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7 Linde, Gene WCB 69-146, Multnomah Affirmed
9 Johnson, Earl H., WCB 69-1774, Klamath, Right leg increased to 55°
18 Armstrong, Genevieve M., WCB 69-731, Marion, award increased 10%
19 Sweeten, James J., Deceased, WCB 69-2173, Multnomah, claim allowed
22 Shaw, Edward W., WCB 69-2387, Multnomah, Claim allowed
23 Fields, Howard E., WCB 69-2339, Marion, affirmed
24 Crocker, Harold K., Deceased, WCB 68-969, Deschutes,

48 Debnam, Clarence, WCB 69-1817, Multnomah, medical report is sufficient
65 Bittner, Sam, WCB 69-1911, Marion, award increased to 121°
66 Jimison, Royce, WCB 69-1986, Multnomah, award increased to 64° unscheduled and 3.6° for hearing.
100 Reeves, Joe M., WCB 69-1966, Sherman, affirmed
102 Stanford, Alvey D., WCB 69-2049, Jackson, hearing officer award re-instated.
106 Green, Charles, WCB 70-56, Multnomah, appeal dismissed
110 Tate, Roy E., WCB 69-2223, Benton, settled for 224°
116 Parker, Lester E., WCB 69-1546, Multnomah, dismissed
117 Burgeson, Herbert T., WCB 70-450, Multnomah, hearing officers award re-instated
118 Hawes, Charlie Dale, WCB 69-2159, Marion, affirmed
123 Banks, Livingston C., WCB 69-2038, Multnomah, dismissed
139 Scott, Andy Buster, WCB 69-1871, Multnomah, settled for $25,000.00
146 Reed, Carma Jean, WCB 69-747, Multnomah, affirmed
153 Schroeder, Charles T., WCB 70-106, Multnomah, affirmed
166 Johnson, Lester A., WCB 70-533E, Multnomah, no off set on 3rd party settlement
176 Lund, Theodore, WCB 69-2018, Yamhill, reversed award fixed at 17°
193 McCallister, Terry D., WCB 69-2170, Multnomah, claim dismissed
193 Petty, John, WCB 70-1474, Multnomah, remanded for hearing because of defective appeal rights.
196 Conroy, Edward A., WCB 70-365, Multnomah, Edward A. Conroy"s disability is equivalent to 25% loss of the left arm of 48° and claimant is therefore entitled to an increase of 38° above the initial award.
198 Ormsby, Peggy A., WCB 70-272, Marion, affirmed
201 Hoagland, Ronald G., WCB 70-82, Deschutes, affirmed

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203 Welter, Ted, WCB 70-107, Columbia, the award of the Hearings Officer entered previously granting permanent partial disability equal to 96°, the same is hereby re-instated, including the award of attorney fees.

205 Reese, John C., WCB 69-1953, Douglas, settled

209 Olson, Lee E., WCB 70-158 & 70-159, Multnomah, combined award increased to 60%

226 Maples, Lorna J., WCB 69-1565, Multnomah, dismissed

235 McLain, Dale, WCB 69-1827, Hood River, affirmed

250 Studer, James F., WCB 69-846, Linn, award increased to 20%

254 Downing, Eva, WCB 70-719E, Malheur, affirmed

259 Peters, Carl S., Deceased, WCB 70-309, Douglas, hearing officers award re-instated.

262 Lara, Petra, WCB 70-27, affirmed

272 Stroh, C. E., WCB 68-1393, Lane, total permanent disability allowed.

282 Jenness, Dale A., WCB 69-2151, Linn, order of the Workmen's Compensation Board is hereby reversed and that the opinion and order of the hearing officer, dated April 22, 1970, is hereby reinstated.

284 Frankfother, Donald, WCB 70-493, Hood River, award increase to 96°

285 Maxwell, Howard, WCB 69-2323, Marion, award increased to 100°

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1 Jackson, Leon, WCB 69-896, LINN; Hearing Officer award reinstated.
6 Kautz, Robert L., WCB 69-1791, COOS; Affirmed.
9 Green, William B., WCB 68-2084, MULTNOMAH; Additional Temoprary total disability allowed.
13 Ziebart, Carl, WCB 69-859, MARION; Affirmed.
20 Youngren, Knute, (Beneficiaries of) WCB 69-375, MULTNOMAH; Affirmed.
20 Williamson, Robert E., WCB 69-2189, LANE; Allen, J: "This matter comes before the court on a Notice of Appeal by the claimant from the Order of the Workmen's Compensation Board dated June 9, 1970. By an Order of this court dated July 14, 1970 all parties were given an opportunity to submit oral argument, to submit additional briefs, or additional evidence on the issue of extent of disability. None of the parties have availed themselves of this opportunity, and therefore it become the obligation of this court to determine the issues of this case upon the record transmitted to it by the Workmen's Compensation Board.

"A third Determination Order of the Workmen's Compensation Board mailed November 19, 1969 granted no additional premanent partial disability to claimant above the amount of permanent partial disability awarded by the Workmen's Compensation Board on its second Determination Order of May 5, 1969 wherein claimant was awarded permanent partial disability of 15% of the right forearm. Claimant through his counsel requested a hearing in regard to the third Determination Order by letter dated November 25, 1969. A hearing was held by the Hearing Officer on February 6, 1970 and pursuant to the Opinion and Order of the Hearing Officer dated February 25, 1970, the third Determination Order of the Workmen's Compensation Board mailed November 19, 1969 was affirmed.

"Subsequently the claimant through his counsel requested a review by the Workmen's Compensation Board of the Hearing Officer's Order on the grounds and for the reason that the Hearing Officer failed to give claimant an adequate award for permanent partial disability. No appeal was taken by the employer from the Order of the Hearing Officer. Claimant and the employer both filed briefs with the Workmen's Compensation Board, and counsel for the employer in their brief closed with the following statement: 'The award of disability equivalent to 15 percent loss of use of the forearm has adequately compensated him, and accordingly, it is respectfully submitted that the Third Determination Order and the Opinion and Order of the hearing officer should be affirmed.'

"The Workmen's Compensation Board in its Order on Review dated June 9, 1970 in a split decision, Commissioner Callahan dissenting, reversed the order of determination by the Closing and Evaluation Division of the Workmen's Compensation Board and the Order affirming that determination and reduced the award of disability to claimant from 28.8 degrees to 6 degrees. Commissioner Callahan in his dissent stated: 'The order of the Hearing Officer affirming the order of the Closing and Evaluation Division should be affirmed.'

"The claimant subsequently appealed to this court from the Order of the Workmen's Compensation Board filed June 9, 1970.

"The Workmen's Compensation Board based their decision stating that in its de novo review that they must make their own independent determination of disability. It is granted that the statute, ORS 656.295, gives broad power on review to the Workmen's Compensation Board and comparable to the powers of the Circuit Court on appeal as granted by ORS 656.298 (6). However, it is the opinion of this court and this court so specifically finds that the Workmen's Compensation Board does not have the authority under the provisions of the aforementioned statute, and even considering that the appeal is a de novo review, to reduce compensation awarded to a claimant upon an appeal by the claimant absent a cross appeal by the employer. This rule would operate and be equally applicable to the Circuit Court in exercising its de novo powers of review.

"The principles enunciated above has long been the rule in appeals from the Circuit Court to the Supreme Court in equity cases where the appeal is a de novo appeal. Gatenbein v. Bowles, et al, 103 Or. 277, Johnson v. Paulson 83 Or. 238, 163 Pac. 435, Caro v. Wollenberg, 83 Or. 311, 163 Pac. 94.

20 "Based upon the foregoing it becomes incumbent now upon this court to exercise its de novo power of appeal and to proceed upon the issues raised by the Notice of Appeal filed herein by the claimant. Based upon this court's independent review of the record, the court is of the opinion and so finds that the Order of the Workmen's Compensation Board made and entered herein on the 9th day of June, 1970 should be reversed and the Order of the Hearing Officer dated February 25, 1970 should be affirmed for the reasons set forth in the Hearing Officer's opinion.

"Claimant is entitled to judgment for his costs and disbursement herein incurred. Counsel for the claimant is requested to prepare a Judgment Order in accordance with this opinion, and submit the same to counsel for the employer for approval as to form and submit the same to the undersigned for signature."

24 Sherman, Harvey L., WCB 69-2104, CURRY; Affirmed.

27 Hall, Willard, WCB 69-1310, YAMHILL; Award increased to 240 degrees.

34 Neufeld, Eldon J., WCB 69-1099, COLUMBIA; Affirmed.

36 Wolfe, Magdalene, WCB 69-2327, LINN; Remanded for hearing.

40 De Witt, Esther, WCB 69-1286, MULTNOMAH; Reversed because of improper evidence.

41 Ford, Kenneth E., WCB 69-1612 and 69-1613, POLK; Williams, J: "Upon conclusion of the arguments in the above entitled cause on January 11, 1971, I took the matter under advisement and have now made my determination.

"The above named claimant while working as a dryer tender at the Leading Plywood Corporation in Corvallis sustained an accidental injury on August 26, 1967 which resulted in second and third degree burns to his face, back, arms, upper extremities, with 50 per cent of his body being burned. At the time of the accidental injury the claimant was 36 years of age. The injury was severe and traumatic. The claimant spent considerable time in the hospital for the treatment of his injuries and for the performance of skin grafts and was disabled for approximately one year. The claimant's work experience prior to his injuries was that of bridge construction, farm labor and plywood mills. He had been employed at the Leading Plywood Corporation for approximately three years prior to the injury referred to.

"It was stipulated at the time of the hearing in this Court that the only issue for determination is the extent of permanent partial disability for an unscheduled disability to the face, neck, abdominal and back areas from the burn injury.

"This Court concurs with the hearing officer that the complaints of Mr. Ford relative to a low back problem and subsequently treated are not compensable and are not an issue in this case as there is no causal connection between the low back problem and the industrial accident referred to.

"There was an earlier award by the Workmen's Compensation Board for a scheduled disability of 38.4 degrees for the left arm and 48.0 for the right arm which is approximately 25 per cent and 20 per cent disability respectively. There has also been a previous award for a ten per cent loss of the thumb on a claim filed on February 10, 1969. None of these previous awards are in question here. The only question for determination is as hereinabove recited, that is, the extent of permanent partial disability for an unscheduled disability to the head, abdomen and back as it relates to the injury from the burn only.

"A review of the transcript of the testimony in this case reveals that the workman has recovered from his burn injury extremely well, and that he is again performing the same job he had at the time of the injury, but that his performance of that job results in extreme fatigue at the end of a day's work. The evidence discloses that there is considerable residual scarring on the claimant's face, ears and upper extremities. The hearings officer had an opportunity to observe the claimant and neither this Court nor the Workmen's Compensation Board had that opportunity. The medical report (exhibit no. 23) recites that 'the thickening and contracture about the ears and preauricular area are unchanged from the last report. Mr. Ford's burned face tissues have a reddish, somewhat thickened appearance and the ears are thin about the periphery with thickening and minimal keloid defect of the skin in the immediate preauricular area'. The evidence further discloses that the claimant's skin is very sensitive to heat and cold and that when his face is subjected to heat he feels a drawing sensation of the skin on his face. This condition presents some problem, though not of major consequence, in his present employment where he is required to stand near a dryer for varying lengths of time but that he can now only expose his face for a period of five to seven minutes. It was further established by the evidence that the claimant's face is easily subjected to sunburn and that he can only remain in the sun for a period of 10 to 15 minutes without being burned from the sun. The claimant further testified that he experiences difficulty in sleeping because of the sensitiveness of the ears against the pillow, and that the ears are tender to the touch and that he sleeps uninterupted for only short periods of time ranging from two to three hours or five to six hours at the most. It was further established by the evidence that the claimant

perspires twice as easily as he did prior to the accident and that such results in an itching sensation on his face. The claimant also suffers from skin eruptions.

"The claimant further testified in great detail as to his extreme state of fatigue at the end of a day's work, and that it was necessary for him to retire as early as 8:00 or 9:00 p.m. and arise at 6:00 a.m., and as soon as he returns home from his job he is inactive and does not participate in any recreation or family affairs. On the other hand, the claimant himself testified that the job of tending the dryer is 'one of the easiest jobs' he has ever had and exerts little physical strength, and that his primary function is supervisor or foreman over seven other employees. The claimant's employer testified that the claimant is a superior workman and that he does his job well, and that he can note little change in his performance subsequent to the injury in question. There is no doubt in my mind from reading the complete transcript that the claimant is an exceptionally industrious, loyal and energetic employee. The claimant has an eighth grade education and his present employment is an excellant job at an excellant rate of pay for his educational and experience background. I can only conclude that this claimant has tremendous desire and courage to hold that job in spite of the resultant condition of extreme fatigue.

"There is no doubt but what the accidental injury hereinabove referred to resulted in some permanent partial unscheduled disability to the claimant and the percentage of disability is the question. I note that the hearings officer made an award of 60 per cent, and the Workmen's Compensation Board reduced that to five per cent, a reduction of 192 degrees to 16 degrees. The Workmen's Compensation Board relies heavily upon the fact that the claimant has returned to his former employment and is making a greater wage than prior to the injury.

"In my opinion the Workmen's Compensation Board by reducing the unscheduled disability to five per cent has unduly penalized the claimant for his extreme desire to work at his former employment which results in utter exhaustion. The fact that the claimant did in fact return to his former occupation and that there has been no loss of earnings are of course matters to be considered, but are not the sole measure of disability. The Workmen's Compensation Law is to adjust in dollars and cents for the loss of effectiveness of workmen cause by accidental injuries in gainful employment in the industries of this state. I do not believe the act was intended to preclude an award for disability by reason of a particular industry and desire on the part of a particular workman, especially when that condition would not be tolerated by the average workman. I realize there is no direct medical evidence as to the causal connection between the burn and the claimant's complaint of exhaustion and fatigue. However, it is a matter of common knowledge that injury sustained to the extent that the claimant sustained injuries in this case that further effort would necessarily be required to preform the tasks required of him in his employment and necessarily result in great fatigue. The Court is permitted to draw upon knowledge gained from common experiences of life and it is reasonable to conclude that the fatigue is a proximate cause of the injury, rather than some other condition. This conclusion is more than speculation and requires no direct medical testimony to establish that fact. To say it another way, I am of the opinion that the workman's state of fatigue, which was a proximate cause of the injury in question, together with the residual scarring on the claimant's face, ears and upper extremities, even though not compensable in themselves, and the resultant sensitive skin, easily subjected to sunburn, and skin eruptions have resulted in a loss of effectiveness and ability to the claimant in gainful employment and that he should be awarded compensation therefor.

"After considering the transcript in detail and all the exhibits attached thereto, I am of the opinion that the claimant is entitled to an award of 128 degrees (40 per cent) of a maximum of 320 degrees for loss of the workman for the unscheduled disability to his upper extremities, all as a proximate cause of the accident in question as hereinabove referred to."

44 Rogers, Olin D., WCB 69-1872, MULTNOMAH; Affirmed.
46 Schmitt, Edwin L., WCB 69-2167, MULTNOMAH; Affirmed.
48 Debnam, Clarence, WCB 69-1817, MULTNOMAH; Bryson, J: "This is an appeal from the June 26, 1970, Order of the Workmen's Compensation Board denying the claim of Claimant, thereby sustaining the February 2nd, 1970, Order of the Hearing Officer who had in turn sustained the State Accident Insurance Fund.

"The Court has reviewed all of the certified record, including the testimony adduced at the hearing.

"There are three principal witnesses; Messrs. Hopman, Wicks and Debnam, the Claimant. They relate opposite statements of the immediate facts at the time of the happening. The only dissent to an otherwise unanimous finding is that of one member of the Workmen's Compensation Board, William A. Callahan.

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48 "Once we adopt the 'horseplay' theory of coverage, there are no principles of law involved. The question is: Which story from which witness is to constitute the facts.

"In *Satterfield v. State Compensation Dept.*, 90 OAS 248, 249, the Court said:
'The hearings officer is the one who heard and saw the witnesses and could note their demeanor and candor or lack thereof. A cold observation of the record falls far short of personal observation. (citing)
"*Romero v. Compensation Department*, 250 Or. 368, 440 P2d 866 (1968), holds that considerable weight must be given to the conclusions of the hearing officer. In that case, in connection with a factual determination of disability, our Supreme Court said:
' " '* * * In this subjective area the opportunity to observe the claimant and the other witnesses is of prime importance. The Hearing Officer is in a position to make this observation and we are not * * *.' 250 Or at 372
"In *Moore v. U. S. Plywood Corp.*, Or App, 89 Adv Sh 831, ___Or ___, 462 P2d 453 (1969), where credibility of the claimant was the cruical issue, this court in denying compensation said:
" '* * * (F) or the same reasons we give weight to the findings of the trial judge on the issue of credibility in cases where he sees and hears the witnesses, we give weight to the findings of the hearing officer on the matter of credibility of witnesses in appeals under the Workmen's Compensation Law." '

"This same reasoning is followed in appeals de novo and in equity. *R & H Construction v. Landmark Enter.*, 90 OAS 1851, p. 1852.

"For the above reasons the appeal is denied and the majority opinion of the Workmen's Compensation Board affirmed.

"Findings of Fact and Conclusions of Law should be submitted accordingly."

53 McMillan, Oliver E., WCB 69-1555 and 69-1556, MULTNOMAH; Claimant found employee of Sunset Memorial Park.

57 Taylor, Claude H., WCB 69-1247, KLAMATH; Piper, J: "The above entitled matter came before the Court September 9, 1970, on an appeal to the Circuit Court by the claimant from the Board Order on Review, denying him compensation for permanent partial disability; the plaintiff appearing by David R. Vandenberg, Jr., his attorney; the employer carrier appearing by W. M. Beers, of its attorneys; all prior steps in the compensation process having resulted in a denial of an award for permanent partial disability. The difficulty is that the claimant has suffered a series of industrial accidents and subsequent to the accident under consideration has suffered a non-industrial accident, most of which have affected the areas of his spine and arm, for which he claims an award. The carrier urges that this is a case governed by the principle of *Surratt vs. Gunderson Bros. Engineering Corp.*, 'When the record is such that after reviewing it we cannot say with any degree of conviction what the proper result should be, we defer to the administrative agency and affirm the result reached by it.'

"Responsible medical authority in this case finds the claimant to have been permanently partially disabled as a result of the accident in question here. The problem is covered by Dr. Compton as follows: 'The only question being whether or not the pre-existing trouble in the low dorsal was aggravated by this lifting episode. I have no way of nailing this down accurately.'

"There were four doctors involved in the treatment of or examination of the claimant for this accident. His chiropractor, Dr. Viets, found an accute strain of the cervical dorsal area. He felt that there would be no permanent impairment. Dr. Compton, the orthopedic specialist, had been acquainted with the claimant's condition through examining him or treating him in connection with the previous industrial accidents. He did not solve the problem of nailing down accurately any degree of aggravation by the lifting episode. Dr. Campagna examined the claimant several times in connection with this accident and also examined him for one or more of the earlier industrial accidents. Dr. Campagna was the examining doctor for claim closure in this case. He found that the claimant suffers, 'Moderate objective and subjective disability of the neck and right arm as the result of the accident of October 5, 1967'. The Hearings Officer was aware that in denying permanent partial disability that his opinion, 'flies in the teeth of the comment made by Dr. Campagna', but he felt that the other evidence weighed heavily against the doctor's opinion. The Workmen's Compensation Board found against Dr. Campagna's report becuase, 'it does not reflect knowledge of the similar symptoms reported in 1967, prior to this accident'.

