the 12 years she lived under full color of marriage to the second husband.

The Workmen's Compensation Board concludes that upon the state of the record the State Accident Insurance Fund has been quite fair in reinstating benefits which it could probably not have been required to reinstate as a matter of law.

The Workmen's Compensation Board concludes that in all good conscience it would do violence to the scheme of workmen's compensation to now retroactively order payment as a widow for a period of time when the claimant was to all intents and purposes remarried.

The Workmen's Compensation Board therefore declines to enter any order in the matter. Pursuant to ORS 656.278 no notice of appeal is appended.

WCB #69-1498 March 19, 1970

CLARK MUMPOWER, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a then 60 year old logger from an accidental injury of December 5, 1965, when he was struck by a log and incurred an acute mid and low back strain.

Pursuant to ORS 656.268 the disability was determined to be equal to the loss of 25% of an arm by separation under the schedule for compensating unscheduled disabilities at that time.

This determination was affirmed by the Hearing Officer who concluded that the claimant has other disability not attributable to the accident at issue. The claimant contends that the injuries are of such magnitude that he can no longer work regularly at a gainful and suitable occupation.

The claimant essentially removed himself from the labor market in 1967 by application for social security benefits at age 62. There is some discussion of record with respect to whether the claimant can engage in the rigorous aspects of Western Oregon logging or commercial fishing. Inability to meet the demands of these vocations as a test would render a substantial part of the over 65 population as totally disabled. This is not the test to be applied. The case has some similarity to the recent decision of the Appeals Court in Kenneth Warden v. North Plains Lumber Company, (March 12, 1970). Warden was a young man but the record otherwise reflects a combination of occupational and non-occupational disabilities and a claim for total disability. The Court expressed the conclusion that the claimant could, if he would, learn to do other types of work. The factor of motivation must be evaluated. Short of total disability it is the disability or increased disability attributable to the accident at issue which is being evaluated.

The Board concludes and finds that the disability attributable to the accident at issue including any permanent exacerbation of pre-existing problems does not exceed by comparison the loss by separation of 25% of an arm.

The order of the Hearing Officer is affirmed.

WCB #68-1982 March 19, 1970

JOHN W. BAILEY, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of the extent of permanent disability sustained by a carpenter, now 57 years of age, as the result of an injury to his low back incurred on August 30, 1967, when the pickup truck into which he was helping to load a heavy generator, accidentally backed up, knocking him backward onto his back.

The order of the Closing and Evaluation Division of the Board entered pursuant to ORS 656.268 determined that the claimant was entitled to an award of permanent partial disability of 80 degrees of the maximum of 320 degrees provided for unscheduled disability.

The hearing held upon the request of the claimant resulted in the Hearing Officer finding the claimant to be permanently incapacitated from regularly performing any work at a gainful and suitable occupation and ordering the award increased to permanent total disability.

The employer has requested a review by the Board of the order of the Hearing Officer contending that the evidence does not justify the Hearing Officer's award of permanent total disability.

The claimant's low back difficulty commenced in 1949 when he sustained an industrial low back injury diagnosed as spondylolisthesis, for which he received an award of permanent partial disability for unscheduled disability equal to 20% loss of use of an arm. He resumed employment as a carpenter in heavy construction and despite some recurrence of back pain, was able to continue working regularly as a carpenter until the occurrence of the present accidental injury.

The claimant's present injury was diagnosed as advanced, grade one, spondylolisthesis, involving the displacement of the fifth lumbar vertebra on the sacrum. The claimant failed to respond to conservative treatment and in January of 1968, a Gill laminectomy was performed. Although there has been some gradual improvement in the claimant's condition following the surgical procedure, it is conceded by the employer and it is clear from the record, that the claimant has sustained a significant permanent disability which precludes his return to his former occupation as a carpenter in heavy construction, in which employment he has been engaged for most of his life.

The claimant was referred to the Physical Rehabilitation Center maintained by the Workmen's Compensation Board for vocational rehabilitation evaluation. The reports of this facility reflect that the claimant has a moderate permanent physical disability which prevents his return to his regular work as a carpenter and that as a result he has a substantial occupational handicap making him eligible for vocational rehabilitation. There is recognition in the reports that his overall occupational aptitudes are limited and present difficulties in his vocational readjustment. He is considered a poor to fair candidate for satisfactory vocational rehabilitation.

Although the claimant professes an interest in vocational retraining and a willingness to work at suitable employment within his reduced capabilities, it becomes apparent from a review of the full record that the claimant was not interested in vocational rehabilitation and failed to cooperate with the efforts of the counselor of the Department of Vocational Rehabilitation in the implementation of a vocational rehabilitation program.

The record contains substantial evidence to document the claimant's lack of motivation as the underlying cause of the failure of the Department of Vocational Rehabilitation to effectuate a successful vocational retraining program. A concerted effort to overcome the obvious lack of motivation by claims of having been rejected and refused counseling by the Department of Vocational Rehabilitation is equally well documented in the record.

Before a workman for whom there is a realistic possibility of restoration to a status of self-support is relegated to a status of permanent and total disability, the record should reflect a determined effort by a properly motivated workman toward the achievement of his vocational rehabilitation. The Board is of the opinion that the evidence in this matter establishes that the claimant is not only eligible for vocational retraining, but that he could, if he would, be restored as a self-supporting and productive citizen.

The Workmen's Compensation Board has been delegated the responsibility and it has consistently been the policy of the Board in effectuating its responsibility to utilize the full resources of the available agencies of this state to aid in the restoration of substantially disabled workmen to regular

suitable and gainful employment in all instances where the workmen retain the capability of continuing to function even for a limited number of years as a constructive and productive member of society.

Although the Board can only make an effort to induce the claimant to take advantage of the facilities of this state which are available and designed to aid in the restoration of disabled workmen to suitable regular employment, the Board does hereby make known to the claimant that the vocational rehabilitation facilities and services of the Physical Rehabilitation Center maintained by the Board, the Department of Vocational Rehabilitation and the Department of Employment remain open to the claimant and that he need only make known to the Board his desire for assistance toward his vocational rehabilitation to cause the Director of the Workmen's Compensation Board to initiate a comprehensive program leading toward the vocational rehabilitation and placement of the claimant in such gainful and suitable employment as may be determined to be the most appropriate in the utilization of the claimant's remaining work capability.

It is the understanding of the Board that the legislative intent in the increase of the maximum award for unscheduled injuries by the 1967 Legislature from 192 degrees based upon the extent of disability compared to the loss of an arm, to 320 degrees based upon the extent of disability compared to the workman before such injury and without such disability, was to avoid the necessity of a permanent total disability award where the disability may approach or exceed the loss of an arm, but not constitute permanent total disability by authorizing a larger award of compensation in cases involving substantial permanent disability which fall short of true permanent total disability.

The Board is of the opinion that the proper evaluation of the permanent disability in this matter justifies a greater award than awarded by the determination order of the Closing and Evaluation Division, but does not justify the permanent total disability award found by the Hearing Officer.

The Board finds and concludes from its consideration of the entire record that the claimant has sustained permanent partial disability of 160 degrees out of the maximum of 320 degrees provided for unscheduled disability attributable to the accidental injury involved in this matter.

The order of the Hearing Officer is therefore modified to reduce the award of disability from permanent total disability to permanent partial disability of 160 degrees.

Claimant's counsel is awarded an attorney's fee of 25% of the increased compensation based upon the increase in the compensation awarded by this order from 80 degrees to 160 degrees. Claimant's counsel is further entitled to an attorney's fee of not to exceed $125 payable by the claimant for services rendered on this review resulting in the reduction of the award of compensation.

WCB #69-452 March 19, 1970

ROBERT A. MUNNERLYN, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the relationship and compensability of a low back injury sustained June 13, 1968. The matter is complicated by the fact that the claimant made claims for subsequent incidents in October and December of 1968. There is no indication that either of these claims were accepted or that any compensation has been paid or is payable on their account.

Pursuant to ORS 656.268, a determination issued December 17, 1968 finding the claimant to have sustained no permanent partial disability as a result of the June 13th injury and finding the medical condition to be stationary. The Hearing Officer found the September and December incidents to be subsequent intervening trauma of sufficient severity to relieve the employer in this claim for liability for temporary total disability and surgery which followed in February of 1969. However, the Hearing Officer did find the June 13th injury had produced a permanent disability which he evaluated at 48 degrees out of the applicable maximum of 320 degrees for "other" or unscheduled disabilities.

It is the claimant's contention that the September and December incidents were simply symptomatic manifestations of the injury previously incurred and did not break the chain of causation.

It is obvious that the Hearing Officer decision was greatly influenced by the claimant's rather substantial work history in the interim. The Board, on occasion, has been critical of claims where there is a long history of work with periodic symptomatic flareups and the Board is requested to decide that some relatively minor industrial incident is to bear the responsibility. If the evidence in this claim was confined to the claimant's recitation of continuing trouble following the June accident, it would be difficult to cut through the history of intervening work. There is clear medical evidence, however, that physiological damage was caused by the June 13th injury in the destruction of certain ligamentous tissue and in a vertebral displacement. This was not just a temporary flareup of pre-existing symptoms. It was these changes which produced subsequent symptoms and these were the defects sought to be alleviated by the surgery in February of 1969.

The Board concludes and finds that the claimant's condition with respect to the June 13, 1968 injury was not medically stationary when closed December 17, 1968 and that said accident of June 13th was responsible for the need for surgery in February of 1969 and temporary total disability associated with the disability requiring surgery.

The order of determination of December 17, 1968 and the order of the Hearing Officer of September 5, 1969 are both set aside and the employer is ordered to accept responsibility for the medical care including the surgery of February, 1969 and to pay temporary total disability as required under ORS 656.268. The employer shall re-submit the matter for further determination of disability pursuant to ORS 656.268 as the circumstances warrant.

Counsel for claimant is allowed a fee of 25% of the compensation paid by virtue of this order including 25% of any permanent partial disability subsequently allowed by the Closing and Evaluation Division of the Workmen's Compensation Board upon the next claim closure to the extent the permanent partial disability may exceed any permanent partial disability paid upon the order of the Hearing Officer at the effective date of this order, the fees in no event to exceed $1,500.

The claimant has sought increased compensation and imposition of attorney fees pursuant to ORS 656.262(8). The claimant admits his action in filing subsequent "claims" was indiscreet. To the extent such actions contributed to the employer's honest opposition to continuing liability, the action of the employer can hardly be classified as unreasonable. Penalties are not to be applied.

WCB #69-1458 and #69-1459 March 19, 1970

JOHN V. GREER, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of which employer and insurer are responsible for the compensation of claimant's back condition following an exacerbation on May 20, 1969.

The claimant was first injured when he fell from a scaffold on November 6, 1967 while employed by H. A. Anderson Co. The claimant had returned to work but his claim from the 1967 injury had not been closed. On May 20, 1969 the claimant was stacking 20 foot 2 x 12's for C. E. John Construction Co. A fellow workman dropped his end with a resultant jar to the claimant and the onset of a dispute between two insurers. The Argonaut Insurance Company, as insurer of the 1967 injury, denied responsibility for any consequences of the May, 1969 board dropping incident. The State Accident Insurance Fund proceeded todeny that there was any new compensable injury incurred in the employment of its insured, the C. E. John Construction Co. There is thus no dispute over whether the claimant is entitled to compensation but by denials from both employers, the claimant is forced to litigate against both in order to obtain compensation.

At this juncture the Board points to ORS 656.307 as a method for instituting compensation subject to a subsequent adjustment between the employers. Though ORS 656.307 is directed to uncertainty as to the true employer, the broad right to determine matters provided in ORS 656.283(1) should be utilized to obtain direction for payment subject to adjustment rather than to embroil the claimant needlessly in litigation.

On the merits of the two claims the Hearing Officer concluded that there was sufficient evidence of an additional compensable injury from employment on May 20, 1969, to warrant the allowance of the claim against the State Accident Insurance Fund. No decision was made with respect to any liability of H. A. Anderson Co. and its insurer, Argonaut Insurance Company.

The Board concurs with the Hearing Officer and concludes and finds that the claimant sustained additional compensable disability from the accident

of May 20, 1969. The order of the Hearing Officer in this respect is therefore affirmed.

Both claims must still be evaluated pursuant to ORS 656.268. Even though both accidents affect the same part of the body, any disability award must be apportioned to conform to the respective responsibility of each injury. (See Keefer v. SIAC, 171 Or 405). The order of the Hearing Officer is modified to provide that the H. A. Anderson Co., and its insurer is only relieved of additional disability attributable to the accident of May 20, 1969. H. A. Anderson and its insurer remain liable for the consequences of the accident of November 6, 1967. To the extent the medical condition was not stationary when the second injury occurred, it is suggested that the two employers concurrently submit the two claims pursuant to ORS 656.268 when the condition warrants.

To the extent that the employers and insurers were responsible for unreasonable delay in payment of compensation admittedly due by one or the other and in light of finding the State Accident Insurance Fund responsible, the Board also finds the imposition of increased compensation and attorney fees appropriate.

Except as modified by the underlined matter above, the order of the Hearing Officer is affirmed.

Counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund pursuant to ORS 656.382 and 656.386.

WCB #70-105E March 19, 1970

THERESA J. HAZELETTE, Claimant.

The above entitled matter involves the claim of a 31 year old employe of a school art supplies distributor who injured her low back while lifting a heavy carton of clay on September 27, 1968.

There being no record before the Workmen's Compensation Board reflecting that the employer had assured that his subject workmen would receive compensation as required by ORS 656.016, the Workmen's Compensation Board instituted proceedings by notice pursuant to the Model Rules of Administrative Procedure promulgated by the Attorney General and adopted by reference by the Workmen's Compensation Board. Rule 3 B of the Attorney General rules is as follows:

(1) A hearing may be instituted by:

(a) Notice from the agency to any person who will be affected by a proposed revocation, suspension, refusal to issue or reissue, of a license, or other proposed action of the agency, which notice must be verified.

(2) Contents of notice

The notice shall be in writing, signed by, or on behalf of the agency, and shall contain:

(a) A concise statement of facts upon which the agency action is based;

(b) Provisions of law upon which the notice is based.

(3) An answer to the charge in the notice shall be filed by noticee within fifteen days of service. Otherwise the allegations of the petition will be deemed admitted.

(4) A notice shall be served in the same manner as is provided in Rule 3A (4)(a) of these rules.

(5) Except as herein expressly provided the rules governing hearing upon petition shall govern a proceeding instituted by notice wherever applicable.

A notice of proposed order was issued to the employer on January 9, 1969. An order declaring the employer to be noncomplying and the claim to be compensable was issued January 21, 1969. Though the order was three days premature no question was formally raised by the employer to this order until approximately one year later, at which time the employer requested a hearing with respect to his status as a complying employer and whether the claimant sustained a compensable injury.

The matter was referred to a Hearing Officer who has set Friday, March 27, 1970, as the time for a hearing on the issues.

The Board has now re-examined the matter and deems the order of the Board in the matter issued January 21, 1969 to have been final as of the time within which the employer was given opportunity to request a hearing.

The notice of hearing issued by Henry L. Seifert setting Friday, March 27, 1970, and Fifth Avenue Building, Hearing Room 1A, 2130 S.W. 5th, Portland, Oregon as the time and place for a hearing is set aside and the request for hearing as to those issues is denied.

It is noted that a determination of disability issued September 29, 1969 pursuant to ORS 656.268. The employer is allowed one year from the date of that order to obtain a hearing upon the issue of disability attributable to the accident and hearing will be appropriately scheduled upon a request for hearing as to that issue.

WCB #69-964 March 19, 1970

PETAR PERICIC, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability attributable to an ankle fracture sustained by a 38 year old warehouseman on June 20, 1968. The lower one third of the fibula was involved in a longitudinal fracture. He was able to tolerate weight bearing by August 2, 1968, and is presently back at his former employment full time.

Pursuant to ORS 656.268, a determination issued finding there to be no residual permanent disability. Upon hearing, an award of 7 degrees was made by the Hearing Officer against the applicable maximum of 135 degrees for injuries to the leg below the knee.

The claimant came to the United States from Yugoslavia about eight years ago. He has been regularly employed since. He is described as quite excitable and his magnified concern about his injury may well have been founded in fears for his security if the injury seriously affected his ability to make a living. The Hearing Officer noted that the exotic and somatic demonstrations reported by examining physicians were not evident at the time of hearing. This, of course, bears out the prognosis of the physicians that even the minimal discomfort will diminish with time.

The Board concurs with the Hearing Officer and also finds and concludes that there is a minimal permanent disability which does not exceed the 7 degrees awarded by the Hearing Officer.

The order of the Hearing Officer is therefore affirmed.

WCB #69-1424 March 23, 1970

CHARLES L. VANDERKELEN, Claimant.

Workmen's Compensation Board Opinion:

The above entitled matter involves the claim of a 63 year old painter whose claim for compensation for chronic liver disease was based upon an alleged occupational exposure to lead paint, thinners and laquer materials.

The claim was denied and following a Hearing Officer order allowing the claim, appeals were concurrently made to the Circuit Court for legal issues and to a Medical Board of Review.

The Board is now in receipt of the findings of the Medical Board of Review which are attached and by reference made a part of this order. Pursuant to ORS 656.814 the attached findings are declared filed as of March 19, 1970 and by said section the findings are declared final and binding.

No notice of appeal is deemed applicable but a copy of this order is to be forwarded to the Circuit Court of the State of Oregon for the County of Multnomah for inclusion in the record now pending before that Court.

Medical Board of Review Opinion:

On March 4, 1970 at 9:00 a.m. Drs. Oren Richards, Kenneth Wilhelmi, and Morton Goodman met in Dr. Goodman's office and sat as a Medical Board of Review to examine the records of Charles J. Vanderkelen (deceased). The transcript of the hearings held on October 6, 1969 were reviewed. The medical records, the hospital reports, the biopsy report and the autopsy report were available for study and consideration.

It seems clear that this patient died of cirrhosis of the liver and the complications of this disorder (esophageal varices with gastrointestinal hemorrhage). All the evidence indicates that the liver disease was long-standing and had developed over a period of a number of years. It may well have been caused by exposure to carbon tetrachloride and/or toluene, solvents

to which he had been exposed for at least 30 years in the course of his occupation. Other possible causes of the liver damage, such as malnutrition, alcohol, drugs and possibly even hepatitis, cannot be completely ruled out as a contributing or even primary cause of his illness. However, from the evidence, we have concluded that the occupational exposure to solvents is the probable major cause of his illness and death.

/s/ Oren R. Richards, M.D.
/s/ Kenneth C. Wilhelmi, M.D.
/s/ Morton J. Goodman, M.D.

WCB #69-1411 March 24, 1970

CLAUDE R. SMALLMAN, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 63 year old machinist whose right forearm was cut by a fragment from a disintegrating flywheel on April 29, 1969.

The claimant returned to his regular work about July 1, 1969. Pursuant to ORS 656.268 a determination issued finding the claimant to have no residual permanent disability. Upon hearing, however, award was made on the finding the claimant had sustained a loss of one sixth of the forearm, entitling him to 25 degrees against the applicable maximum award of 150 degrees.

The Board concurs with the Hearing Officer that there is some residual permanent disability and that the original determination must be modified. The Board also concurs with the Hearing Officer in finding that the disability does not exceed the loss of one sixth of the forearm. Dr. Zimmerman describes the loss of muscle substance as "slight" and the weakness in the arm as a "little bit." The Hearing Officer had the benefit of a personal observation of the claimant and the Board finds no basis for disputing his evaluation of the disabling effect of the injury.

The order of the Hearing Officer is affirmed.

WCB #69-795 March 25, 1970

MATHEW B. THRASHER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability attributable to a fracture of the left leg sustained by a 48 year old laborer on April 29, 1968, as a result of a fall from a tractor.

Pursuant to ORS 656.268, the Closing and Evaluation Division of the Board determined that claimant was entitled to an award of permanent partial disability of 10% loss of use of the left leg or 15 degrees of the 150 degrees scheduled for the complete loss of use of one leg.

Based upon the evidence presented at the hearing, the Hearing Officer ordered the award of permanent partial disability increased 12 degrees to a total of 27 degrees, an 18% loss of use of the left leg.

The claimant has requested a review by the Board of the order of the Hearing Officer on the ground that his permanent disability is greater than that awarded by the Hearing Officer. The claimant asserts that the permanent partial disability award should be no less than 25% or 37.5 degrees.

The claimant sustained a complete fracture with some displacement of the greater trochanter, a bony prominence located on the outer aspect of the upper end of the femur of the left leg. Following hospitalization for a period of four or five days, he was thereafter treated at monthly intervals during the ensuing six months.

The medical reports of Dr. Cherry, the treating orthopedic surgeon, reveal that the fracture healed solidly in satisfactory position with mild displacement. His reports indicate that the claimant's ability to walk has gradually improved and that he now walks quite well. He reports no objective findings other than some remaining tenderness in the area of the fracture.

The examination of the claimant by Dr. Nudelman for the purpose of the evaluation of disability disclosed no tenderness over the site of the fracture as earlier found by Dr. Cherry. He indicates that the claimant walks normally without any limp. He found the claimant to have a full range of motion of the left hip on forward flexion, backward extension, abduction, adduction, internal and external rotation. Other than subjective symptoms to which he gave little credence, Dr. Nudelman found no evidence of disability.

The record reflects subjective complaints indicative of greater residual disability than is substantiated by the objective medical findings. Although the Hearing Officer concludes that the claimant's complaints are exaggerated, he further finds that a fracture of the greater trochanter could result in subjective symptoms of the nature described by the claimant, and as a result accords substantial weight to the claimant's subjective complaints in the evaluation of the permanent disability.

Dr. Cherry concludes his final medical report with an evaluation of permanent disability, stating "It is my estimate that his disability is equal to 25% loss of function of a leg." He fails to indicate the facts upon which he relied in forming his opinion, or the reasons for his opinion. Neither this report nor his prior reports contain objective medical findings which would support his evaluation of disability. Dr. Cherry's evaluation of disability is accordingly entitled to little weight.

The Board deems it proper to note in this regard its long standing policy in conformity with the policy of the American Medical Association, as set forth in its Guides to the Evaluation of Permanent Impairment, that the physician's role or function in the administration of the Workmen's Compensation Law be confined to the evaluation of permanent impairment as distinguished from the administrative and non-medical function of the evaluation of permanent disability.

The Board finds and concludes from its de novo review of the record and briefs, that the Hearing Officer properly weighed the evidence of record and

correctly evaluated the claimant's loss of use of his left leg by an award of permanent partial disability of 27 degrees.

The order of the Hearing Officer is therefore affirmed.

WCB #69-807 March 27, 1970

SHARON MILLER, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 23 year old cook-waitress as the result of a low back injury related to activities in heavy lifting. February 10, 1969 was designated as the date of injury though the symptoms had apparently developed over a period of time.

Pursuant to ORS 656.268 a determination issued on May 29, 1969, finding the claimant to have no residual permanent disability. Upon hearing, however, the Hearing Officer found disability evaluated at 15 degrees against the applicable maximum of 320 degrees for unscheduled or other injuries.

One of the basic issues is whether a person who finds she cannot perform work which is "too heavy for her" should have a disability award when there is no showing that it was the injury which precluded performance of such work. Dr. Abele's report of March 13, 1969, concludes:

> "This girl has a chronic sprain in the right lumbosacral area and I think she would recover if she stopped the unusual strains. I believe this job is too heavy for her."

Dr. Blauer on April 4, 1969, concludes as follows:

> "I believe that her condition at the present time does not include any permanent partial disability. Congential (sic) anomalies of the low back area are often predisposing factors to straining of the back. Perhaps this is true in this case. In any event, she is not getting any active treatment, nor does she need any and I believe that her claim may be closed without any permanent partial disability."

The Hearing Officer, following observation of the claimant, apparently concluded that there was some minimal disability attributable to the work.

The Board concludes and finds that any disability attributable to the alleged accidental injury does not exceed the award of 15 degrees allowed by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #69-1311 March 27, 1970

ADRIAN KING, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 44 year old ply mill chipperman who sprained his low back while pushing a bunch of green veneer on January 20, 1969.

Pursuant to ORS 656.268 a determination issued July 17, 1969 finding the claimant to have an unscheduled disability of 48 degrees against the applicable maximum of 320 degrees comparing the workman to his pre-accident status. This determination was affirmed by the Hearing Officer who held the hearing and observed the witnesses.

The claimant has a history of pre-existing degenerative arthritis and previous injuries to his spine. Dr. Embick's report of February 3, 1969 sets forth his findings on examination made eleven days following the accident. Aside from some pain in the left forefoot the complaints at that time were "quite similar to those of which he complained in February of 1968." In May of 1967, Dr. Embick's report reflects that the claimant had not recovered from prior injuries but the "injury of January, 1969 seems to have been a new injury."

The claimant is described as "obese," and as having a pendulous abdomen. As noted by Dr. Anderson's report of August 23, 1969, "It is difficult to equate the physical findings to account for this patient's complaints of complete disability and inability to return to work." Among the various complaints is that of loss of sexual capacity. There is no medical evidence associating this complaint with the injury.

The problem of evaluating disability is to ascertain the extent of disability attributable to this accident. There is evidence of a minimal to moderate disability attributable to the accident at issue.

The Board concludes and finds that the disability attributable to the accident at issue does not exceed the 48 degrees heretofore awarded. The order of the Hearing Officer is therefore affirmed.

WCB #69-1045 March 27, 1970

IRNA LUCILLE MARTIN, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue on review of whether the claimant has satisfied the prerequisites of the law so as to entitle her to a hearing on a claim of aggravation.

The claimant at age 42 sustained a low back injury on October 9, 1966, while pushing a supply cart in her work as a motel maid. A determination issued May 25, 1967, finding the claimant to have a permanent disability of 19.2 degrees against the then applicable maximum of 192 degrees for such other or unscheduled disabilities.

The request for hearing on the claim of aggravation was filed with the Workmen's Compensation Board on June 11, 1969. It was accompanied by a medical report dated June 4, 1968 from a Dr. Eugene Lee, D.C. and a report of January 14, 1969 from a D. J. Shefield, M.D. Neither doctor appears to be licensed to practice in the State of Oregon. There is no report reflecting claimant's current condition.

The request for hearing was dismissed by the Hearing Officer on the grounds that the compensation law requires substantiation of an aggravation claim by an Oregon doctor and that the medical reports indicated there had been a subsequent intervening accident. It also appears that at the time of instituting the proceedings the claimant was in California.

The Board concludes that the legislative intent in the amendment effected by Ch 447, O.L. 1969, was to authorize the use of reports of out of state doctors. The purpose of requiring a medical report as a prerequisite to a hearing on an aggravation claim is simply to avoid useless hearings in which no corroborative medical evidence is produced.

One of the problems faced by the Board in this case is the fact that the hearing was also denied on the basis of a subsequent accident on a mere recital in one of the doctor's reports. The evidence is not adequate for such a conclusion.

The return of the claimant to Oregon places the entire matter in a different posture. Upon the likelihood that the claimant may now be able to obtain a current report from an Oregon doctor, the matter should be remanded to the Hearings Division with directions to schedule a hearing promptly after claimant obtains and submits a medical report from an Oregon doctor, based upon current medical examination reciting facts from which it appears that there are reasonable grounds for the claim. The law permits the cost of any such medical examination and report to be charged to the State Accident Insurance Fund on a discretionary basis. The Board is not ruling that lack of a report from an Oregon doctor is a jurisdictional defect.

The matter is accordingly remanded to the Hearings Division with directions to allow claimant a reasonable time to obtain a current report from an Oregon doctor reciting facts supporting the claim. If such report is not submitted, the Hearings Division may again enter an appropriate order in the matter.

No notice of appeal rights is deemed required, [Barr v. SCD, Or App, 90 Or Adv Sh 55].

WCB #69-1903 March 27, 1970

ELIZABETH MITCHISON, Claimant.
Request for Review by Claimant.

The above entitled matter involves the claim of a 78 year old nurse's aide who injured her left knee on January 19, 1969.

Pursuant to ORS 656.268 a determination issued finding the claimant to have a disability of 15 degrees against the applicable maximum of 150 degrees for disability of a leg. Upon hearing the Hearing Officer, reciting a review of the evidence and a stipulation of the parties, increased the award to 45 degrees.

The claimant requested a review but now advises the Board the request was filed in error.

Upon the request of the claimant, her request for review is hereby dismissed.

No notice of appeal is deemed applicable.

WCB #68-1791 March 30, 1970

CARL O. SWANSON, Claimant.
Request for Review by Claimant.

The above entitled matter involves the claim of a 54 year old self employed service station owner operator who filed a claim on April 8, 1968 alleging an "abdominal muscle separating" from "continued heavy lifting" which was "first noticed in March, 1967."

The State Compensation Department first assumed some liability on the claim as a continuation of a prior claim for hernia which occurred in September of 1966. The State Compensation Department then denied the claim for the "abdominal muscle separation" on October 28, 1968 and hearing was held upon that issue.

It appears that the September, 1966 claim was for an inguinal hernia. The current issue is over a separation along an operative incision scar produced by surgery for a prolapse of the rectum for which there is no claim.

The claimant obtained insurance from the State Compensation Department as a self employed employer pursuant to ORS 656.128. The legislature has provided that no claim can be allowed or paid for such self employed persons except upon corroboration in addition to the evidence of the claimant. There is no such corroborative evidence of record.

There is a further question of the timeliness of filing the claim. The claim was not filed until April of 1968 at which time more than one year had elapsed without payment of benefits or provision of medical services precluding a hearing under ORS 656.319.

An issue not raised upon hearing appears from the transcript, page 24, where it appears that the claimant was not an employer. He was working alone and did so for three years. ORS 656.023 defines a subject employer as one employing one or more subject workmen. ORS 656.128 permitting extension of coverage extends only to employers subject to ORS 656.001 - 656.794.

For the reason set forth by the Hearing Officer as well as for the additional reasons set forth in this opinion the order of the Hearing Officer upholding denial of the claim is affirmed and the matter is dismissed.

WCB #69-1303 March 30, 1970

NILE EUGENE KAHLER, Claimant.

The above entitled matter involves the claim of a 39 year old truck driver for a produce company who fell from his truck on July 19, 1968 when he missed a step and struck his head on the pavement.

Pursuant to ORS 656.268 a determination issued January 22, 1969 finding there to be no residual permanent disability. Upon July 17, 1969, a request for hearing was filed by the claimant through counsel of record. After a couple of postponements at claimant's request, the Hearings Division of the Workmen's Compensation Board addressed letters of January 9 and February 17, 1970 to claimant's counsel. The latter advised that failure to reply within 15 days would be deemed an abandonment of the proceedings.

On March 10, 1970, the Hearings Division issued an order dismissing the pending proceedings as having been abandoned somewhat on the order of a dismissal for want of prosecution.

Counsel for claimant responded to this order by a request for review filed October 18, 1970 relating for the first time that "the claimant has been a patient at the Eastern Oregon State Hospital, and unable to participate in any hearing," etc.

Though the claimant was under a handicap, counsel was not and counsel should have properly protected the record. The omissions of counsel often adversely affect the rights of their clients. The Board, however, believes the interests of justice will best be served by permitting the claim to be heard on the merits.

The matter is therefore remanded to the Hearing Officer for hearing on the merits.

No notice of appeal is deemed applicable.

WCB #69-914 March 30, 1970

BUD T. VALIAN, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent partial disability sustained by a 34 year old claimant who works as a faller and bucker during the logging season and as a ski instructor during the skiing season. On July 17, 1968, while working as a faller and bucker, the claimant was struck diagonally across the back by a falling tree, resulting in compression fractures of three thoracic vertebrae.

Pursuant to ORS 656.268, a determination issued finding the claimant to be entitled to an award of permanent partial disability equal to a 10% loss of the workman for unscheduled disability, or 32 degrees of the applicable maximum of 320 degrees. This determination was affirmed by the order of the Hearing Officer.

The claimant contends on review that he is entitled to an award of permanent disability of 35% to 50% for unscheduled disability involving his back, and an additional and separate award of permanent disability for the loss of use of his left leg.

The significant medical evidence is provided by the medical report of Dr. Shlim based upon his examination of the claimant in April of 1969, and the medical report of Dr. Case based upon his examination of the claimant in September of 1969. The reports reflect very minimal compression fractures of the fifth, sixth and seventh thoracic vertebrae which are well healed with approximately 15% loss of vertical height and slightly increased curvature of the dorsal and lumbar spine. Some remaining tenderness was found in both the dorsal and lumbosacral areas. A full range of motion existed in the neck, shoulders and low back without pain, with the sole exception of some limitation of rotation in the neck.

In late November of 1968, approximately four and a half months following his accident, the claimant resumed his customary winter employment as a ski instructor. In May of 1969, following the end of the skiing season and the commencement of the logging season, he resumed his customary summer employment as a faller and bucker. He worked regularly in this occupation throughout the logging season without any lost time attributable to his accident.

The claimant's injuries have caused no restriction upon his winter employment and he has experienced no appreciable difficulty with his back during the course of his employment as a ski instructor. Although he discontinued instructing skiing and commenced working in a ski shop during the 1969-70 skiing season, the record is clear that his change of occupation was due solely to economic factors.

The claimant's injuries have causes (sic) some reduction in his former work capability as a faller and bucker. It is recognized that the activity involved in the performance of his work in falling and bucking, primarily related to the operation of a chain saw, precipitates some pain between his shoulder blades and in his low back, which he is able to endure, due in part to his stoical attitude, with only slight interference with his work. The

pain abates when the claimant ceases operation of a chain saw and Dr. Case indicates that the symptoms will ultimately abate within one to two years if the claimant continues employment as a faller and bucker requiring the use of a chain saw. While Dr. Case suggests the discontinuance of employment as a faller and bucker for one to two years as the most practical solution to avoiding the symptoms precipitated by this activity, it appears from the record that the claimant chooses to continue to work as a logger and is able to do so, although it involves enduring the pain for at least a year before it may be expected to subside. The pain, while admittedly genuine, is essentially non-disabling and of limited duration, and to this extent is not compensable.

In the final analysis it appears that the actual limitation upon the claimant's work capability is minimal and is limited primarily to his arduous occupation as a faller and bucker. The probability is that such restrictions in his former abilities as now exist will be reduced or eliminated with the subsidence and ultimate abatement of the pain and other symptoms. The claimant has sustained some permanent disability which requires some adjustment and tolerance in the performance of the more strenuous aspects of his work as a faller and bucker. The extent to which the claimant is unable to perform his work with the same degree of vigor and skill as he formerly possessed is the basis for and is recognized in the existing award of permanent disability.

The claimant formerly worked alone as a faller and bucker on a contract basis. In his present employment he works with a partner in a two man team at a fixed daily wage. The safety of fallers and buckers in logging operations is responsible for the latter practice becoming the accepted method in the logging industry. His former earnings approximated $800 per month and his present earnings exceed $1,000 per month. Consideration of the factors pertinent to the measurement of earning capacity by the decision in Ryf v. Hoffman, 89 Or Adv Sh 483, (459 P.2d 991), fails to disclose any basis upon which to conclude that the claimant has suffered an impairment of earning capacity.

The claimant contends that a further and separate award of permanent disability should be made for the loss of use of his left leg. The source of the symptoms in the left lower extremity, in the opinion of Dr. Case, is ultimately traceable to the vertebral fractures. The evidence does not establish a separate disability of the left leg. The symptoms manifested in the left leg are under the circumstances disclosed by the evidence properly included and incorporated in the award of compensation for unscheduled disability.

The Board finds and concludes from its de novo review that the claimant's disabilities were properly evaluated by the Closing and Evaluation and the Hearing Officer and do not exceed the award of permanent partial disability established by the original order of determination affirmed by the order of the Hearing Officer.

The order of the Hearing Officer is therefore affirmed.

WCB #69-94 March 30, 1970

ROBERT L. BENNETT, Claimant.

The above entitled matter involves an admittedly compensable injury sustained May 15, 1968 by a 28 year old hyster driver. The claim had not been closed when the claimant sustained an exacerbation of the ankle problem while deer hunting on October 8, 1969.

The employer denied any responsibility for any disability arising from the deer hunting incident. Upon hearing the Hearing Officer ruled that the denial should be set aside.

Pending review the parties have submitted a stipulation. Copy is attached and by reference made a part hereof. The parties have settled on a disputed claim basis any responsibility of the employer for the exacerbation incurred in the deer hunting accident.

The Board hereby approves the attached stipulation.

This approval does not terminate responsibility of the employer for compensation attributable to the industrial injury, exclusive of the October 8, 1969 exacerbation while hunting. The Board is advised that its Closing and Evaluation Division is concurrently issuing a determination pursuant to ORS 656.268 with respect to the admittedly compensable injury of May 15, 1968.

WCB #69-1895 April 1, 1970

SCOTTIE L. WITHERS, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of the extent of permanent partial disability attributable to an injury sustained to the right knee of a 57 year old right of way timber faller on October 18, 1968.

The determination order of the Closing and Evaluation Division of the Board entered pursuant to ORS 656.268 awarded the claimant permanent partial disability equal to 23 degrees of the applicable maximum of 150 degrees for the partial loss of use of his right leg.

The order of the Hearing Officer entered following hearing increased the award of permanent partial disability for the partial loss of use of the claimant's right leg to 53 degrees.

The employer sought this review of the order of the Hearing Officer requesting that the Board reverse the order of the Hearing Officer and reinstate the determination order.

The claimant continued working for over a month following the injury to his knee before consulting Dr. Shaw, an orthopedic surgeon. Thereafter he continued working for another two months before undergoing the recommended surgery to his right knee. Following surgery and a three month period of recovery, he returned to his former job as a faller for his former employer, and has worked continuously at this employment since that time.

Dr. Shaw as a result of his final examination of the claimant following his return to work reports objective findings of no atrophy, a full range of motion lacking 5 to 10 degrees of flexion and extension, good lateral stability, no knee joint fluid or swelling, and mild subpattellar crepitus. He reports subjective complaints of pain in going up and down stairs and in deep squatting.

The claimant's testimony, which appears to be fully credible, is essentially to the effect that although he has some loss of physical function in the use of his right leg, he is nevertheless capable of the efficient performance of his work. A fair summary of the claimant's testimony would indicate that the injury to his knee has caused some limitation in the use and function of his leg, and that as a result he experiences some difficulty in traversing the rough and steep terrain encountered in his work, experiences some pain in the leg, some crepitation in the knee joint on movement, and occasional swelling of the injured knee.

The claimant indicates that his employment involves working in snow conditions during the winter. He has had no occasion to work in snow since his return to work following the surgical repair of his knee. Lacking actual knowledge, it seems reasonable to conclude that the effect of snow conditions on his ability to work should be generally consistent with the degree of physical impairment sustained to his leg as a result of the knee injury. At this point the possible effect of deep snow is speculative and conjectural.

The recent decision of the Court of Appeals in Trent v. State Compensation Department, Or App, 90 Or Adv Sh 725, 466 P.2d 622 (1970), extended the rule established in Ryf v. Hoffman, 89 Or Adv Sh 483, 459 P.2d, 991, to scheduled injury cases in holding that loss of earning capacity is a proper consideration in the evaluation of scheduled permanent disability. The evidence of record in this matter reflects neither a present nor a foreseeable future change in the claimant's job, employer or wages. The Board accordingly finds no impairment of the claimant's earning capacity.

The Board finds and concludes from its own de novo evaluation and determination of permanent disability that the claimant's loss of use of his right leg as a result of his accidental injury is inconsistent with the Hearing Officer's increase in the permanent disability award and that the claimant's permanent partial disability does not exceed the 23 degrees awarded by the determination order.

The order of the Hearing Officer is therefore reversed and the determination order awarding permanent partial disability of 23 degrees is reinstated.

Pursuant to ORS 656.313, the claimant is not obligated to repay any compensation paid pursuant to the order of the Hearing Officer during the pendency of this review, in excess of the compensation awarded by the order on review.

In accordance with the schedule of attorney's fees, counsel for claimant is entitled to an attorney's fee of not to exceed $125 payable by the claimant for services rendered upon review resulting in the reversal of the increased award of compensation.

WCB #69-468 April 1, 1970

DENNIS ROSE, Claimant.
Request for Review by Employer.

The above entitled matter involves the claim of a 26 year old jointerman whose right hand was caught and crushed in a jointer on April 5, 1968. The issue is one of evaluation of disability.

Pursuant to ORS 656.268 an award of disability found the permanent disability to be 15% of the thumb and 10% each of the right index, middle and ring fingers.

Upon hearing the Hearing Officer, despite lack of any evidence of injury to the little finger and without specification of disabilities, made an award of 100 degrees upon a maximum of 150 degress as permitted by ORS 656.214 (2)(b) for a complete loss of all five digits.

The employer on review concedes that the medical report submitted by the treating doctor and discounted by the Hearing Officer is incomplete and fails to properly reflect the disability.

Despite the detail to which the legislature has directed the compensation for digits, the Board notes Hearing Officer orders from time to time in which injury to as little as one digit is related to the forearm. At one time the schedule of benefits did provide for injury to the digits and a greater amount to the hand. ORS 656.214 provides no compensation for the injury to the hand proper and subsection (3) thereof includes as part of each finger the metacarpal bone and adjacent soft tissue of each finger which combine to form the palm of the hand. Nearly one fourth of the provisions of ORS 656.214 are devoted to rating finger disabilities including the palm of the hand.

Though the Hearing Officer is critical of the medical report, the situation obviously does not justify an abandonment of attention to detail in favor of a generalization based upon a non-existent injury to all five fingers.

The obvious purpose of the 1967 legislative changes which injected a formula that loss of use was equal to loss by separation was to provide a sliding scale in each category. There is nothing in the legislative history indicating any abandonment of the concept of rating individual fingers. The reasoning followed by the Hearing Officer would impliedly repeal all of ORS 656.214(2)(j) and (k) and 656.214(3) by establishing an award for the hand and generally "lumping" a number of degrees comparable to the loss of two thirds of a forearm.

The Board concludes that medical evidence available to the initial determination and to the Hearing Officer is inadequate for proper evaluation of disability.

Pursuant to ORS 656.295(5) the matter is remanded to the Hearing Officer for further medical evidence. The defendant employer has offered and the Board therefore directs that the claimant be referred to a physician whose special training includes injuries to the hand. The claimant may of course produce further evidence including further medical reports. Upon further hearing and upon receipt of further evidence, the Hearing Officer shall issue

further order in the matter consistent with this order and the additional evidence.

Pursuant to Barr v. SCD, (OR. APP, 90 A. Sh. 55, 463 P.2d 871), no notice of appeal is appended.

WCB #68-1575 April 1, 1970

BOBBY J. LOGAN, Claimant.
Request for Review by Claimant.

The above entitled matter basically involves the issue of whether the claimant's claim was barred by reason of late notice of an accidental injury to the employer.

The claimant, a 32 year old mill worker, alleges that on May 20, 1968, he felt a catch in his back at about the belt line and a catch in the left hip with pain radiating down to the left foot. He continued working to the extent that during June of 1968 he was working 10 hour shifts seven days a week. He first obtained medical examination on July 1 and was hospitalized July 19th. On the day of hospitalization he related the alleged job-association of the injury to Dr. Ralph Thompson. It was apparently on or about this same date of July 19th that the employer had its earliest notice of the injury. The employer commenced payment of compensation and continued payment until the claim was denied September 13, 1968.

The procedure of so initiating payment is under compulsion of ORS 656.262(4) with a reservation in subsection (7) that such payment shall not be considered acceptance of the claim or admission of liability. Subsection (5) requires acceptance or denial of the claim within 60 days of the employer's notice or knowledge of the claim.

The Hearing Officer ruled that the employer having commenced payment, the defense of untimely notice to the employer was not available. This order was affirmed by the Workmen's Compensation Board. Upon appeal to the Circuit Court, the Court ruled that for payment of compensation to defeat the defense of untimely notice, the payment must necessarily have been commenced within the 30 day limitation for filing notice. This is the law of the case upon that issue under direction of the Court.

The Circuit Court remanded the matter for consideration of whether the employer was prejudiced by failure to receive a timely notice and whether the claimant had good cause for failure to give the notice within 30 days after the accident.

At this point it should be noted that a concurrent issue was appealed to the Circuit Court with reference to the employer's liability to pay compensation under the orders of the Hearing Officer and Workmen's Compensation Board pursuant to ORS 656.313 on the issue of the constitutionality of that provision. On May 29, 1969, Judge Sawyer ruled in favor of the claimant upon that issue and that issue is not before the Board. However, this posture of the case has left other procedures in motion including a determination of disability order pursuant to ORS 656.268 and a request for hearing as to that determination order. Since a determination order must be subjected to hearing within

one year, the Board makes an exception to the usual administration and, as requested by the claimant, orders the request for hearing on the determination be held and temporarily abated pending the disposition of the issues of whether the claim is barred for late notice.

Returning to the issue of late notice, the Board also notes the recent decision of the Court of Appeals of February 5, 1970 in Satterfield v. SCD, 90 Or Adv Sh 247, 465 P.2d 239, which places the burden upon the employer of showing that the employer of showing that the employer is prejudiced by reason of the failure of the workman to give timely notice. This decision followed the order of the Hearing Officer on review which was entered January 23, 1970.

The Board construes the Hearing Officer order to reflect that the employer did carry the burden of proof in showing that the employer was prejudiced by the delay. One important witness was not available to the employer by reason of the delay. The accident was unwitnessed. This places an uncommon burden upon the defendant employer. Loss of any important witness to the circumstances surrounding the validity of the claim necessarily prejudices the employer.

The claimant's first medical attention was by Dr. Jennings on July 1, 1968 as noted above. The claimant's explanation for his failure to advise Dr. Jennings of any work association was that "he didn't ask me." This is not the factual situation presented where a workman's delay in notification is one of ignorance of the cause. According to the claimant, his problems originated on May 20th and were a continuing source of pain and discomfort. Six weeks later on his first visit to the doctor, the possible association with work was being concealed. It was not until he was hospitalized that he instituted notice and claim. There is no good cause for delay shown in this course of conduct.

Reviewed in light of the Satterfield case, the Board concludes and finds that the Hearing Officer, who observed the witnesses, properly found that the claimant did not show good cause for delay and that the employer was prejudiced by the delay in giving notice of the injury.

The order of the Hearing Officer is affirmed.

WCB #68-1126 April 6, 1970

ODIE L. BATES, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 43 year old truck driver claimant sustained any compensable permanent disability as the result of an admittedly compensable incident of May 26, 1967, when the claimant incurred a low back injury while helping to carry a large timber.

Pursuant to ORS 656.268, a determination issued finding the claimant to have no residual disability. This determination was affirmed by the Hearing Officer.

The claimant requested a review. The only issue is whether there is a permanent disability and, if so, the degree thereof. A stipulation has now been executed by the parties agreeing that the issue as to present compensable disability may be resolved by granting the claimant an award of 9.6 degrees being 5% of the maximum applicable award for unscheduled injuries. Compensation is to be paid in a lump sum as permitted for awards of less than 24 degrees and upon request of the claimant.

The stipulation, copy of which is attached and by reference made a part hereof, is approved and the matter is dismissed in keeping with the settlement agreed upon by the parties.

No notice of appeal is deemed applicable.

WCB #68-1911 April 6, 1970

JEAN GIBSON, Claimant.

Workmen's Compensation Board Opinion:

The above entitled matter involves a claim for occupational disease. The 59 year old nurse's aide in a hospital incurred an allergic contact dermatitis of both hands and wrists attributable to use of a disinfectant.

The claim was allowed and pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent disability of the loss of 10% of each forearm.

Upon hearing, the evaluation was increased to a disability of 40% of each forearm. The employer rejected this award in the manner provided for administration of occupational disease claims. A Medical Board of Review was thereupon empanelled.

The Workmen's Compensation Board is now in receipt of the findings of the Medical Board which are attached, by reference made a part hereof and declared filed as of March 30, 1970.

Pursuant to ORS 656.814, the findings of the Medical Board are made final by operation of law.

The Workmen's Compensation Board notes that the Medical Board unequivocally stated the disease was not disabling. The claimant appears to have some disability in the hands and forearms of questionable etiology and questionable prognosis.

The Workmen's Compensation Board deems ORS 656.313 applicable and no compensation received pursuant to order of the Hearing Officer is repayable.

Medical Board of Review Opinion:

Re: Jean Gibson, NBR Case #68-1911

Dear Doctor Martin:

Enclosed you will find the form answering the questions for the board of review examination of Jean Gibson on March 17, 1970. Dr. Bruce Chenoweth, Dr. David Frisch, and I examined Mrs. Gibson jointly.

We found moderate dryness of her hands with slight erythema and some thickening and fissuring, but no evidence of significant active dermatitis at the present time.

We were unable to demonstrate any objective neurological deficit or significant loss of motor power, although Mrs. Gibson complains of total inability to use her hands for fishing, playing the piano, etc. We do not believe that she is malingering, but we are unable to provide tangible evidence of her disability.

I think that the form enclosed summerizes (sic) the results of our joint examination.

Sincerely yours,

/s/ Frederick A.J. Kingery, M.D.

WCB #68-592 April 8, 1970

VIOLET K. BURGERMEISTER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether a causal relationship exists between a compensable accident and the subsequent disability. More precisely the issue involves whether vein stripping surgery was necessitated by the accidental injury.

The claimant, a 44 year old clerk, bumped her right shin six or eight inches above the ankle on a desk on two different occasions in the course of her employment, once on March 2, 1967 and again in October, 1967.

The claimant first consulted Dr. Poole in January of 1968, after self-treatment consisting primarily of the application of heat and the use of an elastic bandage, and one consultation with another doctor, proved ineffective. Dr. Poole's examination disclosed a tender, hot, indurated area one to two inches above the inner ankle bone. This examination also revealed rather severe pre-existing varicosities of the right calf. In February of 1969, following a short period of conservative treatment, Dr. Poole performed the vein stripping surgery, which is in controversy in this proceeding.

The Board notes that no dispute exists with respect to propriety of the vein stripping operation as proper and necessary medical treatment of the

claimant's condition, as a result of which the condition of the claimant's leg is now much improved over what it was previously. The sole question relative to the surgical procedure relates to whether it was necessitated by the two bumping incidents to the claimant's shin.

Although the claimant's written notice of the accident was not filed until after the examination and treatment by Dr. Poole, no issue has been raised by the State Accident Insurance Fund concerning the claimant's delay in providing written notice of the claim to her employer.

The denial of the claim by the State Accident Insurance Fund was based upon the ground that the condition requiring treatment was not the result of the activity described. The Fund contends that the two incidents in which the claimant bumped her shin on a desk bear no causal relationship to the claimant's subsequent condition for which the vein stripping surgery was ultimately performed.

The denial of the claim by the State Accident Insurance Fund was upheld by the Hearing Officer, from whose order the claimant was requested this review by the Board.

The resolution of this matter involves the determination of a complex medical causal relationship problem which is entirely within the province and dependent upon expert medical opinion, and with respect to which there is a conflict of medical opinion between two reputable and well qualified medical experts.

Dr. Poole, a noted general surgeon of long standing, is of the unqualified opinion, based upon his examination and treatment of the claimant, that the trauma of the two bumping incidents of the claimant's shin caused the indurated area which his examination disclosed above the claimant's inner right ankle, and that the vein stripping was a necessary surgical procedure for the alleviation of the claimant's condition.

The State Accident Insurance Fund's denial of the claim is supported by Dr. Gaiser, a general surgeon and vascular specialist, who did not examine the claimant, and whose opinion, is based solely upon his review of the medical records.

Dr. Gaiser acknowledged that the trauma to the claimant's leg could have caused the condition resulting in the necessity for vein stripping, but is of opinion that a causal relationship is "much more unlikely than likely."

In his opinion, which he candidly acknowledges is a pure judgment question, the bumping of the claimant's shin was too remote in both time and location to establish a causal relation to the subsequent condition above the inner ankle. He feels that the unrelated condition in the area of the ankle had been resolved and the claimant able to return to work before the surgery was performed.

Dr. Poole supports his opinion of the existence of a causal relationship upon the close proximity of the trauma in the mid-shin area to the long saphenous vein, which produces venous congestion or pressure in this vein, and results in the progression of symptoms commencing with edema, followed by fibrosis and inflamation, then indurated cellulitis, and finally ulceration, which

conditions most commonly develop in the area just above the inner ankle. In his opinions the occurrence of the trauma three or four inches above the area most prone to develop the resultant condition and the lapse of time involved are medically consistent with the resultant condition disclosed by his examination. The surgery performed was in his judgment necessary for the treatment of the claimant's condition.

The Hearing Officer found Dr. Gaiser's opinion to be more believable. The Board places greater weight and reliance upon the opinion and conclusions of Dr. Poole, particularly in light of his advantage in this case as the treating surgeon.

The Board finds and concludes from its review of the record herein that the trauma of the two compensable incidents in March and October of 1967 was the cause of the progression of symptoms which culminated in the claimant's resultant disability, and that the surgery necessary for the treatment of the disability is accordingly a compensable consequence of the claimant's compensable accidental injury.

The order of the Hearing Officer upholding the denial of the claim is therefore reversed and the claim is ordered allowed.

Pursuant to ORS 656.386, counsel for the claimant is entitled to a reasonable attorney's fee payable by the State Accident Insurance Fund for legal services rendered at both the hearing and upon the review where the claimant prevails on the review by the Board of an order of the Hearing Officer affirming the denial of the claim. A reasonable attorney's fee for the legal services rendered by the claimant's attorney at the hearing and review in this matter is set by the Board in the sum of $750.00.

WCB #69-918 April 9, 1970

VIRGINIA VANCE, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 36 year old waitress as the result of slipping and falling when she spilled some hot water on January 15, 1968.

Pursuant to ORS 656.268 a determination issued finding the disability to be only temporary. Upon hearing an award was made of 32 degrees against the applicable maximum of 320 degrees for other or unscheduled injuries.

The initial symptoms were diagnosed as strains and contusions to the right shoulder and right buttocks along with burns to the legs from the hot water.

Some administrative complications have arisen from the fact that the claimant moved to Chicago in early 1969. She sought no medical care in Chicago.

There is little in the way of objective medical findings to support the subjective complaints. There are symptoms which are not explainable upon an anatomical basis. There are some more generous expressions of ultimate

disability in a couple of medical reports. These reports, however, are either too generalized or remote in time to serve as any valid basis for concluding that the determination of the Hearing Officer was in error.

The claimant has a congenital anomaly known as a spina bifida. It was not caused by the injury and there is no medical evidence indicating that it was in any wise permanently exacerbated by the fall.

The Board concludes and finds that the permanent disability attributable to the accident does not exceed the 32 degrees awarded by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #69-1026 April 9, 1970

STEVEN COLE MONTGOMERY, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 20 year old mechanic when he incurred a low back injury on May 13, 1968 while lifting a fuel tank from a tractor.

Pursuant to ORS 656.268, a determination issued finding the claimant's disability to be 48 degrees against the applicable maximum of 320 degrees for other or unscheduled injuries.

Upon hearing, the award was increased to 150 degrees, a disability finding equivalent to over 56% of the workman.

At the time of hearing the claimant was working part time in a service station while attending business college where he is enrolled in bookkeeping and accounting courses.

The Hearing Officer concedes that the claimant's actual earnings in the future will probably increase. The claimant is admittedly precluded from heavy use of his back. The Hearing Officer, in applying the factor of earning capacity discussed in the recent Ryf (89 AD Sh 483, 459 P.2d 991) decision, used a standard of "general industrial employment." If the connotation of "industrial" is in its narrow meaning of heavy physical work, the standard is too narrow. If the claimant had been a bookkeeper or accountant when injured, there would be little, if any, limitation on the continuation of his work by the injury. The treating doctor equated the disability to a standard formerly in use as the loss of function of one-fourth of an arm. It so happens that one-fourth of an arm is presently evaluated at the 48 degrees initially awarded.

The claimant has a partially herniated intervertebral disc. The condition is not severe enough to warrant a recommendation of surgery. There is a possibility that if the condition deteriorates it may warrant surgery in the future. In event of surgery it is a condition which is often completely alleviated by surgery.

The initial determination of 48 degrees recognizes a moderate disability. The award by the Hearing Officer is one of major disability.

The Board concludes and finds that the disability does not exceed the 48 degrees awarded upon the initial determination.

The order of the Hearing Officer is therefore set aside and the initial determination of 48 degrees of disability is reinstated.

WCB #69-1519 April 9, 1970

FRISHIA HUBINSKY, Claimant.

The above entitled matter involves an issue of the extent of permanent disability attributable to a low back injury sustained by a 41 year old bartender on July 8, 1967. The claimant had a prior compensable low back injury in 1950 for which she had received the maximum award then applicable to unscheduled injuries.