"The other doctor involved in the case is Dr. Vinyard, who examined the claimant several times commencing April 4, 1969. He found, 'musculoligamentous strain of a chronic nature of the paraspinus musculature, most notably the thoracic and cervical musculature'.

57 "There's nothing in the evidence to indicate that the claimant is malingering. There's some evidence that he was upset by virtue of a divorce in progress, which may have heightened his complaint, but that appears to be over with at the time of the concluding medical examination; indeed the claimant's propensity for engaging in physical work is pointed out as a contributing factor. The Court can see no reason why the claimant should not be believed when he described his present symptoms as much, much worse than those he had at the time of the closure of his earlier case.

"The Court does not feel that Dr. Campagna's closing opinion can be ignored. His earlier report of September 5, 1968, indicates that he was aware of the accident of 1966, out of which the symptoms in the early part of 1967 grew. Dr. Campagna was aware of the prior complaints of poor coordination and cramping in both hands and was aware of the cervical disc disease. (See his report of February 28, 1964.) He knew of the earlier arm pain. (See his report of August 19, 1964.) He also knew that the claimant had been rated 48% of an arm for back difficulties prior to the accident in question.

"The Court is able to say with a degree of conviction that the claimant has suffered permanent partial disability as a result of the accident in question and that it exists in his spine and in his right arm. The uncertainty lies in fixing the exact amount thereof as Dr. Compton pointed out.

"The Court finds that claimant has sustained a permanent partial disability equivalent to 15% loss of use of an arm for unscheduled disability for injury to his thoracic and cervical spine, and that he has suffered permanent partial disability of 15% of his right arm as a result of the injury sustained by him in the accident of October 5, 1967, it is therefore,

"ORDERED that the defendant pay to the claimant compensation for permanent partial disability of 15% of an arm for unscheduled disability to his thoracic and cervical spine, and 15% loss of function of his right arm; and it is further,

"ORDERED that a fee be allowed to claimant's attorney of 25% of the award."

59 Gosser, Richard G., WCB 69-1938, LINN; Affirmed.

63 McLaws, Darrell R. (Beneficiaries of), WCB 70-383, LANE; This matter be, and the same hereby is remanded to the Hearings Division of the Workmen's Compensation Board for a hearing to determine if any reason exists why the doctrine announced in *Fertig vs SCD* 88 Or Adv Sh 505, 455 P2d 180 (1969) should not apply and be controlling in this matter.

64 Sullivan, Mable J., WCB 69-1033, MULTNOMAH; Permanent Partial Disability fixed at 48 degrees.

66 Oberman, David G., WCB 69-2187, CLACKAMAS; Hammond, J: "The above matter came on for judicial review, and the Court having heard the argument of counsel and having examined the transcript and evidence submitted, now therefore,

"THE COURT IS OF THE OPINION that the findings and opinion of the Hearing Officer entered March 16, 1970 constitute an accurate analysis of the problems of this claimant. There is no evidence of any disability known to the claimant to exist prior to the accident in question and while it is obvious from the opinion of Dr. Willeford that the anatomical abnormalities are congenital in nature, it is also true that they were asymptomatic prior to the accident and that following the accident the claimant's physical problems have been severe in nature.

"The conclusions reached by the Workmen's Compensation Board in scaling down the benefits found by the Hearing Officer to be appropriate are not supported by the record.

"An order may be entered modifying the order appealed from by increasing to 64 degrees the benefits allowed to the claimant in accordance with the Hearing Officer's determination, claimant's attorney to receive compensation as heretofore determined by the Hearing Officer."

69 Smith, Robert Lee, WCB 69-2157, LANE; Affirmed.

70 Brown, Owen R., WCB 69-1241, LANE; Affirmed.

74 Taskinen, Benjamin O., WCB 68-2087, MULTNOMAH; Affirmed.

76 Manning, Earl C., WCB 69-2186, CLACKAMAS; Claim ordered allowed.

78 Hobbs, Dalton L. (Beneficiaries of), WCB 69-1609, MULTNOMAH; Affirmed.

79 Bicknell, Rose P., WCB 69-601, KLAMATH; Affirmed.

82 Magnuson, Arthur E., WCB 69-862, LANE; Award increased to 30% loss workman.

88 Snead, Delbert, WCB 69-254, CLACKAMAS; Affirmed.

89 Fields, Eugene E., WCB 69-1801, JACKSON; Dismissed.

90 Methvin, C.L., WCB 69-1469, MULTNOMAH; Bryson, J: "This matter came on before the Court upon the Notice of Appeal of Claimant set forth in two grounds.

"There is no disagreement as to the fact of the injury. The question resolves itself into one of law. The Claimant suffered injury to four of the five metatarsal bones of his left foot, with no involvement at or above the ankle joint.

"Counsel for Claimant argues the statutory construction of ORS 656.214 (d) should require a finding of a partial loss of left foot. Counsel for the State says the loss should be measured by a finding of loss for the toes.

"This seems to be purely a matter of statutory construction. In *State v. Buck*, 200 Or. 87, 93, the Court stated: 'It is well recognized that when the language of an act is unambiguous the intent of the legislature must be gained from the language used.'

"The reading of ORS 656.214 (d) would support the argument of Claimant that the Legislature is talking about the foot. However, by the reading of the statute with both Paragraphs (d) and (e), it is difficult to understand how the Legislature could mean anything other than that an injury such as suffered in this case should be measured in loss to the toes. If this were not true, why did the Legislature see fit to include the language in (e)?

"In construing a statute to determine the intent of the Legislature, it makes no difference whether the Court is construing a civil statute in relation to civil matters or a criminal statute in relation to crime: The rule is the same. And for this reason I feel that the language in *State v. Buck*, supra, must be controlling.

"It is also held that legislation which is of a similar nature to the statute under consideration, although not precisely in parimateria, is within the reason of the rule and may be referred to for the same purpose.

"Counsel for the State relied upon *Graham v. State Industrial Accident Commission*, 164 Or. 626, 628. This case involves an injury to the thumb, wherein it was argued that it resulted in loss of the use of the hand, but the Court strictly construed the statute and said that the injury must be measured in loss of use to the fingers.

"There is no question that the language of the Workmen's Compensation Act has many strange provisions and much language that is difficult for a lawyer to understand, let alone a lay person. Nevertheless, the State has hobbled along with a fairly workable result in spite of the language of the Act.

"For the above reasons, the Court must sustain the findings of fact and law set forth in the majority opinion of the Workmen's Compensation Board.

"Findings of Fact and Conclusions of Law should be submitted accordingly."

94 Gent, Robert, WCB 69-18, LANE; Affirmed.
95 Overstreet, Clyde, WCB 69-2012, COLUMBIA; Remanded for further medical examination and redetermination.
98 Puckett, Macon, WCB 69-1697, MULTNOMAH; Claim affirmed.
108 Rhodes, Jackie Dee, (Beneficiaries of), WCB 69-1707, LANE; Dismissed for failure to comply with ORS 656.298 (3).
109 Evans, A. D., WCB 69-2281, DOUGLAS; Hearing Officer award reinstated.
111 Kurre, Herbert W., WCB 69-1402, KLAMATH; Affirmed.
113 Anderson, James A., WCB 69-973, LANE; Affirmed.
114 Gregoroff, Mary, WCB 68-1453, LINN; Affirmed.
115 Pearson, Marvin D., WCB 70-834, DOUGLAS; Request for summary determination of attorney's fees denied.
125 Patrick, Howard Miller (Beneficiaries of), WCB 69-1421, MULTNOMAH; Allowance heart attack, claim affirmed.
126 Gray, Ralph D., WCB 70-196, CLACKAMAS; Affirmed.
129 Manke, John, WCB 70-351, MULTNOMAH; Foot award fixed at 54 degrees.
131 Lobek, Normand, WCB 69-2051, LANE; Allen, J: "This matter having come on for hearing upon the record, the court finds as follows:

"In regard to claimant's Notice of Desire to Present New Evidence consiting of a letter from Dr. Arthur A. Hockey, the court finds:

131 "1. That said letter is not 'additional evidence concerning disability' as contemplated by ORS 656.298 (6), but rather it constitutes evidence concerning causation as to the aggravation of a pre-existing injury, and

"2. That there has been no satisfactory showing that the facts as set out in said letter were 'not obtainable at the time of the hearing'.

"Therefore, claimant's request to file the original of the copy of Dr. Hockey's letter dated March 25, 1970 to Lawrence F. Cooley, be, and the same hereby is denied.

"After due consideration of the original transcribed record prepared pursuant to ORS 656.295, all exhibits, copies of all decisions and orders entered during the hearing and review proceedings, the briefs of the parties submitted on review, and the Order of the Board subjected to review, the court is of the opinion and so finds, that the Order on Review of the Workmen's Compensation Board dated August 13, 1970 is correct as to the facts and to the law and that said Order of the Workmen's Compensation Board dated August 13, 1970 is entitled to be affirmed in its entirety.

133 Beedle, Douglas H., WCB 69-2198, CLATSOP; Edison, J: "I have reviewed the record in the above entitled matter which is presently before the Court for decision and have heard oral arguments of the parties. It would appear to me that the Order on Review of the Workmen's Compensation Board should be reversed and an order made granting an award of permanent total disability as was previously determined by the Hearing Officer in this case.

"In effect, I conclude that the proper analysis of the evidence and the appropriate findings thereon were made by Mr. Callahan, the dissenting commissioner. Mr. Callahan found that the claimant suffers from a condition which incapacitates him from regularly performing any work at a gainful and suitable occupation. This of course is correctly based upon the testimony of Dr. Cherry, the treating physician, whose testimony must be given considerably more weight than the other testifying doctors. This necessity is even acknowledged by Dr. Kimberly, whose testimony was most favorable to the Fund. Further compelling evidence requiring a permanent total award is found in the testimony of James White, a vocational consultant, and in the severe physical limitations of the workman as mentioned in Dr. Baskin's report: (Ex. No. 2)

"I should also mention however that it is my feeling that the two majority commissioners have made incorrect conclusions from the evidence. They, first of all, find that the claimant's motivation is questionable. This is a most difficult determination to make from a cold, written record. Obviously the Hearing Officer who was in a position to observe the claimant is better able to judge this matter. It is significant that the Hearing Officer made a specific finding that he was unaware of any reason for questioning the credibility of the claimant. I would concur in such a finding. Secondly, the majority of the Board finds fault with Dr. Cherry's finding of permanent total disability and says that he analyzes the same only in reference to matters for which the claimant has training and experience. A close reading of Dr. Cherry's testimony indicates just the opposite. This is seen from the testimony in the transcript on Pages 73-74:

" 'By Mr. Cronan:
Q. Doctor, what is permanent total disability?
A. I should ask you. In my understanding of the legal term, it is a disability that would prevent a worker from returning to any regular type of employment for which he has been previously fitted or which he could be trained. It's my understanding.'

and further on page 84:

" ' A. He is unable to be on his feet; unable to sit for long periods of time; unable to perform a job consistently that would allow him to return to work.
Q. That is jobs he used to do?
A. Or any job that I can conceive of now that would require regular hours.
Q. Even within the limits you suggested?
A. Yes.'

"Since the Board appeared to give great weight to these matters, I am further persuaded to overturn their ruling.

"I will ask Mr. O'Leary to prepare an appropriate order in line with this opinion. I will make the same award of attorney's fees as did the Hearing Officer."

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136 Crawford, Velma, WCB 69-644, CLACKAMAS; Affirmed.
143 Grabner, Donald F. (Beneficiaries of), WCB 69-1496, LANE; Affirmed.
147 Wilcoxen, Marjorie R., WCB 69-943, LANE; Affirmed.
148 Walters, Edward, WCB 70-237 and 70-238, WASHINGTON; Affirmed.
150 Pieters, Francis P., WCB 70-247, MULTNOMAH; Affirmed.
160 Freeny, Douglas M., WCB 69-1967, LANE; Allen, J: "After due consideration of the transcribed record prepared pursuant to ORS 656.295, all exhibits, copies of all decisions and orders entered during the hearing and review proceedings, the briefs of the parties submitted on review before the Workmen's Compensation Board, and the Order of the Workmen's Compensation Board dated August 24, 1970, and after due notice having been given to all parties of an opportunity to present to the court written briefs, additional evidence on the issue of disability and oral argument by order of this court dated October 5, 1970, and none of the parties having indicated any desire to do so, the court is of the opinion and so finds that the Order of the Workmen's Compensation Board made and entered herein on August 24, 1970 as to the permanent partial disability sustained by the claimant as a result of his industrial accident of March 21, 1969, that is, 8 degrees is correct according to the applicable law and the facts.

"The court expresses no opinion as to whether the employer is entitled to credit for the sum of $500.00 voluntarily paid to the claimant as the court does not feel that such matter is a matter to be determined in these particular proceedings.

"Mr. Buffington is requested to prepare a Judgment Order in accordance with this Letter-Opinion and submit the same to Mr. Wurtz for approval as to form, and then present the same to the undersigned for signature.

161 Sittner, Jerry D., WCB 69-787, MULTNOMAH; Hearing Officer order reinstated.
171 Bivens, Clyde W., WCB 69-2067, LANE; Affirmed.
173 Williams, Elmo A., WCB 69-2383, MULTNOMAH; Additional 48 degrees allowed.
181 Krake, Ernest J., WCB 69-1312, CURRY; Award increased to 160 degrees.
183 Blisserd, Chester A., WCB 70-79, LANE; Affirmed.
185 Murphy, Gerald E., WCB 70-200, MULTNOMAH; Leg award increased to 50 degrees; low back to 48 degrees.
190 Schoch, Edward F., WCB 69-2117, MULTNOMAH; Remanded to Medical Board of Review for aggravation determination.
201 Hoagland, Ronald G., WCB 70-82, DESCHUTES; Affirmed.
201 Hamilton, Edward G., WCB 69-1782, DOUGLAS; Settled for 16 degrees.
202 Hough, Arthur R., WCB 69-2108, LANE; Affirmed.
204 Hankel, Darrell R., WCB 70-1 and 69-1979, MULTNOMAH; Aggravation claim allowed.
207 Fox, Dalton B., WCB 69-2289, GRANT; Affirmed.
211 Kelly, Charles W., WCB 70-373, JOSEPHINE; Award fixed at 160 degrees.
212 Niedermeyer, Bernard E. III, WCB 70-592, MULTNOMAH; Affirmed.
214 McCamey, Oscar R., WCB 70-120, LANE; Dismissed for want of jurisdiction.
217 Garris, Augustus C., WCB 70-210, MULTNOMAH; Unscheduled award of 48 degrees allowed.
221 Hatch, Robert S., WCB 69-2283, MULTNOMAH; Affirmed.
224 Lutz, Jack, WCB 69-2174, DESCHUTES; Affirmed.
225 Jones, Sharon J., WCB 69-2035, MULTNOMAH; Remanded for convening of Medical Board of Review.
228 Allen, Dwight (Beneficiaries of), WCB 68-1998, HARNEY; Dismissed.
234 Ballweber, James W. Jr., WCB 70-513, MULTNOMAH; Back award fixed at 48 degrees.
238 Miller, Eugene S., WCB 69-1393 and 70-437, MULTNOMAH; Affirmed.
246 Culver, Jene, WCB 70-13, MULTNOMAH; Affirmed.
249 Frey, Fred H., WCB 69-2112, MULTNOMAH; Back award fixed at 96 degrees.
252 Pope, Warren, WCB 69-2286, MULTNOMAH; Affirmed.
255 Leding, Elizabeth M., WCB 70-800, CLATSOP; Affirmed.
257 Romans, Lewis W., WCB 69-1388, LANE; Affirmed.
258 Whiteman, Eual, WCB 70-1046, MULTNOMAH; Affirmed.
263 Freitag, Jean Viola, WCB 69-1719, LINN; Award increased to 20% loss of workman.
264 Foreman, Ted, WCB 70-374, WASCO; Award increased to 25% loss arm.
267 Koch, John N., WCB 70-1564, LANE; Remanded for hearing.
267 Hoover, Donald, WCB 67-1310, JOSEPHINE; Affirmed.
268 McNeale, Ira Joe (Beneficiaries of), WCB 69-2161, LANE; Dismissed for want of jurisdiction.
270 Sheehy, Eugene O., WCB 70-536, LAKE; Affirmed.
272 Stroh, C. E., WCB 68-1393, LANE; Dismissed because of failure to comply with ORS 656.298 (3).
276 Barnes, Ama Gene, WCB 69-2083, WASCO; $15.00 doctor bill and $650.00 attorney's fees allowed.

Running, Ralph, WCB 70-804, MULTNOMAH; Beatty, J: "I have reviewed the file and heard the argument of counsel concerning the points at issue in this case. The material facts are as follows:

"1. The claimant, a 43 year old truck driver, developed some chest pain which became sufficiently severe while in bed on the night of February 3, 1970, to cause him to consult a physican, Dr. Gordon A. Caron, on February 4th. Dr. Caron examined him and gave him an EKG. He interpreted the EKG as normal, and his diagnosis was angina pectoris. He saw the patient again on the 5th and had the results of a blood test showing elevation of the serum cholesterol count. He prescribed trinitroglycerin tablets and Amytal and advised him to stop smoking. He told him to go back to work.

"2. On the 9th of February, the claimant, while operating a heavy lift truck with a considerable amount of exertion, suffered additional acute pain, returned to see the doctor, and was immediately hospitalized. EKGs were taken, and the diagnosis was that he had suffered a myocardial infarction. The sole question presented in this case is whether the physical exertion while on the job was a material contributing factor to the myocardial infarction.

"3. Upon this question, we have the opinion of three doctors. First, the opinion of Dr. Gordon A. Caron, the attending physician. Secondly, the opinion of Dr. Donald Wood Sutherland, a cardiologist in private practice who is on the clinical staff of the Cardiology Department of the Medical School. Thirdly, Dr. Herbert Griswold, the head of the Cardiology Department at the Medical School.

"4. Dr. Caron states as his opinion that the infarction had actually commenced on the 3rd of February and that it continued through to the full-blown attack on the 9th. He expressed the opinion that it was a reasonable medical probability that the infarction was not caused by his employment, but he goes on to say: 'Although, I realize that heavy physical labor could have been a contributing factor.' Dr. Caron has a residency in internal medicine in England in dermatology. He spent two years in the Dermatology Department at the Medical School and now is in general practice, specializing in internal medicine and dermatology. He is not Board certified in cardiology; he is not a cardiologist.

"5. Dr. Sutherland is an assistant professor of cardiology at the Medical School, but is primarily in private practice. Dr. Sutherland expressed the opinion that the claimant's exertion in his employment was not a material contributing factor in the appearance of the heart condition. He disagreed with Dr. Caron and states that the electrocardiograms taken on the 4th show a minor abnormality which might reflect "silent undiagnosable coronary artery disease." He disagrees with Dr. Griswold's description of the electrocardiograms taken in Dr. Caron's office and on February 4, 1970 as "abnormal." He suggests that Dr. Griswold thought one EKG taken on the 9th had been taken on the 4th. Whether this was so is irrelevant, since both Dr. Sutherland and Dr. Griswold believed claimant had a pre-infarction syndrome on the 4th, irrespective of what showed on the EKG. He expressed the opinion that about two-thirds of the people who have a pre-infarction syndrome go ahead and infarct. He said he did not believe the pre-infarction syndrome was caused by the employment, and he expressed the opinion that the claimant probably would have had the infarction, irrespective of whether or not he returned to work. He also expressed the opinion that there was a possibility that physical activity could have something to do with an infarction, and he expressed a similar opinion at another point in his testimony about heavy physical acitvity.