Pursuant to ORS 656.268, the claimant was determined to have additional disability of 32 degrees against the present maximum of 320 degrees for unscheduled injury. The Hearing Officer increased the award to 96 degrees.

The request by the State Accident Insurance Fund for review of this order of the Hearing Officer has now been withdrawn.

The matter is therefore dismissed and the order of the Hearing Officer is declared final as a matter of law.

No notice of appeal is deemed applicable.

WCB #69-1322 April 9, 1970

EDWIN ADELBERT REYNOLDS, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disabilities sustained by a 49 year old crane operator as the result of injuries incurred when the crane he was operating toppled over on October 26, 1966.

The primary residual disabilties are in the left foot and in the dorsal area of the spine where there was some compression of vertebrae.

Pursuant to ORS 656.268 a determination issued finding the disability to be a 20% loss of use of the left foot and 67.2 degrees for unscheduled injuries against the then applicable maximum of 192 degrees. Upon hearing the award as to the foot was affirmed but the Hearing Officer increased the award for unscheduled injuries to the applicable maximum of 192 degrees.

Upon hearing and review the claimant contends that his injuries are such that he can no longer work regularly at a gainful and suitable occupation and that he should be compensated on the basis of a permanent and total disability.

In the alternative, if award is made upon a partial basis, the claimant contends the disability as to the left foot should be rated upon the entire leg instead of the leg below the knee. There is no injury above the knee but there is some dimunition in size of the thigh on the basis of lack of use. The Board concludes that there has been no permanent injury at or above the knee.

The Board also concludes and finds that the claimant's disability does not preclude him ever again working regularly at a gainful and suitable occupation.

The injuries are serious and this is recognized by the awards for permanent partial disability. The claimant, to date, has not been vocationally readjusted but this is not to say that he cannot ever again engage in regular suitable employment. The Court of Appeals concluded in the recent decision of Warden v. North Plains Lumber, 90 AD Sh 737, 466 P.2d 620 (1970), that the claimant, precluded from further strenuous labor, could, if he would learn to do other types of work. The Board reaches the same conclusion with reference to this case.

The order of the Hearing Officer is therefore affirmed.

WCB #68-304 April 13, 1970

MAX L. GLOVER, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of whether another hearing may now be held upon the merits of a matter which was considered and decided by a hearing officer in a prior hearing, considered and decided on review of the hearing officer order by the Board and also considered and decided by the Circuit Court on appeal. The order of the hearing officer presently on review concludes that the first hearing officer and the Board and the Circuit Court were in error and that it is proper procedure to start the hearing process all over again to correct the alleged errors in the first go-around. No appeal was taken to the Supreme Court from the judgment of the Circuit Court. The hearing officer construes the statutory right of any party at any time to a hearing to include a hearing on alleged errors of the Circuit Court. By his reasoning, even a Supreme Court ruling would be subject to a new hearing and review by a hearing officer.

The claim in this instance arose from an injury on November 11, 1965. It was subject to the jurisdiction of the then State Industrial Accident Commission. The claim was allowed by the State Industrial Accident Commission. On September 27, 1966, the State Compensation Department, as insuring successor of the State Industrial Accident Commission, closed the claim with an award of unscheduled disability of 30% loss of an arm. The claimant at this point had a choice of procedural remedies under Sec 43 of Ch 285, O.L. 1965. He could have sought a rehearing and Court review with jury trial as provided for claims occurring prior to January 1, 1966. Claimant elected the alternative procedures for claim review applicable to post January 1, 1966 claims.

Pending the hearings in 1967, the State Compensation Department became aware for the first time of an intervening nonindustrial incident on January 5, 1966, when the claimant was shoveling snow. The State Compensation Department became concerned that it had made an award for injuries not incurred in the accident. Not wishing to be bound by its findings, in light of Kennedy v. SIAC, 218 Or 432, the State Compensation Department cancelled its findings of disability on January 18, 1968. This action by the State Compensation Department was made a part of the record of the initial hearing. The order of the first hearing officer made April 22, 1968, includes a reference to that order of the State Compensation Department disowning its findings of disability. The Workmen's Compensation Board and the Circuit Court included that development in their review.

Despite the fact that a hearing was pending in which the January 18, 1968 order of the State Compensation Department was made part of the case, the claimant, on February 19, 1968, filed a new request for hearing. It is that request for hearing which the claimant and present hearing officer now insist should serve as the basis for a new hearing.

The present order of the hearing officer treats the January 18, 1968 order of the State Compensation Department as a "determination." Whatever the status of that order, the State Compensation Department was no longer vested with power to issue a "determination" as contemplated by law. The claimant, in November of 1966, sought Board hearing. The State Compensation Department became simply an insurer at that point. Its action, as noted, was only to avoid being bound by a previous admission of liability for disability of questionable origin.

The proceedings for compensation are not to be proliferated. There was only one real issue in the first hearing. That was the extent of disability, if any, incurred in the accident on which the claim was based. That was the issue decided by the hearing officer, the Board and the Court. That is the same issue the claimant now seeks to have heard. The first hearing officer, the Workmen's Compensation Board and the Court have ruled that the claimant has no residual permanent partial disability. He has received and retains compensation in full for a disability adjudged not compensable. As a matter of law he is not required to repay the erroneous award. There is no claim of aggravation involving increased disability following a prior proceeding.

The entire thrust in the present proceeding is to impeach the prior decisions of the hearing officer, the Board and the Court. The broad right to a hearing on any issue does not extend to matters already litigated which have become final as a matter of law.

The hearing officer has made 10 specific findings in the present order under review. He is correct only with respect to finding No. 6 which correctly relates that the State Compensation Department is now presently titled and known as the State Accident Insurance Fund.

The order of the hearing officer is reversed and the request for hearing is dismissed.

WCB #68-856 April 13, 1970

WALTER F. TAYLOR, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the compensability of a myocardial infarction allegedly arising out of the employment when the 44 year old log truck driver threw some binders and wrappers over a load of logs on March 12, 1968. The claim was denied by the State Accident Insurance Fund as insurer of the employer and this denial was affirmed by the Hearing Officer.

The evidence is in dispute whether the claimant had a temporary shortness of breath and ache in his shoulders when he completed binding down the load. He drove to the landing and removed two binders while waiting to be unloaded. He experienced chest pain and nausea while waiting for his turn.

It appears well settled that the claimant had pre-existing arteriosclerotic hardening of the arteries. The question then becomes one of whether the effort expended by the claimant materially contributed to the occlusion of the artery. Dr. Moore, the initial treating doctor, reported that he had similar symptoms before during the normal pursuit of his logging duties.

There is conflicting medical evidence. Both Dr. Campbell and Dr. Griswold are experts in the specialty of cardiology. Their testimony represents the opposite poles with respect to the relation of effort and myocardial infarcts.

The Board is not in agreement with respect to the matter. The majority concludes that the infarction was merely the culmination of a progressive hardening of the arteries. Even Dr. Griswold concedes that the prior history is important in arriving at a conclusion with respect to whether the infarct was one of natural progression or whether it was materially induced by work effort. It is not realistic to say that there can never be a medical causal relationship. Neither can one accept the proposition that simply because symptoms occurred during working hours that perforce whatever effort was expended was a materially contributing factor.

An inordinate delay occurred in this matter between the date of hearing and the date of the Hearing Officer's order. The principle that "Justice delayed is justice denied," applies equally to administrative law procedures. It is the duty and obligation of counsel and of this Board and its Hearings Division to constantly strive to bring hearings to a conclusion as quickly and promptly as full development and thorough consideration will permit.

The history in this claim reflects a long pattern of heart pain. There is a discrepancy in the evidence resolved against the claimant by the Hearing Officer with respect to when the symptoms were first noticed. That conflict weakens the force of any hypothetical question answered by Dr. Griswold who testified that if effort is a factor the symptoms will be noted within a few minutes. The majority notes the Hearing Officer's reference to an uncompleted telephone call and also to referring to Dr. Campbell as Dr. Moore. Neither factor is material to the decision of the Hearing Officer or the Workmen's Compensation Board on the merits of the issue.

The majority conclude and find that there was no material medical causation arising between the claimant's efforts at work and his myocardial infarction. The order of the Hearing Officer is affirmed.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan dissents as follows:

The decision of the Hearing Officer was rendered more than 14 months after the date of the hearing. The delay was not entirely due to the Hearing Officer. This long delay is not conducive to accuracy. Even with voluminous notes, some recall from memory is necessary to write a sound decision.

Doubt is further generated when the Hearing Officer recites in his findings that:

"Dr. Charles Moore, a qualified internist ***testified that in his opinion ***."

Dr. H. Dan Moore was a treating physician but did not testify at the hearing. Dr. Charles Sumner Campbell testified at the hearing.

Further, the Hearing Officer recites in the first paragraph of his opinion:

"He apparently did not mention any problem to his wife when he stopped to phone her on the way to the dump."

At page 35, lines 20 and 21 of the transcript the claimant testified:

"And I drove down to Lyons to a phone booth, stopped to call my wife and couldn't contact her."

These errors cause one to lose faith in any part of the decision by the Hearing Officer. Fortunately, the transcript, made from the reporter's record at the time of hearing, is available for review, as are the exhibits.

The Hearing Officer places unjustified weight on the deposition of investigator Harvey Jacobsen, an employe of the State Accident Insurance Fund. Jacobsen stated that he recalled the interview with the claimant from memory, stating that he had a hard time finding the claimant's house.

Q. "This difficulty helps to jog your memory, you mean?" (dep.4)

A. "Yes, and I remember my cases pretty well."

The interview with the claimant was on April 1, 1968; the deposition was taken November 7, 1969, more than 19 months after the interview. Mr. Jacobsen may have an exceptional memory, but the fate of a workman's claim should not depend on an insurance investigator's memory after 19 months.

Further doubt is cast upon Mr. Jacobsen's recital of what the claimant told him when he stated:

A. "Yeah, when he went to unsnap the binder chains to unload the logs he experienced nausea pain in the chest and shortness of breath * * *."
(Emphasis supplied)

Binders on log trucks are not loosened by "unsnapping" them.

At page 8 of the deposition, Jacobsen was asked:

Q. "Did you discuss the footing up at the landing at all?"

A. "No, we did not."

Q. "Did you ask him about it?"

A. "No, I did not."

Q. "Did you ask him what happened when he threw the binder chains over the load at the landing?"

A. "No, I did not."

The hearing officer seems to place great weight upon this kind of testimony and completely disregards the claimant's testimony that the first symptoms (tr 22) appeared when he put on the remaining three wrappers, a short distance from the landing. This was again testified to at tr 32 and 34.

Dr. Griswold in his deposition testified:

"* * * throwing over these log chains, driving, throwing over some more chains, ratcheting them down, for the first time in this hypothetical question of development of severe chest pains and shortness of breath, which was undoubtedly the beginning of his, or the premonition indicating the beginning of a heart attack; that there is a definite relationship between this activity and these symptoms, which culminated in his heart attack."

Dr. Griswold furnishes the medical causation to make this claim compensable. His reasons for doing so are logical and reasonable.

Both Dr. Griswold and Dr. Campbell are recognized leaders in their specialty of cardiology. I place more weight on the opinions of Dr. Griswold because of the inflexible statements by Dr. Campbell.

Dr. Campbell states (tr 85):

"The fact of the matter is that he had problems before the date of the onset of the acute myocardial infarction."

Granted. Preexisting conditions are not a bar to a workmen's compensation claim.

"* * *and had suffered no unusual effort that day that he wasn't doing every other day."

It is true that a log truck driver must put binders on each load, but is work of only a few minutes to throw the binders over the load. This exertion is not an all day affair. Dr. Campbell further stated:

"The facts of the matter are quite clear that he did have a myocardial infarction, and it is my opinion that the myocardial infarction had nothing to do with his exertion."

On cross examination (tr 93) Dr. Campbell was asked:

Q. "But basically, your testimony is, Doctor, no matter what this man was doing, no matter if it was picking up the side of this logging truck, this would have nothing to do with his heart attack?"

This was objected to, but the Hearing Officer allowed Dr. Campbell to answer.

A. "I think perhaps what you're trying to say is that under extreme exertion or circumstances of this sort, far beyond the usual exertion of an individual, and I use the word 'far' with emphasis, you would like to indicate that this might lead to an acute myocardial infarction, and the answer is 'No'."

The Oregon Supreme Court in Clayton stated:

"We have chosen to reject the view that exertion or stress can never be a causative factor in these cases."

I find Dr. Griswold's opinion acceptable, Dr. Campbell's opinions unacceptable. In this I am guided by the Supreme Court.

The Hearing Officer should have given more weight to the testimony of the claimant and less weight to the testimony of the State Accident Insurance Fund's investigator. He should have been guided by the Supreme Court. Had he done so, his order would have been different.

The Hearing Officer should be reversed and the claim remanded to the State Accident Insurance Fund for payment of benefits under the applicable sections of the Workmen's Compensation Law.

/s/ Wm. A. Callahan

WCB #69-358 April 13, 1970

IVIN I. BILLINGS, Claimant
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 74 year old plywood mill employee who fractured the femur of his right leg in a fall into a truck lubrication pit on January 6, 1968. There is also an issue of whether certain delays in payment of compensation warrant the imposition of increased compensation and attorney fees as provided in ORS 656.262(8) for unreasonable delay.

Pursuant to ORS 656.268 a determination issued finding the claimant to have a disability of 22.5 degrees against the applicable maximum of 150 degrees for the total loss of a leg. Upon hearing the award was increased to 60 degrees. The claimant urges that this award is inadequate and the employer urges the increase was more than adequate.

The problems in the administration of this claim by the employer and its insurer arose from the fact that the claimant elected to retire from the labor market. He was long past normal retirement age when injured. There was thus no return or prospective return to employment which would normally serve as the basis for termination of temporary total disability. The employer-insurer also experienced difficulty in obtaining medical reports on claimant's status. The claimant was able to fish and drive a standard transmission jeep truck.

The Board concludes and finds unanimously that the disability does not exceed the 60 degrees awarded by the Hearing Officer. The claimant has a full extension of the injured leg with minimal loss of circumference above the thigh. There is some weakness in the leg evidenced when required to exercise by alternately standing on tiptoes and heels 20 times or so. Basically the claimant has had a good recovery. The Board therefore affirms the order of the Hearing Officer finding of disability of 60 degrees.

Upon the issue of whether the employer should be penalized for unreasonable delay or resistance to payment of compensation, the Board is not unanimous. The majority of the Board concludes and finds that the special circumstances surrounding this retiring workman made the occasional delays in payment reasonable. Any employer or insurer assuming the responsibility of suspending compensation does so at the risk of having the action deemed unreasonable and the basis for the penalty of increased compensation. Each case must be weighed upon its own facts. A delay is not unreasonable simply because of passage of a stated period of time. A few days' delay might be unreasonable but a few weeks' delay under other circumstances would not be unreasonable. Compensation was paid properly and promptly in keeping with the anticipated course of recovery. The intervention of retirement does not warrant suspension of temporary total disability, but it can and did make questionable the continuing responsibility of the employer when coupled with inability to obtain any confirming medical reports.

The order of the Hearing Officer is therefore affirmed in all respects.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan concurs in the finding of permanent disability. However, Mr. Callahan dissents from the majority upon the issue of whether increased compensation should be awarded for the delays in payment of compensation. His dissent follows:

> My dissent involves the matter of unreasonable delay and unreasonable refusal to pay compensation.
>
> The applicable section of the law is clear and unabmiguous (sic):
>
> ORS 656.268(2) "* * *If the attending physician has not approved the workman's return to his regular employment, the department 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."
>
> Following the order of the Hearing Officer, in which the claim was ordered accepted, a payment was promptly made for temporary total disability to June 1, 1968. This partial payment of temporary total disability might be excused if the insurance carrier had promptly determined the balance then due and had made payment for this and continued payment.
>
> As it was from this point forward payments were made in a piecemeal manner which can only be characterized as resistance to payment of compensation. It must be remembered that this was after the Hearing Officer had ordered the claim accepted and payment of benefits be made.
>
> The Hearing Officer in the instant case excuses the insurance carrier for this lack of payment on the grounds that the carrier had no medical evidence of continued time loss. The clear words of the statute require payment until the treating physician has approved the workman's return to his regular employment, or a determination under ORS 656.268 has been made terminating payment of temporary total disability benefits. This imposes an obligation on the part of insurance carriers to find out if the conditions have been met <u>before</u> terminating payment of compensation.
>
> When insurance companies qualify to sell workmen's compensation coverage to Oregon employers, they are bound to fulfill the requirements of Oregon law. If this is not done, it is the insurance carrier that has brought down upon its head the penalties for noncompliance with the provisions of the law.
>
> Additional compensation is due the claimant for all benefits not paid as provided by law.
>
> Attorney fees are due claimant's counsel for services at the hearing, because of resistance to payment of compensation, to be paid by the employer-carrier.
>
> The attorney is also entitled to 25% of the increased permanent partial disability awarded by the Hearing Officer, to be paid by the claimant from the increased award.

Review by the Workmen's Compensation Board was requested because the Hearing Officer did not grant additional compensation to the claimant for late payment and attorney fees to claimant's counsel because of unreasonable resistance. For this reason attorney fees to claimant's counsel at Board review and subsequent review should be paid by the employer-carrier.

I affirm the increased award for permanent partial disability made by the Hearing Officer.

/s/ Wm. A. Callahan

WCB #69-1625 April 13, 1970

FRANCIS L. ABELN, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 53 year old mechanic who sustained an injury to fingers and the palm of the left hand as the result of an infiltration from the explosive force of an undercoating gun.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 60 degrees against the applicable maximum of 150 degrees for total loss of a forearm. Upon hearing, the award was increased to 75 degrees.

There are two matters which appear to be incompletely heard for purposes of Board review. The Hearing Officer found little loss at or above the wrist. If the claimant did not sustain injury to all five digits and if there is no disability at or above the wrist, the disability should have been rated upon the individual digits including the metacarpal bones and adjacent soft tissue of the palm. Upon further hearing, the facts should definitely reflect these respective factors of disability.

Following the Hearing Officer order the Court of Appeals in Trent v. SCD, OR App, 90 AD Sh 725, 466 P2d 622 (1970), indicated loss of earning capacity to be a factor in disability ratings. The evidence is insufficient to determine any such factor in this claim.

The matter is therefore remanded to the Hearing Officer for further evidence upon these matters and for such further award or decision as may be warranted by the additional evidence.

No notice of appeal is deemed applicable. [Note Barr v. SCD, 90 Adv Sh 55]. [463 P2d 871].

WCB #68-759 April 14, 1970

HAROLD D. KAHL, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of whether the claimant's need for further medical treatment and continued temporary total disability is causally related to the compensable accidental injury sustained by the 41 year old plumber on July 12, 1967, when he slipped while standing on the lower rungs of a stepladder, fell backward and struck his head and back against the wall and floor.

The claimant was hospitalized immediately after his accident, and came under the care of Dr. Campagna, a neurological surgeon. Immediately following the accident his primary complaints were head injury, paralysis of both legs and the right arm and blurred vision. A complete physical and neurological examination disclosed no brain damage and no organic cause for the paralysis and blurred vision. The head injury was diagnosed as a cerebral concussion. The paralysis and visual difficulties were determined to be of functional or emotional origin. The diagnosis was conversion hysteria. The claimant improved rapidly and was discharged from the hospital ten days after the accident. On September 21, 1967, Dr. Campagna reported that the claimant had made a satisfactory recovery without permanent disability and was able to return to work on November 1, 1967.

Examination of the claimant on November 15, 1967, by Dr. Cooper, a medical examiner for the now State Accident Insurance Fund, confirmed that the claimant's condition was medically stationary, that he was able to resume normal activity and that he had sustained no permanent disability.

On November 28, 1967, a determination of the claim was made pursuant to ORS 656.268, finding that the claimant was entitled to compensation for temporary total disability to November 1, 1967, and finding that the claimant had sustained no permanent partial disability as a result of the accidental injury.

Following a hearing held at the request of the claimant, the Hearing Officer found that the claimant had sustained a brain injury as a result of the accident, that his condition was not medically stationary and that he was in need of further medical treatment and further temporary total disability. The Hearing Officer ordered the State Accident Insurance Fund to provide further medical care and treatment for the claimant's condition, continued temporary total disability benefits and awarded counsel for the claimant an attorney's fee in the amount of $850.

The State Accident Insurance Fund has requested this review by the Board of the order of the Hearing Officer and asserts that the decision of the Hearing Officer is erroneous and contrary to the overwhelming weight of the evidence and should be reversed.

The claimant admittedly now has a psychological condition manifested primarily by intermittent amnesia or blacking out episodes. The determinative questions to be resolved are first, whether the claimant's problem is of psychological origin or is due to psychomotor epilepsy of organic origin;

and second, whether the condition is a manifestation or exacerbation of a pre-existing psychological condition or is causally related to the accidental injury.

The questions relative to the origin and causal relationship of the psychological condition are complex medical questions which must be resolved by expert medical opinion. There is a conflict in the medical evidence with respect to both questions, and by reason thereof, the Board is not unanimous in its decision in the matter.

The majority of the Board finds that the medical evidence submitted by the University of Oregon Medical School, Department of Psychiatry; Dr. Larson, one of the state's leading neurologists; Dr. Campagna, an eminent neurological surgeon and the Veterans Administration Hospital located at Roseburg, Oregon, which support the conclusion that the claimant did not sustain a brain injury, and that his condition is a conversion or hysterical neurosis of psychological rather than organic origin, resulting from a pre-existing psychological problem not causally related to the accident, constitute the clear weight of the medical evidence.

The report of the University of Oregon Medical School Department of Psychiatry medical staff, following exhaustive diagnostic evaluation and treatment of the claimant while he was a patient in the psychiatry ward of the Medical School Hospital for approximately four months, diagnosed his condition as hysterical neurosis of the dissociative type manifested by fugue states. The medical school psychiatric staff concluded that his psychological difficulties commenced several years earlier and had been gradually increasing in severity during the intervening years. It was their opinion that his psychological disturbance was neither caused nor aggravated by the July, 1967 accident.

Dr. Larson, based upon his own extensive examination of the claimant and his review of the other medical evidence in this matter, concluded that the amnestic spells are of psychological origin and are not due to psychomotor epilepsy. He is of the opinion that it could reasonably be anticipated that some abnormality would have been disclosed by the several electroencephalograms if a significant brain injury was present. In his judgement the sole basis for a diagnosis of psychomotor epilepsy is that the amnesia episodes, apparently disappear with the use of Dilantin. Due to the lack of a clinical test or blind study in the evaluation of the drug, however, he considers this indication of the presence of psychomotor epilepsy to be medically unfounded and logically fallacious.

Dr. Campagna, primarily on the basis of his own examination commencing immediately following the accident, remains firmly of the opinion that the claimant sustained no brain injury or damage. In his experience brain damage in the areas that produce psychomotor epilepsy would result in an abnormal electroencephalogram in approximately 90% of the cases and the normal results of the electroencephalograms in this instance is in his estimation highly significant. He considers Dilantin a poor drug to control psychomotor seizures, and feels that a double blind study to test the effectiveness of a drug is essential in dealing with a problem in the psychological field. He considers psychological testing as probably the weakest tool for diagnosing brain damage. In his opinion the claimant does not have psychomotor epilepsy

and his blackout spells are not due to this condition. He is extremely doubtful that the claimant's psychological problems are the result of the accidental injury.

The reports of the Veterans Administration Hospital medical and psychiatric staff, based upon a 43 day period of supervision of the claimant, are noteworthy in that although they initiated the use of the anti-convulsant drug Dilantin in the control of the claimant's amnesia problem, and found that it apparently produced symptomatic relief, they nevertheless ruled out psychomotor epilepsy as the cause of his amnesia spells.

Dr. Gardner, a psychiatrist of somewhat limited experience, to whom the claimant was referred by Dr. Campagna shortly after his accident for psychiatric consultation with regard to the conversion hysteria, provides the chief support for the contrary conclusion. Dr. Gardner at the outset was of the impression that the claimant's amnesia or blacking out episodes were on a psychological basis. His initial diagnosis was an adult situational reaction to the trauma of the accidental injury. Dr. Gardner at the time of his testimony at the hearing had abandoned his initial diagnosis as an explanation for the amnesia spells. His final impression is that the claimant has psychomotor seizures or epilepsy caused by post-traumatic brain injury from the accident of July, 1967. The most conclusive evidence in support of his ultimate opinion is the remission of symptoms of amnesia from the use of the anti-convulsant drug Dilantin.

Dr. Gardner's opinion that the claimant has psychomotor epilepsy based upon the remission of the amnesia episodes with Dilantin, without blind studies or clinical tests for the evaluation of the effectiveness of the drug, and the lack of any other evidence of brain damage, reduces the weight of his diagnosis in the judgment of the majority of the Board to the realm of the sheerest of possibilities.

As indicated by the Supreme Court in Lucke v. State Compensation Department, 89 Or Adv Sh 715, 461 P.2d 269, a medical diagnosis based upon history, findings and observations, where the condition cannot otherwise be accounted for, is not the strongest kind of reasoning. The Court implies that such medical reasoning should be relied upon only where objective medical evidence is lacking.

The majority of the Board find and conclude from its de novo review of the record that the claimant's hysterical neurosis is of psychological origin and is not causally related to the accidental injury of July 12, 1967.

The majority of the Board also deem it proper to note in this order that since the hearing in this matter was held upon the claimant's appeal from the determination of an accepted claim, the award of attorney's fees to claimant's attorney predicated upon the claimant having finally prevailed on a denied claim in the hearing before the hearing officer pursuant to ORS 656.386(1) was patently in error.

The order of the Hearing Officer is therefore reversed in its entirety.

Pursuant to ORS 656.313, compensation received by the claimant under the order of the Hearing Officer pending this review is not reimbursable.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan dissents as follows:

This workman's claim was closed prematurely. The Closing and Evaluation Division of the Board is not to be blamed for this. Material furnished at that time indicated closure.

There is much talk about the claimant being mentally effected prior to his injury of July 12, 1967, but no evidence. No psychiatric services had been necessary prior to the injury and it is not logical to assume that the claimant could have held the jobs that he did, or acquired the property he has, if he had been psychiatrically deranged as we would be led to believe.

Dr. Gardner is firm in his statements that the claimant's fall resulted in brain injury. He has successfully treated the claimant. His opinions are entitled to great weight. Dr. Larson approved Dr. Gardner's management of the claimant's problems.

The University of Oregon Medical School report is not entitled to as much weight as must be given Dr. Gardner's opinions. Dr. Gardner has training making him competent to render opinions worthy of great weight and has had six years of experience, not 20 months as the State Accident Insurance Fund's attorney would have us believe.

Some parts of the report of the Medical School cause one to question the credibility of that report, which was compiled principally by a resident, not a board certified specialist.

A Reitan test, which is to rule out brain damage, showed minimal evidence of a left cerebral hemisphere lesion.

> "However, in view of lack of supportive data from neurological evaluation, this test is felt to be unreliable."

The same source (Medical School) further reported:

> "Since the accident the depression has become more marked."

Another reason for questioning the credibility of the University of Oregon Medical School report is the statement of a <u>self-inflicted knife wound</u>. It was the claimant's own knife that made the wound, but it was not a "self-inflicted wound." The injury was accepted as a workmen's compensation claim. The circumstances of the injury were known and it would not have been accepted as a workmen's compensation claim if the wound was "self-inflicted."

Dr. Campagna may have detected some instability when he operated on the claimant after the knife wound. If so it was no more than a pre-existing condition not requiring treatment at that time. At the time of the deposition Dr. Campagna had not treated the claimant for a long time. He was not well qualified to speak of the claimant's condition as it developed when Dr. Gardner was treating the claimant. Dr. Campagna's statement regarding the claimant's insurance is not evidence regarding the claimant's need for psychiatric treatment after the injury of July 12, 1967.

Weight to be given m edical evidence is not established by counting doctors' noses. Competence and knowledge of the claimant is the determining factor. In this regard the opinions of Dr. Gardner must be given the most weight.

When the total record is considered the preponderance of evidence is most favorable to the conclusion that the claimant's psychiatric problems needing treatment are due to his injury of July 12, 1967. The claimant's condition was not stationary at the time of claim closure. The order of the Closing and Evaluation Division was premature. Medical treatment and time loss subsequent to claim closure is compensable. When claimant's condition is stationary a new determination should be made by the Closing and Evaluation Division of the Board. That part of the order of the Hearing Officer identified as (1) and consistent with the statements herein should be affirmed.

The portion of the order of the Hearing Officer identified as (2) is in error. This was not a denied claim. It was legally closed, by the Closing and Evaluation Division of the Board, although prematurely. Attorney fees to claimant's counsel must be paid from benefits accruing to the claimant by virtue of an order. Such fees are not to be paid by the State Accident Insurance Fund as in a denied claim.

/s/ Wm. A. Callahan.

WCB #69-1146 and
WCB #69-482 April 15, 1970

RAYMOND L. CUTRIGHT, Claimant.
Request for Review by Employer.

The above entitled matter combined for consideration two claims for low back injuries occurring November 12, 1966 and February 23, 1967. The claimant is a 51 year old heavy duty mechanic. Both injuries were in the employment of American Ship Dismantlers. In the interim between the two incidents the employer's workmen's compensation insurance was shifted from the State Accident Insurance Fund to Employers Mutual of Wausau. The issue to be resolved was whether the present complaints were related to the November 12, 1966 (SAIF) claim, the February 23, 1967 (Mutual of Wausau) claim, or whether neither was responsible on the basis of an unknown and non-compensable etiology. The issue of disability is with respect to responsibility for compensation and medical care to a presently totally disabling condition.

The claimant slipped on November 12, 1966 while pushing iron in a shear. He sustained a mild acute traumatic sprain of the dorsal area and right sacroiliac sprain. He lost no time from work and the claim was closed by a final order awarding no permanent partial disability. The claimant's benefits were limited to payment for medical services consisting of six chiropractic treatments.

On February 23, 1967, the claimant slipped on a ladder wrenching his lower back and right hip. Pursuant to ORS 656.268, a determination order issued February 28, 1969, with relation to this February, 1967 accident

finding the claimant to have an unscheduled disability of 9.6 degrees against the then applicable maximum of 192 degrees for unscheduled injuries. The claimant also initiated a claim for aggravation with respect to the prior injury involving the State Accident Insurance Fund as an insurer and the two matters were joined for purpose of resolving the issue of disability as well as the issue of which insurer was responsible.

The Hearing Officer concluded and found that the rather dramatic fall of February 23, 1967 was more likely the precipitating cause of the current problems than the minimal trauma of the preceding November. It should be noted that the claimant's history of back problems dates back at least to 1964 with injuries in both 1964 and 1965.

The Board has reviewed the chain of events in light of the Hearing Officer's observations with respect to the demeanor of the witnesses, the course of treatments and the relative degree of trauma. The Board concludes and finds that the responsibility for the present disability and compensation is that of the February, 1967 accident in which Mutual of Wausau was the insurer.

The order of the Hearing Officer with respect to the responsibility for the continuing compensation is therefore affirmed. The order of the Hearing Officer is modified by increasing the maximum attorney fee from $800 to $1,500 dependent upon 25% of the compensation for temporary total disability and payable therefrom.

The Board has obtained from the Hearings Division and incorporates in the record the letter of David K. Mitchelson of June 18, 1969 and letter report of June 2, 1969 of George A. Dunn, D.C., with reference to the claim of aggravation as to the November, 1966 injury.

The claim is to be referred to the Closing and Evaluation Division of the Workmen's Compensation Board pursuant to ORS 656.268 when the claimant's medical condition warrants.

WCB #69-1377 April 15, 1970

LLOYD F. COLLINS, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 60 year old claimant sustained any permanent disability as the result of an inguinal hernia incurred February 5, 1968, while employed as a well driller.

Conditions such as those sustained by the claimant arise from congenital defects predisposing certain workmen to the development of the hernia. The legislature has recognized the area of questionable compensability of some claims in this area by imposing restrictions found in ORS 656.220.

Given a normal patient, the operation to repair the hernia generally removes the factor predisposing to the hernia and the patient in many cases is thus less disabled than prior to surgery.

There is no medical evidence in the record from which to arrive at a finding of permanent disability. At best there is a complaint by the claimant of some tenderness. This is not an unusual postoperative experience. The evidence, as noted, does not rise to the level of proof of a permanent disabling pain.

Neither party has favored the Board with a brief in the matter.

The Board concludes and finds that there is no permanent disability attributable to the injury. The order of the Hearing Officer is affirmed.

WCB #69-1529 April 15, 1970

LOUIS E. HARTLEY, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 26 year old veneer plant worker who fractured his left malleolus when a pile of green veneer fell on December 6, 1968.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 27 degrees out of the maximum of 135 degrees allowable for an injury to the leg below the knee.

The claimant returned to his regular work and subsequently moved to like work for another employer. He was out of work at the time of hearing due solely to layoff from market conditions.

The Hearing Officer affirmed the findings of disability.

The claimant asserts that the loss of motion warrants finding of greater disability. Loss of certain motion in the movement of the ankle is only one of numerous factors entering into the use of the foot. As noted by the Hearing Officer, the claimant basically has a good useable functioning foot. There is some physical impairment but little indication of any impairment affecting his earning capacity so far as the foot is concerned.

The Board concludes and finds that the disability does not exceed the 27 degrees heretofore awarded.

The order of the Hearing Officer is affirmed.

WCB #69-1659 April 15, 1970

TED E. EGAN, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 65 year old claimant who incurred an exacerbation of a pre-existing osteoarthritis in the left hip in the process of pushing against timbers with his hip. The claim is based upon a three week period of such work up to February 6, 1968.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent disability of 48 degrees out of the applicable maximum of 320 degrees for the unscheduled injury. Upon hearing the award was increased to 96 degrees.

The claimant has returned to his former work. The Hearing Officer bases her increase upon the recitation of Dr. Short that "the osteoarthritis throughout the lumbar spine was moderately severe." Dr. Short neither attributed the continuing development to the injury nor is there any medical support for the Hearing Officer conclusion that "it is reasonably probable that but for the accident, claimant would not have developed the disabling arthritis." The condition was there prior to injury without disability. The Hearing Officer sought to equate the existence of the condition with disability.

Dr. Short's medical conclusion is as follows:

> "It is my opinion that this patient aggravated a pre-existing osteoarthritis in his back when he was working hard on February 6, 1968. The patient also has a rather diffuse neurological disorder which could be related to arthritis. The patient attributes the weakness in his knees to the traction. Sometimes, traction will aggravate a pre-existing neurological disorder. Since this patient is working and because his symptoms seem to be improving, I would not recommend any further treatment at this time. It is my opinion that there is a small amount of permanent disability resulting from an aggravation of his pre-existing conditions."

The Hearing Officer has chosen to interpret Dr. Short's report as reflecting substantial disability due to the claim. Dr. Short summarizes his own findings in terms of a "small disability."

The Board concludes and finds that the evidence does not warrant an award in excess of the 48 degrees determined by the original closing order.

The order of the Hearing Officer is therefore set aside and the original determination of 48 degrees of disability is reinstated.

No compensation paid to claimant by virtue of the order of the Hearing Officer is repayable pursuant to ORS 656.313.

Counsel for claimant is authorized to collect a fee from his client not to exceed $125 for representation on a Board review where award of compensation is reduced.

WCB #69-64 April 20, 1970

THELMA ANN DEAN, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the liability for penalties (increased compensation) and attorney's fees for alleged unreasonable delay or refusal to pay compensation and the extent of permanent partial disability. The then 30 year old female grader and sorter in a lumber re-manufacturing plant sustained a cervical strain on May 8, 1968, as a result of turning to place a bundle or stack of boards on a pallet.

The determination order of the Closing and Evaluation Division of the Board entered pursuant to ORS 656.268 in addition to temporary total disability and temporary partial disability awards, awarded the claimant permanent partial disability of 16 degrees for unscheduled disability.

The hearing held at the request of the claimant culminated in an order of the Hearing Officer denying the claimant's request for penalties and attorney's fees under ORS 656.262(8) for unreasonable delay or refusal to pay compensation, and affirming the determination of permanent partial disability.

The claimant contends on review that the Hearing Officer erred in not awarding penalties and attorney's fees and in not increasing the permanent partial disability award.

Dr. Campagna following his examination of the claimant on October 22, 1968, reported that the claimant was capable of regular work as of November 1, 1968. In reliance upon this report, the insurer terminated temporary total disability compensation effective October 31, 1968. The insurer had earlier continued to make temporary total disability payments despite the prior reports of Dr. McIntosh indicating that the claimant was released for light work in August, 1968; confirming that she was able to continue on a light work status in September, 1968; and stating that the claimant was released for work in October, 1968 without indicating whether for regular or light work.

Counsel for claimant by letter dated December 2, 1968, demanded the immediate resumption of the payment of compensation, contending that the claimant had been released for light work only and had not been released to regular employment. Following an examination of the claimant on January 23, 1969, Dr. Campagna reported on January 29, 1969, that the claimant had not returned to work and on February 14, 1969, that she was unable to work.

The insurer's request for clarification of the conflicting reports resulted in Dr. Campagna's report of March 17, 1969, in which he indicated that although he had previously released the claimant for regular work on November 1, 1968, he was now of the opinion that she was not able to work during the period from November 1, 1968, to March 10, 1969. Thereafter the insurer promptly made payment of temporary total disability compensation retroactive to November 1, 1968. Dr. Campagna confirmed in his March 28, 1969, report that the claimant was capable of resuming regular work on March 10, 1969.

The claimant contends that Dr. Campagna's report approving the claimant's return to "regular work" without stating specifically either that she was capable of returning to her "regular work," or that she was capable of returning to a designated form of employment or her previous employment, was sufficiently ambiguous that the insurer was not justified in relying on the physician's report in terminating the temporary total disability compensation.

The statutory provision governing the payment of temporary total disability compensation is contained in ORS 656.268(2) which provides in effect that an insurer is authorized to terminate temporary total disability payments if the attending physician has approved the workman's return to his regular employment.

The terms "regular employment" and "regular work" are commonly used and have a recognized meaning in the administration of the compensation law justifying reliance upon their use in medical reports. Dr. Campagna's report stating that the claimant was capable of regular work constitutes the authorization necessary to justify the insurer's termination of the further payment of temporary total disability compensation to the claimant.

Dr. Campagna's reconsideration and revision of his opinion with respect to the date on which the claimant was capable of regular work, resulting in his approval of her resumption of work being postponed from November 1, 1968, to March 10, 1969, was the sole cause of the necessity for the insurer to resume the temporary total disability payments following its earlier termination of compensation payments in reliance upon the previous unqualified approval of her return to regular work, and the payment of temporary total disability compensation was expeditiously resumed by the insurer following the March 17, 1969 report of Dr. Campagna.

The Board concurs with the Hearing Officer in finding and concluding that under the circumstances of this matter, the insurer was justified in relying upon Dr. Campagna's report approving the claimant's return to regular work as authority to terminate the temporary total disability payments, and that its action in this respect did not constitute an unreasonable delay or refusal to pay compensation subjecting it to liability for penalties and attorney's fees under ORS 656.262(8).

The testimony presented by the claimant and corroborated by a number of her friends and relatives, reflects subjective complaints and symptoms which would if accorded full weight establish a much greater degree of permanent disability than that substantiated by the objective medical evidence.

The claimant contends on review that since the testimony presented on behalf of the claimant is unrebutted that it must be believed and followed by the Hearing Officer unless he makes a specific finding relative to said witnesses' lack of credibility.

The Hearing Officer, as a trier of fact, need not accept as conclusive as conclusive the uncontradicted statements of one or more witnesses unless he believes them to be true, and he may disregard uncontradicted testimony where it is unsatisfactory to his mind. Rich v. Tite-Knot Pine Mill, 245 Or 185 (1966); Graham v. Coos Bay R. and N. Co., 71 Or 393 (1917).

While in a particular matter the decision of the Hearing Officer may involve the question of the credibility of one or more witnesses, the ultimate function of the Hearing Officer, as is true of any trier of fact, is to judge or determine the effect or weight of the evidence produced before him. The Hearing Officer in evaluating the weight of the evidence, may, but need not necessarily make a finding as to the credibility of the witnesses testifying at the hearing.

The order of the Hearing Officer reflects that he has properly carried out his function as a trier of fact in the consideration and determination of the weight of the evidence produced at the hearing. He has found that the testimony of the claimant and her corroborative witnesses is in substantial conflict with the medical findings; that the testimony produced on behalf of the claimant has failed to produce belief or conviction in his mind and fails to sustain the claimant's burden of proof of establishing her claim by a preponderance of the evidence; and that the objective findings of the medical experts do result in belief and conviction and constitutes the greater weight of the evidence.

The medical evidence is uncontradicted that the claimant has sustained only a very minimal permanent disability of the neck as a result of the accident. The permanent disability disclosed by the medical evidence is amply recognized in the award of the determination order. The Hearing Officer found the claimant's permanent disability resulting from the accident to be commensurate with the award made by the determination order.

The Board, based upon its own de novo review and evaluation of the evidence, coupled with the weight which it gives to the Hearing Officer's evaluation of the testimony presented on behalf of the claimant because of his opportunity to see and hear the witnesses, concurs with the Hearing Officer in finding and concluding that the claimant's permanent partial disability is fully reflected in the award of 16 degrees made by the determination order and affirmed by the Hearing Officer.

The order of the Hearing Officer is therefore affirmed.

WCB #69-1766 April 20, 1970

ANDY CAMPBELL, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of whether the Workmen's Compensation Board should entertain a review of an order entered by a Hearing Officer based upon a good faith stipulation executed between the parties who were both represented by competent counsel.

The claimant was a 47 year old millwright when injured November 24, 1967 by slipping and falling on a table. The injury was initially diagnosed as a contusion of the left ribs. Pain developed in the right flank, lower abdomen and both upper and lower back. A diagnosis of herniated intervertebral disc at the thoracic 11-12 level led to surgery by way of a bilateral laminectomy at that level.

The claimant's past history is notable. As a survivor of Corregidor and several years as a prisoner of war, he endured some years of post war gastro-intestinal problems related to that experience. Some 13 years ago he was thrown through the windshield when the car in which he was riding struck a log.

Despite these rugged misadventures, the claimant was apparently able to function well enough to capably perform his job as a millwright until the accident at issue.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability attributable to the accident of 48 degrees against the applicable maximum of 320 degrees. (A rather poor copy of that order has been obtained and included at Board review--no copy appearing in the record from the hearings.)

Upon hearing, as appears at pages 17-18 of the transcript, the parties agreed that the issue of the extent of disability be settled by increasing the unscheduled award from 48 to 128 degrees and by additional awards of 22.5 degrees for partial loss of the left leg and 22.5 degrees for partial loss of the right leg. This agreement was incorporated into an order.

Unfortunately the Hearing Officer appended the usual notice that the parties, if dissatisfied, could request a Board review within 30 days. Obviously neither party should retain the right to review an ordered entered openly and in good faith between the parties.

The request for review is not upon the basis that there was any misrepresentation. The claimant apparently had some afterthoughts and obtained what appears to be a mixture of legal and medical advice from a doctor who examined the claimant after the hearing.

The issue is basically whether, upon the record, the stipulation and the order based thereon should be set aside. The claimant's problems are rather complicated. There was obviously a careful weighing of all factors including those indicative of only a minimal disability attributable to the accident.

The Board concludes that no showing has been made warranting a review by the Board of the order entered upon agreement of the claimant.

The request for review is dismissed and the order of the Hearing Officer is affirmed.

WCB #69-1452 April 20, 1970

DONNIE G. UNDERHILL, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent partial disability sustained by a 30 year old faller and bucker when he slipped and fell into his chain saw on November 15, 1968, resulting in a deep laceration of his left knee.

The order of the Closing and Evaluation Division of the Board entered pursuant to ORS 656.268 determined that the claimant was entitled to an award of permanent partial disability equal to 15 degrees of the maximum 150 degrees for the partial loss of use of his left leg.

A hearing held at the request of the claimant resulted in the entry of the order of the Hearing Officer increasing the award of permanent partial disability to 50 degrees against the applicable maximum of 150 degrees for the complete loss of a leg.

The claimant has requested a review by the Board of the order of the Hearing Officer contending that by reason of his limited ability to pursue his former occupation as a faller and bucker that the award of permanent disability made by the Hearing Officer inadequately compensates him for the loss of use of his left leg.

The medical reports of Dr. Smith, the treating orthopedic surgeon, indicate that the injury involved a laceration of the vastus medialis muscle above and on the inner side of the left knee. The scar is well healed, but mildly tender and slightly adhered to the underlying structure. Range of motion of the knee is normal and pain free. Flexion, extension and rotation are all normal. The ligaments are normal. There is no swelling or locking of the knee joint. Slight crepitus is noted but no worse than in the uninjured right knee. Slight atrophy of the left thigh has developed and small osteophytes have formed in the left knee. Dr. Smith's opinion is that the claimant has a significant residual disability to his left knee.

The Hearing Officer found the claimant to be a highly credible witness and accorded full weight to his testimony. The claimant's testimony indicates that despite medical advice to the contrary, he has returned to his former occupation as a faller and bucker, but has experienced considerable difficulty in his efforts to continue working at this employment. He is only capable of working a full work schedule on the infrequent occasions where the logging conditions are entirely favorable and the terrain is reasonably level. He has been required to limit his work schedule to approximately 3½ to 4 hours a day under the usual rugged logging conditions and hilly terrain ordinarily encountered in the woods. He indicates that his difficulty is limited to his left knee and the muscles above the knee, but that the knee is weak and will not support his weight in a flexed position, which affects his ability to go up and down hills and also stairs since he can only step forward with his right leg. His injured knee also causes difficulty in squatting and kneeling. His physician recommended that he discontinue work as a logger and obtain lighter work which can be performed on a level surface such as on a logging landing, or in a mill, or driving a truck in which employment it appears he would be capable of full time work.

During the pendency of this matter on review, the Court of Appeals decided Trent v. State Compensation Department, Or App, 90 Or Adv Sh 725, 466 P.2d 622 (1970), which extended to scheduled injuries the loss of earning capacity concept of Ryf v. Hoffman Construction Company, 89 Or Adv Sh 483, 459 P.2d 991, in which the Supreme Court held that impairment of earning capacity was a factor to be considered in the permanent partial disability award for an unscheduled injury. The Court of Appeals recognized however that as held by the Supreme Court in Jones v. State Compensation Department, 250 Or 177, 441 P.2d 242 (1968), that the "upper limit of recovery for the loss of the use of an extremity is the award provided in the statutory schedule for the loss of the same limb by separation."

Accordingly, the award of permanent partial disability in this matter must take into consideration the ability of the claimant to work and earn before and after his injury in addition to the loss of physical function of the claimant's left leg, however, the maximum award is limited to that scheduled for the loss of a leg since the only injury in this matter is to the claimant's leg.

The testimony of the claimant indicates that as a result of his injury he is now capable of working approximately one-half of the regular work schedule, reflecting a 50% loss or impairment of his former earning capacity. The order of the Hearing Officer indicates that the effect of the claimant's injury upon his ability to work and his earnings was a persuasive factor in his increase of the permanent partial disability award to 50 degrees, although he correctly recognized at the time of his decision, prior to the Trent case, that loss of earnings was not a determinative factor with respect to the extent of impairment of a scheduled member.

The Board finds and concludes that the loss of physical function of the claimant's left leg was properly evaluated in the determination order by the award of 15 degrees; that the claimant has sustained a 50% loss of earning capacity as a result of the injury to his left leg which is equal to 75 degrees of the maximum of 150 degrees for the loss of a leg; and that the permanent partial disability to the claimant's left leg measured by a consideration of both the loss of physical function and the loss of earning capacity is a total of 90 degrees.

The order of the Hearing Officer is therefore modified to increase the award of permanent partial disability from 50 degrees to 90 degrees.

Counsel for claimant is awarded an attorney's fee of 25% of the increased compensation, but not to exceed the sum of $1,500, payable from the increased compensation.

WCB #69-886 April 20, 1970

BETTY M. ROGERS, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability arising out of cutting her right index finger on a broken glass on December 26, 1967.

Pursuant to ORS 656.268 a determination issued finding the claimant to have a disability of 75% of the affected finger. This award was affirmed by the Hearing Officer. Upon review the claimant urges that the whole arm is involved and compensation should be made accordingly.

The claimant does have some problems in the arm that are in nowise related to the cut finger. The medical reports reflect a lessened right radial pulse. As a rather heavy smoker, she was advised of the adverse effects of smoking on circulation to the extremities.

It is recognized that any injury to a digit will to some extent affect the total use of the arm. However, it is only the unusual effect of a digital injury beyond the limits of the digit which will serve as the basis for award in addition to the digit. The rather vauge and self serving contentions of unusual and extraordinary effect of the finger injury are not supported by the medical evidence. The medical reports are remarkable in the absence of any indication of injury attributable to the accident other than to the finger itself.

The Board concludes and finds that disability attributable to the accident does not exceed the award of 75% of the finger.

The order of the Hearing Officer is affirmed.

WCB #70-327 April 20, 1970

DAVID A. GOULD, Claimant.

The above entitled matter involves a claim of alleged injury on July 25, 1969. No written notice of the claim was made until October 8, 1969, more than 60 days following the date of alleged injury. [See ORS 656.265(4)]. The claim was denied by the State Accident Insurance Fund on October 24, 1969 and no request for hearing was filed until February 19, 1970.

The matter was dismissed by the Hearing Officer on March 10, 1970 due to the untimely filing of the request for hearing.

A request for review of the Hearing Officer dismissal was filed with the Workmen's Compensation Board on March 16th. On March 24th, the Workmen's Compensation Board inquired concerning the basis of the request for hearing and advised claimant that the matter would be dismissed if no response was made prior to April 10, 1970.

No response having been filed and it appearing that the claimant gave the employer untimely notice of the claim, that claimant failed to seek a hearing within the time limited and that the basis of a request for review has not been made a matter of record, the Board concludes and finds that the order of the Hearing Officer should be affirmed.

The matter is therefore dismissed.

WCB #69-1478 April 20, 1970

JOHN T. PEARSON, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of the extent of permanent disability attributable to a lumbosacral strain sustained by a 25 year old warehouseman on January 7, 1969.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent disability of 16 degrees against the applicable maximum of 320 degrees. Upon hearing the award was increased to 65 degrees.

The claim poses two interesting facets in the problem of evaluating permanent disability. The structure of claimant's back is such that he has been advised to refrain from heavy labor. This is not a limitation imposed by the accident at issue. The accident at issue merely was evidence of the fact that the claimant's congenital defects would be adversely affected under the unusual stress. There was a temporary exacerbation and a minimal residual from the accident at issue.

The other facet is the question of the application of Ryf v. Hoffman, 89 AD. Sh 483, 459 P.2d 991 (1969). Claimant's counsel recognizes that the claimant's age, education and intelligence are such that the claimant faces no prospective loss of earning capacity. The claimant's earnings, in all likelihood, will prove substantially greater.

The Board finds and concludes that the claimant has sustained only minimal physical impairment with no prospective reduction in earning capacity due to the injury.

The Board further finds that the disability does not exceed the 16 degrees awarded by the Closing and Evaluation Division of the Workmen's Compensation Board. The order of the Hearing Officer is therefore set aside and the disability determination of 16 degrees disability is reinstated.

Pursuant to ORS 656.319, no compensation paid by virtue of the order of the Hearing Officer is repayable. Counsel for claimant, under the rule, is authorized to collect a fee from his client not to exceed the sum of $125 for services in connection with defense of the matter on review.

WCB #69-1132 April 20, 1970

PAT E. MURPHY, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the liability of the State Accident Insurance Fund for further medical diagnosis and care possibly associated with a back strain sustained January 2, 1968 and also the issue of whether the claimant incurred a permanent disability as a result of the incident.

Pursuant to ORS 656.268, the claim was closed November 27, 1968 with allowance for periods of temporary total and temporary partial disability but without any finding or award of permanent disability.

The claimant is 32 years of age. In 1951 he had the misfortune of losing his right leg surgically as the result of a malignancy in the hip.

The present claim involved the lower dorsal area of the back at approximately the D-10 area. A Dr. Woodward, now deceased, performed a myelogram in connection with a diagnosis of problems in the upper dorsal and cervical areas with no indication of any relationship to the accident at issue. There was a time when an area of calcification at the 10th dorsal vertebra concerned the claimant and his doctors. This was diagnosed as a pre-existing "Schmorl's nodes."

The claimant is understandably concerned in light of past medical history. However, there does not appear to be any evidence warranting further medical diagnosis or intervention with respect to the lower dorsal injury of January, 1968. Furthermore, the evidence does not reflect any permanent disability as a result of that injury.

The Board therefore affirms the order of the Hearing Officer.

WCB #69-783 April 20, 1970

ERNEST J. BROWN, Claimant.

The above entitled matter involves the issue of the compensability of a claim based upon a rheumatoid arthritis affecting both knees of the 50 year old claimant and allegedly compensable either as an accident or occupational disease upon the theory that the work effort and accumulation of strains and minor trauma over a period of months precipitated an exacerbation of the arthritis.

The claim was denied by the State Accident Insurance Fund but ordered allowed by the Hearing Officer as an occupational disease. The order of the Hearing Officer was rejected by the State Accident Insurance Fund thereby appealing to a Medical Board of Review.

The Medical Board of Review has now submitted its findings to the Workmen's Compensation Board which are attached and by reference made a part hereof and declared filed as to April 2, 1970.

The Workmen's Compensation Board notes the findings of the Medical Board to be rather equivocal with response to the answer to Question (1), but that the answer to Question (3) concludes that the disease "can not be claimed to have caused or arisen out of the course of claimant's regular employment."

March 25, 1970

Ernest James Brown. Mr. Brown is a 53-year-old white male who was seen at the request of Doctor Van Olst, in order to offer some evaluation to the State Board of Compensation. This gentlemen was apparently in good health prior to 1966, with the exception that he had had back symptoms

which he related to an on-the-job injury occurring about 1949. He had a laminectomy done in 1949 and spinal fusion in 1951. In approximately early 1966, he developed pain in his right wrist and saw Doctor Bartell in Albany after this persisted for some time. He does not recall swelling or warmth in the wrist. A diagnosis of gout was made and he was treated apparently with some shots and the pain disappeared. Somewhat thereafter he developed pain in his right knee accompanied by swelling. He does not recall that there was any fusion. He was about that time hospitalized for one week and treated with physical therapy, apparently intra-articular injections with some temporary improvement. He returned to his work as a construction worker but began having symptoms in his left knee which became extremely troublesome for him, again consisting primarily of pain, some swelling, and he believes, no effusion. He was apprently about this time begun on Cortisone and took fairly high doses on his own with some remission of his symptoms. The left knee, however, continued to be swollen and painful and he was seen by Doctor Van Olst and subsequently in March of 1969, had a synovectomy of the left knee and in June of 1969, a synovectomy of the right knee.

Since that time he has continued to have pain, particularly in the left knee on walking and has noted increased symptoms in his back in the last 1 to 2 months. Presently the back symptoms are decreased somewhat by wearing a back brace.

There has been no past history of arthritis. There has been no involvement of other joints, other than the ones mentioned above. There is some morning stiffness, particularly in the back and the knees. There is no history of psoriasis. There is a history of urethritis at approximately age 20 which was ascribed to venereal disease. He has not had conjunctivitis or eye symptoms.

The examination today is confined to the joints. The joints of the hands, wrists, elbows, and shoulders are normal. There is no tenderness in the feet, heels, Achilles tendon. Ankle joints are normal. There are surgical scars over both knees. The right knee shows full extension and approximately 75 degrees of flexion and seems to stop very firmly at this point. There is no swelling, tenderness or effusion in the right knee. The left knee shows full extension. There is 130 degrees of flexion. There is no swelling or fusion. There is no tenderness and the patient has some pain on full flexion, just above the knee joint, medially. There is minimal crepitus on flexion. There is no instability of either knee. At the hip joints there appears to be a 5 degree flexion contracture of the right hip and a normal range of motion of the right hip. There is some tenderness to palpation over the back in the lumbar and lumbo-dorsal junction. There are well-healed surgical scars in the whole lumbar area and the spines of L4 and 5 are missing. There is essentially no flexion of the spine in the lumbar and low dorsal spine.

Examination of x-rays of the sacro-iliac joints shows them to be normal. X-rays of the back taken in the early part of 1969, show moderate degenerative disc disease with anterior lateral and posterior osteophytes. X-rays of the left knee, taken in April, which would have probably have been after the synovectomy, are not remarkable.