"6. Dr. Griswold expressed the opinion by letter, having reviewed the files and the EKGs, that the claimant was having a pre-infarction syndrome on the 4th of February. He went on to say: 'There is little question that a person having a pre-infarction or a developing myocardial infarction as this gentleman had between the 4th of February on to the 9th of February when it became a full-blown affair would be aggravated by his work on the 9th of February.'

He went on to say: 'Certainly, the work he was doing on the 9th of February which he ordinarily could handle was the precipitating cause of his final development of all the symptoms and signs of a myocardial infarction, and undoubtedly this work load was a major precipitating and contributing cause in the development of his myocardial infarction.'

"7. All three doctors agree that hospitalization was indicated for a patient with a pre-infarction syndrome. Dr. Sutherland testified that he does this primarily because 2/3 of the patients with the syndrome go on to full-blown attack, and it is better to have them in the hospital when they have the attack. We can infer from Dr. Griswold's report that he believes physical exertion can precipitate an infarction in a patient who is having the syndrome.

"8. To the extent that Dr. Griswold and Dr. Sutherland as cardiologist disagree, Dr. Griswold's experience and credentials are more persuasive. It is not necessary that medical causation be established by probabilities, although in fact Dr. Griswold does express his opinion in terms of probability. As the trier of fact, I choose to place greater weight on Dr. Griswold's opinion than upon Dr. Sutherland's in this instance, both because of his greater experience and position and because it seems inherently unreasonable to say that physical exertion has nothing to do as a selection process in determining which one-third of the patients with pre-infarction syndromes do not go on to a full-blown myocardial infarction. I find that the claimant's exertions in connection with his employment were a material contributing factor in producing the full-blown infarction and that he has a compensable injury.

"Appropriate finds may be presented."

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WCB #69-896 May 20, 1970

LEON JACKSON, Claimant.
Request for Review by SAIF.

The above entitled matter involves issues of the responsibility for a certain period of temporary total disability arising out of two claims to different parts of the body while working for different employers and insured by different insurers. Also at issue is whether penalties and attorney fees should be assessed one of the carriers for having suspended compensation with approval of the Compliance Division of the Workmen's Compensation Board.

The most critical issues arise over a period of time from April to September of 1969, when the claimant was apparently unable to work as a result of either and both accidental injuries. The following chronology of events relates the course of each claim independently and then discusses the respective liabilities during the overlapping period in dispute.

The now 38 year old claimant sustained a lumbosacral back injury on November 28, 1966 and underwent surgery therefore on December 16, 1966. He was paid temporary total disability until October 30, 1967 and on October 30, 1967, he was determined to be medically stationary with an award of permanent partial disability of 48 degrees against the applicable maximum of 192 degrees. The claimant accepted this award and received advance payment by way of lump sum of 50% of the award on his application. This claim was reopened on March 4, 1968 for further medical and time loss and again evaluated by the Closing and Evaluation Division of the Workmen's Compensation Board on November 1, 1968 with an award of 19.2 degrees of disability above the prior award of 48 degrees. A timely request for hearing was filed and was pending on April 24, 1969 when another critical event took place. A stipulation was executed between the parties and approved by the Hearing Officer. The stipulation is of record and will not be recited here in full. The stipulation does recite that at the time of the stipulation there was a concurrent claim with respect to which the State Accident Insurance Fund has some responsibility. The stipulation appears to limit the liability of the employer insured by Employers Mutual to a nominal difference between the rate of temporary total disability payable by the State Accident Insurance Fund and that payable by Employers Mutual. Despite the fact that the obligations of the State Accident Insurance Fund were being subjected to the stipulation presented to the Hearing Officer for approval, no effort was made by the parties or the Hearing Officer to join the State Accident Insurance Fund. If that had been done, much that followed would have been avoided.

We now proceed to the neck injury incurred January 15, 1969, and insured by the State Accident Insurance Fund. The claimant sustained a neck injury quite apart from his difficulty at the other end of his spine. The claimant's claim was made for compensation as a married man though he was not married until after the accident. The State Accident Insurance Fund thus instituted payment of compensation at a rate higher than required by law and was so paying until the State Accident Insurance Fund was advised that the claimant's other claim had been reopened for surgery on the low back. The State Accident Insurance Fund was still not advised of the stipulation made by the claimant and employer in the first accident. The State Accident Insurance Fund thereupon suspended payment of temporary total disability on

the belief that to continue making payments would result in erroneous duplicate payments of compensation contrary to the provisions of ORS 656.222. On June 9th, 1969 the State Accident Insurance Fund sought and obtained approval for this procedure from the Compliance Division of the Workmen's Compensation Board.

On May 20, 1969 the claimant commenced the present proceedings by a simple request for hearing on the pending State Accident Insurance Fund claim. The issue was stated for the first time at this time of hearing to be the alleged "improper termination" of temporary total disability compensation by the State Accident Insurance Fund on May 1, 1969.

The claimant through his attorney entered into an agreement with Employers Mutual Insurance Company that Employers Mutual would pay the nominal compensation payable by the stipulation and "loan" the claimant the balance of each payment of compensation otherwise due pending settlement of the claim against the State Accident Insurance Fund. The State Accident Insurance Fund was of course also unaware of this loan assignment which appears in violation of ORS 656.234.

At this point the three page medical opinion of Dr. Gurney Kimberley of February 27, 1969 becomes important. It was addressed to claimant's counsel but was not made available to the State Accident Insurance Fund. Neither was this report submitted to the Workmen's Compensation Board proper or to the Hearing Officer who approved the settlement. At the top of page 3, Dr. Kimberley advised claimant's counsel as follows:

> "This man is completely disabled at the present time and not able to engage in any gainful occupation. The greater of his two disabilities has to do with his low back. I would advise that he have a spinal fusion."

The only recommendations with respect to treatment of the neck injury was continuance of his neck brace.

Knowing that the greater of the two problems involved the back, the claimant and his counsel without advising the State Accident Insurance Fund, involved the Hearing Officer in the aforementioned stipulation cutting short the liability of Employers Mutual for temporary total disability while the claimant was hospitalized for surgery.

Despite this record, the Hearing Officer decided that by some exercise of diligence the State Accident Insurance Fund could have found out what had happened in the other claim and thereby would know that Employers Mutual had obtained approval from the Hearing Officer to pay only a small portion of the temporary total disability. The Hearing Officer proceeded to declare the action of the Compliance Division of the Workmen's Compensation Board "Null and Void." The Hearing Officer accuses the State Accident Insurance Fund of not making a full disclosure of the facts to the Compliance Division. The fat was in the fire at this point. The duty of disclosure where real failure occurred was with respect to the report of Dr. Kimberley and the stipulation executed by the parties and approved by the Hearing Officer without notice to the State Accident Insurance Fund. The order of the Compliance Division was not "Null and Void." The Compliance Division is the enforcement division of the Workmen's Compensation Board. It must act directly without the formality

of formal hearings in many cases. It supervises the insured status of over 50,000 employers and the claims status of over 100,000 claims each year. Such direct action is only temporary to allow the matter to be finally resolved by the more orderly but time consuming process of a hearing. As pointed out above, if the claimant, his counsel, Employers Mutual and the Hearing Officer had properly advised the State Accident Insurance Fund of the goings on, the State Accident Insurance Fund would not have been blindly led into a situation from which they were charged the lion's share of the responsibility, where the greater of the disabilities was undergoing surgery. If anyone should have been subjected to penalties it was not the State Accident Insurance Fund.

The Hearing Officer has followed a highly technical course of reasoning to arrive at a conclusion that the State Accident Insurance Fund did not follow the letter of the law and that the State Accident Insurance Fund is therefore guilty of unreasonable delay or refusal to pay compensation. A delay is not ipso facto unreasonable.

When the State Accident Insurance Fund suspended compensation the State Accident Insurance Fund had substantially overpaid the claimant. Even if the State Accident Insurance Fund was not aware of the overpayment, it could not be charged with delay or refusal to pay compensation it did not owe. Before that overpayment was offset by compensation possibly due from the State Accident Insurance Fund to claimant, the claimant was receiving full temporary total disability compensation from Employers Mutual. No amount of diligence would have revealed that the money being paid in the manner and form as compensation was subject to an oral, under-the-table agreement to label the compensation as a loan and an illegal assignment of compensation to be collected from the State Accident Insurance Fund.

The Hearing Officer made no finding with respect to the fact that the claimant was totally disabled as the result of the low back surgery but ordered the State Accident Insurance Fund to pay claimant's counsel for transmission to Employers Mutual the full liability for claimant's temporary total disability.

The Board concludes and finds that the action by the State Accident Insurance Fund in suspending compensation was not unreasonable and that the Compliance Division acted properly and legally in ratifying the suspension of compensation by the State Accident Insurance Fund.

The Board also concludes and finds that during the period of time following the low back surgery in April of 1969 the claimant was temporarily and totally disabled as a result of that claim and that employer and insurer were not absolved of liability for a full share of compensation due by an agreement to pay only the excess upon comparison of two rates of payment.

The Board therefore orders with respect to the Hearing Officer order under review:

1. Section (1) of the Hearing Officer order is reversed.

2. Section (2) of the Hearing Officer order is modified to provide that the liability of the State Accident Insurance Fund for temporary total disability for the period involved is 50% of the compensation less credits for any overpayment. R. Veal & Son and its

insurer, Employers Mutual, is liable for the remaining 50% of the compensation so payable plus 100% of any additional compensation payable by virtue of the difference in the rate of compensation.

3. Sections (3) and (4) of the Hearing Officer order are set aside since the claimant and his counsel share responsibility for the situation and the only legal construction applicable to the payments made by Employers Mutual is that the payments were compensation.

4. Claimant's counsel and Employers Mutual are jointly and severally liable for reimbursement to the State Accident Insurance Fund of any moneys paid by the State Accident Insurance Fund to claimant's counsel and Employers Mutual in excess of the liability of the State Accident Insurance Fund as determined by this order.

ADDENDUM - Future Policy

The Board enunciates the following policy with respect to claims involving fixed rights to compensation vested in a claimant but with issues as to which employer or insurer is responsible for the payment of compensation.

ORS 656.307 is adopted as the procedure to be followed in the following cases where the issue is limited to which is the responsible paying agency.

1. As stated by statute, where there is an issue of which of more than one employer is the true employer.

2. Where the employer is certain but there is an issue of which of successive insurers of that employer is responsible.

3. Where there are two or more accidental injuries creating concurrent liabilities for compensation between two or more employers or insurers.

Application shall be made to the Compliance Division of the Workmen's Compensation Board, which Division shall verify the existence of the dispute, direct which employer shall pay compensation pending resolution of the dispute and forthwith refer the matter to the Hearings Division for resolution of the issue. Resolution may take the course of ordering the parties to share the liabilities, to establish the full liability of the party ordered to pay by the Compliance Division or to order the other party to assume responsibility and direct any necessary monetary adjustment between the parties. The claimant shall be joined as a necessary party but shall be treated as a nominal party unless the claimant asserts a special interest in resolution of the issue.

SAIF # BB 28990 June 1, 1970

ALLMAN M. KINION, Claimant.

The above entitled matter involves the claim of a machinist who was 52 years of age when injured in falling backwards against a wall and the floor on October 26, 1963.

The claim was apparently closed in October of 1964 with an award of disability of 14½ degrees as an unscheduled disability equal to the loss of use of 10% of an arm. The residual disability involved the neck on the basis of an exacerbation of degenerative disc disease in the cervical spine.

The matter has come before the Board with respect to whether recent treatment of the claimant's cervical area is compensably related to the accidental injury of 1963.

The time within which claimant could request a hearing as a matter of right having expired, the issue is directed to the own motion jurisdiction vested in the Workmen's Compensation Board proper by ORS 656.278.

The records available to the Workmen's Compensation Board are not sufficient for the Board to make a decision on the issue. The matter is therefore referred to the Hearings Division of the Workmen's Compensation Board for the purpose of holding a hearing and taking evidence on the causal relationship, if any, between the injury of 1963 and the present symptoms and treatment.

The Hearing Officer is not to make a decision upon the merits but shall conduct the Hearing in the usual manner, cause a transcript of the proceedings to be prepared and refer the record to the Board proper for decision.

WCB #70-317 June 1, 1970

JERRY McVAY, Claimant.
Request for Review by Claimant.

The above entitled matter is restricted to the issue of whether the employer and its insurer should be subjected to a penalty of 25% of the compensation due plus imposition of attorney fees. A Hearing Officer order on January 5, 1970 awarded the claimant 22.5 degrees out of a maximum applicable award of 150 degrees for injury to the right forearm.

As of February 9, 1970 the employer had not made a payment on the award. On that day the claimant's attorney forwarded the request for hearing to the Workmen's Compensation Board. On February 10th, undoubtedly spurred by this turn of events, the employer paid the award in full as permitted for an award of less than 24 degrees, (ORS 656.230(3). Any penalty, if found applicable would apply to not more than four weeks compensation and would be $74 at the most. The claimant, though experiencing a nominal delay in part, then received advance payment of nearly three months compensation.

The Hearing Officer found that the delay by the employer was not unreasonable and refused to assess any penalty.

The actions and reactions of two parties with respect to whether one has been unreasonable must be measured by the actions of both. The record is devoid of any indication that the claimant or his counsel made any inquiry from the employer or insurer about the delay prior to precipitating a request for hearing. A simple telephone call would probably have resolved the problem. There is indication that effort was made by the employer through its insurer to resolve the problem without hearing or review. Claimant and his counsel must assume the responsibility for being unreasonable at this point, particularly since the claimant's compensation had been paid in full and prior to the time it was legally due.

The fact that claimant's counsel may have experienced delays in other cases is not the proper basis for making an example of this employer and its insurer. Each case must be measured in light of its own facts. Penalties are not a primary compensation and are imposed essentially to facilitate prompt compliance with the law.

A similar delay under other circumstances might well be the basis for imposition of the statutory penalty.

The Board concurs with the Hearing Officer that the delay in this instance was not unreasonable nor did it constitute resistance to payment.

The order of the Hearing Officer is affirmed.

WCB #69-1791 June 1, 1970

ROBERT L. KAUTZ, 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 mechanic when he fell from a truck while stepping to a ladder carrying a 50 pound rocker arm assembly. This accident of June 19, 1967 resulted in injuries to his low back and right knee.

Pursuant to ORS 656.268 a determination issued by the Closing and Evaluation Division of the Workmen's Compensation Board finding a disability of 8 degrees out of a maximum of 110 degrees for injury to the leg and 32 degrees out of an applicable maximum of 192 degrees for the unscheduled injury. Upon hearing, the award with respect to the leg was affirmed but the award for unscheduled injuries was increased to 48 degrees.

Upon review, the issue is one of application of the facts to the doctrine of the Ryf v. Hoffman decision relating to the loss of earning capacity as a factor in evaluation of permanent disability.

The claimant in this instance returned to his former employment and performed capably within the range of work capacity consistent with the awards of disability. The claimant left his former employment and his earnings from self employment at the time of hearing are urged as a basis for permanent award. The record indicates that the claimant anticipates an increase in earnings from his venture. The profit or loss from a private venture is not as accurate a guide to earning capacity as wage levels. The

claimant could well go broke in such a venture with no disabilities. Taking the record as a whole, the doctrine of Ryf has little, if any, significance when applied to this case.

The Board concludes and finds that the permanent disability with respect to both the leg and unscheduled area is as found by the Hearing Officer.

The order of the Hearing Officer is therefore affirmed.

WCB #69-146 June 3, 1970

GENE LINDE, Claimant.
Request for Review by Claimant.

The above entitled matter involves the claim of a 51 year old construction worker who was injured in a fall on June 12, 1968. The admitting hospital diagnosis included a cerebral concussion with possible injury to the vestibular system and multiple trauma to the left 7th rib, left elbow, left iliac crest, right thumb and ecchymoses of the left leg. Also diagnosed was a chronic alcoholism with depressive manifestations.

The hearing was precipitated by the employer's denial that the claimant's psychiatric problems were compensably related to the injury and by the fact that compensation for temporary total disability was suspended for a period of time.

The Hearing Officer affirmed the denial of the employer disclaiming responsibility for psychiatric problems but assessed penalties and attorney fees against the employer with respect to the suspension of payments of temporary total disability. The workman has sought review on the exclusion of his psychiatric problems. The employer seeks to be relieved of the penalties and attorney fees.

The administration of the claim has been hindered by conflicts generated by the claimant with treating and examining doctors. The same factor has caused several changes in legal counsel. As the Board was completing its review process, the claimant advised the Board on May 22, 1970 that claimant "is now his own attorney."

The issue as to the psychiatric problem reflects a long standing personality and psychiatric dysfunction. The condition was not caused by this accident nor is there any medical evidence that the psychiatric problem was in any degree adversely affected. Claimant's counsel urges in effect that the Board should recognize a natural cause and effect under the circumstances. The Board concludes that psychiatric problems are too complex for laymen to diagnose and that whether an additional and permanent disability has been imposed requires some substantiation by a medical report.

One of the points at issue is a finding by the Hearing Officer that the employer was guilty of unreasonable refusal to pay compensation for the week between October 29, 1968 and November 6, 1968. The record reveals that the claimant had been a patient at the Veterans Hospital at Roseburg and that compensation checks were being forwarded to that address. On October 27, 1968 a check was returned from the hospital with a notation that the claimant

was A.W.O.L. without leaving a forwarding address. On November 8, 1968 the claimant showed up at the insurer's office and received his checks. It would have been an exercise in futility to execute and forward compensation when the claimant's whereabouts were unknown. There could be no punishable refusal to pay compensation under the circumstances.

The next point in issue is whether the employer and its insurer should be penalized for unreasonable refusal to pay compensation following February 4, 1969. The insurer had arranged for the claimant to be examined in November of 1968 by Dr. Dow and by Dr. Cherry. The claimant failed to keep either appointment. As provided by ORS 656.325(1) the employer's insurer sought and obtained from the Compliance Division of the Workmen's Compensation Board authorization to suspend compensation. The insurer sought the suspension upon the refusal of the claimant to keep scheduled appointments. The actual confirmation of the authorization of suspension contained the words, "until the claimant is examined by his doctor." The Hearing Officer concluded that after the claimant was examined by "his doctor" (Dr. Eckhardt), the insurer exceeded its authority in further withholding compensation. The record is clear that the employer and its insurer were entitled by law to have the claimant examined by doctors of their choice, that the claimant failed and refused to be so examined and that the employer and its insurer believed and had good cause to believe that the authority to suspend was continuing until the claimant complied with this obligations under the law. The Hearing Officer concedes that the claimant is difficult. The measure of whether the employer or its insurer is unreasonable must be measured by the facts in each case. An employer or its insurer could be guilty of an over-reaction in administering a claim with a "difficult" claimant. The Board, taking the record as a whole, concludes that the employer and its insurer acted quite reasonably at all times. For instance, the accident in June of 1968 was followed in July of 1968 by the insurer being advised by the Vancouver, Washington police that the claimant was in custody on an intoxication charge and had removed the cast from his hand. Whether the insurer acted unreasonably with respect to the authority obtained from the Compliance Division of the Workmen's Compensation Board is not to be determined by a strict reading of the letter of authority from Mr. Pomeroy. A better policy for a Hearing Officer to follow in such matters would be to make an inquiry of the Compliance Division before assessing penalties as though the insurer had defied the Compliance Division when in fact the insurer was obviously acting in good faith.

The Board therefore finds and concludes that the employer and its insurer did not unreasonably refuse to make payments of compensation.

The order of the Hearing Officer allowing penalties and imposing attorney fees to be paid by the employer is therefore set aside.

The order of the Hearing Officer is affirmed with respect to upholding the denial of the employer for responsibility of any part of the claimant's psychiatric problems.

The claim had not been closed pursuant to ORS 656.268 and the Hearing Officer order with respect to the open status of the claim is also affirmed.

As noted by the briefs, this claim has since been processed by the Closing and Evaluation Division of the Workmen's Compensation Board. Any issue of further temporary total disability or extent of permanent partial disability excluding psychiatric problems is of course subject to hearing and possible review and appeal of the determination order of January 26, 1970.

WCB #69-1774 June 3, 1970

EARL H. JOHNSON, 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 logger who was struck by limbs and the top of a falling tree on March 4, 1967. The claimant was rendered unconscious and remained in a coma for several days. Claimant sustained extensive lacerations with a left scapular fracture, hyperextension of the right knee, laceration of the right popliteal artery and avulsion of the peroneal artery.

Pursuant to ORS 656.268, the Closing and Evaluation Division of the Workmen's Compensation Board found claimant to have a permanent disability of 22 degrees for partial loss of the right leg against the applicable maximum of 110 degrees and unscheduled injuries of 20 degrees out of the applicable maximum of 192 degrees for unscheduled disabilities. Upon hearing, the respective awards were increased to 44 degrees for the leg and 30 degrees for the unscheduled injuries.

The claimant can no longer fall and buck timber at which occupation he earned as much as $50 a day. The claimant's woods experience is extensive and his desire to follow that trade has led to his present work as a cat-skinner which he accomplishes despite his injuries.

The Board is inclined to conclude that the awards may properly reflect the physical impairment but is doubtful whether there is sufficient evidence upon which to apply any possible loss of earning capacity factor to conform to the decision of Ryf v. Hoffman.

The Board therefore concludes that the matter was incompletely heard and pursuant to ORS 656.295(5), the matter is hereby remanded to the Hearing Officer for taking further evidence concerning the claimant's permanent loss of earning capacity and for such further order as the Hearing Officer deems warranted in light of the further evidence.

WCB #68-2084 June 3, 1970

WILLIAM B. GREEN, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained on March 29, 1968 by a 40 year old meat cutter as the result of an incident while helping unload a meat grinder when a fellow employe dropped his end of the machine.

The claimant was caused to receive a jerking type injury which apparently produced some tearing of the rotator cuff, some strain of the muscles about the shoulder girdle and probably some pulling on the brachial plexus.

Pursuant to ORS 656.268 a determination issued finding the claimant to have a permanent disability of 15% of the right arm and 5% of the workman for unscheduled injuries. Upon hearing the award for the right arm was increased from 28.8 degrees to 48 degrees out of the applicable maximum of 192 degrees. The unscheduled award of 16 degrees was affirmed by the Hearing Officer.

The evaluation of disability is complicated by the fact that the claimant was injured in an automobile accident in January of 1965. Though the claimant testified that a different area of the back was involved, a medical report contemporary to the automobile accident reads like a recitation of the claimant's complaints following the incident of March 29, 1968. Dr. Cohen's report of November 13, 1968 also recites a playful assault suffered by the claimant on October 18, 1968 when he was struck by a fist aggravating the shoulder injury.

The claimant approximates 5' 11" in height and his weight as much as 270 pounds. He has not looked for work (Tr 93). There has been some communication with vocational counselors. Despite the claimant's intelligence and opportunity for work in his trade, he seems motivated toward claiming a permanent total disability allegedly produced by the accident at issue because of limitations affecting a limited area of the work.

The Board concludes and finds that the disability is far from totally incapacitating and that it does not exceed the awards made by the Hearing Officer.

The order of the Hearing Officer is affirmed.

The Board notes for the record that counsel for claimant submitted what appears to be a standard form fee agreement executed by the claimant in excess of the schedule of applicable fees adopted by the Workmen's Compensation Board after consultation with the Oregon State Bar. The Board will not depart from the approved fee schedule except in the unusual cases permitted by the approved schedule. The contract also provides for fees to be applicable to determinations pursuant to ORS 656.268 where the proceedings are normally ex parte without representation by counsel. Attorney fees do not normally attach to any compensation unless the compensation is at issue and the attorney is instrumental in obtaining additional compensation.

WCB #69-1835 June 3, 1970

ANNA ROSE IRBY, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of whether the 25 year old grocery clerk sustained a compensable low back injury on her first day at work on June 11, 1969. The work allegedly producing the injury consisted of bending over and cleaning a dairy case.

The claimant had prior episodes of low back trouble in May of 1968 while working in a laundry and in December of 1968 following an incident of lifting a table at home.

The claim was denied but upon hearing the Hearing Officer found the claimant to have sustained injury as the result of her employment.

The latest medical information of record indicates that the claimant has a protruded degenerative intervertebral disc at the L5-S1 level. Conservative treatment including traction failed to relieve the problem. Further diagnostic and possible surgical intervention was postponed pending the outcome of these proceedings.

The issue before the Workmen's Compensation Board is not whether the claimant's problem originated with her work of bending over and cleaning out the dairy case. It is quite likely that some contribution to the degenerative process is attributable to the prior episodes in May and December of 1968. It is even possible that the degenerative process might have progressed at some time without an acceleration associated with the trauma and stress of the repeated bending and twisting involved in the work at the grocery on June 11, 1969. The issue is whether the work caused a substantial exacerbation of the low back problem and thus precipitated the disability and need for medical care. The claimant brought a back to work that on previous occasions had demonstrated that it was subject to injury. The predisposition to injury is not a defense to a claim when injury occurs.

The Board concludes and finds that the claimant did sustain a compensable injury to her low back as alleged in the process of bending, turning and lifting in cleaning the dairy case on June 11, 1969.

The order of the Hearing Officer is affirmed.

Claimant's counsel is allowed the further fee of $250 for services in connection with this review payable by the State Accident Insurance Fund pursuant to ORS 656.382 and 656.386.

WCB #68-933 June 3, 1970

CLYDE M. POAGE, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability sustained by a 57 year old logger who was struck on the right shoulder and neck by a section of a falling tree on March 21, 1966. The claim was first closed pursuant to ORS 656.268 with an award of permanent partial disability of 29 degrees for unscheduled injury. The claim was reopened as the result of a hearing on the first closing by order of January 24, 1968. The claim was again closed April 19, 1968 without additional award of permanent partial disability. Hearing was again requested on this second determination but on July 25, 1968 the claimant sustained a further injury in a slip and fall incident. The injury on this occasion was to the low back. Though the injuries are clearly separable, the circumstance led to some confusion over which injury was responsible. With respect to the claim at issue, the claimant, as a partner, was self-employed and insured as permitted by ORS 656.128.

The Hearing Officer on the order under review found that both scheduled and unscheduled disabilities were incurred and in evaluating the separate disabilities he found the disability to the arm to be 22 degrees out of an applicable maximum of 145 degrees and the unscheduled disability to be 20 degrees out of the applicable maximum of 192 degrees. The increase in awards was 13 degrees.

The claimant gave up working in the woods but conceded that it was largely as a concession to the concerns of his wife. Whether any earnings capacity loss attributable to the accident at issue was incurred is doubtful. The record

indicates the claimant could have returned to his former work and given similar types of timber could have equalled his prior income.

The work in which the claimant was employed at the mill following this accident and prior to his second injury was actually heavier. One job was not more strenuous activity than the other. The primary limitation was work entailed while reaching up with his hands. (Tr. p 36).

Taking the evidence in its entirety, the Board concludes and finds that the disability does not exceed the 43 degrees awarded by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #69-1481 June 3, 1970

FREDRICK F. BENNETT, Claimant.
Request for Review by Claimant.

The above entitled matter involved the issue of the extent of permanent partial disability sustained by a 34 year old truck driver for a wholesale grocery distributor as a result of a low back injury incurred on December 1, 1968, when he slipped and twisted his back in the course of securing the load in the trailer of his truck.

The Closing and Evaluation Division of the Workmen's Compensation Board determined from its evaluation of the claim pursuant to ORS 656.268 that the claimant was entitled to temporary total disability to December 6, 1968 and that there was no permanent partial disability attributable to the December 1, 1968 incident. This determination was affirmed by the Hearing Officer. The claimant requested a review by the Board of the order of the Hearing Officer.

The claimant had previously sustained a compensable low back injury in 1965 or 1966 in the course of his employment for a former employer. The evidence adduced at the hearing of this matter disclosed a likelihood that the present incident involved only a temporary exacerbation of the claimant's prior low back condition.

Counsel for claimant has now notified the Board of the claimant's withdrawal of his request for review of the Hearing Officer's order. Counsel's letter indicates that the reason for the withdrawal of the request for review is that the claimant has now elected to proceed by way of a claim for increased compensation for aggravation of his prior back injury.

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

WCB #69-859 June 4, 1970

CARL ZIEBART, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 52 year old warehouseman who was thrown from the seat of a hyster lift truck on July 7, 1966 when he ran the hyster into a post. The issue, more particularly, is whether the claimant's injuries preclude him from ever again engaging regularly in a gainful and suitable occupation so as to warrant a finding and award of permanent total disability.

The claimant had sustained a prior industrial injury but this was not subject to the Workmen's Compensation Law. The order of the Hearing Officer erroneously recites a prior award of 100% of an arm for the prior accident. As a claim not subject to the then Workmen's Compensation Law, it was probably settled under a private policy in which settlements were made with reference to what would or could have been paid had the claim been subject to the law. The only significance of the prior accident is that all of the permanent disability now apparent probably did not arise from the accident at issue.

Pursuant to ORS 656.268, the Closing and Evaluation Division of the Workmen's Compensation Board found the claimant's disability to be partial only and claimant was awarded 38.4 degrees for the permanent disability attributable to this accident against an applicable maximum of 192 degrees.

The Hearing Officer found the claimant to be permanently and totally disabled despite finding the claimant's testimony unreliable and the claimant devoid of motivation to return to work. The Hearing Officer order findings No. VIII, IX and X are as follows:

VIII.

"No great reliance can be placed on the claimant's testimony describing his physical condition and his symptoms either before or after the accidental injury of July 7, 1966. This finding is based upon Exhibit 32, a report from Dr. Norman W. Hickman who states as an expert witness that claimant ' --- is more interested in achieving a total permanent disability status than in returning to work.', and in several medical exhibits including Exhibits 33 and 34 where claimant attempted to confound the doctors by voluntarily withholding responses on testing strength or reflexes. It is also based on an evaluation of claimant's behavior on the witness stand which does not generate a feeling of confidence in his testimony.

IX.

"Claimant is unable to return to any gainful employment in his present frame of mind. This finding is based on Exhibit 32 and on the claimant's testimony and attitude.

X.

"Claimant's total inability to return to any gainful occupation is based on his poor attitude and lack of motivation, and resulted from the accidental injury of July 7, 1966. This finding is based on the claimant's testimony and on the medical reports in the file as well as on Exhibit 32."

The Board finds that the record supports these findings by the Hearing Officer, but the Board disagrees with the Hearing Officer that a poorly motivated claimant whose testimony is not accepted as reliable is thereupon entitled to an award of permanent total disability. Unreliable testimony also affects the conclusions of doctors to the extent the doctor must rely upon an accurate history from his patient.

The Court of Appeals in Warden v. North Plains Lumber Co., 90 Or Adv Sh 737, 740, discussed the implication of a "severe lack of motivation" with respect to a claim for permanent total disability. The Court of Appeals in Moore v. U. S. Plywood, 89 Or Adv Sh 831, also commented upon the credibility of the claimant as a factor in compensation claims.

Taking the testimony as a whole as weighed against the claimant's testimony being considered unreliable and the claimant's motivation being against return to work, the Workmen's Compensation Board concludes and finds that the claimant is not permanently and totally disabled.

The Board does find the claimant has sustained a permanent disability attributable to this accident in excess of that awarded by Closing and Evaluation. The Board finds that claimant's disability is 115 degrees against the applicable maximum of 192 degrees.

The award of permanent total disability is set aside, claimant is awarded a permanent partial disability of 115 degrees and claimant's counsel is allowed a fee equal to 25% of the compensation represented by the increased award from 38.4 to 115 degrees payable from the increase on award above the initial determination by Closing and Evaluation.

WCB #69-835 June 8, 1970

JOSEPH M. QUIRK, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether a now 23 year old stockman and baker for a commercial baking company sustained any permanent partial disability as a result of sustaining bilateral inguinal hernias on July 9, 1968 while lifting supplies in the stockroom.

The claimant had a pre-existing congenital weakness of the fascial tissue in the inguinal region which predisposed him to inguinal hernias. The claimant had previously sustained an inguinal hernia in 1963 when he was 16 years old, which was surgically repaired with a good result, enabling him to carry on normal activities without difficulty or problems.

The Closing and Evaluation Division of the Workmen's Compensation Board determined pursuant to ORS 656.268 that the claimant was entitled to compensation for temporary total disability to February 16, 1969, and that the claimant was not entitled to an award of permanent partial disability as a result of the bilateral inguinal hernias.

A hearing was held upon the claimant's request at which he contended that he was entitled to an award for permanent partial disability. The Hearing Officer found that the evidence failed to substantiate that the claimant had sustained any residual permanent disability. The order of the Hearing Officer affirmed the determination order of the Closing and Evaluation Division. The claimant has requested a review by the Board of the order of the Hearing Officer. The claimant contends that he has sustained some permanent disability as a result of the bilateral inguinal hernias and the operation performed for the repair of said hernias.

The claimant underwent an operation for the surgical repair of the bilateral inguinal hernias on December 16, 1968. The medical reports of Dr. Raglione, the operating physician and surgeon, reflect that the results of the surgical repair of the hernias were completely satisfactory and that the claimant was able to resume regular employment approximately 60 days thereafter on February 16, 1969. Due to the inherent weakness of the tissue in the inguinal region and the resultant susceptibility to subsequent hernias, Dr. Raglione recommended that the claimant discontinue any employment involving heavy manual labor. In his opinion neither the hernias sustained by the claimant nor the surgical repair of said hernias resulted in any permanent disability.

Following the determination of the Closing and Evaluation Division, the claimant consulted Dr. Jones for an examination and physical therapy. Dr. Jones' examination of the claimant confirmed that the surgical repair of the hernia had obtained a good result, and that the fascial tissues in the inguinal region were well healed and firm. He reported that the residual discomfort experienced by the claimant was not unusual but was a natural consequence of such surgery which would gradually subside and ultimately abate within a short time, aided by the physical therapy program provided to the claimant. He concurred with the recommendation that the claimant refrain from employment involving heavy lifting or other strenuous activity due to the danger of further hernias from the undue strain which such employment would place upon the inherently weak tissues in the inguinal region. In his opinion no permanent disability could be anticipated to result from the hernias or the operation upon the hernias.

The Workmen's Compensation Law makes specific provision for compensation for a hernia. ORS 656.220 provides in material part that:

> "A workman, entitled to compensation for hernia when operated upon, is entitled to receive under ORS 656.210, payment for temporary total disability for a period of not more than 60 days."

The enactment of the specific statutory provision relative to the compensation for a hernia indicates that it was the intent and purpose of the Legislature to limit the compensation for an operable hernia to the cost of the operation and limited temporary total disability, although an award of permanent partial disability is not precluded for other injuries received at the time

of the occurrence of the hernia or for such permanent disability as under the peculiar circumstances of a particular case may be a direct result of a hernia or the operation performed for the repair of a hernia. Plowman v. SIAC, 144 Or 138 (1933); Tucker v. SIAC, 216 Or 74 (1959).

It is clear from the evidence of record in this matter that the necessity for the claimant to refrain from employment of a heavy nature is attributable solely to the inherent or congenital weakness of the fascial tissue in the inguinal region which cause the claimant to be susceptible to sustaining an inguinal hernia from the additional stress that such employment imposes upon the tissue in this region. The claimant's susceptibility to hernia which precludes his engaging in employment involving heavy labor and lifting is not the result of either the hernias which he sustained or the operation for the repair of these hernias and does not constitute a permanent disability justifying an award of permanent partial disability.

It is equally clear from the evidence of record, particularly the medical report of Dr. Jones, that the tenderness and discomfort which the claimant has experienced following the surgical repair of the bilateral inguinal hernias is a usual and expected consequence of such surgery, which is both non-disabling and of temporary duration, and does not establish any residual disability entitling the claimant to an award of permanent partial disability.

The Board finds and concludes from its de novo review of the record and briefs herein, that the claimant sustained bilateral inguinal hernias, that the operation performed for the repair of the hernias attained a good result and restored the claimant to his pre-accident condition, and that the compensation to which the claimant is entitled is limited to that authorized by ORS 656.220; and that, accordingly, there is no residual permanent disability attributable either to the hernias sustained or the operation performed for the surgical repair of the hernias entitling the claimant to an award of permanent partial disability.

The order of the Hearing Officer is therefore affirmed.

WCB #69-1790 June 8, 1970

GUST CLEYS, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 54 year old laborer as the result of an incident on August 23, 1968 when the claimant strained his low back in reaching out with the jackhammer he was operating.

The Closing and Evaluation Division of the Workmen's Compensation Board, pursuant to ORS 656.268, issued a determination finding an unscheduled disability of 16 degrees. This determination was affirmed by the Hearing Officer.

The record is rather unusual in that the claimant appears to have no disability which interferes with his operation of the jackhammer. This rather strenuous activity actually makes the claimant feel better. The claimant's

symptoms about which he complains occur at rest and at home. There is no decrease in his work capacity or in his earning capacity. It is not even clear whether the discomfort at rest is due to the incident of August 23, 1968, or whether it simply reflects a normal protest to the daily labors with a jackhammer by a physique past its prime in years.

The Board concludes and finds that any residual permanent disability attributable to the incident of August 23, 1968 is minimal and does not exceed the 16 degrees heretofore awarded.

The order of the Hearing Officer is affirmed.

WCB #68-580 June 8, 1970

HARLIE F. BODEMAN, Claimant.

The above entitled matter involves a solicitation for the Workmen's Compensation Board to invoke its own motion jurisdiction with respect to rather bizarre symptoms by the claimant with respect to sensing a burnt or acrid persistent odor allegedly caused by head injuries from a fall on January 4, 1966. The odors became noticeable several months later and were the subject of a hearing on June 28, 1968.

Compensation was denied by the Hearing Officer and the order of the Hearing Officer became final 30 days following July 23, 1968 as a matter of law.

The request to reopen was accompanied by a medical report from Dr. Herman Dickel under date of April 28, 1969, which appears to have been prepared on the basis of a reassessment of prior examinations and reports. The report of Dr. Dickel is somewhat equivocal, appears to add nothing which was not thoroughly examined at the previous hearing and is dated more than a year before the application for Board own motion consideration. It is quite questionable whether any compensable disability exists even if the claimant does experience a sensation of smelling non-exsistent (sic) odors.

The Board concludes that the record does not warrant an own motion incursion into issues which were rather thoroughly subjected to the adversary hearing process and were therefore the subject of an order which is final as a matter of law. The Board therefore will not exercise its own motion jurisdiction at this time.

WCB #69-731 June 8, 1970

GENEVIEVE M. ARMSTRONG, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 56 year old bookkeeper who tripped and fell on April 25, 1968 incurring a comminuted fracture of the neck and head of the left humerus. Pursuant to ORS 656.268 the disability was determined by the Closing and Evaluation Division of the Workmen's Compensation Board to be 20% of the arm or otherwise expressed in terms of 38.4 degrees out of the applicable maximum of 192 degrees.