From the history available, it sounds like this man's problem is primarily degenerative joint disease involving his knees and back. There does not seem to be evidence suggestive of rheumatoid arthritis and Ankylosing spondylitis would seem to be excluded by the normal sacro-iliac joints.

The etiology of this type of degenerative joint disease is not clear. Certainly once the disase has developed excessive use of the involved joints can be expected to aggravate it. Attempt will be made to review films prior to his surgery.

/s/ John Ladd, M.D.

WCB #69-534 April 20, 1970

LESLIE CANSLER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 55 year old aluminum plant employe has sustained a compensable aggravation of the left elbow which he bumped on March 4, 1966. The treatment was first limited to the first aid available at the plant dispensary. The first doctor's services were obtained on November 18, 1966. This doctor first reported "multiple fracture fragments left elbow" but this diagnosis is not supported by any of the subsequent medical examinations. At best there was an undisplaced hypertrophic spur which may or may not have constituted a fracture.

The claimant was discharged from military service in 1944 due to arthritis and has a 30% veterans disability rating related to that.

This claim was first closed in July of 1967 with an order of determination pursuant to ORS 656.268 finding a permanent disability of a loss of use of 5% of the left arm.

ORS 656.271 requires a claim of aggravation to be supported by a written medical opinion setting forth facts substantiating the claim. A report of Dr. Daack of March 6, 1969 was submitted referring to "elbows injured bilaterally in old accident of 1967." The accident at issue was in 1966 and there is no record of bilateral injuries. The condition is reportedly "continually aggravated by his work activities." In July of 1969 Dr. Daack diagnosed five various conditions and the left elbow was obviously a minimal part of the problem. The other conditions were not related.

A claim for aggravation must show that the condition caused by the accidental injury has become worse as a result of that injury and that such worsening is related to the injury and warrants a reopening of the claim for further compensation. The natural progression of other debilitative processes is not compensable unless it appears that the accident and not nature is responsible for future debilitation.

The evidence does not support the contention of a compensable aggravation. The disability in the elbow is minimal and suggestions for relief at best are limited to palliative measures directed toward his entire systemic problem.

The Board concludes and finds that there has been no compensable aggravation.

The order of the Hearing Officer is affirmed.

WCB #69-1126 April 20, 1970

JOHN O. DAMRON, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 37 year old catskinner as the result of being struck on the back of the head by flying rocks from the explosion of a powder charge on September 1, 1967.

Pursuant to ORS 656.268 a determination issued finding the claimant to have a permanent disability of 48 degrees out of the applicable maximum of 320 degrees for unscheduled injuries. This determination was affimred by the Hearing Officer.

The claimant contends alternatively that he is still temporarily and totally disabled or permanently and totally disabled or entitled to a substantial increase in the award of permanent partial disability.

The incident from which the claim arose was quite dramatic. However the claimant appears to have only minimal physical residuals from the accident. The chief problem in evaluation of disability in this claim is the part played by the claimant's psychopathology and the extent to which it has possibly been adversely affected.

One example of the interplay is the fact that prior to the determination of disability there was no restriction in neck motion. With litigation under way complaints were made of stiffness and limitation of neck motion unsubstantiated by any objective medical findings.

The prime basis of the claimant's psychological problems appears to be an unstable family relationship. The accident did not cause this problem nor can the accident be the cause for failure of that problem to resolve itself.

There is some dispute over an isolated incident with respect to whether the claimant had contacted a vocational rehabilitation counselor. That particular incident is not of importance other than as a small part of the total picture.

The claimant has minimal physical disability. Whether the claimant again becomes a useful productive citizen is up to the claimant.

The Board concludes and finds that the minimal physical disability combined with the questionable contribution to the pre-existing psychopathology does not exceed the 48 degrees heretofore awarded. The provisions of ORS 656.214(4) require a comparison to the pre-accident status without the disability attributable to the accident.

The order of the Hearing Officer is affirmed.

WCB #70-432 April 20, 1970

JOHN P. STEWART, Claimant.

The above entitled matter involves an issue of procedure with regard to the timeliness of requesting a hearing by an 11 year old newsboy whose claim was denied by the State Accident Insurance Fund as insurer of the employer.

The State Accident Insurance Fund denial was mailed December 23, 1969. (Copy of the denial was not sent to counsel who was representing claimant.)

A request for hearing was deposited in the mail on February 20th, 1970 and was not received until February 24, 1970. Pursuant to ORS 656.262(6) and 656.319(2)(a), the request must be filed within 60 days. The Workmen's Compensation Board construes the word filed to mean delivered to and accepted by the Board for the purpose intended.

In computing time within which an act is to be performed, the Board follows the interpretation that the date a letter of denial is mailed would be excluded from the computation. The first day, for purposes of computing the 60 day limitation, is December 24th. There would thus be 8 days in December and 31 days in January permitting the request for hearing to be filed as late as February 21st. The 21st was Saturday, the 22nd was Sunday and the 23rd was a legal holiday due to the George Washington Birthday holiday falling on Sunday and becoming observable on Monday. Where the concluding day or days of a time limitation fall on a non-business day or holiday, the time limitation is extended to the following day. Under the facts in this case the time for filing was thus extended to Tuesday, February 24th, the day on which the request for hearing was actually filed.

Even if the request was otherwise untimely filed, the amendment to ORS 656.319(2)(a)(b) permits a filing within 180 days where good cause is shown for failure to file within the 60 days. Failure to notify the counsel for an 11 year old claimant who was unaware of the implications is good cause for a delay which might have extended beyond the statutory limit.

For the reasons stated the order of the Hearing Officer denying a hearing is set aside and the matter is remanded for hearing upon the merits of the compensability of the claim.

No notice of appeal is deemed applicable.

WCB #69-2149 April 21, 1970

SYLVIA M. HUFF, Claimant.
Request for Review by Claimant.

The above entitled matter involves a question of procedure and jurisdiction arising from an injury of September 3, 1963. The first final order was issued by the State Accident Insurance Fund, insuring successor to the former State Industrial Accident Commission, on July 4, 1969. A petition for rehearing was directed to the State Accident Insurance Fund on August 4, 1969. SAIF then affirmed its first closure order.

The claimant then sought a hearing of the matter by the Workmen's Compensation Board under procedures applicable to injuries incurred on and after January 1, 1966, and also applicable to pre-1966 injuries where the claimant elects, at the time of the first SAIF order, to proceed under the post 1965 procedures.

In this instance the claimant by filing with SAIF the petition for re-hearing exercised the election, permitted by Sec 43 of Ch 285, O.L. 1965, to choose the procedures in effect on the day of the injury.

The Hearing Officer dismissed the request for hearing upon this basis. The claimant sought Board review. The SAIF has filed a Motion to Dismiss the request for review upon the foregoing state of the record.

The Board concludes as a matter of law that the motion is well taken and the motion is therefore allowed.

The order of the Hearing Officer is affirmed and the matter is dismissed as not properly before the Workmen's Compensation Board.

WCB #69-1339 April 21, 1970

A. R. WILLHITE, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 59 year old truck driver who incurred a back injury in alighting from his truck on December 1, 1966.

Pursuant to ORS 656.268 a determination issued finding a permanent disability of 48 degrees against the applicable maximum of 192 degrees for unscheduled injuries.

The hearing was held on October 1, 1969, which was prior to the Supreme Court decision of Ryf v. Hoffman relating to the factor of loss of earning capacity in evaluating disability.

In the conduct of the hearing evidence was excluded by the Hearing Officer which was proper in light of the Board policy and interpretation at that time.

Upon review, the Board now concludes that the tendered evidence should have been received.

The matter is accordingly remanded to the Hearing Officer for receipt of evidence relating to decreased earning capacity of the claimant as related to the injuries incurred in this claim and for such further order as the Hearing Officer may deem warranted by the further evidence in light of Ryf v. Hoffman, 89 O.A.S. 483, 459 P.2d 991.

No notice of appeal is deemed applicable.

WCB #69-1857 April 21, 1970

DONALD K. WENDLANDT, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claimant's recurrence of low back disability in two incidents on August 13, 1969, at home and in getting out of his pickup, constituted a compensable aggravation of his claim of injury incurred December 20, 1967.

The claimant is 43 years old and is still employed as a mechanic at Northwest Grocery. The 1967 injury involved getting a catch in his back as he lifted a pan containing about seven gallons of oil. The injury was diagnosed as a sprain. He had had other back problems but at a different level of the spine. The treatment as to this claim was conservative.

Following the August 13th incidents off the job, the claimant made a claim for aggravation which was denied by the employer-insurer and this denial was affirmed by the Hearing Officer.

The claimant has what has been diagnosed as a chronically unstable back. The situation is not comparable to one where an industrial injury creates the unstable back. The question is whether an industrial incident to a chronically unstable back imposes a continuing liability upon that employer for all future similar situations where the chronically unstable back flares up.

The word "aggravation" is used quite loosely by both the medical and legal profession. The statement of a doctor that a given incident constitutes an "aggravation" of a prior problem does not necessarily imply that there is a compensable aggravation of a condition which was caused by a prior compensable claim.

In the instant case it appears that the claimant has sustained a reoccurrence of low back problems and that the reoccurrence is due to his basically unstable back and not the fact that he had prior problems with the back.

The Board concludes and finds that the claimant did not sustain a compensable aggravation.

The order of the Hearing Officer is affirmed.

WCB #69-216 April 21, 1970

HELEN CROWELL, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 47 year old bartender who slipped and fell injuring her tailbone and incurring some low back symptoms. The injury occurred on May 23, 1966.

Pursuant to ORS 656.268, a determination issued allowing temporary total disability from March 30, 1968 to January 30, 1969 and finding a permanent disability of 28.8 degrees against the then applicable maximum of 192 degrees. This award was affirmed by the Hearing Officer.

One of the factors entering the disability picture is the claimant's refusal to undergo a diagnostic and therapeutic procedure known as a caudal block. This is not a procedure involving any special risk. Despite the recommendations of the doctors, the claimant asserts that she prefers to live with whatever pain she may have rather than undergo the procedure. The choice may well be indicative of the true measure of pain the claimant has. If the pain was as disabling as claimed, it is likely that the suggested procedure would be readily accepted.

The claimant's occupational opportunities may well be limited to a rather menial type of work. The work being performed when injured is so classified. The claimant provides no basis for application of any factor of reduced earning capacity. The question becomes simply one of evaluating the degree to which the alleged discomfort is disabling. Upon the claimant's election to "live with it" it appears the disability does not exceed the 28.8 degrees heretofore allowed.

The order of the Hearing Officer is affirmed.

WCB #69-1771 April 21, 1970

ARGYLE MOORE, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 56 year old veneer plant chipper operator whose left hand was caught in a belt on April 4, 1969.

Pursuant to ORS 656.268 a determination issued finding the claimant's disability to an award of 24 degrees for the complete loss of the left index finger, 2 degrees for partial loss of the left middle finger out of a maximum allowable of 22 degrees and 14 degrees for the uninjured thumb for the loss of opposition of the thumb out of a maximum allowable 48 degrees for total loss of a thumb.

Upon hearing the award for the left middle finger was increased from 2 to 5 degrees and the award for the thumb was increased from 14 to 24 degrees.

The employer urges that the increase in disability awards is not justified by the weight of the evidence. The Hearing Officer of course had the benefit of a personal observation of the injured fingers not available to the Closing and Evaluation Division. There is an unusual phenomenon with reference to the thumb which is not medically explainable upon an anatomical basis but which is not necessarily shown to be unrelated.

The Board concludes and finds that the weight of the evidence sustains the findings of disability of the Hearing Officer. The order of the Hearing Officer is therefore affirmed.

Pursuant to ORS 656.382(2), counsel for claimant is allowed a further fee in the sum of $250 payable by the employer.

WCB #69-1149 April 23, 1970

GEORGE C. BERGERON, Claimant.

Workmen's Compensation Board Opinion:

The above entitled matter involves the compensability of a degenerative intervertebral disc disease developed by a 48 year old furniture factory workman allegedly due to his work in lifting heavy lumber over a period of time.

The claim was denied and upon hearing the denial was affirmed.

There was some question whether the claim was one of accidental injury or occupational disease.

On December 10, 1969, the Hearing Officer denied the claim as an occupational disease and that order was rejected by the claimant. This rejection operated as an appeal to a Medical Board of Review.

The Medical Board of Review was duly constituted. The Workmen's Compensation Board is now in receipt of the findings of the Medical Board which are attached, by reference made a part hereof and declared filed as of April 15, 1970.

The function of the Workmen's Compensation Board is limited to filing the findings of the Medical Board. The findings recite that the claimant does not suffer from an occupational disease or infection. ORS 656.814 makes such findings binding upon the parties as a matter of law.

The Board notes the matter has also been subjected to appeal to the Circuit Court and a supplemental certification of the record to include this order and the findings of the Medical Board is to be made to the Circuit Court.

Medical Board of Review Opinion:

The following is a report of the joint examination of George O. Bergeron performed in the office Dr. F.A. Short at 2348 N.W. Lovejoy in Portland, Oregon, on April 3, 1970.

HISTORY: This 48 year old factory worker experienced a sudden and severe pain in his back and left leg while bending over to pick up a cat under the kitchen table at home on January 30, 1969. He sought medical attention shortly thereafter. According to the report of the treating physician, the diagnosis was ruptured lumbar disc and lower lumbar disc degenerative disease. Treatment consisted of traction, rest, and medications. The patient returned to work in March, but was unable to continue because of back pain. The patient states that he decided his work was too heavy, and therefore has sought lighter work. At the time of the onset of this back pain, he was working at a job where he was feeding lumber into a planer. This was hardwood lumber, and he states that some of the pieces weighed as much as 200 pounds. He had been working for that employer for three years.

PAST HISTORY: The patient states that prior to the January 30, 1969, injury, he had experienced low back pain for a number of years. He had not lost any time from work because of this back pain, had not sought medical

attention, and had not reported any type of an industrial accident of his back. He remembers he once went to his doctor regarding his back about 20 years ago. His health has been reasonably good. He has had a hemorrhoidectomy. He was told that he had a ruptured diaphragm.

EXAMINATION: This patient appears to be of the stated age. He is 5 feet 8 inches in heighth (sic), and weighs 160 pounds. He has very good muscular development and the muscles of his trunk are developed in proportion to the muscles of his extremities. He moves about without apparent pain or guarding. His spinal posture is normal except for a modest increase in the dorsal kyphosis. He can bend forward without bending his knees and reach down until his fingertips are three inches from the floor. He straightens without a catch. Backward bending is normal. Bending to the right and left is normal. Straight leg raising can be carried out to 80 degrees on each side. The Laseque tests are negative. The cross leg tests are negative. Bent leg raising is normal. Leg length is equal. Each calf measures 13 1/2 inches in circumference. Each thigh measures 18 inches in circumference, 7 inches above the patella. The patient is able to stand on his heels and tiptoes. He is able to perform a deep knee bend. There is no muscle spasm in the spinal muscles. There is no localized tenderness in the back or hip areas. The tendon reflexes are active and equal. There are no sensory changes.

X-RAY: AP and lateral x-rays of the lumbosacral spine show marked narrowing and degenerative changes in the lumbosacral joint. The other disc spaces in the lumbar area are well preserved. There are some mild arthritic changes in the remaining portion of the lumbar spine and in the lower dorsal spine.

COMMENTS: It is the opinion of the examiners that this patient has degenerative arthritic changes of the lumbosacral joint. There is no evidence of nerve root compression at this time. The answers to the five questions regarding occupational disease accompany this report.

/s/ F.A. Short, M.D.

WCB #69-1665 April 23, 1970

CLARENCE C. TIPPIE, Claimant.
Request for Review by Claimant.

The above entitled matter involves the primary and determinative issue of whether the claimant has a condition resulting from his compensable injury for which he is entitled to medical services subsequent to the determination of his claim under the provisions of ORS 656.245.

The claimant, a 47 year old molder of steel castings, sustained a compensable injury on February 23, 1967, when as a result of being in the path of a moving ladle of molten metal, he was struck across the bridge of the nose by a steel bar attached to the ladle and knocked unconscious.

The second determination order entered pursuant to ORS 656.268, after the claim had been ordered reopened by the Hearing Officer following the initial

determination, awarded the claimant additional temporary total disability, but no permanent disability award.

The record reflects that the claimant had an undifferentiated form of collagen disease which was pre-existing and not caused by the accidental injury. As a result of the accidental injury combining with the pre-existing collagen disease, a prolonged period of convalescence was required for the claimant's recovery from the effects of the injury. Following the claimant's recovery from the injury, the pre-existing collagen disease remained active requiring some medication and injections to enable the claimant to continue working. The medication and injections were required solely for the treatment of the collagen disease existing at the time of the injury, and not for the treatment of the combined effect of the injury with the disease.

The question to be resolved therefore is the responsibility of the State Accident Insurance Fund for the payment of the nominal medical expense for the medication and injections required to control the continuing effects of the pre-existing collagen disease following the claimant's recovery from the injury.

In connection with its review of the record in this matter, the Board finds and concludes that the portion of the medical report of Dr. Hatheway dated October 21, 1969, marked as Defendant's Exhibit No. A, which was not received into evidence by the Hearing Officer on the ground that it is hearsay, is admissible and is entitled to be received into evidence.

It is the general and well known rule that when an accidental injury combines with a pre-existing disease or condition to prolong the period of time loss, require further medical treatment, or produce more serious disability, the resulting additional time loss, medical treatment, or greater disability produced by the combined effect of the injury and pre-existing disease or condition is causally related to the accidental injury and is compensable.

A corrollary (sic) to the general rule is that when the claimant has fully recovered from the effects of the injury, and the injury no longer combines with the pre-existing disease or condition to produce disability including time loss or medical treatment, any subsequent time loss, medical treatment or disability attributable solely to the pre-existing disease or condition is not causally related to the accidental injury and is not compensable.

The Board finds and concludes from its de novo review of the record in this matter that the claimant has fully recovered from his injury, that the pre-existing collagen disease is the sole cause of his requirement for further medical services and that the State Accident Insurance Fund is not responsible for the payment of such medical expenses.

The Board having found against the claimant on the primary issue, finds and concludes that the secondary issue involving whether the refusal of the State Accident Insurance Fund to make payment of the medical expenses constitutes an unreasonable refusal to pay compensation subjecting it to liability for additional compensation and an attorney fee under ORS 656.262(8) and 656.382 is moot and unnecessary of determination.

The order of the Hearing Officer is therefore affirmed.

WCB #69-1720 April 23, 1970

WARREN A. WAHNER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of disability sustained by a 51 year old lather who fell through a hole on June 24, 1969 and sustained multiple injuries.

Pursuant to ORS 656.268 the claimant was allowed compensation for temporary total disability to August 4, 1969 without award of permanent partial disability. This determination was affirmed by the Hearing Officer.

The claimant was returned to his regular work but has continuing complaints with reference to his right shoulder and blurred vision. Though the claimant has some arthritic involvement, the extent to which it may have been permanently exacerbated would be a proper basis for an award of permanent disability.

There is no medical report from an opthamologist though there is reference to the claimant having been examined by such a specialist. If the report of Dr. Bohlman of November 4, 1960 is given credence, as it must, there are some matters which require further evidence. The Board concludes that the matter was incompletely heard and that the record should be amplified by inclusion of the report of the opthamologist referred to in the record and by a current examination by an orthopedist for an orthopedic examination. Upon the record the Board concludes that such examinations should be obtained from doctors of claimant's choice and be payable by the State Accident Insurance Fund.

The matter is therefore remanded for further hearing consistent with this order and for such further findings and order as the Hearing Officer deems warranted by the record following such further hearing.

No notice of appeal is deemed applicable.

WCB #69-345 April 23, 1970

BILLY JOE SISSON, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claimant sustained a compensable inguinal hernia on or about May 28, 1968 and if so, whether his claim should be barred for failure to comply with the notice provisions of ORS 656.265.

The claimant alleges, and his testimony is supported by several fellow workmen, that in attempting to open a heavy door with the aid of a fellow employe, he had a pain in the groin of such severity that he stoppped working for several minutes and clutched the area claimed to have been injured. Though some of the facts are in dispute the foreman recalls and testifies that he made an appointment for the claimant to see a doctor. When the claimant returned to work a couple of days later he was not re-employed and was given his check.

The claimant is illiterate. Following his discharge he went to Alaska and correspondence on behalf of the claimant was in fact written by claimant's wife.

The denial of the claim was upheld by the Hearing Officer. There were numerous witnesses. The Board is reluctant in areas of disputed factual situations to substitute its judgment of which witness to believe over the judgment of the Hearing Officer who has observed the witnesses. There are exceptions.

The Hearing Officer apparently became quite involved in areas of dispute which did not bear upon whether the claimant in fact was injured on the job. It is immaterial whether the claimant was discouraged by Chernowsky from seeing Mochowfsky about getting his job back. The Hearing Officer also found that the claimant's pain on the day in issue was from an illness rather than from an accident. No other disease or illness has been diagnosed to produce a pain in the right inguinal area and the hernia was not present when the claimant was extensively treated just a year before. The Hearing Officer speculates upon other matters but in nowise upon the origin of the hernia which remains as an uncontroverted fact and which is consistent with the finding of a hernia by the doctor immediately after an incident, with credible corroborative witnesses, which serves as the logical causative factor.

Taking the record from its four corners, the Board concludes and finds that the weight of the evidence supports a conclusion that the claimant on or about May 28, 1968, sustained a compensable hernia. The Board also concludes that the claimant was justified in his late written notice and that the employer has not borne the proof of any prejudice by virtue of the late formal written notice. The foreman in fact "lost" claimant's letter from Alaska in July on the subject.

The order of the Hearing Officer is therefore reversed and the employer and its insurer are ordered to accept the responsibility for compensation associated with the hernia.

Pursuant to ORS 656.386, counsel for claimant is allowed the fee of $750 for representation of claimant upon hearing and review. The fee is payable by the employer in addition to the compensation payable.

WCB #69-1120 April 23, 1970

HENRY L. FALER, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 34 year old logger as the result of being struck by a falling log on April 16, 1968. The initial injuries involved unconsciousness with an acute head injury, multiple rib fractures and fractures of the left scapula and left tibia.

Though the claimant returned to log truck driving for three months, following his convalesence, he then changed occupations and is selling vacuum cleaners.

Pursuant to ORS 656.268 the determination of disability found a permanent disability of 16 degrees out of a maximum possible award of 320 degrees for unscheduled disability and 27 degrees against a maximum of 135 degrees for injuries to the leg below the knee.

Upon hearing a further award was made of 10 degrees disability for injury to the left arm and in other respects the award was affirmed. The award on the arm was based on some limitation on abduction of the arm due to the injury to the shoulder.

The claimant contends the awards are not adequate. One of the factors influencing the Hearing Officer after observing the witnesses was the fact that the claimant had a pronounced limp at the hearing, but a witness who had observed the claimant numerous times over a period of time testified he had never observed the claimant limping.

The claimant had a serious accident but the purpose of these proceedings is to evaluate only the permanent residuals of that accident. Awards should not be made for a non-existent limp or for any other non-disabling complaint.

The claimant was able to return to his former occupation and has demonstrated an ability to work at his new job from 12 to 16 hours a day for a regular week plus 6 - 8 hours on a Saturday.

The Board concludes and finds that the various disabilities do not exceed the awards made by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #69-1042 April 23, 1970

CHARLES HUFFER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 55 year old carpenter who wrenched and strained his low back lifting some timbers on April 25, 1968.

The claimant's problem was treated conservatively by chiropractic and physical therapy means. The claimant had a pre-existing degenerative osteoarthritis and had experienced prior episodes of back injuries in 1959 and 1961.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 48 degrees against the applicable maximum of 320 degrees for unscheduled injuries.

The claimant has been advised to avoid heavy work. This medical advice is consistent with the claimant's degenerative osteoarthritis regardless of whether there has been a degree of exacerbation superimposed by the compensable injury.

The claimant also has some psychological problems and there is no medical testimony relating the development of these problems to the accident. Actually there is little objective evidence of residuals attributable to the accident.

The Back Evaluation Clinic maintained by the Physical Rehabilitation Center of the Workmen's Compensation Board found only a degenerative arthritis aggravated by overweight and weak abdominal muscles. The latter, of course, can only be restored by conditioning which the claimant has neglected.

The total picture is one of a workman beset by other problems who has attached undue significance to a minimal injury and is avoiding any assumption of responsibility to resume being a constructive member of society.

The Hearing Officer had the benefit of a personal observation of the claimant as a witness and the Board concludes and finds that the disability does not exceed that approved by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #69-1364 April 24, 1970

LLOYD P. SAUVOLA, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent partial disability sustained by the then 48 year old sheet metal worker on June 8, 1966, when he fell from the roof of a service station building under construction. A large heavy piece of sheet metal fell on top of him striking his right leg resulting in a subtrochanteric comminuted fracture. He also sustained multiple facial and head injuries from which he has recovered without permanent disability.

The determination order of the Closing and Evaluation Division of the Board entered pursuant to ORS 656.268, granted the claimant an award of permanent partial disability of 33 degrees of the then applicable maximum of 110 degrees for the loss of use of his right leg.

The order of the Hearing Officer increased the award of permanent partial disability by 22 degrees to a total of 55 degrees.

The claimant requested a review by the Board of the order of the Hearing Officer asserting that his permanent disability is greater than that awarded by the Hearing Officer.

The hearing of this matter on October 16, 1969, was held open at the claimant's request for the receipt of additional evidence. Thereafter, claimant obtained the medical report of Dr. Clarke dated October 20, 1969, which was received into evidence. Following receipt of the Hearing Officer's order, counsel for claimant solicited a further medical report from Dr. Clarke, and during the pendency of this review, moved the Board for an order allowing the medical report obtained from Dr. Clarke on December 3, 1969, into the record for consideration on review, or in the alternative for an order remanding the case to the Hearing Officer for the purpose of receiving said report into evidence for consideration in the case.

Board review of Hearing Officer orders is limited by statute to the record made at the hearing and such argument as may be received. The Board is not authorized by statute to receive additional evidence concerning disability

not obtainable at the time of the hearing as is provided on judicial review in the Circuit Court. The Board has however in its discretion and on its own motion occasionally sought the production of further evidence concerning disability not obtainable at the time of the hearing with the consent of the parties. In this matter, the State Accident Insurance Fund has objected to the admission of said medical report into the record. The motion to admit the medical report into evidence for consideration on review was of necessity denied by the Board.

The Board may, under the law, if it determines in its discretion that the case was incompletely heard, remand the case to the Hearing Officer for the taking of further evidence. It is the determination of the Board that this case has been completely heard by the Hearing Officer as reflected by the voluminous medical reports of record, the record having been held open for the receipt of a further medical report of Dr. Clarke, and the latest report of Dr. Clarke containing essentially only a further discussion of his prior examinations of the claimant. The Board has further determined that the December 3, 1969, report of Dr. Clarke does not meet the test of additional evidence concerning disability that was not obtainable at the time of hearing. Beagle v. Rudie Wilhelm Warehouse Company, Or App, 90 Or Adv Sh 61, 463 P.2d 875 (1970).

Counsel for claimant takes the position that the case should be remanded to the Hearing Officer for the taking of further evidence, that an adverse ruling precludes the claimant's further active participation in the Board review, and as a result is unwilling to argue or submit a brief in support of the claimant's position on this review by the Board of the order of the Hearing Officer.

The claimant sustained a serious injury to his right leg involving an extensively comminuted subtrochanteric fracture of the right upper femur. Treatment consisted initially of traction, which because of continuing malalignment was followed by the open reduction and internal fixation of the fracture with a Smith-Petersen's nail and side plate for improved position and alignment. The fracture healed solidly with good alignment and by the first of December, 1966, he was able to resume walking without external weight support. He was referred to the Physical Rehabilitation Center maintained by the Workmen's Compensation Board early in January of 1967 for physical therapy. The claimant made an extremely conscientious and enthusiatic effort to assist with his physical rehabilitation and demonstrated an excellent motivation to return to work as rapidly as possible.

On April 24, 1967, the claimant returned to his former occupation as a sheet metal worker for the same employer by whom he had been employed for many years prior to his injury in the construction of prefabricated steel service station buildings throughout the state. The claimant has worked regularly and full time since the resumption of his former employment, with the sole exception of a short period when he underwent surgery for the removal of the nail and plate from his right leg and for the repair of nasal injuries sustained in the accident.