This determination was affirmed upon hearing.

One of the areas of conflict was with respect to whether there was a distinct and separable injury to the shoulder as an unscheduled injury apart from the admitted injury to the arm. Though the claimant has some complaints, there is no medical substantiation for finding a separate injury. Even if there was such a separate injury the total effect of the injury has been expressed in the award made for the arm. The function of the arm remains the basic issue.

There was one medical recommendation for further surgery which the claimant has declined. The refusal of surgery is not urged as an unreasonable refusal. It may serve somewhat as a test of the true severity of injury where the claimant elects to live with the problem rather than to accept a suggested repair.

The Board does not solicit expressions of ultimate disability ratings from the doctors and prefers to have the doctors set forth their findings from which, with other evidence, a disability determination may be made. In this instance three doctors have made such ultimate expressions and it is interesting to note that their conclusions of the ultimate disability concur with the determination found by the Board and approved by the Hearing Officer.

The claimant has some degree of arthritic involvement which is not uncommon at her age. Again the evidence does not reflect that the arthritis was materially or permanently affected by the accident at issue.

The claimant has returned full time to her regular job. There are some restrictions of activity but these restrictions are consistent with a 20% limitation of use imposed upon the extremity.

The Board concludes and finds that the permanent disability attributable to the accident does not exceed the 20% loss of the arm found by Closing and Evaluation and the Hearing Officer.

WCB #69-2173 June 8, 1970

The Beneficiaries of
JAMES J. SWEETEN, Deceased.
Request for Review by SAIF.

The above entitled matter involves the compensability of a fatal heart attack sustained by a 56 year old stationary engineer on November 20, 1968. The decedent workman had a long history of heart troubles caused by congenitally undersized arteries for which he carried nitroglycerine tablets for relief. On the date of his attack he was servicing an excavation pump, walking through mud and lifting five gallon cans of water from a sump to prime the pump.

The heart attack was not the type commonly encountered in compensation proceedings in that there was no infarction. The actual mechanics involved is called a ventricular fibrillation in which the heart flutters with an arythmia rather than continuing to function as an efficient pump. The question then becomes one of deciding whether the work effort contributed materially to the heart going into fibrillation. A fibrillation, if not promptly controlled, produces death without the arterial occlusion and infarct found in the coronary attacks.

The claim was denied by the State Accident Insurance Fund, but ordered allowed by the Hearing Officer. The foregoing discussion is sufficient to reflect that the problem is one which is to be resolved by medical opinion. There is a conflict in the medical opinion evidence and the burden of the Board is to weigh the respective opinions in light of the record.

Dr. Rogers is a cardiologist whose practice is limited to heart disease. Dr. Rogers is of the opinion that the work effort in the case at issue served as a trigger mechanism which caused the heart to fibrillate. Dr. Drips is an internist with a substantial cardiac practice. Dr. Brady is a pathologist. None of the doctors are dogmatic in their approach to the problem of cause and effect. Areas of medicine which permit dogmatic opinions scarcely need an expert medical opinion as proof of a proposition.

Considering all of the evidence and the valuable contributions to the record by all three doctors, the Board concludes and finds that the work effort was a material contributing factor to the onset of the fibrillations and consequently the claimant's death from such fibrillation.

The order of the Hearing Officer is affirmed.

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 rendered upon this review.

WCB #69-375 June 9, 1970

The Beneficiaries of
KNUTE YOUNGREN, Deceased.
Request for Review by Beneficiaries.

The above entitled matter involves the issue of the compensability of a fatal heart attack sustained by a 62 year old refrigeration foreman while at work on November 25, 1968. The decedent had a previous attack approximately two years before and had been on a regular regimen of physical examinations and had been prescribed nitroglycerine to relieve the anginal symptoms he suffered from time to time.

On the day and time at issue he had been engaged in customary activity which did not involve any unusual stress or activity. The claim was denied and thus denial was sustained by the Hearing Officer.

Since there was some activity involved at work the question moves to one of medical causation rather than an issue of legal causation. In this instance there is testimony from a Dr. Charles Grossman that the environment was uncomfortably warm and that he had climbed a short ladder to the work site. Dr. Grossman's opinion that the work was unusual is not supported by the record. Dr. Grossman is a specialist in internal medicine and thus has some expertise in cardiology. Dr. Frank Kloster, however, is a cardiologist. As such he acknowledges that work effort may play a material role in precipitating a heart attack. It is Dr. Kloster's opinion that under the facts in this case the work effort did not materially contribute to the heart attack. In weighing the expertise of the two doctors, together with their respective opinions the Board places a greater reliance upon the conclusions of Dr. Kloster.

The Board therefore concludes and finds that the decedent did not sustain a compensable injury to his heart and that the heart attack, though arising in course of employment, did not arise out of the employment.

The order of the Hearing Officer denying the claim is affirmed.

WCB #69-2189 June 9, 1970

ROBERT E. WILLIAMSON, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 26 year old sawyer whose right hand was pulled into a chain and sprocket on May 24, 1968.

The issue has been the subject of three orders of determination by the Closing and Evaluation Division of the Workmen's Compensation Board. The second order, issued May 5, 1969, found a permanent disability of 15% of a forearm. On November 19, 1969 the matter was again closed with a determination affirming the prior finding of a 15% disability of the forearm. This finding of disability was affirmed by the Hearing Officer.

The residual mechanical aspect of the injury consists of an amputation of the little finger including the metacarpal bone together with a substantial part of the adjacent soft tissue.

ORS 656.214(3) provides that "the loss of any digit shall be rated as specified with or without the loss of the metacarpal bone and adjacent soft tissue." The legislative standard inherent in this limitation is that a claimant whose finger is severed at the palm is paid the same as the claimant whose finger is removed together with the metacarpal bone extending into the flesh of the palm along with the adjacent soft tissue of the palm. The latter is obviously a greater injury but the award of compensation is not increased. If a disability is caused at or above the wrist level the disability is rateable upon the forearm. The loss of strength or grip in the hand, if caused by the loss of the finger and adjacent soft tissue is not an additional injury. It is the natural consequence of the loss of the finger.

The Board, in its de novo review, must make its own independent determination of disability. The Board is not unanimous in this instance. The majority of the Board finds no basis in the evidence reflecting any injury to any area other than the little finger including the associated metacarpal and adjacent soft tissue. There is some medical evidence of differences in the claimant's two arms but there is no medical evidence ascribing any such difference in the injured extremity to the accident at issue. A careful reading of the medical reports shows only that the residuals of this injury are compensable only to the extent of a 100% loss of the little finger. If an inequity is urged against such a limitation of compensation, any correction must be obtained by a legislative liberalization rather than by an administrative interpretation ignoring an obvious legal restriction.

It is therefore the order of the majority of the Board that the order of determination by Closing and Evaluation and the order of the Hearing Officer affirming that determination are reversed and the award of disability is reduced from 28.8 to 6 degrees. It is assumed that the compensation payable on the aforementioned award has probably been paid in full. To the extent that claimant has been paid any sum in excess of the compensation payable under this order, the claimant is not required to repay such sum pursuant to ORS 656.313.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan dissents as follows:

> I believe this case should be rated on the forearm because there is loss of motion in the right wrist. Dr. Stanley L. James in his comprehensive report, dated April 7, 1969, finds loss of dorsiflexion, loss of palmar flexion and loss of ulnar deviation in the right wrist as compared to the left. It is logical to assume that this is due to the injury, because of the type of accident sustained by the claimant.
>
> The order of the Hearing Officer affirming the order of the Closing and Evaluation Division should be affirmed.

WCB #69-2387 June 9, 1970

EDWARD W. SHAW, Claimant.
Request for Review by Claimant.

The above entitled matter involves the compensability of an injury alleged to have been incurred by a 58 year old chef in the act of firmly pressing his right thumb on the pilot light burner of a deep fryer. The incident allegedly occurred November 13, 1969 and the claimant relates a subsequent radial nerve palsy to this act of attempting to light the pilot light.

The claim was denied by the employer's insurer, primarily because of medical reports that the radial nerve palsy was from an unknown etiology. The Hearing Officer sustained denial, also upon the basis that the medical evidence did not relate the condition to the alleged cause.

The Board is not unanimous in its conclusions upon review of the matter.

The majority of the Board recognizes the importance of medical evidence in assessing medical causation in areas which essentially require medical expertise. In the instant case the doctors relate the problem as of unknown etiology. The doctors do not say the condition was not caused by incident other than by the indirection of relating the cause to be unknown. The chain of circumstances is not refuted. The condition came on following extended pressure by the thumb from an awkward position. The claimant had been at work for many hours without any obvious problem. If he had just shown up for work there would be a proper area of conjecture or speculation founded on the possibility of the claimant having had a circulatory interference prior to coming to work.

The majority of the Board concludes and finds that the total circumstances warrant acceptance of the claim despite the reluctance of the medical experts to arrive at a definite diagnosis. The Board therefore finds that the claimant sustained a compensable injury as alleged.

The order of the Hearing Officer is reversed and the claim is ordered allowed.

Counsel for claimant is allowed a fee of $750 for services rendered upon hearing and review, payable by the employer pursuant to ORS 656.386.

/s/ M. Keith Wilson
/s/ Wm. A. Callahan

Mr. Redman dissents as follows:

Mr. Redman, dissenting, concludes that the claim should not be allowed simply because the symptoms arose during a period of employment. The type of nerve involvement apparently does not arise from the physical activity described. This is the basis for the medical opinion that the etiology in this case is unknown. This is therefore the basis for dissenting from a decision to order the claim paid.
/s/ James Redman.

WCB #69-2339 June 9, 1970

HOWARD E. FIELDS, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 54 year old iron worker who fell some 16 feet on February 14, 1969. He incurred multiple rib fractures and fracture of the left iliac wing and left pubic ramus. The fractures apparently healed without residual problems except as to the left hip. The accident also imposed a lumbosacral sprain upon the back.

Pursuant to ORS 656.268, a determination order was issued by the Closing and Evaluation Division of the Workmen's Compensation Board finding the claimant to have a disability of 32 degrees out of an applicable maximum of 320 degrees for unscheduled injuries. Upon hearing the award was increased to 50 degrees.

The claimant, prior to the accident, had suffered from high blood pressure and diabetes. Prior surgeries included operations removing one lung and also for hernia. The claimant has not returned to work and it is his contention that he is now permanently precluded from regularly performing work at a gainful and suitable occupation as a result of his fall.

Aside from working about his small acreage, which he has now sold, and working to complete his new residence, the claimant has not returned to work for pay. The question at this point becomes one of whether the claimant is unable or simply unwilling to return to work. If a claimant could, if he would, return to work he is not entitled to an award of permanent total disability. [Warden v. North Plains Lumber, Or App 90 Or Adv Sh 757, 740, 466 P.2d, 620 (1970)].

The Hearing Officer, who observed the claimant, concluded from his observation and the medical reports that it is a lack of motivation which stands between the claimant and return to work.

The Board also concludes and finds that the claimant is not precluded from regularly performing gainful and suitable work by his injuries and that the disabilities attributable to this injury do not exceed the 50 degrees awarded.

The order of the Hearing Officer is affirmed.

WCB #69-2104 June 10, 1970

HARVEY L. SHERMAN, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of procedure and whether the claimant instituted a request for hearing within the time permitted by law following a denial of his claim by the State Accident Insurance Fund.

The claimant incurred two leg injuries. The first was on about May 30, 1969. Despite a fracture he kept on working with aid of crutches and claims a second injury on June 12, 1969. Both claims were denied by the State Accident Insurance Fund on July 14, 1969. A timely request for hearing was filed as to the first accident but the claimant neglected to request a hearing as to the second claim until November 17, 1969, well over the 60 day limitation provided by the law in effect on the day of the accident and the day the claim was denied.

It is urged by the claimant that Ch 206, O. L. 1969 amending ORS 656.319 went into effect on August 22, 1969 and that the claimant was thereby given an additional 120 days within which to obtain a filing if he could establish good cause for failure to file within the time permitted. There is authority for permitting application of procedural limitations to pending claims. [Colving v. SIAC, 197 Or 401, 1953]. However, any argument over retroactive or prospective application of a statute must yield to a clearly expressed legislative intent. In this instance the legislature restricted the application to "denial of claims on and after the effective date of this Act." The denial was an accomplished fact before the amendment became law. Whether the claimant's oversight would constitute a good cause is a moot issue under the facts. The fact remains that he filed two claims and received two claim denials. No compensation had been instituted as required by law and it is certainly quite questionable that he did not know that the State Accident Insurance Fund was denying responsibility for both accidents.

The order of the Hearing Officer was based upon the procedural requirements of the statue (sic) denying a hearing on the merits of the claim for failure to timely file a request for hearing.

The Board finds that the Hearing Officer properly applied the law and the facts in this instance and that the request for hearing was not timely.

The order of the Hearing Officer is affirmed.

WCB #68-969 June 11, 1970

The Beneficiaries of
HAROLD K. CROCKER, Deceased.
Request for Review by Beneficiaries.

The above entitled matter involves the issue of whether the claimant was permanently and totally disabled as defined by law on the date of his death. The claimant died of a malignancy unrelated to an accident incurred January 10, 1967.

The accident on which the claim is based involved a fall on schoolhouse steps. The decedent was a school superintendant. The fall resulted in head injuries from which the permanent residual disability was a loss of hearing.

Pursuant to ORS 656.268, the Closing and Evaluation Division of the Workmen's Compensation Board found the disability to be 58½% loss of hearing in the right ear and 24% loss of hearing in the left ear. If the disability related to the injury is only partial, the loss of hearing rating became final upon the decedent's death under the ruling in Fertig v. SIAC, 88 Or Adv Sh 505, 455 P.2d 180. For all purposes relevant to this case the disability as to hearing is as stated above. The decedent did not lose all of his hearing. He retained over 40% hearing in one ear and over 75% hearing in the other.

The claimant resigned his position at the end of the school year in June of 1967. It was during the summer of 1967 that the stomach distress from the carcinoma signalled the unfortunate development from which he passed away in March of 1968.

Though the claimant had a previous loss of sight in one eye and some problem with the other eye, his vision was such that he was able to read, study and drive an automobile. Though he also had some prior hearing problem, this accident did not preclude understanding conversation in a face to face confrontation.

Counsel for the beneficiaries in effect urges that the compensation law as interpreted by the Courts does not adequately compensate the beneficiaries. However, it was not the additional loss of hearing which brought an unfortunate and untimely death to the decedent. The ravages of a malignancy, unaffected by the injury, produced total disability and then death.

The result of the injury was solely a partial loss of hearing. Even if an injury results in a total loss of hearing the legislative standard classifies such a loss as only partially disabling. ORS 656.214(2)(g). The Hearing Officer ruled the claim to be limited to the partial scheduled disabilities and applied Jones v. SCD, 250 Or 177, 441 P.2d 242 (1968).

The Board concludes and finds in concurring with the Hearing Officer that the disability was partial only and that the appropriate award is limited to award of a loss of hearing of 58½% of the right ear and 24% loss of hearing of the left ear.

The order of the Hearing Officer is affirmed.

WCB #69-2095 June 11, 1970

ETHEL DEDMON, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 46 year old machine operator who sustained a lumbo-sacral sprain on September 11, 1968 when she attempted to slide a heavy box along the floor.

This sprain was imposed upon a degenerative intervertebral disc problem at the L5-S1 level which was pre-existing but theretofore asymptomatic. The incident also set in motion a chain of other problems including physical reactions to medications and emotional reactions to the situational stresses. Her physical condition is such that under normal circumstances surgery would be the treatment of choice to stabilize the lower spine as a preventative measure against a recurrence of the injury. Due to the other problems noted, surgery is contraindicated.

The claimant's life is being redirected by schooling to prepare her for office work in which the chances are minimal of exacerbating the accumulated problems.

With this background, a determination issued by the Closing and Evaluation Division of the Workmen's Compensation Board finding the claimant to have disability attributable to the accident of 16 degrees out of the applicable maximum of 320 degrees. Upon hearing the Hearing Officer modified the determination order by increasing the award to 110 degrees. The employer sought review urging the award to be excessive. Claimant sought a review urging that the award is inadequate and that she should be declared permanently and totally disabled. There is a large degree of naivety in the suggestion that where a workman has not returned to work an award of permanent total disability should be made with the prospect of setting the award aside if and when the claimant returns to work.

The Board is unanimous in its conclusion that the claimant is not permanently and totally disabled.

The Board, however, is not unanimous with regard to the extent of the permanent partial disability. The majority concur with the Hearing Officer in finding that the initial award of 16 degrees was not realistic and also concur in finding that the disability warrants an award of 110 degrees. The claimant is intelligent. Some doubt is raised about her motivation with respect to re-employment. That motivation may be somewhat clouded by the pending litigation. The award is generous in terms of actual additonal physical impairment. The claimant shares a measure of obligation to return to a useful and productive life. If she chooses not to do so, the burden of unemployment through her remaining years is not chargeable to this injury.

Upon this basis the majority of the Board affirm the order of the Hearing Officer finding the disability to be partial and not to exceed 110 degrees.

The employer having initiated the review, claimant's counsel is allowed a fee payable by the employer in the sum of $250 for services on review pursuant to ORS 656.382(2).

/s/ M. Keith Wilson
/s/ Wm. A. Callahan

Mr. Redman dissents as follows:

Mr. Redman dissents and urges that the initial determination of 16 degrees awarded by the Closing and Evaluation Division of the Workmen's Compensation Board be reinstated. The claimant had a pre-existing infirmity. That infirmity was temporarily exacerbated. Any need for surgery existed before this accident. The various reactions to medications were not caused by this accident. Even the underlying psychological problem existed before the accident. It is true that the claimant weathered a rather distressful period but the issue now is one of permanent disability attributable to this accident. With the various physical and psychological problems returned nearly to their pre-accident status, the initial award of 16 degrees is adequate recognition of any possible increase in disability.

/s/ James Redman.

WCB #69-1310 June 11, 1970

WILLARD E. HALL, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 50 year old claimant who injured his low back on December 10, 1968 when he used his arms to swing down from a planer.

Pursuant to ORS 656.268, the Closing and Evaluation Division of the Workmen's Compensation Board found the residuals of the injury at issue to be 16 degrees out of the maximum of 320 degrees. Upon hearing the award was increased to 96 degrees. The claimant asserts that he can no longer work regularly at a gainful and suitable occupation and that he should be classified as permanently and totally disabled.

The claimant is not a stranger to physical adversity. He has had, since birth, a defect which he describes as a "hunch back." He sustained multiple rib and vertebral fractures in 1954. This previous claim against the State Accident Insurance Fund was settled in 1958 on the basis of a permanent disability of 100% loss of an arm for unscheduled injuries plus 35% loss of the right hand. The arguments of counsel for claimant with respect to whether the prior award should be now considered concedes that the prior awards were in excess of the true permanent disability incurred.

In addition to the physical defects the claimant has a very limited educational background. He is intelligent, however, and the lack of formal educational training is not a permanent deterent to return to lighter work. The record reflects that the claimant has heretofore returned to heavy work despite injuries estimated as equal to all of one arm plus 35% of a hand.

The Board concurs with the Hearing Officer in finding that the additional disability has not now totally incapacitated this claimant from ever again engaging in regular, gainful and suitable employment. He has marketable residual abilities.