The medical evidence reflects that the claimant has made an excellent recovery from his serious injuries, although he retains a significant permanent disability in his right leg. Disability evaluations are of course predicated

not upon the severity of the initial accident, but upon the resultant residual disability after the claimant has been restored as nearly as possible to a condition of self-support as an able-bodied workman. The claimant has been able to return to his former comparatively heavy and strenuous employment as a sheet metal construction worker. There is no question but that the claimant is working despite the extensive disability to his right leg. On the other hand it is equally clear that the claimant retains a substantial use of his right leg. Although there is no limitation upon his ability to perform his work, the claimant does indicate that he experiences distress during the course of the working day and considerable pain and discomfort following a hard day's work. His testimony relative to his subjective symptoms is accorded full weight in the evaluation of his permanent disability as a result of the Hearing Officer's finding that the claimant appeared to be a very credible witness. In the evaluation of the claimant's permanent disability, it is recognized that care must be exercised to avoid minimizing the disability of this highly motivated claimant by reason of the fact that he has demonstrated an excellent attitude toward overcoming his disability and re-assuming his role as a productive and self-supporting citizen.

The Board finds and concludes from its de novo review of the record that the claimant's permanent disability is limited to his right leg and that the permanent disability to his right leg is fully recognized in the Hearing Officer's award of permanent partial disability of 55 degrees of the then scheduled maximum for the loss of a leg of 110 degrees.

The order of the Hearing Officer is therefore affirmed.

WCB #69-1747 April 24, 1970

JAMES T. McDERMOTT, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether a 22 year old welder sustained a compensable low back injury on or about June 2, 1969.

No written notice was executed by the claimant until August 18, 1969. In that notice he subscribed a statement reciting "While bending over moving chain preparatory to welding I had a sudden onset of blinding pain." The part of the body allegedly affected was the "middle-low back left."

The claim was denied by the State Accident Insurance Fund for untimely notice an (sic) on the basis that claimant's disability was not caused by the alleged injury.

The denial was affirmed by the Hearing Officer. The claimant, on review, urges that the Hearing Officer erred in concluding that the claimant's statements were inconsistent and further urges that it was not until several months later that the claimant recalled the event and accorded some significance to the event.

Upon hearing, for the first time (Tr 26), the claimant relates that the alleged accident involved pulling on a prybar when all of a sudden the track fell off and it was almost like slipping on a piece of ice and he went back

against a flux box behind him. By page 79 of the transcript one discovers that instead of "bending over" he was "sitting down." At pages 47-49 Tr, claimant relates he did not remember the incident until some time after he consulted his attorney in August and at page 52 he testified that as late as October, 1969, he did not remember the incident on which the claim is based.

On page 33 of the transcript at line 14 he testified that his back was fine before June 2 and that he previously did not have any pain in it at all. The reports of Dr. Short, Dr. Smith, Dr. Abele and Dr. Robinson all relate histories from the claimant of back trouble since November or December of 1968. Claimant's wife is a nurse and they were apparently married at a time approximating the inception of the back pain (as reported to the doctors) in December of 1968. At page 85 his wife testified he had "no back trouble that I know of" prior to June 2, 1969.

The claimant was examined by Dr. Smith two or three days following the alleged injury of June 2nd or 34d with symptoms in the left flank through the left abdomen which had been present for six months. The claimant was examined on June 18 by Dr. Short with claims of pain in the left side of the back since November of 1968. Dr. Abele, for the benefit of the Armed Forces Examination Station, in September reported low back pain around the lower left rib cage which seemed to come from the dorsal spine with an onset in December, 1968. Dr. Robinson, on August 19, 1969, is the only doctor given a history relating any problem to June 3rd. Even Dr. Robinson dates the onset as in December of 1968 and Dr. Robinson did not relate the symptoms to any orthopedic problem.

An interesting aspect of the case is that the claimant does have some low back congenital defects but the symptoms are not medically related to those defects.

The accident was unwitnessed. The claimant at best told some of his fellow workmen that his back "hurt" but he did not relate the "hurt" to any activity on the job. The claimant would have the employer bound by a simple letter of transmittal from the employer's clerk requesting a claim form and reciting, "since he was injured working for us." The clerk had no knowledge of the incident. Even the claimant could not be charged with knowledge at this point since even the claimant did not remember the alleged incident until some months later.

As of the date of the hearing there is no medical evidence reflecting that the claimant sustained any injury to his back in the course of employment. The symptoms were such that tests were made for possible infections, kidney involvement or other internal problems not possibly associated with the alleged trauma.

The Board concludes and finds that there is insufficient medical evidence to warrant any conclusion of an accidental injury as alleged, that the written notice of the alleged injury was unduly delayed and that the history of the problems given to the examining doctors is incompatible with the versions of the alleged injury given on the claim form and in the testimony. The Hearing Officer, furthermore, had the benefit of a personal observation of the witnesses The rule of Moore v. U.S. Plywood, Or App, 89 Or Adv Sh 831, 833, 462 P.2d 453, is applicable.

WCB #69-1572 April 24, 1970

RAY D. FORBESS, Claimant.

The above entitled matter, at Board review, involved issues of whether the widow and administratrix of the decedent claimant's estate was entitled to compensation by virtue of an injury sustained by the workman on June 25, 1969, to his right ring finger and with respect to an infectious hepatitis incurred about the same date. The workman died as the result of an unrelated non-industrial automobile accident following the hearing before the Hearing Officer, but prior to closure of the hearing and issuance of the Hearing Officer order denying further benefits in the matter.

Mrs. Gaylene Forbess as widow and administratrix has now withdrawn the request for Board review in the matter.

Pursuant to the request of the petitioner and particularly in light of Fertig v. SCD, 88 Or Adv Sh 505, 455 P.2d 180, limiting the survival of benefits rights in such cases, the matter is hereby dismissed.

No appeal notice is deemed applicable.

WCB #68-1741 and
WCB #68-1752 April 28, 1970

WILLIAM L. WEBER, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of whether the claimant sustained a compensable injury to his back on April 18, 1968, while wheeling a wheelbarrow of cement working for a cemetery association. The claim was denied by the State Accident Insurance Fund but ordered allowed by the Hearing Officer.

The issue arises from the fact that the claimant, now 45 years of age, has had serious problems with his back for over 12 years. The history includes a lumbosacral strain while logging in California in September of 1957. A ruptured intervertebral disc was surgically removed in January, 1959. Further acute intervertebral disc disease was treated in 1962, 1963 and 1964. In September of 1967, a compensable injury was incurred in the employment of Harvey Zoon Logging Co. Claimant was pinned under a log and sustained a strained hip, multiple rib fractures and two or three fractures to transverse processes of the lumbar spine. A disability award for permanent disability to the left leg was issued June 19, 1968, two months following the April 18th wheelbarrow incident on which the instant claim is based. The matter became further complicated by the fact that when the claimant's symptoms forced him to quit work he had returned to work for Zoon and had again been falling and bucking logs for three weeks.

If the claimant's pattern of symptoms had been consistent throughout all of the chronology of events, the doubts of the State Accident Insurance Fund as to whether any new injury was sustained in the wheelbarrow incident would be better founded.

The evidence reveals, however, that following the wheelbarrow incident the claimant experienced, for the first time, the symptom of pain radiating down the left leg. The medical evidence supports a conclusion that some new injury was imposed by the stress of wheeling the wheelbarrow of cement and that this was a material contributing factor to the low back problem requiring further surgery in June of 1968.

The Board concurs with the Hearing Officer and concludes and finds that the claimant sustained a compensable injury on April 18, 1968.

The order of the Hearing Officer is affirmed in all respects.

Pursuant to ORS 656.382 and 656.386 counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services in connection with this review.

WCB #69-2380 April 28, 1970

HARRY T. PICKAR, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of whether the claimant tendered sufficient medical evidence with a claim of aggravation to entitle him to a hearing pursuant to ORS 656.271 as interpreted by the Supreme Court in Larson v. SCD, 87 Or Adv Sh 197, 200.

The claimant injured his left leg on November 25, 1967 and on April 18, 1968 was found, pursuant to ORS 656.268, to have a permanent disability of a loss of 20% of the leg.

The instant proceedings in the form of a claim for aggravation was accompanied by a medical report from Dr. Lawrence J. Cohen which concludes with the following comment:

> "The patient's signs and symptoms are approximately the same as they were at my examination on March 2, 1968. He has swelling and brownish discoloration of both lower extremities, due to venous congestion. I doubt very much whether than (sic) has been any basic change in the situation since my claim closure. However, there may be a slight degree of change. It is my feeling that at this time, the patient has a disability of the left lower extremity as a result of the accident equivalent to 25% loss function of a leg. This is the total disability resulting from the accident."

A hearing on the claim of aggravation was denied on the basis that the medical report does not set forth facts from which a reasonable conclusion of aggravation could be drawn.

The significant words in the doctor's comments are as follows:

> "The patient's signs and symptoms are approximately the same as they were at my examination on March 2, 1968."

"I doubt very much whether than (sic) has been any basic change in the situation since my claim closure."

The claimant relies upon the doctor's statements that "there may have been a slight degree of change" and upon the doctor's evaluation of disability at 25% instead of the award of 20% of the leg.

The doctor's increased evaluation basically impeaches the award which is no longer subject to appeal. The claimant urges that the 25% increase over the 20% award is the "slight degree of change" the doctor recited.

The legislature has prescribed, in effect, that a prima facie case of aggravation be established before hearing is granted. Such a prima facie case is not made by a doctor who simply impeaches the original award. With symptoms "approximately the same," with no "basic change in the situation," and with only a possible "slight degree of change," the Board concludes that the record does not reflect a material change warranting submitting the matter to a hearing.

The issue is not whether there has been an aggravation. The issue is whether the medical facts accompanying the claim of aggravation reflect a basis for a reasonable conclusion that there has been a compensable aggravation.

The Board concludes and finds that the Hearing Officer properly refused to schedule a hearing upon this state of the record. This does not preclude a hearing at such time in the future as the record may be properly implemented to then justify a hearing.

The order of the hearing officer is affirmed.

WCB #69-1567 April 28, 1970

KENNETH E. NELSON, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 41 year old blacksmith helper who strained his back when a wrench slipped as he was exerting pressure on the wrench. The injury occurred on December 30, 1966.

The claim was first closed by an award of the Closing and Evaluation Division of the Workmen's Compensation Board on August 39, 1967, finding a disability of 19.2 degrees out of the maximum allowable award of 192 degrees. The claim was subsequently reopened and upon the last closure pursuant to ORS 656.268, no additional award of permanent partial disability was made by the Closing and Evaluation Division.

This order was affirmed by the Hearing Officer and the issue is thus whether the residual permanent disability exceeds the 19.2 degrees heretofore awarded.

As noted by the Hearing Officer the claimant has been examined by numerous physicians. None of the physicians found objective evidence to

support the continuing complaints. Complaints are made which do not follow the known anatomical nerve patterns. There is some measure of improvement possible with respect to strengthening the musculature of claimant's back but this is a factor solely within the control of the claimant by proper activity. In any event, any deficiency in this area is not a permanent injury.

At the time of hearing the claimant was working as a service station attendant on a four hour shift for six and seven days per week in addition to getting started as a handyman in a fixit business at which he devoted many hours per week. The record does not reflect any basis for application of the earning capacity factor applicable from the Ryf (89 OAS 483, 459 P.2d 991) decision. This is particularly true in light of the fact that the weight of the medical evidence indicates a minimal physical impairment despite the claimant's complaints.

The Board concludes and finds that the permanent disability does not exceed that found by the Hearing Officer who had the advantage of a personal observation of the witnesses.

The order of the Hearing Officer is affirmed.

WCB #69-1063 April 28, 1970

JOHN NEUFELD, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of whether the 43 year old claimant has sustained any permanent disability as the result of being struck in the jaw by a 2 x 4 on December 15, 1967. His jaw was fractured and several teeth displaced. A full upper denture and a partial lower denture were required as a result.

Pursuant to ORS 656.268, the Closing and Evaluation Division of the Workmen's Compensation Board found there to be no permanent disability and this determination was affirmed by the Hearing Officer.

The two issues as to disability are whether the restriction of movement of the jaw is a compensable disability and whether there was an associated loss of hearing, which is in dispute.

The question as to the teeth and mouth is whether the disability is compensable. Oregon does not have the provision for cosmetic or disfigurement injuries found under some laws. There is no evidence in this case even of cosmetic defect. At best there is a dimunition of the lateral involvement and inability to open the mouth as wide. There is no evidence that in this case there is any effect upon this claimant's ability to work. Even in light of the recent Ryf v. Hoffman (89 OAS 483, 459 P.2d 991) decision there is no evidence of any loss of earning capacity due to the injury. As noted by the Hearing Officer there is no evidence showing any disability with respect to the jaw injury which imposes any restriction on ability to work. It is not whether there are permanent effects of the accident but whether the permanent effects of the accident but whether the permanent effects are disabling that forms the basis of an award of disability.

There is also, as noted, an issue over alleged hearing loss. Basically the medical evidence indicates the claimant has a hearing deficiency which is in a range beyond the normal requirements of useful hearing and it is medically disputed whether this is related to the accident. The hearing deficiency, whatever its cause, verified by the doctors is equal in both ears but the claimant asserts a disability in one ear.

The Board accepts the medical testimony which establishes that the loss, whatever its source, is at a high frequency level which is essentially not disabling. The Board also accepts as the weight of the evidence, the proposition that any possible hearing loss relation to the accident is conjectural and speculative.

The Board concurs with the Hearing Officer and concludes and finds that under the facts of this particular case the injuries to the jaw and teeth do not represent any compensable permanent injury. The Board also finds that the claimant has sustained no compensable loss of hearing.

The order of the Hearing Officer is therefore affirmed.

WCB #69-953 April 29, 1970

EDNA LEE COOPER, Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 54 year old county courthouse janitress who struck her right elbow on a door casing on June 14, 1968.

Pursuant to ORS 656.268, a determination order by the Closing and Evaluation Division of the Workmen's Compensation Board found the claimant had a permanent disability of 5% of the arm. Upon hearing, the Hearing Officer increased the award to 90 degrees out of the applicable maximum for total loss of an arm.

The chronology reflects that she was able to work despite the initial pain and swelling in the elbow until July 17, 1968. She returned to work August 2 until December 12, 1968, and has not since returned to work. Her treating doctor recommended that she limit her lifting to 20 pounds but she was unable to make arrangements within these limitations.

The claimant apparently sustained a contusion to the superficial branch of the right radial nerve at the elbow. The condition has generally been diagnosed as either a tennis elbow or a lateral epicondylitis.

There is some indication that the claimant is a difficult patient and that her complaints are certainly not minimized. The persistence of the symptoms, however, produced the conclusion of the doctors that further therapy would not be of material help and that the disability exceeds the minimal award initially made by the Closing and Evaluation Division.

The Board concludes that the award by the Hearing Officer of 90 degrees is liberal, but not excessive and that the net effect of the injury is a substantial loss of function of the arm and earning capacity of the claimant.

The order of the Hearing Officer is therefore affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services rendered in connection with this review.

WCB #69-1853 April 30, 1970

ROMUALDO OVALLE, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability sustained by a 53 year old migrant farm laborer who fell from a ladder while picking cherries on July 7, 1967. The first medical attention sought was nearly a month later when seen by Dr. Charles Schultz for complaints of pain in the dorsal spine and left foot.

The administration of the claim has been complicated by the fact the claimant communicates only in the Spanish language, the claimant's itinerant travels have absented him to places in California and Texas and the claimant developed a paralysis unrelated to the fall from the ladder. The paralysis was due to a potassium deficiency which bears the medical term hypokalemia.

Pursuant to ORS 656.268, the Closing and Evaluation Division of the Workmen's Compensation Board found there to be permanent unscheduled injuries of 32 degrees against the applicable maximum of 320 degrees and a disability of 6.75 degrees for each foot against the maximum for complete loss of 135 degrees for each foot.

Upon hearing, the Hearing Officer deleted the award with respect to the right foot upon finding the right foot had not been injured.

The claimant on review asserts that the ladder fall has precluded him from regularly working at a gainful and suitable occupation and that he should be declared to be permanently and totally disabled.

Though Dr. Howard Cherry has appended an evaluation of disability greater than that awarded, a careful examination of the medical findings by Dr. Cherry and the findings of Dr. Raymond Case reflects a rather nominal permanent disability attributable to the fall from the ladder.

The claimant moved about easily on medical examination and at the hearing without obvious pain. The X-rays are consistent with what is expected of a person of claimant's age.

The Board concludes and finds that the complaints are greatly out of proportion to any residual disability which may be attributable to the fall from the ladder and that the claimant has already received the benefit of the doubt by the awards heretofore made.

The Board finds that the disability does not exceed the 32 degrees of unscheduled disability and 6.75 degrees for the left foot found by the Closing and Evaluation Division as affirmed by the Hearing Officer in deleting award for the right foot.

The order of the Hearing Officer is affirmed.

WCB #69-1930 and
WCB #69-1931 April 30, 1970

EUGENE MILLER, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability sustained by the 44 year old logger as the result of two separate right leg accidents involving different employers and different insurers.

The first injury on June 18, 1968, caused a fracture of the tibia and fibula of the right leg while employed by Lagler Logging Co. which was insured by the State Accident Insurance Fund.

The claimant has returned to work, working for U. S. Plywood on January 19, 1969. On February 26, 1969, he fractured the os calcis or heel bone of the same leg. The insurer as to this accident was Liberty Mutual Insurance Company.

Both claims were processed by the Closing and Evaluation Division of the Workmen's Compensation Board pursuant to ORS 656.268. The determination of May 13, 1969 found there to be no permanent disability as to that injury. The determination as to the second injury was made October 1, 1969 and found there to be a permanent injury to the leg below the knee of 14 degrees against the applicable maximum of 135 degrees.

Upon hearing, the Hearing Officer affirmed the determination as to the second injury. However, the Hearing Officer concluded there was residual permanent disability at the knee level attributable to the first accident. Award was made of 17 degrees permanent disability against the applicable maximum of 150 degrees for injuries including or above the knee.

The claimant on review seeks an increase in both awards. The combined awards, on the basis of a comparison to the total leg, represent slightly in excess of a 20% loss of the leg.

The hearing was held in December of 1969. The State Accident Insurance Fund relies largely upon the last examination by Dr. Brooke in January of 1969, in which Dr. Brooke anticipated a complete recovery without permanent residuals as to the first injury.

The claimant has returned to his former rather arduous labors and apparently satisfactorily performs the work at the increased applicable wage levels. A fellow workman opined that claimant "is not as good as he used to be."

The Board concurs with the Hearing Officer that the weight of the evidence supports a conclusion that the first injury of June 18, 1968 resulted in permanent injury at or above the knee level. The Board also concurs with the Hearing Officer that the disability as to the June 18, 1968 injury is 17 degrees against a maximum of 150 degrees and the disability as to the February, 1969 injury is 14 degrees against the applicable maximum of 135 degrees.

The combined awards for the injuries are slightly in excess of that allowed for a loss of 20% of a leg. A workman with permanent injuries of 20%

loss of a leg would be expected to be "not quite as good as he was before." The fact is that his work production is equal to that of his fellow employes in one of the more difficult of Oregon's occupations.

The Board concludes and finds that the disabilities arising from both accidents were properly evaluated by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #69-1718 April 30, 1970

LOUIS E. HILLIARD, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent partial disability sustained by a 61 year old general construction superintendent as a result of a fracture of his right ankle incurred on March 21, 1968, when a heavy plank struck his foot.

The Closing and Evaluation Division of the Board determined pursuant to ORS 656.268 that the claimant was entitled to an award of permanent partial disability of 14 degrees of the scheduled maximum of 135 degrees for the partial loss of his right foot. A hearing held at the claimant's request resulted in an increase of the award of permanent disability by the Hearing Officer to 55 degrees.

The claimant has requested a review by the Board of the order of the Hearing Officer. Claimant's brief asserts that the claimant should be considered permanently and totally disabled. Respondent's brief submits that the Hearing Officer has correctly evaluated the claimant's permanent disability.

During the pendency of this review, claimant requested that this matter be reopened for inclusion in the record of a post-hearing medical report of the treating physician. ORS 656.295 provides that the review by the Board shall be based upon the record made at the hearing and such argument as may be received. The Board may, if it determines that the case was incompletely heard, remand the case to the Hearing Officer for the taking of further evidence. It is not contended and the Board determines that the case was not completely heard. A subsequent exacerbation of the claimant's physical condition or earning capacity of a permanent nature may properly be the basis for an application under ORS 656.271 for increased compensation for aggravation.

The claimant in seeking an award of permanent total disability submits that the claimant by reason of his injury, age, education and training is permanently incapacitated from regular work at a gainful occupation, and urges the unconstitutionality of the statute establishing maximum limits for scheduled injuries. The Supreme Court of Oregon recently held in Jones v. State Compensation Department, 250 Or 177 (1968), in which it was contended that the loss of use of an arm coupled with advanced age, lack of education and limited training established an incapacity to work justifying a permanent total disability award, that the "upper limit of recovery for the loss of the use of an extremity is the award provided in the statutory schedule for the loss of the same limb by separation." The Oregon Court of Appeals even more

recently held in Trent v. State Compensation Department, Or App, 90 Or Adv Sh 725, 466 P.2d 622, (1970) involving an injury to the foot or the foot and leg claimed to be totally incapacitating entitling the workman to an award of permanent total disability, that "until the legislature changes the statute or Jones is reversed or modified by the Court which decided it, it is our interpretation that the maximum award can be only that scheduled for the "loss of use' (sic) of the extremity, where, in a case like this, the only injury is to the extremity." The Board concurs with and feels compelled to follow the recent decisions of the Oregon Appellate Court.

The claimant's injury involved a fracture of the medial malleolus of the right ankle from which recovery was initially anticipated without permanent disability. Treatment consisted of the internal fixation of the fracture with a surgical screw, which was subsequently removed, and the application of a short leg cast later replaced by a short walking cast. His ankle was in a cast for a total of approximately eight weeks, following which he was on crutches for two weeks, and he was then able to resume walking with the aid of a cane. He returned to work as a construction superintendent in late June of 1968, at a higher salary than before his injury, and has worked steadily since that time. This work history further renders the contention of permanent total disability untenable even if a permanent total disability could be founded on injury to one leg.

The medical evidence reflects that the fracture has healed in excellent position, with nominal restriction of motion in the ankle, consisting of limitation of dorsiflexion, extension, and inversion and eversion. There is tenderness remaining in the area adjacent to the medial malleolus and swelling persists around the medial side of the ankle joint. The treating physician has diagnosed a tenosynovitis condition in the right ankle to be attributable to the fracture of the ankle. Post traumatic chondritis, an arthritic condition in the claimant's right ankle, is also indicated in the medical reports.

The claimant indicates that he has a constant dull pain in his right ankle. Walking or standing for a short period causes a sharp pain in his ankle which is relieved by rest and elevating his leg. He has been required to restrict his employment activity to the supervision of construction projects which can be reached by a vehicle and do not involve extensive walking particularly on rough terrain, and he is unable to continue to engage in recreational activities involving the continued active use of his right foot, such as hiking, hunting, fishing and dancing.

The Hearing Officer concluded from his consideration of the testimony of the claimant and his wife that the claimant has a much greater disability of his right foot than is indicated by the medical evidence. The evidence of record reflects, however, as found by the Hearing Officer that the claimant retains a substantial use of his right foot despite the limitation of use and consequent restriction of activity. The limitations in the use and function of his foot as indicated by the claimant's testimony appear to have been fully reflected in the Hearing Officer's evaluation of the claimant's permanent disability.

The Board finds and concludes from its de novo review of the record and briefs that the Hearing Officer has properly evaluated the claimant's permanent

partial disability for the loss of his right foot, and that such permanent disability does not exceed the 55 degrees awarded by the order of the Hearing Officer.

The order of the Hearing Officer is therefore affirmed.

WCB #69-1248 April 30, 1970

LEONARD M. CHAPMAN, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a then 64 year old mail clerk employed by the Oregon State Senate who fell on the ground floor of the Capitol Building on February 16, 1967, when a rope on a mail bag slipped. The claimant had previously lost the lower portion of his left leg. The initial injury reported was injury to the left shoulder and an abrasion to the left leg from the artificial prosthesis. The claimant had a pre-existing osteoarthritis of the cervical and upper thoracic sections of the spine with disc degeneration. A suggestion of neurosurgical examination and possible surgical decompression of the 6th and 7th cervical nerve roots has been refused by the claimant.

Pursuant to ORS 656.268, the Closing and Evaluation Division of the Workmen's Compensation Board found there to be an unscheduled disability of 19.2 degrees against the applicable maximum of 192 degrees for the neck and shoulder involvement and 14.5 degrees against the applicable maximum of 145 degrees for the loss of use of the left arm. Upon hearing, the determination of disability as to the arm was increased to 36 degrees and the determination with respect to unscheduled disability at 19.2 degrees was affirmed. Upon review, the claimant urges that the Hearing Officer should in effect have followed the evaluation of Dr. Jones which recommended 72.5 degrees for the combined disabilities. The Workmen's Compensation Board has encouraged examining doctors to recite the factors of physical impairment rather than to usurp the ultimate administrative responsibility of converting those factors into disability ratings. The Hearing Officer properly discounted the opinion of Dr. Jones.

The claim involves another unusual facet in that the claimant refuses recommended surgery. If such refusal is unreasonable it is grounds under ORS 656.325(2) for suspension of compensation. The Hearing Officer reasoned that even though such refusal may fall short of being unreasonable, it is a factor to be considered in evaluating whether the subjective symptoms are indicative of a disability as great as asserted by the claimant. The Board concurs in this line of reasoning. This is particularly true where more palliative treatment appears to at least temporarily relieve the claimant completely.

The claimant's motivation and retirement age are also factors to be included in a consideration of just how much disability is attributable to the accident at issue.

The Board concludes and finds that the disabilities equal but do not exceed the findings of disability made by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #69-1150 May 4, 1970

DARRELL D. CARR, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent partial disability sustained by a 46 year old diesel mechanic as a result of injuries to his neck and left arm incurred on November 22, 1967, when he slipped and fell from the cab of a truck.

Pursuant to ORS 656.268, a determination issued awarding the claimant permanent partial disability of 48 degrees against the applicable maximum of 320 degrees for unscheduled disability, and 9.6 degrees against the applicable maximum of 192 degrees for loss of the left arm. Upon hearing, the award for unscheduled disability was affirmed and the award for loss of the left arm was increased to 40 degrees. The claimant requested review by the Board of the order of the Hearing Officer. The claimant indicates his satisfaction with the award for the loss of his left arm, but contends that the award for unscheduled disability is inadequate.

The claimant's testimony at the hearing reflects that he has returned to work for his former employer at his former occupation as a diesel mechanic, but that his employer has made concessions with respect to the nature of his work by limiting his duties to the less strenuous aspects of the ordinary work activity. The claimant indicates that he has seldom been able to work a full shift since returning to work and that he is paid only for the hours actually worked. In effect the claimant maintains that his employer is "carrying him" and that he is not expected to perform the full work of a diesel mechanic.

Subsequent to the hearing of this matter by the Hearing Officer and the entry of his order which has been subjected to this review, the Supreme Court decided Ryf v. Hoffman Construction Company, 89 Or Adv Sh 483 (459 P.2d 991), (October 22, 1969) and the Court of Appeals decided Trent v. State Compensation Department, Or App, 90 Or Adv Sh 725, 466 P.2d 622 (March 12, 1970), which held that loss of earning capacity is a factor to be considered in the determination of unscheduled and scheduled permanent disability.

The foregoing testimony of the claimant would indicate a possible impairment of the claimant's earning capacity, justifying the obtaining of additional evidence relevant to this factor for consideration in the evaluation of the claimant's permanent disability. The Board therefore determines that this matter has been incompletely developed and heard with respect to the possible application of the subsequently decided Ryf and Trent cases.

The matter is therefore remanded to the Hearing Officer for the limited purpose of the taking of further evidence relevant to the question of the impairment of the claimant's earning capacity attributable to his accidental injury, and for such modification, if any, in the award of permanent partial disability as may be determined proper by the Hearing Officer after consideration of such additional evidence as may be adduced by the parties hereto.

No notice of appeal rights is deemed required. Barr v. State Compensation Department, Or App, 90 Or Adv Sh 55 (January 15, 1970).