Moving to the issue of the extent of the partial disabilities, the Board concludes that in light of language in recent Court decisions that [see Audas v. Galaxie, Inc., Or App 90 Or Adv Sh 959, 964, 467 P.2d 654 (1970)], the limited educational background warrants a substantial increase in the award of disability. The Board concludes and finds that the increased permanent disability attributable to this injury is 160 degrees.

The order of the Hearing Officer is therefore modified and the award of disability is increased from 96 to 160 degrees.

The Board notes for the record an obvious error by the Hearing Officer order which recites that Dr. Winkler suggests the claimant should do more heavy work. The order in its entirety reflects that the Hearing Officer recognized that Dr. Winkler recommended no more heavy work. The inability to do heavy work is of course not equivalent to permanent total disability.

Counsel for claimant is allowed a fee of 25% of such increased award and payable therefrom.

WCB #69-1607 June 17, 1970

WILLIAM E. GATES, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of whether the now State Accident Insurance Fund is liable as the insurer of the above named employer with respect to an injury incurred by the claimant on July 2, 1969.

The employer's application to the then State Compensation Department was filed with that agency on June 19, 1969, together with a check in the amount of $100. The check was not deposited by the State Compensation Department until June 26, 1969 and it was presented to the bank on which it was drawn on June 30. On July 8th the now State Accident Insurance Fund was advised the check was refused due to insufficient funds.

The issue upon hearing concerned the validity of the check as payment. The State accident Insurance Fund urges that the coverage was not effective until July 10th, the day the check was redeposited though not honored in the course of events until July 14th.

The Board concludes the State Accident Insurance Fund became liable as insurer on June 19, 1969 for reasons other than the question of whether the NSF check constituted payment. However, the matter of the check will be considered first.

There is no question but that the State Accident Insurance Fund, in its transactions with employers, can advise the employer that his insurance will become effective when the premium check is honored. This would, of course, delay the inception of coverage in every instance where an uncertified check

is accepted by the State Accident Insurance Fund. For obvious business reasons, the State Accident Insurance Fund does not wish to operate on such a contingency basis in which the effective date of coverage is dependent upon the vagaries of the mail and clearances from bank to bank. Normally, coverage is instituted forthwith. The State Accident Insurance Fund seeks to have a provisional coverage established subject to being declared void ab initio. The question is not whether the check constitutes payment, but whether the parties in the course of the transaction treated the check as payment. It is significant that there was only one check issued, that the State Accident Insurance Fund redeposited that check and that it was that check of June 19th that was eventually honored on July 14th. The State Accident Insurance Fund liability may have been suspended when the telegram of July 9th was forwarded to the employer. This, however, would not affect any liability for the accident of July 2nd.

The Board concurs with the result reached by the Hearing Officer with respect to the effect of tender, acceptance and redeposit of the check.

There is a consideration broader than the relation between the employer and the State Accident Insurance Fund. The Workmen's Compensation Law devolves upon the Workmen's Compensation Board the responsibility of administration of the law. Employers and their insurers are required to qualify as Direct Responsibility Employers or as contributing employers. Certifications issue to Direct Responsibility Employers and the insured status of the employer as of the records of the Workmen's Compensation Board is an integral part of the system.

The Board has examined its records with respect to the insured status of the employer in this case. On June 25, 1969 a document was filed with the Workmen's Compensation Board notifying the Workmen's Compensation Board that the employer's liability "will be insured by the State Compensation Department effective June 19, 1969." This form is obviously one prepared by the State Compensation Department. It was processed by that agency on June 24, 1969 as evidenced by a receiving stamp. The State Compensation Department obviously forwarded that notice to the Workmen's Compensation Board. That document, not introduced at the hearing, is subject to administrative notice and is incorporated in this record.

By causing that instrument to be filed with the Workmen's Compensation Board, the State Compensation Department caused itself to become of record with the Workmen's Compensation Board the insurer of the named employer until the coverage was cancelled as provided by law by the employer or State Compensation Department. The question of whether the check was good becomes moot. The Workmen's Compensation Board is entitled to rely upon such filings whether by private insurers or the State Accident Insurance Fund.

The Workmen's Compensation Board therefore concludes and finds that for the period of June 19 to July 9, 1969 the named employer was a subject, complying, contributing employer and that the State Accident Insurance Fund is the responsible insurer for any compensable injury incurred by the subject workman of the employer including the claim of William E. Gates for injuries incurred July 2, 1969.

WCB #69-1355 June 18, 1970

LESLIE W. MOSSMAN, Claimant.
Request for Review by SAIF.

The above entitled matter involves the compensability of a coronary infarction sustained by the 41 year old truck driver claimant. The infarction apparently occurred at home at about 2:00 a.m. on May 23, 1969. The claimant had last worked at about 12:30 p.m. the previous day. There is evidence of episodes of illness during exertion for several weeks prior thereto with specific references to April 10, April 16, April 24, May 14 and May 20. It is not quite clear whether the claim is based upon a single episode or upon the entire sequence of events.

The claim was denied by the State Accident Insurance Fund as insurer of the employer, but ordered allowed, following hearing, by the Hearing Officer.

There is the usual conflict of medical authority essential to creation of the issue of medical causation in claims involving coronary attacks. The Board is not unanimous in its findings and conclusion. The majority, from their de novo review, arrive at a different conclusion from that expressed by the Hearing Officer.

Despite the references to the claimant as a previously healthy and robust individual, there is one common ground accepted by all of the medical authorities and that is that the claimant had a degenerative atheroscleratic process developing in his blood vessels including the coronary arteries of the heart. It is also accepted by all of the medical experts that the pain symptoms which are experienced by persons with arteries thus narrowed are basically symptoms of the underlying insufficiency and inability of the blood vessel to carry the volumes of blood. There is no evidence in this case that there was any occlusion of the artery prior to May 23rd. The medical evidence does not reflect that the underlying deficiency was either caused or in any way exacerbated by the work on any of the occasions mentioned. The symptoms which occurred following the early morning coronary occlusion on May 23rd were not the same as the symptoms experienced on prior occasions. This is because a new factor had been added. On the previous occasions blood was passing through the vessel with some difficulty due to stress. In the early morning of May 23rd there was no stress. The claimant had not been at work for over 12 hours. The claimant was at rest at home in bed. One of the coronary arteries became blocked. It was not a case of an artery being called upon to carry blood beyond the normal capacity of the narrowed artery. A clot of blood formed at rest and occluded the artery. The issue then becomes one of whether an episode or episodes of stress many hours, days or weeks prior to that occlusion is responsible for the formation of the clot and associated occlusion of the artery. It is here that generalizations about the relationship of stress and coronary occlusion must yield to the specific facts in the case at hand. The fact that stress may have produced symptoms at a prior time is not proof that the same stress is somehow responsible for a subsequent occlusion. The theory urged by the claimant and adopted by the Hearing Officer would make every coronary occlusion compensable if the claimant had ever experienced anginal pain regardless of when a subsequent occlusion occurs.

The record contains the medical opinions of Dr. Leo J. Freiermuth, an internist; Dr. Robert Childs, an internist; Dr. Donald Wysham, an internist and Board qualified but not certified cardiologist and Dr. William Cohen, an internist with special interest in heart problems as president of the Oregon Heart Association.

The Hearing Officer relied largely upon Dr. Freiermuth and read into his opinions an adamant position in favor of compensability. The conclusions of Dr. Freiermuth can be said to support the compensability of the claim but not to the positive degree attributed by the Hearing Officer. The questions propounded to Dr. Freiermuth were largely directed to whether, once the arteries became narrowed to produce symptoms on effort, one could expect recurrences of such symptoms.

The majority of the Board has directed its attention to whether any effort or stress in the course of employment materially contributed to the infarction which occurred at rest at 2 o'clock in the morning, more than 13 hours after any work effort. In the application of the facts to the particular situation, the majority of the Board concludes that the opinions of Dr. Wysham and Dr. Cohen are more persuasive.

The order of the Hearing Officer is therefore reversed. Pursuant to ORS 656.313, no compensation paid pursuant to the order of the Hearing Officer is repayable. The amount of attorney fee allowed at $2,000 is in excess of the usual maximum. It becomes moot at this point by reversal of the Hearing Officer order but the Board considers the usual maximum of $1,500 to be an adequate fee.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan concurs in the matter referred to the attorney fee, but dissents with respect to the decision on the merits of the claim.

Mr. Callahan dissents as follows:

The attacks of angina pectoris preceding the trip from Colorado to Portland were an indication that the claimant had an insufficient flow of blood to supply the needs of the heart during periods of exertion. The nature of the claimant's work was such that these periods of great exertion were of short duration and constituted a small percentage of the claimant's working time. These attacks of angina pectoris would indicate that future and more serious episodes could be expected in the future.

The attorney for the State Accident Insurance Fund would have us believe that the claimant left his work at 12:30 p.m. in no distress and that all was tranquil until 2:00 or 3:00 a.m. and at that time a sudden heart attack producing the infarction occurred. This is contrary to the evidence.

The claimant recites (Tr 1, 82-88) that beginning with the hand unloading of the overload of wheat at Hayden, Colorado to the parking of the truck at Clackamas, Oregon, the sweating and nausea was continuous, at times worse than at other times. This continued at his home, until the episode of

extreme pain about 2:00 to 6:00 a.m., May 23. This was corroborated by claimant's wife. A witness is presumed to speak the truth. There was no refutation of this, and no allegation that the claimant or his wife was not believeable.

It is true that doctors recommend exercise for their cardiac patients, but within limits that the patient can tolerate, and not at a time that the patient exhibits the symptoms shown by the claimant. Driving a heavily loaded truck without power steering from Colorado to Portland, while the claimant exhibited the symptoms testified to by the claimant, is not the exercise that would be recommended by a doctor.

Dr. Freiermuth was asked (Tr II, 44):

Q. ". . . do you have an opinion as to whether or not his work activity caused or substantially contributed to the myocardial infarction . . . ?

A. Well, I felt it did.

Q. Would you explain why?

A. Well, first of all, it, of course, coincided with it, reasonably in time, I suppose; secondly, he gave indication that he had been subject to heavy work of an intermittent nature; thirdly, I saw no evidence that he had any heart trouble prior to this."

On cross-examination (Tr II, 51), Mr. Hess explained he wanted answers in what could be termed a reasonable medical probability or 51% certain.

Q. "Now, accepting that, Doctor, legally speaking, can you say, based upon reasonable medical probability, what was the productive, immediately productive, or precipitating cause of the acute myocardail (sic) infarction in Mr. Mossman?

A. Well, I would feel, based upon at least a little above 51% possibilities, that it was acute stress; and the only stress we have learned of is in connection with his work.

Q. What stress do you have reference to -- are you speaking of physical stress or mental stress?

A. Well, perhaps both."

The physicians called by the State Accident Insurance Fund are recognized as experts in their field and their integrity is not questioned. When taken as a whole, their testimony does not preclude the claimant's work activities from being a medically probable substantially contributing factor in the occurrence of the claimant's myocardial infarction. To make the claim compensable it is only required that it be medically probable that the work activities be a substantial <u>contributing</u> factor.

There was a great deal of discussion about the attacks of angina pectoris. These are not relevant to the matter before us. We are concerned with the myocardial infarction, for which the claimant was hospitalized

and which resulted in disability. Dr. Wysham testified that the infarction probably occurred about 2:00 a.m., and this being about 14 hours after claimant had stopped work, he could not see "any particular relationship" with his work. This is not a categorical denial of any relationship. Further, the previous discussions had tended to focus upon the 14 hour period prior to the episode of severe pain being a period of usual happenings, rather than a period of pain and nausea and a continuation of the symptoms while driving the truck from Colorado to Oregon, as testified to by the claimant.

Dr. Cohen testified (Dep. 43) that claimant's

> " . . . underlying condition was a progressive one, his coronary tree was becoming progressively more stenosed, more narrowed . . ."

Dr. Cohen does not believe that exertion is a precipitating factor in the development of artherosclerosis. This is commonly accepted. It is not relevant to this matter. The doctor does believe that if a man has an underlying coronary arteriosclerosis, exertion may produce a myocardial infarction.

When one considers Dr. Cohen's testimony as a whole he does not positively rule out the relationship of the claimant's work to the myocardial infarction.

The sequence of events from the hand unloading of 1,940 pounds of wheat, driving from Colorado to Oregon while in pain and being nauseated, the continuation of such symptoms, worse at times, until the severe pain about 2:00 a.m., May 23, and the testimony of the treating physician, an internist, convince me that Mr. Mossman's heart attack is compensable.

I do not accept all of the findings of the Hearing Officer, but I affirm the conclusion that the claim is compensable.

/s/ Wm. A. Callahan.

WCB #69-2320 June 18, 1970

J. C. SHELLENBARGER, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of whether the 26 year old truck mechanic sustained a compensable injury on August 21, 1969 as the result of twisting while lifting on a truck part under the truck.

The claim was denied by the State Accident Insurance Fund but was ordered allowed following a hearing.

As noted by the Hearing Officer, some of the evidence certainly impeaches the claimant with respect to the extent to which he may have been injured. The issue before the Board, however, is not the extent of disability but whether the claimant sustained any compensable injury. A complete denial of a claim cannot be sustained if the claimant sustained some compensable injury.

Some contention concerns the date of the alleged injury. Again, unless a given date is material for purposes of a statute of limitations, an immaterial error in fixing the exact date of an injury will not serve to defeat the compensability of a claim. Further the claimed discrepancies in the matter of relating the exact mechanics of the injury are not necessarily material.

The Board does not adopt the Hearing Officer's hypothesis that the claimant's version should be accepted simply because it would have been easier to concoct a more believeable version. On the other hand, conjecture as to motivations or discrepancies immaterial to the issue should not be utilized to defeat a valid claim.

The Board, weighing the evidence in its entirety, concludes and finds that the claimant incurred a compensable injury as alleged on or about the date alleged.

The order of the Hearing Officer is affirmed. Pursuant to ORS 656.386, counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services in connection with the request for review by the State Accident Insurance Fund on a denied claim.

It should be noted that pending this review on the compensability of the claim, the claim has been processed pursuant to ORS 656.268. On May 4, 1970, an order issued finding certain temporary total disability and permanent partial disability related to the accidental injury. That order is subject to independent hearing and review.

WCB #69-1099 June 18, 1970

ELDON J. NEUFELD, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of whether the 26 year old claimant sustained any permanent disability from a low back claim involving a gradual onset of pain over a period of time while working on a planer chain in November of 1968.

Just as there is no clear cut accidental injury, there is also a rather vague picture with respect to whether there was any real injury associated with the symptoms. If there was in fact some strain the effects of that strain are no longer demonstrable. The issue resolves down to discussions by psychiatrists and a psychologist over the claimant's longstanding psychiatric problems.

Pursuant to ORS 656.268, the determination issued by the Closing and Evaluation Division of the Workmen's Compensation Board found there to be no residual permanent disability. Upon hearing the Hearing Officer found a permanent unscheduled disability of 48 degrees, largely based upon the reports and findings of Mr. Norman Hickman, Ph.D

In fairness to all it should be noted that Mr. Hickman is a duly licensed psychologist whose services are and have been of value in claims involving psychological problems However, the license possessed by Mr. Hickman is not

a medical license such as would authorize his identification as "Doctor" in medical situations. Mr. Hickman appropriately identifies himself as Norman Hickman, Ph.D. The academic doctorate should not be used to indicate the bearer to be licensed as a medical doctor.

The Workmen's Compensation Board does not demean the valuable services of Mr. Hickman. In this instance the record reflects opinions and reports from Dr. K. E. Vreeland; Dr. John Abele, an orthopedic surgeon; Dr. Henry Storino, a neurologist; Dr. Norman Janzer, a psychiatrist, and Dr. James Petroske, a psychiatrist. In weighing the background, training and expertise of the witnesses the Board concludes that the greater weight should be accorded the experts of record with full medical licensed accreditation where a decision must be made on opinions from the two classes of experts. The Hearing Officer order in the matter appears to have been entered against the Hearing Officer's own disagreement with Mr. Hickman. The Hearing Officer's reference to AMA Guides to Impairment of the Central Nervous System makes no finding with respect to any of the three possible factors of central nervous system injury. The Board concludes the weight of the evidence does not warrant any application of the Medical Guide mentioned.

The Board concludes and finds from the reports of the licensed doctors that claimant has no residual physical disability attributable to the "accident" and that the work exposure did not contribute materially to the preexisting psychiatric problem. There is thus no compensable permanent disability associated with the claim.

The order of the Hearing Officer is set aside and the order of determination finding no compensable permanent partial disability is reinstated.

Pursuant to ORS 656.313, no compensation paid to the claimant as the result of the order of the Hearing Officer is repayable.

Counsel for claimant is authorized to collect from the claimant a fee of not to exceed $125 for services rendered upon review where the award is reduced on review instituted by the employer.

WCB #69-1685 June 18, 1970

ERWIN J. MEYER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether a 34 year old dairy farm manager sustained a compensable injury on July 10, 1969, while operating a caterpillar tractor. The claimant contends that a hydraulic hose on the tractor became disconnected from its coupling and that the pressure in the hose produced a whipping motion which resulted in the hose striking him in the head.

The claim was denied by the State Accident Insurance Fund on behalf of the employer. The denial of the claim was affirmed by the Hearing Officer following a hearing. The matter is now pending before the Board on the claimant's request for review of the order of the Hearing Officer.

The record in this matter reflects that Gene Hogan, another employe on the dairy farm, witnessed the incident and could offer pertinent testimony relative to the alleged accidental injury. At the time of the hearing of this matter on January 10, 1970, Mr. Hogan's whereabouts were unknown, and the claimant's efforts to locate him and secure his attendance at the hearing were unsuccessful. The hearing was continued by the Hearing Officer to allow the claimant a further opportunity to locate and obtain the testimony of said witness, but he could not be located by either party, and the hearing was ultimately closed by the Hearing Officer without his testimony on March 11, 1970.

Counsel for claimant has now moved the Board for an order remanding this matter to the Hearing Officer for the purpose of taking the testimony of the said Gene Hogan. The motion is supported by the affidavit of the claimant to the effect that Gene Hogan has now been located, that he was a witness to the claimant's accidental injury, and that he is now available to appear and testify relative to said incident at such further hearing.

The Board has concluded from its consideration of the claimant's motion and supporting affidavit and its review of the record in this matter, that giving full effect to the right of hearing contemplated by the Workmen's Compensation Law requires that the claimant be granted an opportunity to obtain the testimony of this formerly unavailable witness. It is the determination of the Board therefore that due to the unavailability of an essential witness at the time of hearing, this matter has been incompletely developed and heard and should be remanded to the Hearing Officer to permit the taking of the testimony of Gene Hogan.

The above entitled matter is therefore remanded to the Hearing Officer for the purpose of taking the testimony of Gene Hogan and such other and further evidence as either party may offer on the issue of whether the claimant sustained a compensable injury on July 10, 1969 and for such further order of the Hearing Officer as he shall determine proper from his consideration of the complete record following the further hearing.

WCB #69-2327 June 18, 1970

MAGDALENE WOLFE, Claimant.
Request for Review by Claimant.

The above entitled matter involves a procedural issue with respect to a request for hearing on a claim of injury which was incurred on April 14, 1967. The claimant slipped on a rubber mat and injured her back and right elbow. The claimant required only medical services and her claim was administratively closed by the Workmen's Compensation Board on August 17, 1967. The last medical services were provided July 3, 1967.

The instant proceedings were instituted by a request for hearing filed December 22, 1969. The claimant did not set forth any issue to be resolved at any hearing, [see Board Rule 5.01 B footnote] nor did the claimant tender any medical opinion pursuant to ORS 656.271 which could have served as the basis for granting a hearing on a claim of aggravation.

Approximately 80% of all claims involve only minimal medical care with no compensable loss of time or permanent injuries. Over 80,000 claims per year fall in this category. By administrative policy and interpretation the Board deemed no determination of disability to be required where there was obviously no disability to be determined. [See Rule 4.01 A footnote.] Furthermore, reading ORS 656.268 in conjunction with numerous claims would not be processed as provided in ORS 656.268. As a matter of fact, ORS 656.319 even contemplates that there may be no such determination in some cases where disability payments have been made. ORS 656.319(1)(c). By the provisions of ORS 656.319(1)(b) the claimant had until July 3, 1968 to request a hearing as matter of right. The interpretation of ORS 656.268 sought by the claimant requires that no effect be given to ORS 656.319. The policy of the Workmen's Compensation Board gives effect to both sections. The interpretation of ORS 656.268 sought by the claimant would also establish a reservoir of well over 300,000 claims accumulated since January 1, 1965 in which time would never run within which to request a hearing. Claims of bona fide disabilities, on the other hand, have fixed limitations and require supporting medical evidence as a prerequisite to a hearing on reopening, [ORS 656.271].

Claimants have two safeguards. One is the claim for aggravation. The other is the own motion jurisdiction of the Board pursuant to ORS 656.278.

The claimant in this instance seems more motivated and determined to upset the administrative process than in establishing that she has a claim with some merit.

The claimant not having requested a hearing within one year of the last date upon which medical services were provided, the claimant having further failed to set forth an issue to be resolved and the claimant having failed to support her request for hearing with a medical report as provided in ORS 656.271, there appears to have been no basis established for granting a hearing. The order of the Hearing Officer is affirmed. This order is without prejudice to a further request for hearing duly supported as required by law. By Board rules 7.01 and 7.02, the aggravation claim should first be presented to the employer or its insurer.

FOOTNOTES

5.01 B. The Board interprets ORS 656.283(1) to require a party seeking a hearing to state the question to be resolved before the request is referred to a hearing officer for determination. Failure to state all questions will not deny any party the right to hearing as to other issues but may be grounds for continuance as to those issues.

4.01 The law requires the Board to make a determination of compensation due on every compensable injury. (ORS 656.268)

4.01 A. Exception: Claims involving no compensable loss of time from work, claims involving no medical services and claims involving only medical services will not ordinarily be processed for determination pursuant to ORS 656.268 in keeping with administrative policy followed since January 1, 1966. Determination will issue in such claims upon special request. For purposes of establishing rights to hearing thereon, including claims for aggravation, a determination is deemed to have been made as of the administrative closure of the claim according to the records of the Board.

WCB # 47, 67-255, 67-271 and 69-2302 June 19, 1970

MARIE THOMAS, Claimant.

This is a Board's Own Motion proceeding, instituted at the request of the State Accident Insurance Fund. The State Accident Insurance Fund in its request to the Board alleged that the claimant was: (1) no longer permanently and totally disabled; and (2) was using an inordiante (sic) amount of drugs.

The claimant sustained a low back injury in June of 1963 and since January of 1968 has been drawing compensation on the basis of being permanently and totally disabled. The claimant has moved to Arkansas. The Workmen's Compensation Board on December 16, 1969, exercised its own motion, pursuant to ORS 656.278, to authorize the State Accident Insurance Fund to cease payment for medications until further order of the Board.

The matter was then immediately referred to a Hearing Officer for the purpose of taking testimony bearing on the question of medication and permanent total disability status. The hearing took the better part of four days and involved over 800 pages of transcript, not including numerous exhibits. A substantial part of the time was consumed in disputatious motions and technicalities tending to obfuscate the issues and facts. The Board is urged to open the record for further evidence.

The basic responsibility of the Board is to see to it that each injured workman receives all that he is entitled to under the law. This has been the Board's approach to the request of the State Accident Insurance Fund for Board's own action in this case.

This claimant is entitled to necessary and reasonable medication, but based upon the evidence, the Board is convinced that any salvation of this claimant lies in some control and limitation of her drug problem under adequate medical supervision.

The claimant's problems did not originate with this claim in 1963. The medical record reflects that she has been medically treated for years with much the same pattern as early as 1956.

As mentioned earlier in this order, the hearing took the better part of four days and required over 800 pages of transcript and numerous exhibits. On the basis of this alone, an attorney fee of the maximum allowable, namely $1,500, would be justified, however, in the opinion of this Board, the hearing was unnecessarily prolonged and therefore an attorney fee of $750 is awarded to the claimant's attorney to be paid by the State Accident Insurance Fund.

WCB #69-2074 June 23, 1970

ROBERTA E. MILLER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 26 year old claimant sustained a fracture of her left wrist by accidental injury arising out of the course of her employment as a cocktail waitress on August 12, 1969. The claimant worked as a cocktail waitress and alleges that at about 4:00 p.m., having started work at 2:00 p.m., a case of liquor fell about 15 inches and fractured the wrist. She continued to work the rest of her shift ending at 6:30 p.m. She was then joined by her husband and they stayed for a few drinks to celebrate her birthday and then picked up a pizza to go. She did the dishes and by now, 11:00 p.m., she claims the wrist really started to hurt.

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

The alleged accident was not witnessed and the claimant made no report of the injury and evidenced no injury when she left the job. Even the social hour at her place of employment following her work was spent without complaint of any incident of sufficient severity to break her wrist. The type of fracture is one commonly associated with a hyperextension rather than a blow. Furthermore there was no bruising which would normally be associated with being struck by a falling object.

This Board has heretofore had occasion to note that under circumstances involving an unwitnessed accident, the surrounding circumstances and credibility of the claimant are important. Moore v. U.S. Plywood, Or App, 89 Or Adv Sh 831, 833, 462 P.2d 453 (1969).

The Hearing Officer, who had the additional advantage of a personal observation of the witness, concluded upon a consideration of the probabilities arising out of these circumstances that the claimant's wrist was not fractured as claimed in the course of employment.

The Board concurs with the Hearing Officer. No brief was tendered to the Board upon review. There is certainly no persuasive reason to find that the Hearing Officer erred in the merits of the matter. There is an obviously immaterial clerical error in recitation of the name of one of the witnesses.

The order of the Hearing Officer is affirmed.

WCB #69-1287 June 23, 1970

ESTHER DeWITT, Claimant
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 64 year old furniture saleman claimant sustained a compensable injury on December 20, 1968 when she allegedly injured her low back in helping to lift a dresser.

The claim was denied and this denial was upheld by the Hearing Officer.

The claimant's back problems date back at least to 1959. In September of 1966 the claimant fell down the stairs at another furniture store where she was then employed. She was hospitalized twice in October of 1966 for that injury and the claim associated with that accident was not closed until October of 1968, some two months prior to the allegedly new accident. There is some suggestion by the claimant that the prior claim was basically for the neck and cervical area. Medical reports such as that of Dr. Stevens of March 1, 1967 reflect a diagnosis of compression deformity of the 1st lumbar vertebra and a hypertrophic lumber (sic) spondylosis.

One of the problems giving rise to the issue in the instant case is that the alleged accident was at best mentioned to the employer in a jocular way and no written notice was given the employer for over five months. In the interval the claimant was examined by doctors on several occasions without mention of the incident which she now claims constituted a new accidental injury.

Whether or not the employer or the State Accident Insurance Fund were prejudiced by the months of delay in making a written notice, the delay certainly casts a substantial doubt on whether the incident occurred. A good example of the confusion caused by such delay and the problem created in reaching the truth is reflected in the claimant's testimony at pages 94-96. Her testimony recites extremely sharp pains in her head "and this all happened after I had lifted this dresser." She testified she never had sharp pains like that before. The record reflects that the complaints of sharp head pains preceded the dresser incident. The claimant appears versed in medical procedures such as an EEG which she further defined as an electroencephalogram. It is significant that no mention is made in any of numerous medical reports about an electroencephalogram. It is not a procedure easily overlooked in anyone's medical history. Whether it was ever performed should not be based upon the tesimony of an obviously confused lay witness.

One purpose in requiring prompt notice of an injury is to enable those who must eventually decide the issue to have the benefit of contemporary circumstances. The validity of the claimant's version of the incident is destroyed by her inconsistencies and confusion.

The Hearing Officer had the additional benefit of evaluating the claimant's demeanor. The delay in filing the claim and the conflicting and confusing testimony is such that the Board concludes and finds that claimant did not incur a new accidental injury as alleged.

The order of the Hearing Officer is affirmed.

WCB #69-109 June 23, 1970

FRANK CORRADINI, Claimant.

The above entitled matter involves a claim of occupational disease denied by the State Accident Insurance Fund, but thereafter ordered allowed by the Hearing Officer and decided favorably to the claimant by a Medical Board of Review.

The findings of the Medical Board were filed February 20, 1970.

Counsel for the claimant now request approval of an allowance of attorney fees to be payable by the State Accident Insurance Fund for services rendered by counsel in connection with the appeal to the Medical Board of Review.

The statute is not clear, but in the recent decision of Beaudry v. Winchester Plywood, 90 Or Adv Sh 1193, 1203, 469 P.2d 25 (1970), the Supreme Court applied the principle of allowance of attorney fees in occupational disease claims.

Claimant's counsel has requested the allowance of a fee in the sum of $120 which is deemed to be a reasonable fee for the services rendered.

It is accordingly ordered that the State Accident Insurance Fund pay to claimant's counsel the fee of $120 conforming to ORS 656.382, 656.386 and the Beaudry decision.

WCB #69-1612 and
WCB #69-1613 June 24, 1970

KENNETH E. FORD, Claimant.
Request for Review by SAIF.

The above entitled matter involves issues of the extent of permanent disability sustained by a now 37 year old workman as the result of burn injuries incurred August 26, 1967 when he attempted to fuel a hyster with propane while the engine was operating. A subsequent claim on February 10, 1969 involved a pinching injury to the end of the right thumb. Both claims were joined for a common hearing on the residual permanent disabilities.

The claimant was found to have a loss of 10% of the thumb on the latter injury pursuant to ORS 656.268 and this award was affirmed by the Hearing Officer. The Board concurs with the Hearing Officer that the injury to the thumb was minimal and concludes and finds that the disability does not exceed 10% of the thumb.

The order of the Hearing Officer as to the disability of the right thumb in case WCB 69-1613 is affirmed.

The more serious claim for the burns incurred in February of 1967 resulted in a determination pursuant to ORS 656.268 finding a 20% (38.4 degrees) loss of each arm and 5% of the workman (16 degrees) out of a maximum of 320 degrees for unscheduled disabilities. Upon hearing the Hearing

Officer, possibly by inadvertence, reduced the award for the left arm by .4 of one degree. The right arm disability award was increased from 38.4 to 48 degrees. The major issue on review involves the Hearing Officer increase of the award for unscheduled disabilities from 16 to 192 degrees.

The claimant has problems associated with his low back which the Hearing Officer concluded were neither caused nor exacerbated by the accident. The Board concurs that the low back was not compensably injured. However, the Hearing Officer proceeded to base an award of unscheduled disabilities almost entirely upon symptoms related almost entirely to the back problem.

One would seldom find a greater disparity in the description of a workman's capabilities than a comparison of the version given by claimant's counsel and that of claimant's foreman. The claimant's work capacities appear to be minimally affected and his earnings have increased. The Tr, pages 61-63 reflects an above average workman whose only complaint is being delayed by someone else. The foreman wishes he had a mill full of workmen like the claimant who is so much better than his fellow workmen that some decrease in his work output would hardly be noticeable because he exceeds the others.

The Hearing Officer, in addition to apparently making an award of unscheduled disabilities on unrelated problems infers that this superior workman is the beneficiary of a sympathetic employer and that he could not market his abilities to advantage elsewhere. There is no basis for this conclusion. There is always a market for workmen whose chief complaint is that he is being slowed down by fellow employes.

The claimant's initial injuries were dramatic and severe. The consideration of permanent injuries is not based upon the pain and suffering initially incurred. The award must be based upon permanent disabilities compensably related to the accident at issue. The major permanent residual disability associated with the accident are the burns to the arms. The claimant was found to have permanent disability of 38 degrees for the left arm and 48 degrees for the right arm. The Board concurs with the Hearing Officer evaluation in this respect with the exception that the conversion to degrees deprived the claimant of .4 of a degree for the left arm which is hereby restored to make the award for the left arm 38.4 degrees and the award for the right arm 48 degrees.

The unscheduled injuries must be evaluated without reference to the back complaints. They must also be evaluated without reference to a pre-existing chronic urinary infection which is now quiescent and does not appear to have been permanently exacerbated by the burn injuries. In summary, excluding the non-compensable factors, the claimant has only minimal permanent unscheduled residuals. This claim is one in which the claimant was personally observed by the Closing and Evaluation Board in the process of making the initial determination of disability pursuant to ORS 656.268. The Board concludes and finds that the unscheduled disability does not exceed the 16 degrees awarded by that initial determination.

The order of the Hearing Officer with respect to WCB 69-1612, the burn case, is affirmed with respect to the award of 48 degrees for the right arm, modified by reinstating the award of 38.4 degrees for the left arm and further modified by setting aside the award of 192 degrees for unscheduled injury and reinstating the initial determination of 16 degrees unscheduled disability.

The award having been reduced on appeal by the insurer, claimant's counsel is authorized to receive a fee from his client for services on review in the amount of $125.

WCB #69-2088 June 26, 1970

EILEEN ALVEREZ, Claimant
Request for Review by Claimant.

The above entitled matter involves issues of disability arising from a fall going upstairs while working as a waitress on December 20, 1968.

Her claim was closed October 21, 1969 without award of permanent partial disability.

The claimant asserted upon her request for hearing that she was alternatively entitled to either more time loss and medical care or an award of permanent partial disability. The Hearing Officer affirmed the claim closure. The claimant has requested a review. It must be assumed that the same issues are raised. The claimant has not stated any issue in her request for review nor has any brief been filed with respect to the matter. The Board reviews such matters de novo but it is hardly in keeping with sound administrative or judicial process for a litigant to place the reviewing body in the position of conjecturing just what the claimant wants.

The claimant is 26 years of age and is described by the doctors as being moderately obese. Her husband has undergone three back operations. The medical record indicates the initial injury to the claimant involved the low back and that those symptoms had substantially all disappeared when the claimant began to express complaints about her neck and thoracic regions. There is scarcely any objective evidence of residual disability attributable to the accident. The claim is largely one of numerous spreading complaints by a claimant whose lack of proper conditioning and poor motivation alone reasonably accounts for whatever real basis there may be to her complaints.

The Hearing Officer had the additional advantage of observing this witness whose claim largely rests upon subjective complaints without objective evidence of compensable relationship.

The Board concurs with the Hearing Officer and concludes and finds that the claim was properly closed without finding an award of permanent partial disability.

The order of the Hearing Officer is affirmed.

WCB #69-1872 June 26, 1970

OLIN D. ROGERS, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of compensable permanent disability sustained by a 59 year old carpet layer as the result of an accident on July 17, 1968 when he knelt upon and cut his left knee on a piece of glass.

Pursuant to ORS 656.268 the Closing and Evaluation Division of the Workmen's Compensation Board found the claimant to have a disability expressed at 45 degrees as the proportionate loss of the applicable maximum of 150 degrees for the total loss of the leg. That award was affirmed by the Hearing Officer.

As a carpet layer, the claimant presents a picture of some degeneration in both knees. The only issue here is the disability associated with the cutting injury of July 17, 1968. In surgery, seeking for a piece of glass thought possibly to be still imbedded, certain cartilaginous defects and degenerative defects were found which were surgically treated. There is no evidence that these conditions were attributable to the episode at issue. In any case, the course of events following the glass cut led to surgical correction.

The claimant urges upon review that there is no evidence of any preexisting condition. The report of Dr. Frank Smith under date of June 20, 1969 reflects the degenerative changes were "almost equally present in both knees." That report also reflects that the claimant is a difficult patient who expresses anger at any suggestion that he cooperate in rebuilding the muscle strength lost from disuse. There is no permanent injury to these muscles and the claimant is unwilling to contemplate even a mild discomfort which might be associated with restoring the musculature.

If the claimant cannot return to carpet laying, that is an indication of disability but the evaluation is not to be restricted to whether the claimant can perform a particular occupation. The claimant walks favoring the left knee and restricting knee motion which produces a limp. A substantial use of the leg remains.

The Board concurs with the Hearing Officer and concludes and finds that the disability does not exceed the 45 degrees awarded on a proportionate basis against the applicable maximum of 150 degrees for complete loss of a leg.

RALPH LITTLEFIELD, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of whether the 63 year old claimant was in the course of employment when he fell from a ladder while picking apples. The basis of the claim denial is that the claimant had been asked to return to his cabin when it became obvious that he was rather unsteady on his feet. Having been told not to work according to the foreman, it is the contention of the State Accident Insurance Fund that the claimant could not have been in the course of employment even though he proceeded to work. The other aspect is whether the claimant was in a state of intoxication to remove him from course of employment.

The evidence reflects that the claimant had consumed some quantity of alcoholic beverages the evening before. The evidence also reflects an admission that the only drinking on the day in question was a drink to "steady him."

It is undisputed that the claimant was given a picking bag and a ladder and was assigned a row of trees to pick. It is also undisputed that the claimant ascended the ladder a number of times and that as of the time he fell he had picked a partial bin of apples. He fell wearing the apron which was partially filled with apples.

Unfortunately the circumstances are not too well defined. The foreman's version of what transpired was substantially weakened by admissions that part of his statement was "something I didn't know anything about." Despite asserting that he had told the claimant to return to his cabin the only explanation for having given the claimant the picking bag and ladder was "I don't know why I did."

The contract of employment in fruit harvesting is quite informal. On a day to day basis the one factor which would appear to be most meaningful would be that of supplying the tools of the trade. Without a ladder there would have been no ladder from which to fall. The claimant certainly had no use for a picking bag and ladder back at the cabin if that is where the foreman "ordered" him to go though leaving him in possession of such tools.

There is another circumstantial conclusion which appears inescapable. If the claimant was so obviously incapable of working as the employer now contends, the employer had a greater obligation than to provide a ladder together with a suggestion that the claimant return to his cabin. The foreman stated he had a belief that the claimant wouldn't use it anyway. The foreman guessed wrong. Having guessed wrong, would they admit to a contract of employment if the claimant picked all day? There is no evidence that the employer refused to accept the fruits of claimant's labor in the form of the partially picked bin of apples.

The other aspect is the contention that intoxication may be such as to remove a workman from course of employment. This appears to be an accepted legal proposition. However, the facts in this case do not appear to justify application of such a proposition. The cases which apply such a doctrine do not include all "under the influence" situations. It does not include

the merely tipsy or other intermediate classifications. It is only when the intoxication reaches an advanced state that Courts will sometimes conclude the workman incapable of performing the work contract. The claimant was working, albeit not as safely as he could have without the loss of coordination attributable to the alcohol.

The Board concurs with the Hearing Officer that the State Accident Insurance Fund was not precluded from denying the claim at such a late date and that the denial was not unreasonable upon the information provided to the State Accident Insurance Fund.

The Board also concurs with the Hearing Officer and concludes and finds that the claimant was in the course of employment when he fell from the ladder.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.386 counsel for claimant is allowed the further sum of $250 payable by the State Accident Insurance Fund for services rendered in connection with review proceedings.