WCB #69-2078 May 4, 1970

BARBARA HAMM, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 32 year old meat packer. The initial injury involved a cut on the left index finger when a hand truck fell and caught the claimant's finger between the handle of the truck and the claimant's knee. This occurred July 24, 1968. On September 30, 1968, the claimant developed what was diagnosed as a ganglion of the left wrist. There is some doubt whether this condition was related to the finger injury. There is some evidence that it may have been related to her work by way of long term repetitive strains. The condition appears to have been accepted as part of the finger claim.

Pursuant to ORS 656.268 the Closing and Evaluation Division of the Workmen's Compensation Board found the claimant to have a permanent disability of the left forearm of 23 degrees out of the applicable maximum of 150 degrees. This determination was affirmed by the Hearing Officer. The claimant in effect asserts the forearm is entirely useless and asks for an award of 150 degrees. According to the claimant the examining doctors simply do not understand her problem. The forearm is obviously not useless. There are basically no permanent residuals from the finger injury.

The Board concludes and finds that the disability does not exceed that found by the Closing and Evaluation Division and affirmed by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #69-266 May 4, 1970

FRANK L. WRIGHT, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 62 year old sawmill yard worker who injured his right foot on June 20, 1968 when a lift truck ran over the foot. The fifth metatarsal was fractured. The claimant has continued to have substantial subjective complaints of pain and cramping in the calf, ankle and foot.

The disability evaluation found by the Closing and Evaluation Division of the Workmen's Compensation Board on July 23, 1969 found the permanent disability to be only 7 degrees against the applicable maximum of 135 degrees for complete loss of a leg below the knee. This determination was affirmed by the Hearing Officer basically upon the fact that the medical reports reflect only a minimal permanent physical impairment.

Since the hearing the Oregon Court of Appeals in Audas v. Galaxie on April 9, 1970 extended the concept of loss of earning capacity, as a factor in evaluating disability, to include scheduled injuries.

There is some dispute over the communications between the claimant and the employer over possible re-employment. It appears clear that at the time the claimant sought re-employment on a lighter work basis, no work was tendered to him.

The record thus reflects a workman with a pre-accident wage of $3.08 an hour who, at the time of hearing, was reduced to $1.85 an hour (Tr 54). The Board concludes that despite the lack of more than minimal impairment found by the doctors, the entire record supports a conclusion that this workman has sustained a substantial disability in terms of loss of earning capacity in terms of marketing his labors with the limitations of use imposed by the injured foot.

The Board concludes and finds that the loss of earning capacity warrants an award of an additional 40% of the foot, which, expressed in degrees, warrants an award of 61 degrees against the applicable maximum of 135 degrees.

The order of the Hearing Officer is accordingly modified to increase the finding and award of disability from 7 to 61 degrees.

Counsel for claimant is allowed a fee of 25% of the additional compensation payable therefrom.

WCB #69-2035 May 4, 1970

SHARON J. JONES, Claimant.

The above entitled matter involves a procedural issue arising out of a dermatitis incurred by a 23 year old paint brush factory employe as a result of exposure to epoxy resins.

The claim was allowed but the Closing and Evaluation Division of the Workmen's Compensation Board determination pursuant to ORS 656.268 found there to be no permanent disability.

Upon hearing, the Hearing Officer also found there to be no permanent disability and declared the claim to be one compensable as an occupational disease.

The claimant then sought a review by the Workmen's Compensation Board reciting, "The purpose of the review is to award claimant compensation for permanent partial disability for unscheduled injuries, for loss of earning capacity."

The Hearing Officer having found the claim compensable as an occupational disease, the Workmen's Compensation Board accepted the matter as one to be directed to a Medical Board of Review.

The claimant has demanded that the Workmen's Compensation Board review the matter and issue an order or to certify the matter to the Circuit Court for Multnomah County on legal issues. By letter of April 16, 1970, the claimant recites,

"The legal issues are whether the claimant's compensable injury is or is not an occupational disease, and her entitlements to a permanent partial disability award."

The records of the Medical Division of the Workmen's Compensation Board reflect the counsel for claimant has orally advised that Division that he would not appoint a claimant's doctor to any Medical Board of Review as required by ORS 656.810(2).

If the claim is compensable as an occupational disease, the Medical Board is vested by ORS 656.812(d)(e) with establishing the degree of disability.

Concurrent with the Board's consideration of this matter, a notice of appeal requesting certification of the record to the Multnomah Circuit Court has been served upon the Workmen's Compensation Board.

The Workmen's Compensation Board, upon this state of the record, notes that if the ultimate decision with respect to whether any claimant has an occupational disease is a legal issue for resolution by the Workmen's Compensation Board and the Court, there is no purpose in submitting any claim to a Medical Board of Review.

The Workmen's Compensation Board also concludes that if either party may effectively bar review of any occupational disease claim by refusing to appoint a member to a Medical Board, the administration of the law may be seriously hampered.

The Workmen's Compensation Board is not in a position to render any decision upon the merits. If the Hearing Officer is in error in finding the claim to be one of occupational disease, the law requires the answer on review be by a Medical Board of Review. A reversal of the Hearing Officer upon this issue does not preclude further proceedings upon an alternative basis as decided in Barr v. SCD, Or App, 90 Or Adv Sh 55, 463 P.2d 871. The issue is not whether the Workmen's Compensation Board is prejudging a claim for accidental injuries. The issue is whether the Workmen's Compensation Board can reverse a Hearing Officer order finding the claimant had an occupational disease.

The Workmen's Compensation Board concludes that the only affirmative action available to the Workmen's Compensation Board is to abate the claim and proceedings before the Workmen's Compensation Board until such time as the claimant selects a member of the Medical Board of Review.

Proceedings in the above matter before the Workmen's Compensation Board and before a possible Medical Board of Review are therefore abated until such time as the claimant appoints a member to the Medical Board of Review.

The Board notes that the record will be certified to the Multnomah Circuit Court, the record to include this order of abatement being issued following the request for certification.

WCB #69-2076 May 5, 1970

PHILLIP W. JACKSON, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent partial disability attributable to a low back injury sustained by a 27 year old salesman on July 26, 1968 as a result of unloading a heavy box of supplies from a truck.

Pursuant to ORS 656.268 a determination issued from the Closing and Evaluation Divison of the Board awarding the claimant permanent partial disability of 32 degrees of the maximum of 320 degrees for unscheduled disability to his back. The order of the Hearing Officer affirmed this determination of the claimant's permanent disability. It is the claimant's position on review that the Hearing Officer's award is inadequate.

The claimant's injury has been diagnosed as a ruptured or herniated intervertebral disc on the left side at the L-4, 5 level of the lumbar spine. As a result of the ruptured disc there are objective medical findings of limitation of motion of the lumbar spine and subjective symptoms of pain in the low back and left leg. The claimant is capable of working regularly at his employment as a salesman, but is precluded from any substantial activity involving bending, stooping or lifting. In the opinion of the treating orthopedic surgeon a laminectomy is advisable and would substantially improve or correct the claimant's disability. The claimant has refused to undergo surgery at the present time and prefers to await future developments before further consideration is given to the advisability of undergoing a laminectomy.

It is the settled rule that where a workman refuses to undergo a safe and simple operation which is reasonably certain to result in the removal of the disability, is not attended by serious risk or extraordinary pain, and is one which an ordinarily prudent and courageous person would undergo for his own benefit and well being regardless of compensation, the claimant's disability is not the proximate result of the accident, but is the direct result of his unreasonable refusal, and is not compensable. Conversely, where the operation is major in character and attended with serious danger, and the probability of success is doubtful, the refusal of a workman is reasonable and the disability is compensable. Determination of whether or not a workman has acted reasonably in the refusal of surgery is ordinarily a question of fact which is dependent upon a consideration of all of the pertinent factors in each case.

The Board is unable to find that the claimant's rejection of the recommended surgery in the instant case is an unreasonable refusal justifying the denial of compensation for so much of his disability as is attributable to his refusal. The Board is of the opinion, however, that the refusal of surgery is a factor which may properly be considered in the evaluation of the claimant's disability. An indication of the extent of the claimant's disability is reflected in his testimony relative to his rejection of surgery in which he stated in part: " . . . I decided if it gets bad enough, I'll have to do it. Until it gets to the point I can't live with it, I won't have it done until then. It doesn't seem practical." The Board feels compelled to conclude

that if the claimant's disability was as great as contended, he would be much more likely to undergo the recommended surgery which offers a reasonably certain prospect of substantially reducing and possibly removing his disability.

The Board believes that the proper administration of the Workmen's Compensation Law requires that caution be exercised in the evaluation of permanent disability in cases involving a refusal of medical or surgical treatment, to preclude the possibility of a workman initially seeking an award of compensation for the permanent disability which exists by reason of his refusal to accept surgery offering a reasonable prospect of reducing or removing the disability, and thereafter, following his receipt of the compensation awarded, consenting to the surgery which does result in the reduction or removal of the disability for which he has previously been the recipient of compensation, thereby obtaining compensation to which he is not entitled under the law.

The Board finds it unnecessary in its review of this matter to either distinguish or evaluate any disability of the claimant other than the permanent disability sustained by the claimant for which he is entitled to an award of permanent partial disability. The Board has, therefore, in the course of its de novo review of the record in this matter, considered the evidence solely with a view to the evaluation of the claimant's permanent disability resulting from his accidental injury.

The Board finds and concludes that the claimant's permanent partial disability attributable to the accident of July 26, 1968 does not exceed the 32 degrees determined by the Closing and Evaluation Division and affirmed by the order of the Hearing Officer.

The order of the Hearing Officer is therefore affirmed.

WCB #69-1788 May 11, 1970

JOHN H. BRIERY, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 61 year old painter sustained a compensable injury when he fell from a ladder on August 7, 1969 while painting a new residence under construction.

The owner of the house, the alleged employer, had not qualified as a complying employer under any of the insuring options permitted by ORS 656.016. The alleged employer was building a personal residence for his own occupancy with financing obtained under the State of Oregon veterans' home loan program. There was no general contractor. As recorded at page 84 Tr, the various phases of construction such as sheet metal, plumbing, electric, excavating, roofing, drywall, septic tank, etc. were all let to independent contractors. The alleged owner did some work personally but need (sic) some fascia boards and trim painted to pass a 60% completion inspection in connection with his veteran's loan. The claimant agreed to do the work for $5 an hour and this contract was resolved to a $60 fixed charge prior to the accident. The claimant supplied his own ladders, spray gun and compressors and also enlisted the help of his teen age son in setting up the equipment. The alleged employer supplied the stain to be applied.

If the claimant performed the work as a subject workman of a subject employer, the claim is compensable pursuant to ORS 656.054 with the State Accident Insurance Fund charged with paying benefits recoverable from the alleged employer.

The hearing was primarily concerned with whether the claimant performed the work as an independent contractor. The claimant was aware of the Workmen's Compensation Law, having been formerly insured as an employer. He made no inquiry with reference to that law in contracting his services. For that matter, none of his painting earnings for the entire year of 1969 were reflected on any W-2 forms utilized for tax purposes for wage income. The claimant was identified to the alleged employer as a "painting contractor." As found by the Hearing Officer, most of the classic tests applied toward determination of such relationships favor a conclusion that the claimant was an independent contractor. The Board so finds.

There are two other considerations which render this claim non-compensable even if the claimant was clearly an employe. There is not one whit of evidence that the alleged employer had any other persons working at the time or within the 30 day period encompassing the claimant's efforts. ORS 656.027(3) excludes a workman where the employment is casual and the work in any 30 day period involves a labor cost of less than $100. The claimant is thus precluded from coverage by the exempt casual status.

The other consideration is the non-industrial aspect of the alleged employer building his own home. ORS 656.027 exempts maintenance, repair, remodeling or similar work in or about the private home. It is true that no mention is made of new home construction. It is also true that some new home construction is done by individuals on a house to house basis as a trade or business. The Board concludes that it was not the intent of the legislature to encompass the nominal or minimal work employed by a home owner under the circumstances found in this case.

For the further reasons set forth herein, the order of the Hearing Officer denying the claim is affirmed.

WCB #69-1910 May 11, 1970

ALBERT NACOSTE, JR., Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 21 year old mill worker and truck driver sustained any permanent disability as the result of a back strain incurred April 8, 1969 when he slipped while working on the green chain.

The Closing and Evaluation Division of the Workmen's Compensation Board in its evaluation pursuant to ORS 656.268 found there to be no permanent partial disability. This determination was affirmed by the Hearing Officer.

Aside from an automobile accident in 1963, when claimant injured his neck and shoulders, he appears to have been robust and athletically inclined.

The back strain was not severe and the claimant was treated conservatively for a few weeks. The chronology of events follows:

(1) A heat prostration claim incurred May 29, 1969 for another employer.

(2) A marriage in early June, 1969. This interfered with any return to work at the place where injured since the work available was at a different time than the hours worked by his bride.

(3) In July a funeral in Louisiana brought about an auto trip to that state which was accomplished in 2½ days driving each way. The fact that occasional rest stops were made enroute is not indicative of any underlying pathology. The claimant's bride stayed in Louisiana from July to September.

(4) An incident in August, 1969 when the claimant experienced severe pains of undiagnosed origin while swimming.

(5) A further incident on August 29, 1969 arising out of hurting his back while raising pigs. Two doctors' reports contain histories from the claimant of having so hurt his back though the claimant testified simply to being unable to tolerate the work.

A careful review of the medical reports reflects only subjective complaints of doubtful origin. The great weight of the medical findings reflect neither orthopedic nor neurological pathology.

The Board concurs with the Hearing Officer, who observed the witness, and finds and concludes that the claimant is not in need of further medical care and that he has sustained no permanent disability attributable to the simple low back strain. If there is in fact some disability it is minimal and the chronology of events makes it quite unlikely that any such possible minimal disability is causally related to the accident.

The order of the Hearing Officer is affirmed.

WCB #69-493 May 11, 1970

ETTA D. SAGER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the extent of permanent disability sustained by a 64 year old sales clerk who incurred a back strain when she tripped and fell over a youngster playing in the aisle. This incident occurred in May of 1966. The claim was accepted and there was intermittent opening and closing of the claim and medical care until the determination of March 19, 1969. The Closing and Evaluation Division of the Workmen's Compensation Board found there to be no permanent partial disability and the Hearing Officer affirmed this finding. The claimant contends she is permanently and totally disabled. The claimant relies heavily upon a prior Hearing Officer order at which time the Hearing Officer found the condition not to be medically stationary. The fact that she may have had a temporary problem more than a year before the present hearing is not proof of a permanent disability at this time.

The claimant's basic problem is what is termed an osteoporosis. It was not caused by the accidental injury and according to the numerous medical reports it is apparent that at best there was a temporary exacerbation of the osteoporosis without permanent residual effects. The osteoporosis developed to the point that some compression of a thoracic vertebrae occurred. There were no thoracic symptoms for nearly a year following the accident. In this connection Dr. Thompson's report of November 19, 1968 is significant where he reports:

> ". . . I feel somewhat caught in the middle in a situation where the patient tells me one thing and then I have subsequently found out that she has told another doctor something else. I would have to agree with Doctor McShatko that if the patient did not complain of thoracic spine symptoms for one year following the fall, then it would be most unlikely that the findings I note on x-ray now are directly attributable to the fall but rather attributable to her progressive osteoporosis."

The claimant, prior to this accident, had undergone numerous major surgeries. There is no question but that she has a degenerative condition of osteoporosis common to post-menopausal women. Numerous competent doctors are unable to relate her multitudinous complaints to the fall. No further treatment is presently required and only conjecture and speculation can attribute any degree of permanent disability to the event of May, 1966.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's condition is medically stationary and that she has sustained no permanent disability as a result of the accident.

The order of the Hearing Officer is affirmed.

WCB #69-433 May 11, 1970

CARMEN PIMENTEL, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 41 year old seafood cannery worker as the result of a low back strain incurred in March of 1967. The claimant is a native of the Philippines. Her education terminated at the fourth grade in the islands. She came to the United States some nine years ago and had worked variously as a domestic and for four years in the seafood cannery.

Her disability was determined by the Closing and Evaluation Division of the Workmen's Compensation Board to be 28.8 degrees out of the applicable maximum of 192 degrees pursuant to ORS 656.268. This was affirmed by the Hearing Officer.

One major problem in evaluating the claimant's disability is the fact that the claimant developed neck and shoulder symptoms some time after the injury. Though the claimant thinks there may be a causal relation, there is no medical evidence supporting her speculation and the evidence from the doctors is that there is no causal relation between the accident and the neck-shoulder complaints.

The claimant did have surgery for the removal of a ruptured intervertebral disc at the lumbosacral level.

There is some evidence of a pschosomatic problem. The medical findings with respect to impairment reflect that the physical impairment is not severe.

The Board concludes that the award of 28.8 degrees probably correctly determined the disability attributable to the low back injury exclusive of other considerations. The pronouncements of the Supreme Court and the Court of Appeals with reference to the factor of earning capacity should be given effect in light of the claimant's age, sex, education and language difficulties.

The Board concludes and finds that the disability is 48 degrees, an increase of 19.2 degrees above that heretofore awarded.

The order of the Hearing Officer is accordingly modified to increase the determination of disability from 28.8 degrees to 48 degrees.

Counsel for claimant is allowed a fee of 25% of the increased compensation payable therefrom as paid.

WCB #69-1170 May 11, 1970

DALE W. MAGILL, Claimant.
Request for Review by Claimant.

The above entitled matter involves a rather technical question in the area of evaluation of the extent of a permanent loss of vision.

On September 19, 1968, the 53 year old farm laborer claimant sustained an injury of the left eye which was struck by a piece of wire.

As noted by the Hearing Officer, Dr. J. I. Moreland found an enlarged pupil in the left eye which did not react to illumination properly which problem stemmed from a traumatic paresis of the sphincter of the left iris caused by the accident in question. His vision was found to be 20/20 right and 20/25 left with presbyopic correction added. Dr. Hurlburt reports that claimant's decreased visual acuity stems from normal presbyopia rather than the injury. He did not relate the need for suggested colored lenses to any residual from the injury.

Pursuant to ORS 656.268, the Closing and Evaluation Division of the Workmen's Compensation Board found the disability to be 3 degrees against the applicable maximum of 100 degrees for loss of vision measured with maximum correction.

The legislative standard for award of permanent loss of vision is set forth in ORS 656.214(1)(h) as follows:

> "For partial or complete loss of vision of one eye, that proportion of 100 degrees which the loss of monocular vision bears to normal monocular vision. For the purposes of this paragraph, the term "normal monocular vision" shall be considered as Snellen 20/20 for distance and Snellen 14/14 for near vision with full sensory field."

It should be noted that this legislative yardstick includes a reference to Snellen Standards. The Workmen's Compensation Board, on review, requested a clarification of the problem of coversion of the medical findings in this case to the Snellen System. Dr. Rolland A. Martin, Medical Director of the Workmen's Compensation Board, has supplied the following information:

> "This examination was conducted by R. L. Hurlburt, O.D. on September 22, 1969. The findings reported were as follows (with a pair of corrective colored lenses):
>
> | | |
> |---|---|
> | Distance vision | O.D. 20/20 |
> | | O.S. 20/25 |
> | Near vision | O.D. 20/20 |
> | | O.S. 20/30 |
>
> "Unfortunately, the near vision is not given in the usual terms of 14 inches and thus we must convert this reading to a customary Snellen system in the best manner at hand. Referring to Table 1, Page 6, in the AMA Guides to the Evaluation of Permanent Impairment of the Visual System, and using the distance column at the top of this table, we find 20/32 is the closest figure to 20/30. This is considered as a 10% loss of central vision.
>
> "If we then move to the bottom of the table, 10% loss of central vision is equivalent to a Snellen recording of 14/28 near vision. If we use this and combine it with a Snellen rating for distance of 20/35 as indicated in Table 2, Page 7, we find the percentage of loss of vision is 8%. Thus a percentage rating of 7% - 8% of loss of vision for this claimant should be within a reasonable range."

The Workmen's Compensation Board accepts and adopts this explanation as the proper measure of disability in this case. Copies of pages of the AMA Guides to the Evaluation of Permanent Impairment of the Visual System referred to by Dr. Martin are reproduced and attached hereto.

The order of the Hearing Officer is accordingly modified and the claimant is found to be entitled to an award of eight degrees for a corrected loss of 8% vision of one eye.

Counsel for claimant is allowed a fee of 25% of the increase in compensation from 3 degrees to 8 degrees. The fee is payable from the increased compensation as paid.

WCB #69-1298 May 11, 1970

ALICE McCOY, Claimant.
Request for Review by Employer.

The above entitled matter involves issues of whether the 26 year old hairdresser sustained a compensable injury and, if so, the date of the injury and the extent of permanent disability, if any, attributable to the alleged accident. The particular date of the alleged injury is important in that the applicable benefit schedules were substantially increased on July 1, 1967 and there was some dispute with respect to whether the claim originated June 30 or July 1.

The claimant allegedly slipped and fell on her back as she rounded a corner. At the time she was in her seventh month of pregnancy. Following normal delivery, she returned to work and worked regularly until the fifth month of a second pregnancy in April of 1968.

The claim was not submitted for determination until July of 1969 at which time the Closing and Evaluation Division of the Workmen's Compensation Board found the claimant to be entitled only to some temporary total disability and that there was no residual permanent partial disability.

The claimant requested a hearing on July 17, 1969, seeking further temporary total disability and an award of permanent partial disability. Prior to hearing and on September 18, 1969 the employer's insurer denied the claim in its entirety. All compensation theretofore due had been paid.

Upon hearing, the Hearing Officer found there to be a compensable accidental injury on June 20, 1967; found there to be no further temporary total disability due; found the claimant to have an unscheduled disability of 36 degrees out of the applicable maximum of 192 degrees and imposed a penalty and attorney fees including a penalty based upon compensation no part of which was due until after the Hearing Officer order finding there to be a permanent partial disability.

The Board is unable to find that the claimant has any disability attributable to the accident. She is a well developed young woman who is described as tense and chronically nervous. This condition is not medically associated with the incident of June 30, 1967. The claimant returned to work and it was the second pregnancy and the desire to remain home with the two children which motivated the claimant to remove herself from the labor market.

The Board is also unable to find any legal basis for the imposition of any penalty for unreasonable delay in denial of the claim. The claim was admittedly not denied until after the commencement of these proceedings but there was no compensation then due. ORS 656.262(8) is as follows:

> "If the department or direct responsibility employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, it shall be liable for and additional amount up to 25 percent of the amounts then due plus any attorney fees which may be assessed under ORS 656.382."

As noted above, there was neither temporary total disability nor permanent partial disability due at the time of denial. Attorney fees would be chargeable to the employer pursuant to ORS 656.386 but the yardstick for imposing increased compensation is compensation due as of the time of the late denial. The Hearing Officer has treated his award as payable prior to the denial.

The order of the Hearing Officer finding a disability is reversed and the order of the Closing and Evaluation Division finding there to be no permanent partial disability is reinstated. Pursuant to ORS 656.313 no compensation paid pending review of the Hearing Officer order is repayable.

The order of the Hearing Officer ordering a penalty of 25% of the permanent partial disability is also reversed.

The order of the Hearing Officer allowing attorney fees is affirmed, but on the basis of ORS 656.386.

On review the parties admit the accident date was June 30, 1967. The Hearing Officer order was thus in further error in referring to 320 degrees as the maximum applicable to unscheduled disability. Again, in the absence of any permanent partial disability, this error becomes unimportant.

WCB #69-1908 May 11, 1970

BEN C. FLAXEL, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 63 year old self-employed attorney as the result of a myocardial infarction. The attorney, as a subject employer, had insured himself with the State Accident Insurance Fund by election for personal coverage as permitted by ORS 656.128.

Pursuant to ORS 656.268, the Closing and Evaluation Division of the Workmen's Compensation Board found the disability to be 77 degrees against the applicable maximum of 192 degrees in effect on the date of the injury. Upon hearing, the award was increased to 115 degrees.

There is a dispute over disparate expressions of ultimate disability obtained from Dr. David White. The function of the doctor in this area is one of reporting physical limitations and impairment rather than a conversion into the award of disability. To some extent Dr. White appears to have expressed the claimant's entire limitation including acknowledged pre-existing problems.

Dr. White referred to certain functional and therapeutic classifications of patients with diseases of the heart. These are derived from a formula prepared by the criteria committee of the New York Heart Association. The Workmen's Compensation Board herewith takes judicial notice of these widely circulated classifications and a copy thereof is reproduced and attached to this order.

Akin to these functional and therapeutic classifications is the guide to the evaluation of permanent impairment of the cardiovascular system published by the American Medical Association. Pages 5 and 6 of that publication are also encompassed with judicial notice and reproduced herewith.

A better understanding of the claimant's physical status is obtained by utilizing Dr. White's evaluation of Functional Capacity II and Therapeutic Classification B along with his reference to AMA disability of 25% of the whole man. When one considers that prior to the coronary infarct Dr. White had advised a limitation of physical activity it would appear that the claimant's classification was not basically changed for purposes of the American Heart Association and American Medical Association classifications.

The Board recognizes of course that the infarct has produced some additional disability. The Closing and Evaluation award of 77 degrees recognizes a substantial disability. A comparison of the claimant's disability in the

various categories from minor to major reflects disability in the lower portions of the scale. Another comparison is possible in that on the "whole man" evaluation, an arm is 60% of the whole man. Upon this basis, 25% of the whole man would convert to 80 degrees where the total of the arm is 192 degrees.

The Board concludes that the expression of Dr. White with reference to the Heart Association and Medical Association ratings are more reliable than his second thoughts with reference to 80% loss of an arm without any comparative basis for determining disabilities.

There is no basis for application of earning capacity loss in light of the fact that the claimant's earnings have not decreased.

The Board therefore concludes and finds that the disability does not exceed the 77 degrees found and awarded by the Closing and Evaluation Division.

The order of the Hearing Officer is therefore set aside and the permanent additional disability sustained by the claimant as the result of the accidental injury is determined to be 77 degrees.

WCB #68-1836 May 11, 1970

GIL L. MEYER, JR., Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue on review of whether a 25 year old carbon setter for an aluminum manufacturer sustained a loss of vision as a result of a compensable accidental injury on April 1, 1966, entitling him to an award of permanent partial disability.

Pursuant to ORS 656.268, a determination issued finding no permanent partial disability for loss of vision to be attributable to the accidental injury.

The hearing of this matter before the Hearing Officer was continued at the claimant's request for the submission of a medical report from Dr. Kellogg, an ophthalmologist, with respect to his examination of the claimant scheduled for completion a short time after the hearing. Claimant's counsel despite diligent effort was unable to obtain Dr. Kellogg's report. The Hearing Officer concluded after a period in excess of eight months had elapsed that Dr. Kellogg's report was unattainable, and closed the hearing and made his order. The order of the Hearing Officer, in addition to resolving other issues not pertinent to this review, affirmed the determination finding no permanent disability for loss of vision to be attributable to the accidental injury.

Following the issuance of the Hearing Officer's order and a substitution of attorneys, the claimant obtained the long delayed medical report from Dr. Kellogg, which the claimant contends establishes a permanent partial loss of vision. The claimant's sole contention on review is that this matter should be remanded to the Hearing Officer for the inclusion in the record of Dr. Kellogg's report in support of the claimant's position that he has sustained permanent disability on account of a partial loss of vision.

The State Accident Insurance Fund has conceded that ". . . it seems only fair that the matter be remanded . . ." for the purpose of permitting the Hearing Officer to consider the report of Dr. Kellogg with the opportunity to examine Dr. Kellogg in determining whether the claimant has sustained a compensable loss of vision as a result of the April 1, 1966, incident.

The Board has concluded that the interests of justice will best be subserved by its determination that the matter has been incompletely developed and heard, and its remand of the matter to the Hearing Officer for further evidence taking in order to assure that the claimant is not deprived of compensation to which he may be entitled as a result of his prior inability to obtain necessary medical evidence.

The matter is therefore remanded to the Hearing Officer for the specific purpose of taking further evidence on the issue of whether the claimant has sustained permanent partial disability as a result of a loss of vision attributable to his accidental injury of April 1, 1966, and for such further order as the Hearing Officer shall determine proper from his consideration of the complete record following the further hearing.

No notice of appeal is deemed applicable to this order of remand.

WCB #69-1514 May 11, 1970

FRANK J. CSERGEI, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of whether the claimant is a subject workman and, if so, whether he sustained a compensable injury in the course of employment.

The claimant is a 55 year old landscaper and carpenter who was engaged at an hourly wage to put in a lawn and build a sidewalk.

The claimant, in the course of the work, backed the tractor over a low bank and allegedly injured his right leg and low back. No complaint was made of any distress except as to the leg between the date of the accident on May 5th and the conclusion of the work on May 20th. On the latter date the claimant undertook an automobile trip to Alaska of two or three weeks duration. The claimant alleges he suffered pain in the right hip and back during the Alaska trip. The pains were relieved by medication obtained from "a friend." The first medical consultation was obtained upon his return and it is contended that the claimant's histories to various doctors are conflicting and confusing. Much of the latter conflict is with respect to the exact dates or chronology of events.

The Workmen's Compensation Board is unanimous in its findings and conclusion that the relationship of the parties was that of employer-workman and not that of independent contractor. The findings and order of the Hearing Officer are affirmed upon this issue.

The majority of the Board, however, conclude and find that the weight of the evidence supports a conclusion that the claimant sustained a compensable

injury in the course of the work when the tractor backed over the bank. The majority recognize that they do not have the advantage of a personal observation of the witness. The majority, analyzing the Hearing Officer's decision, notes that it is largely based upon alleged inconsistencies which are not necessarily material and that the claimant would not have undertaken the journey to Alaska if the injuries were as severe as contended. The injuries admittedly did not prevent the claimant from working an additional 15 days. It does not necessarily follow that there was no injury simply because a long automobile journey was undertaken two weeks following an admitted trauma which could have produced the symptoms. The legal issue as to whether the claimant was a workman could easily explain the delay in seeking medical care if the claimant was to be required to pay for the medical care.

The majority of the Board therefore reverses the findings and order of the Hearing Officer and find that the claimant did sustain a compensable injury.

In addition to the compensation payable to the claimant, the State Accident Insurance Fund is ordered to pay an attorney fee to claimant's counsel pursuant to ORS 656.386 in the sum of $750 for services rendered at hearing and upon review.

/s/ Wm. A. Callahan
/s/ James Redman

Mr. Wilson, dissenting, finds:

The Hearing Officer should be affirmed.

Necessary proof of medical and legal causation between the industrial incident of May, 1969 and any injury to the right hip and low back is lacking. The initial complaint of injury was limited to the lower leg. Thereafter the claimant continued to perform rather strenuous physical work until May 20, 1969, at which time he undertook a trip to Alaska and return. It was not until the return from Alaska that claimant sought medical attention. At this time he was complaining of injury to the right hip and low back. The more logical conclusion to be drawn from the evidence is that the claimant's pre-existing sacral spondylolisthesis was aggravated by the rigors of the Alaskan trip.

The Hearing Officer had the advantage of seeing and hearing the witnesses and his decision affirming the denial of this claim should be upheld.

/s/ M. Keith Wilson

WCB #69-2013 May 12, 1970

HARRY A. CAYLOR, Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 27 year old carpenter who fell nearly 20 feet from a ladder and incurred multiple contusions and soft tissue injuries when he landed flat on his back on a concrete floor on November 26, 1968.

Pursuant to ORS 656.268, the Closing and Evaluation Division of the Workmen's Compensation Board found a permanent disability of 16 degrees against an applicable maximum of 320 degrees for unscheduled injuries. This award was affirmed by the Hearing Officer.

A review has been requested but the parties have now submitted a stipulation, attached and by reference made a part hereof, pursuant to which the issue of the extent of compensable disability at this time is resolved by the defendant employer agreeing to pay and the claimant agreeing to accept an increase in the award of disability from 16 to 32 degrees.

Counsel for claimant is to receive a fee of 25% of the increased compensation payable therefrom.

The settlement is hereby approved.

WCB #69-1821 May 13, 1970

WILLIAM W. DEADMOND, Claimant.
Request for Review by Claimant.

The above entitled matter involves the claim of a 60 year old City of Portland Water Bureau laborer who twisted his right knee when he stepped in a hole on June 11, 1968.

The claim was closed January 13, 1969 by the Closing and Evaluation Division of the Workmen's Compensation Board pursuant to ORS 656.268 with a finding of a 15% loss of the right leg. The claimant resigned his job effective March 21, 1969 in order to withdraw amounts to his credit in the retirement fund prior to the deadline for such action on his 60th birthday. He also sought social security retirement on a disability basis.

The present proceedings were instituted by filing a request for hearing on October 3, 1969. The Hearing Officer ordered the claim reopened as of April 14, 1969. The Hearing Officer, however, declined to order the State Accident Insurance Fund to pay penalties or attorney fees for not having voluntarily reopened the claim at some earlier date.

The issue on review is whether the State Accident Insurance Fund was guilty of unreasonably resisting the payment of compensation so as to warrant the imposition of penalties and attorney fees.

The record reflects that the claimant obtained treatments for the knee in March and April of 1969 which were paid by the State Accident Insurance Fund when billed in June. This is in keeping with ORS 656.245 which makes required medical services though obtained after claim closure. Permanent disability and necessary medical care do not necessarily equate to a total disability.

This matter came on for hearing on November 17, 1969. As noted by the Hearing Officer the first medical information which the State Accident Insurance Fund received which might have been an indication that the claimant's condition prevented him from working was received by the State Accident Insurance Fund after the request for hearing.

There is no indication in the record that the State Accident Insurance Fund at any time "resisted" payment of compensation. Their records, including the reports from the doctors, reflected a workman who had taken his retirement and at best needed some further medical care following claim closure.

It appears to the Board that the claimant received the benefit of the doubt under the circumstances by a retroactive imposition of temporary total disability to April 14th. The claimant had voluntarily removed himself from the labor market and the evidence certainly is not clear that the admitted disability was totally disabling.

The penalty provisions of the law should only be applied when the employer or insurer has in fact resisted payment of compensation by overt act or by such careless disregard of the claimant's rights as to equate resistance. Penalties should not be applied simply because additional compensation is found to be due under circumstances subject to legitimate inquiry or dispute.

The Board concurs with the Hearing Officer and concludes and finds that penalties and attorney fees for alleged unreasonable resistance to payment of compensation should not be imposed.

The order of the Hearing Officer is affirmed.

WCB #69-1713 May 13, 1970

PAUL SIMPSON, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claimant, who was 41 years of age at the commencement of the claim, sustained any permanent disability as the result of an episode of heat exhaustion on July 30, 1967.

A prior hearing on May 1, 1969 resulted in an order remanding the claim for psychiatric care.

The claimant is a baker and the claim arose on a hot day complicated by lack of fans ordinarily used to dispense the heat of the ovens. An indication of the difficulty to be encountered in the claims management was the complaint of pain in the lumbosacral area which first appears in medical examination of May, 1968, some ten months following the heat exhaustion incident.

Upon the hearing under review it developed that the claimant responded well to the psychiatric consultations. His claim was closed without award of permanent partial disability, and this finding by the Closing and Evaluation Division of the Workmen's Compensation Board was affirmed by the Hearing Officer.

The claimant has what is described as an obsessive compulsive personality. It was not caused by the exposure to heat. The claimant, in fact, has no physical impairment in any degree attributable to the heat exposure back in July of 1967. The obsessive compulsion of course serves as a basis for a recommendation that the claimant temporarily change work situations as a part of the program of meeting the problem. Again there is no evidence of any permanent effect attributable to the incident.

The Board concurs with the Hearing Officer and finds that there is no evidence reflecting that the claimant has sustained any permanent impairment or disability as a result of the incident on which the claim is based. The Board also concurs with the principle that without a finding of a permanent impairment any factor of alleged wage loss becomes academic.

The order of the Hearing Officer is affirmed.

WCB #69-1984 May 13, 1970

TILLIE D. FRIED, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent partial disability sustained by a 55 year old female buffing machine operator as a result of an injury to her right knee incurred on March 4, 1969, when a stack of metal bins containing furniture hardware tipped over while being unloaded from a hand truck and fell against her.

The Closing and Evaluation Division of the Board determined in accordance with the procedure set forth in ORS 656.268 that the claimant had sustained no permanent partial disability as a result of her accidental injury. Following a hearing held at claimant's request, this determination was affirmed by the Hearing Officer. The Board review of the Hearing Officer's order requested by claimant seeks a substantial award of permanent partial disability.

The claimant sustained multiple contusions and hematomas to the soft tissue of her right leg, left foot and right arm. X-rays were negative with respect to fractures or bony injury. Initial treatment consisted essentially of rest and the application of ice packs during a brief period of hospitalization. She was released to return to work on May 20, 1969. The final examination by her treating physician, Dr. Fitch, revealed objective findings of slight discoloration and loss of sensation remaining in the area of a hematoma on her right knee and subjective symptoms of occasional discomfort in her legs. It was undetermined by Dr. Fitch at that time whether any permanent disability would result from the injury.

On July 18, 1969, while walking on a sidewalk near her home, the claimant tripped and fell on her right side, re-injuring her right knee. The claimant contends that her fall is causally connected to her compensable accident on the theory that after she tripped, she fell because of the weakened condition of her right knee. The State Accident Insurance Fund maintains that the claimant's sidewalk fall was a subsequent intervening accident not causally related to her compensable accident. The Board finds that the evidence of record fails to substantiate either that the claimant's right leg was in a weakened condition, or that the fall occurred as a result of the weakened condition of her right leg, and therefore concludes that there is no causal connection between the compensable accident and the sidewalk fall incident.

On September 29, 1969, the claimant was examined by Dr. Patton, a medical examiner for the State Accident Insurance Fund. The history which he obtained from the claimant was essentially consistent with her testimony at the hearing. The objective findings disclosed by his examination consisted solely of some

remaining discoloration and slight tenderness in the area of the old hematoma on the lateral aspect of her right knee. He concluded that her condition was medically stationary and recommended that her claim be closed. In his opinion her subjective symptoms were unsubstantiated by the objective physical findings.

On October 23, 1969, following the initial determination of the claim, the claimant consulted Dr. Grossman for a further examination. It was his impression that in addition to the multiple soft tissue injuries to the right knee and left foot, the claimant's present problems consisted of moderately advanced osteoarthritis in the right knee and left foot, diabetes mellitus, hypertension, obesity and a limited hallux valgus deformity. In his opinion the injury to the right knee aggravated the pre-existing arthritis and made it symptomatic. His examination disclosed a moderate limitation of motion of the knee, which together with the claimant's subjective complaints, caused him to conclude that the claimant had a permanent disability of the right knee.

The claimant at 5' 3" in height and 210 pounds in weight is substantially overweight. She has not been sufficiently motivated to follow medical advice to reduce her weight. From his observation of the claimant at the hearing, the Hearing Officer noted however that she exhibited no discomfort or difficulty in connection with the use of her right leg by reason of her excess weight. The Board concurs with the Hearing Officer's conclusion that the claimant's obesity is a factor which may properly be considered in the assessment of her present problems.

The records of the Department of Employment reflect that the claimant certified that she was able to work in order to draw unemployment compensation benefits from July to October of 1969. The benefits were ultimately terminated as a result of an administrative determination that she was not actively seeking employment. The claimant has not worked since her accidental injury in March of 1969 and it is apparent from the full record that she has, for the time being at least, voluntarily withdrawn from the labor market.

The Board concludes that the reports submitted by Dr. Fitch, the treating physician, and Dr. Patton, which reflect findings and conclusions of no permanent disability, are more compelling and constitute the greater weight of the medical evidence. The report of Dr. Grossman relied upon by the claimant, although it reflects a thorough examination by the doctor, is accorded lesser weight by the Board in this matter by reason of the length of time that had elapsed before his first examination of the claimant, during which period the intervening sidewalk fall incident occurred. Consequently, his conclusion involved greater reliance upon the history and subjective symptoms related by the claimant following her dissatisfaction with the determination order in making his findings and reaching his conclusions.

The Board finds and concludes from its de novo review of the record that the claimant has sustained no compensable permanent disability as a result of the accidental injury of March 4, 1969.

The order of the Hearing Officer is therefore affirmed.

WCB #69-1270 May 13, 1970

DORIS M. DeCOTEAU, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 31 year old claimant sustained any permanent injury as the result of a fall to the floor on April 8, 1968 in which she incurred contusions and strains to the neck and back.

The Closing and Evaluation Division of the Workmen's Compensation Board issued a determination on June 2, 1969 finding the claimant's condition to be medically stationary without permanent residuals. This finding was affirmed by the Hearing Officer.

The claimant argues perforce that the continuity of complaints and ministrations by doctors to the subjective complaints for the period of over a year is indicative of permanent injury.

The claimant has a concurrent problem of dizziness for which treatment was received and which is definitely not causally related to the accident at issue. Despite conceding the dizzy spells were not causally related, the claimant sought to have penalties imposed upon the State Accident Insurance Fund for not paying the medical services obtained relating to the noncompensable problem.

There has been an unstable employment record post injury but this is consistent with the claimant's record prior to the accident. The claimant has other problems but insists that the accident bear the brunt of these unrelated problems.

The claimant's symptoms are entirely subjective with exception of matters not related to the claim. The weight of the medical evidence clearly indicates that there is no permanent disability attributable to the accident.

The Workmen's Compensation Board concurs with the Hearing Officer and concludes and finds that the claimant is not in need of further medical care for any problem related to the accident and further finds that she has no residual permanent disability attributable to the accident.

The order of the Hearing Officer is affirmed.

WCB #68-923 May 13, 1970

RAFAEL RUIZ, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of whether a now 49 year old mill laborer has sustained a compensable aggravation with respect to a claim for injuries incurred on February 8, 1966.

Pursuant to ORS 656.268, a determination issued by the Closing and Evaluation Division of the Workmen's Compensation Board on October 14, 1966

finding there to be no permanent disability. No request for hearing was filed and that order became final on October 14, 1967. The present proceedings by way of a claim for aggravation were instituted on May 27, 1968. The order of October 14, 1966 is not subject to impeachment or alteration in these proceedings though the Workmen's Compensation Board would have own motion jurisdiction to correct an error if one existed.

The Hearing Officer found there to have been an aggravation of the previously non-existent disability and the employer sought this review.

Defendant's Exhibit E is a report of the claimant's admission to the Oregon State T. B. Hospital in June cf 1961. His admitting history reflects a fall from a scaffold several years before with pain in the upper lumbar area since that time.

The claimant is able to speak some English but most communications have been in Spanish. The Hearing Officer notes that the claimant exaggerated his symptoms. Medical conclusions should be based upon an accurate history to determine the proper cause and effect as well as reality of any given symptom or disability.

Though the claimant has been examined by several doctors, only Dr. Donald Sanders is familiar with the full before and after picture. Dr. Sanders diagnosed a compression fracture of a mid-thoracic vertebra in June of 1962. In April of 1966, only a couple of months after the accident on which this claim is based, Doctor Sanders again diagnosed the longstanding pre-1962 thoracic compression and reported no "evidence of recent traumatic injury to the back." As late as September, 1969, Dr. Sanders again positively asserts that the claimant's complaints are not related to the fall.

Dr. Tsai's report reflects that the claimant "did not mention any chronic back pain prior to the accident which occurred in February, 1966." Dr. Tsai does discuss the history which may follow a compression fracture. His conclusions that a radiculitis could have followed a trauma causing a compression would relate the condition to the scaffold fall prior to 1962. Dr. Cohen notes the mild wedging but was apparently unaware of the longstanding compression.

In summary, the record reflects a pre-1966 injury which caused a mid-thoracic vertebral compression. He has had continuing back complaints. The only contemporary report from a doctor closely approximating the 1966 injury shows no evidence of recent traumatic injury. This record medically and legally reflects no disability attributable to the accident in October of 1966 when the claim was closed. With this history, it is unreasonable to accept the possibilities expressed by doctors whose opinions are based upon exaggerations and incomplete misleading histories. With due respect to the other doctors, the Board places greater reliance upon the conclusions of Dr. Donald Sanders with respect to the effect of the 1966 incident. There simply was no injury to be aggravated.

The order of the Hearing Officer is reversed. The aggravation claim is denied.

Pursuant to ORS 656.313, no compensation paid conforming to the Hearing Officer order is repayable.

WCB #69-754 May 18, 1970

MARCELLUS BRUDANA, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claimant has sustained a compensable aggravation of a low back disability.

The claimant is 38 years of age. On February 23, 1966 he fell from a ladder and injured his back. In prior proceedings the date of August 1, 1967 appears to be the date fixed as the time the claimant's condition became medically stationary.

The present proceedings were commenced by filing a claim for aggravation on April 29, 1969. ORS 656.271 requires that any such claim be supported by a medical opinion that there are reasonable grounds for the claim. The Supreme Court in Larson v. SCD, 87 Or Adv Sh 197, 200 has interpreted that requirement to mean that the doctor's opinion set forth the operative facts from which it could be concluded that there are reasonable grounds for the claim.

The medical report tendered in support of the claim for aggravation was from a Dr. Michael Rask under date of December 4, 1969. The substance of that report (Claimant's Exhibit 2) reads as follows:

> "Please be advised that Marcellus Brudana has been in my office on several occasions recently, October 8, 1968, October 18, October 30, November 13, November 26, 1968.
>
> "On all of these occasions he states that his back pain is definitely worse. Re-xrays show L 4-5 and lumbosacral joint instability and I believe there is no question this man's back condition is worse and that he needs further treatment consisting of injections into trigger areas, physical therapy and a back support."

In retrospect this foregoing report is more significant in what is omitted than in what is said. The report was solicited by claimant's attorney and Dr. Rask was advised that the report was to be used to establish that there was reasonable grounds for a claim for aggravation. The issue in such cases is not simply whether a given condition is worse. If the claimant has sustained an intervening accident, for instance, the claim of causation for "being worse" may not be attributable to the accident on which the claim is based. Dr. Rask, under cross examination, testified as follows:

> " Q Now, did you take a history from Mr. Brudana on any of those occasions from October 8 through November 26, 1968, which would indicate to you what had happened to him, why his condition was worse as he complained?
>
> A On one occasion he said he was in California for awhile, but I don't remember the exact date.
>
> Q Was there any history which you took which would explain why his condition was worse as he described it?
>
> A No.

Q Does his history recite any of his activities at all?

A No, just that he hadn't been working.

Q Do you know what he had been doing?

A No."

Dr. Rask thereby was in the position of knowing nothing of the interval history which would be essential to an informed opinion on the cause of "being worse."

There is a graver error of omission. On October 18, 1968 Dr. Rask received X-ray reports as follows:

> " . . . opacities projected in the right mid-sacral area consists of metallic foreign bodies, the largest of which measuring about 1 cc. in greatest diameter; tiny fragments seen in the soft tissues of the right hip region."

In addition, Dr. Rask admitted on cross examination that he knew of the bullet wounds in the back and admitted that this made the claimant's back "worse." The report of Dr. Rask subscribed, knowing that it was for purpose of establishing a claim for aggravation, omitted any reference to the bullett wounds. He knew that "they wouldn't pay for that." His omission of that fact could have led to "they paying for that." Dr. Rask, under date of November 16, 1968, also submitted to the employer's insurer what purported to be "a complete medical report concerning Marcellus Brudana." The bullet fragments are also missing from this "complete report."

Upon this state of the record the Hearing Officer denied the claim of aggravation. Upon review the claimant seeks to shift the burden of proof to the employer.

The Board concurs with the Hearing Officer. The law as interpreted by the Supreme Court casts the burden on the claimant to support his claim. As noted above, the report is deficient and based upon incomplete prior history and omission of pertinent facts.

The order of the Hearing Officer is affirmed.

WCB #69-1031 May 18, 1970

NORMAN R. THOMAS, Claimant.

The above entitled matter involves the claim of a 46 year old cannery worker who sustained an injury to his right elbow on November 14, 1968, when he slipped on a ladder and twisted and struck his elbow in his efforts to keep from falling.

The determination of the claim pursuant to ORS 656.268 awarded the claimant temporary total disability to February 8, 1969 and permanent partial disability of 19.2 degrees against the applicable maximum of 192 degrees for loss of his right arm by aggravation of a preexisting condition.

Following a hearing, the Hearing Officer by an order entered on October 10, 1969, reopened the claim "for further medical care and treatment and corollary temporary total disability compensation as of September 1, 1969; to continue as an open claim until again closed by the Closing and Evaluation Division of the Workmen's Compensation Board.

Pursuant to a stipulation of the parties, the Hearing Officer by an amended order entered on October 30, 1969, further ordered that the claimant be "awarded permanent partial disability of 30 degrees for unscheduled disability; being an increase of 10.8 degrees."

No request for review by the Board was made with respect to either the original or amended order of the Hearing Officer and both orders have become final by operation of law.

The present posture of this matter is therefore one in which the claim is concurrently reopened for further medical care and treatment and temporary total disability, and closed with an award of permanent partial disability.

Both the statutory and case law of this state provides that claims shall not be closed and awards of permanent disability made until the claimant's condition is medically stationary. ORS 656.268(1); Helton v. SIAC, 142 Or 49 (1933).

The employer through its insurer has now notified the Board that it believes that the claimant's condition has become medically stationary and has requested a determination of the claim by the Closing and Evaluation Division of the Board pursuant to ORS 656.268.

Where an order of a Hearing Officer has been entered which is contrary to law and the erroneous order has become final, the Board is of the opinion that it is not only justified but that it is its clear duty and function to act to correct the error and reinstate the matter upon a proper course.

The Board deems this matter to be a proper case in which to exercise the continuing power and jurisdiction vested in it by ORS 656.278 to modify the order of the Hearing Officer by setting aside the premature award of permanent partial disability.

It is the order of the Board, acting upon its own motion pursuant to ORS 656.278, that the amended order of the Hearing Officer entered on October 30, 1969, be set aside and that this matter be remanded to the Closing and Evaluation Divison of the Board for re-determination at such time and in such manner as is proper in accordance with the procedure provided in ORS 656.268.

The re-determination shall include such adjustments as may be necessary between the payments of compensation to the claimant as temporary total disability and permanent partial disability pursuant to ORS 656.268(3). The right of any party to request a hearing under ORS 656.283 on a determination shall attach to the re-determination of the claim by the Closing and Evaluation Division of the Board as provided in ORS 656.268(4).

No notice of appeal rights is attached to this order since normal rights of hearing, review and appeal will attach to the new order of determination.

WCB #69-806 May 18, 1970

ROY G. CAMPELL, Claimant.

Workmen's Compensation Board Opinion:

The above entitled matter involves issues of whether the claimant incurred a compensable occupational disease and the timeliness of filing the claim. The claimant is a 57 year old asbestos mechanic who worked at that trade from 1939 to 1964 and from 1966 to 1969.

The claim for asbestosis was denied by the State Accident Insurance Fund but found compensable by the Hearing Officer. The order of the Hearing Officer was rejected to act as an appeal to a Medical Board of Review.

The findings of the Medical Board of Review are attached, by reference made a part hereof and declared filed as of May 14, 1970.

There are legal issues also involved and at the time of rejecting the Hearing Officer order, request was also made for certification of the matter of the Circuit Court. Copy of the instant order filing the findings of the Medical Board of Review with copy of those findings is to be submitted to the Circuit Court by way of a supplemental certification.

Medical Board of Review Opinion:

Dr. Olson and I met on Monday afternoon, April 27, to examine Mr. Campbell, review his chest X-ray and forced expiratory spirogram of that date, and to discuss his WCB file. Dr. Wilhelmi, the third member of the panel, was unable to attend because of a medical emergency but the problem was discussed with him briefly by telephone.

The patient told us he had last worked in March, 1969. Progressive shortness of breath on exertion had begun in 1967, and is now present on climbing a flight of stairs, and is associated with brief palpitation on exertion. He has a tickling sensation in his throat, throat clearing, and some cough from 1967 on, productive of small amounts of thick whitish sputum, raised with difficulty. Since early 1969, he has had perhaps a dozen episodes of a "bursting sensation" in the anterior chest associated with shortness of breath, and sometimes with pain radiating briefly to the arms. One such episode led to his being examined by Dr. Reeves and Dr. Wilhelmi, as noted in the file. Some episodes have occurred on retiring, and other episodes on exposure to cold air or cigarette smoke. He has had no clear-cut angina, and no orthopnea or nocturnal dyspnea. There is occasional slight ankle edema in the evening. He has been aware of occasional slight wheezing since early 1969, and has tired easily since then. Clubbing of his fingers was first noted by Dr. Troutman in 1963. Mild aching in the interphalangeal joints has been present from 1967 on.

The patient said he had worked for various employers as an asbestos worker from 1939 on. He had worked for Columbia Asbestos Company for a total of about three years, most recently from December, 1966 until March, 1969. He thinks he was more exposed to asbestos dust

than if he had been a regular workman (when employed as a foreman for Columbia Asbestos). Through the years, he had had trouble wearing a respirator because of "not getting enough air". On most jobs, he says there was no adequate venting or forced ventilation. He quit smoking cigarettes in 1963. Before that, he had smoked a package a day. He gives no past history of bronchial asthma or hayfever. He had been advised by Dr. William DeMond of the Permanente Clinic, Portland, to get out of the asbestos industry after the doctor examined him in August, 1964. After a period of being off work because of injuries, and working six months as a bartender in Idaho, he resumed work with asbestos in December, 1966 out of economic necessity. Financial help through DVR was not adequate, and he was not eligible for early disability under the Social Security Administration.

PHYSICAL EXAM: The patient is a short stocky man of 57, who cleared his throat frequently during the questions and examination. Moderate clubbing of the fingers with spoon-shaped fingernails was noted. There was moderate limitation of rib motion. Resonance was impaired in the lung bases, with numbers of subcrepitant rales heard both posteriorly and anteriorly. The heart sounds were satisfactory. No wheeze was evident.

The attached note about a PA chest X-ray of 4/27/70 includes a note about his forced expiratory spirogram. He would be placed in Class III of the AMA classes, with and estimated 50% impairment "of the whole man."

Dr. Olson and I discussed some of the questions raised in this case, many of which are legal rather than strictly medical. In our opinion, from the medical stantpoint he can be considered to have been "disabled" as regards employment in the asbestos industry in the fall of 1964, when he was advised to quit this type of work by Dr. DeMond. He deserved Workmen's Compensation at that time, but unfortunately the claimant's rejection of the SIAC's order of March 10, 1965 was a day or two late in being filed. The patient showed poor judgement in returning to the industry in December, 1966, but he felt it necessary for economic reasons. We presume that no screening examination was done by Columbia Asbestos Company to eliminate workers with pre-existing asbestosis. There is a distinction, of course, between being physically able to work in the asbestos industry and being medically fit to do so.

It was brought out in the hearing and reports in the medical literature that asbestosis can be likened to silicosis from the standpoint of workmen's compensation, since lung fibrosis continues after the patient stops work. Changes in the chest X-rays are usually not visible for at least several years after the patient is exposed to asbestos or silica dust, and it is often several years after that before lung function begins to be impaired. Exposures to asbestos early in the patient's working career have a longer time to produce lung damage and interfere with function than do more recent exposures. It is difficult to assign proportionate responsibility to the various employers of an asbestos worker, since extent of an exposure does not depend solely on time worked, but depends also upon materials used and certain working conditions, such as ventilation and use of respirators. Considering the time he worked for Columbia Asbestos as compared with that for other employers since 1939, the proportionate effect of this recent employment on his disease would probably be in the order of 10%.

Asbestosis differs medically and medicolegally from silicosis in that asbestos workers show a greater propensity to develop carcinoma of the lung or pleura, and sometimes malignant tumors of other organs, such as peritoneal mesothelioma. Such conditions may only be diagnosed years after the workman has retired or been disabled. In Mr. Campbell's case, there is no present evidence of a lung neoplasm. The effects of his employment with Columbia Asbestos for the last 2-1/3 years are considered to be relatively minor now, but will contribute in years to come to progressive lung fibrosis (and possibly to a lung or pleural tumor).

Because of the special hazards and medicolegal problems in the asbestos industry, it has been suggested that a trust fund be established for compensation of workmen who have been advised to quit work in the industry because of early asbestosis, or have already quit the asbestos industry. Compensation for such workmen would permit them to get by while they were being trained, when feasible, in some other type of work. The difficulties of job training and placement increase as these men grow older, making it all the more important to protect asbestos workers through proper industrial hygiene, and to follow them by regular medical examinations so that the diagnosis of asbestosis can be made at an early stage.

The Medical Board of Review appointed for Mr. Campbell's case may be exceeding its role in making these observations and recommendations, but we hope that they will be of some value to the Board in cases of this type which will no doubt arise in the future.

/s/ John E. Tuhy, M.D.
/s/ Donald E. Olson, M.D.
/s/ Kenneth C. Wilhelmi, M.D.

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