WCB #69-2167 June 26, 1970

EDWIN L. SCHMITT, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability sustained by a 45 year old truck driver as the result of being caught between a hyster and a truck on June 2, 1969. The claimant incurred fractures of several ribs and various contusions of the body and left arm.

Pursuant to ORS 656.268, the Closing and Evaluation Division of the Workmen's Compensation Board found the claimant to have an unscheduled disability of 16 degrees against the maximum of 320 degrees. The claimant has had several prior compensable injuries. Whatever the full implication of ORS 656.222 and Keefer v. SIAC, 171 Or 405 may be, any such prior awards and determination affecting the same area should be a matter of record. From the monetary recoveries admitted by the claimant, it appears that the claimant had previously been awarded at least 60 degrees for permanent unscheduled injuries. The claimant is not to be compensated anew for previous injuries and disability is to be determined in part with regard to the combined effect of the injuries and past compensation therefore. As modified by these conditions it is the additional permanent disability attributable to the accident at issue which is now to be resolved.

The claimant in this case has returned to his former employment at the same wage. With relatively minor inconvenience he is able to work full time at this job. The issue arises from the fact that for a few months prior to the accident, a substantial amount of overtime work had been made available to the extent that the claimant was working up to 60 hours per week. The claimant now works only 45 hours and claims a 25% disability. There is no evidence that the reduction in hours is permanent. The record of pre-accident earnings and claimed lack of prior disability seems to reflect that the claimant has heretofore been awarded compensation for "permanent" disabilities which proved to be not permanent.

Considering the prior injuries and awards and considering the fact that the claimant remains able to work full time with some overtime at a rather strenuous job, the Workmen's Compensation Board concludes and finds that any additional disability attributable to this injury for which claimant should be compensated does not exceed the 32 degrees awarded by the Hearing Officer.

The order of the Hearing Officer is affirmed.

SAIF Claim # EA 923095 June 26, 1970

D. D. RICKMAN, Claimant.

The above entitled matter involves the claim of a 47 year old workman who sustained a compensable low back injury in 1962 which eventually resulted in a jury determination and judgment on December 13, 1965 that the claimant was permanently and totally disabled as a result of the 1962 injury.

The accidental injury was subject to the administration of the then State Industrial Accident Commission. Pursuant to O L 1965, ch 285, sec 43(2), the continuing jurisdiction of such claims under ORS 656.278 was vested in the now Workmen's Compensation Board.

The reference to own motion of course includes matters where the own motion jurisdiction is involved upon the request of a party even though the party does not have the right to demand such assumption of jurisdiction.

The request by the State Accident Insurance Fund in this instance asserts that the State Accident Insurance Fund has evidence that the claimant has been gainfully employed for some time accompanied by medical opinions of Dr. Russell Parcher and Dr. Nathan Shlim that the claimant is not now permanently disabled.

The Board procedure in such matters is to refer the matter to the Hearings Division for the purpose of permitting the parties to present evidence on the issue. The Hearing Officer upon conclusion of the hearing forthwith prepares a transcript of the proceedings and forwards the record to the Board for Board decision.

If the Board then determines that the award of compensation should not be reduced, attorney fees will be assessed the employer or the State Accident Insurance Fund in the manner provided by ORS 656.382(2).

The matter is hereby referred to the Hearings Division for the purpose of taking testimony and other evidence on the issue of the extent of claimant's permanent disability attributable to the accident and more particularly with reference to whether the claimant's disability attributable to the accident now precludes the claimant from regularly engaging in a gainful and suitable occupation.

The Hearing Officer, without decision on the matter, shall cause the record to be transcribed and certified to the Board proper for decision in the matter.

WCB #69-782 June 26, 1970

MARJORIE DOTTON, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of procedure and jurisdiction involving a request for review following a Hearing Officer order.

The order of the Hearing Officer was mailed to the parties on December 31, 1969. Pursuant to ORS 656.289(3), that order became final unless within 30 days one of the parties requested a review under ORS 656.295. ORS 656.295(2) provides that "the request for review shall be mailed to the board and copies of the request shall be mailed to all other parties to the proceeding before the Hearing Officer."

In the case before the Board no request for review has ever been mailed to the Board. It does appear that a request for review was left with some employe of the Workmen's Compensation Board in the Portland Office of the Hearings Division of the Workmen's Compensation Board on January 30, 1970. That document was not received by the Board proper until February 3, 1970.

The Workmen's Compensation Board applies ORS 16.790 as applicable to mailed service. ORS 16.790 was formerly 7-404 OC 1930. As such it was applied in a workmen's compensation case in Payne v. SIAC, 150 Or 520 (1935). The date of mailing is deemed the date of service. If claimant had properly mailed the request on January 30th, the receipt by the Board on February 3rd would be immaterial. Having chosen to effect service in a manner not contemplated by law the Board deems the actual receipt untimely even if actual receipt can be substituted for the service by mail specified by statute.

The Board notes for the record that a substantial issue raised, but not decided on review, is evidence which, if controlling, indicates a possible compensable aggravation post hearing. The claim would still be open for a viable claim of aggravation if the medical evidence should reflect facts supporting such a claim. The Board also retains own motion jurisdiction if it should appear that previous orders in the matter are such as to justify reconsideration. Those issues are not reached in this proceeding.

The Board deems the order of the Hearing Officer to have become final. Upon this basis the order of the Hearing Officer is affirmed and the request for review is dismissed.

WCB #69-1817 June 26, 1970

CLARENCE DEBNAM, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 46 year old claimant employed as a welder sustained a compensable low back injury when he was allegedly kicked or kneed in the posterior by his foreman on August 4, 1969.

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

All three of the principal witnesses, including the claimant, a fellow workman and the foreman have a history of prior low back problems. The claimant's history includes slipping on a pencil on December 23, 1966 with a resultant lumbosacral strain and litigation, an auto accident on July 14, 1967 when a wheel came off his car with resultant aggravation of a left hip arthritis and litigation and a strained back on the job on April 4, 1968 when lifting a metal object from his foot. That claim was accepted and may serve as the basis of any compensable aggravation attributable thereto.

The witnesses are at odds over whether any such incident occurred. The Board is not unanimous in its decision. The Board counsel appears to have been entirely unfounded. The merits of the case basically must rest upon which witness to believe. The tactics of counsel in thus asserting "foul" before the contest hardly began was obviously aimed at making any decision against her client untenable regardless of the facts.

The majority of the Board express their confidence in the ability of the Hearing Officer to rise above the contention and express his honest conviction and appraisal of the evidence. The circumstances are not such that the Board should substitute its judgment for that of the Hearing Officer. The claimant's own version of what happened reflects that even if he was kicked, kneed or bumped as alleged the trauma was not such as to inflict physical injury. The claimant's uncertain testimony of the mechanics of the alleged blow rather reflects that if the incident occurred, the only injury was to claimant's personal feelings for never having experienced a similar incident in his life. The claimant's uncertainty over what actually happened is matched by a similar evasiveness over the events of the two preceding weeks while on vacation.

The majority of the Board therefore concludes and finds that the claimant did not sustain a compensable accidental injury as alleged.

The order of the Hearing Officer is affirmed.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan dissents as follows:

I cannot agree with the Hearing Officer that the denial of this claim should be affirmed.

The Hearing Officer states that claimant was evasive and "had a remarkable lack of recollection" of his activities during the two weeks immediately preceding August 4, 1969. Counsel for the employer asked questions about this period in such a way as to confuse the witness, such as connecting claimant with a strike and walking a picket line. The claimant's union was not on strike. Also by asking for details of what claimant did while on vacation, did he go on a trip, did he receive any injuries, etc.

The Hearing Officer expected the claimant to recite all of the details of the incident at the coffee machine, and feels that "these circumstances would be indelibly impressed upon the minds of the participants." The Hearing Officer refers to the claimant stating that he was in a stooped-over

position, whereas Mr. Wicks stated claimant was standing up. The actual occurrence would have been a matter of a second or two. It is not unusual to have several eyewitnesses to an occurrence give honest opinions as to what happened and no two account will be the same. The claimant would naturally have been startled and should not be expected to remember as well as Mr. Wicks.

The Hearing Officer places a high degree of credibility on the testimony of Wicks. It is logical to assume that Wicks would have a better opportunity to observe what actually happened than the claimant, whose back was toward the person who kicked or kneed him. Further, the claimant would naturally be upset and his dignity affected.

The demeanor of a witness can affect the degree of credibility to be given to his testimony. However, a witness is presumed to speak the truth. The testimony of the claimant cannot be completely nullified by demeanor in this case. There was nothing that would impeach the honesty or integrity of the claimant.

The Hearing Officer places a great deal of reliance on the testimony of Mr. Wicks, who was the only one of the three principal characters that had no interest in the outcome of the matter. The Hearing Officer recited:

> "On the other hand, Mr. Wicks' demeanor was such as to invoke confidence and belief. The essential elements of his testimony were the same from the time he was first interviewed by an investigator to the time of testifying at the hearing . . ."

Mr. Hopman denies any part in the incident. It would be expected that the employer would produce witnesses to testify that Mr. Hopman is "a good hard worker," "a good foreman" and "dedicated to his job."

Another foreman, Mr. Olsen, admits there is horseplay. It would be hard to believe anyone who would state there was not. In Stark v. SIAC, the Oregon Supreme Court stated that redblooded American men could be expected to indulge in horseplay. That decision was rendered many years ago, but human nature has not changed since.

The testimony of the eyewitness Wicks, to whom the Hearing Officer pays a high compliment for reliability, and who had no interest in the outcome of the hearing, is enough to convince one that the incident happened as he testified to under oath.

The claimant reported the incident to the nurse at the first aid station the very next day. It is recorded in the log and that is in evidence. The employer was thus notified. The 801 was signed by the workman on April 12, 1968 and signed by the employer's authorized representative the same day. The claimant sought and received medical treatment April 8, 1969.

This evidence cannot be ignored. Nor is it overcome by the denial of Mr. Hopman and the Hearing Officer's disbelief of the claimant's testimony because of confusion and demeanor.

The claim of Clarence W. Debnam is compensable.

WCB #69-1547 June 26, 1970

THOMAS L. SMITH, Claimant.
Request for Review by Claimant.

The above entitled matter involves three issues: the extent of permanent partial disability, the need for further medical care and treatment, and the payment of medical treatment provided after determination and prior to hearing of the claim. On January 31, 1967, the 48 year old claimant employed as a lumper whose duties consist of unloading freight from trucks, sustained a low back inuury as a result of losing control of a box being unloaded from a truck.

The claim was originally denied by the State Accident Insurance Fund on the ground that the claimant was not an employe of the employer at the time of the injury. The Hearing Officer held that the claimant had sustained a compensable injury. The order of the Hearing Officer entered on October 2, 1967, remanding the claim for acceptance and the payment of compensation was affirmed and became final following Board review and Court appeal.

The order of the Closing and Evaluation Division of the Workmen's Compensation Board entered on September 25, 1968, determined pursuant to ORS 656.268 that the claimant was entitled to compensation for temporary total disability to February 20, 1967; and that the claimant had sustained no permanent partial disability as a result of the accidental injury.

Following the entry of the determination order, the claimant filed a claim for increased compensation on account of aggravation. The order of the Hearing Officer entered on July 9, 1969, dismissed the aggravation claim as being without merit. Neither party requested Board review and this order has become final.

The claimant thereafter requested a hearing on an appeal from the determination order. This hearing resulted in the order of the Hearing Officer which has been subjected to this review by the Board affirming the determination of the Closing and Evaluation Division. The Hearing Officer's order also rejected the claimant's contentions that he required further medical care and treatment and that the expesne of medical treatment incurred after the claim was closed should be paid by the State Accident Insurance Fund. Subsequent to filing the claimant's request for Board review, claimant's counsel withdrew from the case. The claimant has elected to proceed with the review without counsel and without filing a brief. As a result, this review is made by the Board without the benefit of briefs from either party.

The claimant was initially treated for a period of approximately 20 days following his injury by Dr. Hill, a chiropractic physician, whose reports reflect that as a result of this brief periods of chiropractic treatment the claimant's condition became medically stationary and he was able to resume regular employment on February 20, 1967. Dr. Hill's medical reports also reflect his opinion that the claimant sustained no permanent disability as a result of the accidental injury.

The claimant returned to work unloading trucks as an independent contractor but found this work to be more onerous after his injury. He thereafter worked steadily in a succession of jobs primarily as a truck driver.

In December of 1968 he commenced his present employment as a truck driver for a beverage company, which he indicates is a much better job than he has previously held. His present earnings of over $1,200 per month are substantially in excess of his prior earnings.

The claimant indicates that he experiences an essentially constant annoying pain in his low back which causes some soreness in his low back after extensive lifting and some limitation in his ability to lift very heavy objects, and requires that he take more frequent rest breaks when driving a truck, although he is not precluded from the efficient performance of his truck driving duties. The Hearing Officer found and the Board also finds that the claimant's pain and suffering has not resulted in or caused any physical disability. Pain and suffering which does not result in disability is not compensable. Wilson v. SIAC, 189 Or 114 (1950); Lindeman v. SIAC, 183 Or 245 (1948). See also Hannan v. Good Samaritan Hospital, 90 Or Adv Sh 1517, _____ Or App ____(1970). The Board based upon its own independent de novo review of the record, concurs upon its own independent de novo review of the record, concurs with the Hearing Officer in finding and concluding that the evidence of record fails to establish that the claimant has sustained any permanent disability as a result of his accidental injury.

The claimant contends that further medical care and treatment is required for his low back condition. The necessity for further medical treatment must as a general rule be established by expert medical opinion. Dimitroff v. SIAC, 209 Or 316 (1957). No medical evidence in support of his position was offered by the claimant. Additionally, the claimant's testimony is grossly lacking in providing clarification or producing conviction with respect to his need for future medical treatment. The Hearing Officer found and concluded that the claimant had failed to sustain his burden of proof relative to his need for further medical treatment and the Board's de novo review of the records results in its concurrence with the finding and conclusion of the Hearing Officer.

The claimant seeks payment by the State Accident Insurance Fund of the medical expense incurred for a series of chiropractic treatments provided by Dr. Rarey, a chirporactic physician, commencing in March of 1969. The Hearing Officer found and the Board from its own independent review of the record concurs that the evidence supports a finding that the chiropractic treatment was clearly palliative in affording the claimant temporary relief for a few days. Medical treatment that is only palliative and not curative after the claimant's condition has become medically stationary is not compensable. Tooley v. SIAC, 239 Or 466 (1965). The Board further finds that the claimant failed to produce sufficient evidence to sustain his burden of proof on this issue. The Board concludes, therefore, that the State Accident Insurance Fund is not responsible for the payment of the medical expense incurred by the claimant for the medical treatment provided by Dr. Rarey.

The order of the Hearing Officer made and entered in the above entitled matter is therefore affirmed.

WCB #69-2119 June 29, 1970

CLARENCE LASLEY, 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 welder who caught his right hand between a cable and winch on November 7, 1968.

Pursuant to ORS 656.268, a determination issued by the Closing and Evaluation Division of the Workmen's Compensation Board on October 22, 1969, finding the claimant to have a permanent disability of 30 degrees for injury to the right arm below the elbow against the applicable maximum of 150 degrees for a total loss of that portion of the extremity.

This award was affirmed by the Hearing Officer.

The fracture of the navicular bone in the wrist has resulted in a non-union but this is not considered of sufficient consequence to warrant further treatment. The prime residual problem appears to be a weakness and sensory loss in the fingers. Some improvement may be expected with exercises to improve the princh and grip.

The claimant, after first returning to lighter work, has resumed his normal job without loss of earnings and is able to perform his work adequately.

The Board concurs with the Hearing Officer and concludes and finds that the proportionate loss of the arm below the elbow does not exceed the 30 degrees heretofore awarded.

The order of the Hearing Officer is therefore affirmed.

WCB #69-1555 and
WCB #69-1556 June 29, 1970

OLIVER E. McMILLAN, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues arising from the second and third of three claims for low back injuries arising from three separate employers and two of their insurers.

The first incident, not apparently at issue here, involved an accident while employed as a maintenance engineer at the Portland Sheraton Hotel on May 13, 1964. He was hospitalized several times for conservative treatment and subjected to surgery involving the area from the third lumbar to the first sacral segments of the spine.

Shortly thereafter, while employed at Alpenrose Dairy on January 5, 1966, the claimant slipped and strained the lumbar area of the back. In a subsequent proceeding the back disability was evaluated as 51% of an arm with 15% of an arm attributable to the January, 1966, Alpenrose claim. The current proceedings involve an alleged aggravation of those injuries which have been denied by the employer.

The third back incident involved stepping off a curb in downtown Portland on April 14, 1969. The actual day is uncertain and was not reported to the alleged employer, Sunset Hills Memorial Park, for at least 49 days. The claimant was enroute back to his car after his customary restaurant breakfast. The claimant's regular employment had been terminated more than two months before April of 1969. The claimant did negotiate one sale and it is contended that the date of that sale was the date he slipped on the curb. That sale was accepted by Sunset Hills despite the prior termination of employment. This claim was denied on the basis that the claimant was not in the course of employment when injured and that the untimely notice prejudiced the employer and its insurer with respect to determining the validity of the claim.

The curb slipping incident of April 14, if it did occur, was at a time when the claimant was no longer employed. The fact that he undertook to negotiate a sale which was accepted as a customer courtesy would unilaterally and retroactively vest the alleged employer with all of the responsibilities of an employer. Even had the claimant been a regular salesman, he was on a personal diversion to obtain breakfast under circumstances not incidental to, contemplated or required by any employment. Further, if the claim was otherwise compensable, the delay in giving notice under the circumstances was such as to bar the claim.

The Board concludes and finds that any injury incurred in stepping off the curb did not arise out of or in course of employment and, if it did so arise, the claim should be barred by reason of prejudicial untimely notice.

The order of the Hearing Officer upholding the denial by the State Accident Insurance Fund of the April 14, 1969 injury is affirmed.

The issue remains as to whether the claimant has sustained a compensable aggravation of the previous accidental injury of January 5, 1966. The claimant's condition did become worse at some time later but the claimant himself attributes and associates that worsening by the slip and fall when he misjudged the height of the curb. This constituted such a subsequent independent intervening event that any increase in disability was attributable to that incident and was not compensably related to former accident or accidents. That incident on this record could not serve as the basis for a valid claim of aggravation with respect to previous accidents.

The order of the Hearing Officer upholding the denial of the claim for aggravation is therefore also affirmed. The results of the Hearing Officer decision are affirmed in all respects.

WCB #69-2353 June 29, 1970

WILLIE L. LESLIE, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 56 year old painter who jumped from a slipping ladder and fractured his right ankle on August 26, 1969.

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 7 degrees against the applicable maximum of 135 degrees for injuries to the leg below the knee.

This determination was affirmed by the Hearing Officer.

The claimant was able to return to his former employment and subsequently undertook custodial work which he is able to perform though evaluated by the claimant as being more arduous and difficult than painting. The claimant has some pain and discomfort, but the symptoms only minimally affect the claimant's work capacity.

There is some misleading implication in the Hearing Officer conclusion II with respect to whether loss of earning capacity is a factor in evaluation of disability. In light of Trent v. SCD, 90 Or Adv Sh 725, 729, ____ Or App ____, 466 P.2d 622(1970), loss of earning capacity is a factor. There is no apparent loss of earning capacity in this case where the fracture healed in good alignment with no evidence of impairment of nerves, muscles or circulation. The occasional symptom is only minimally disabling.

The Board concludes and finds that the disability, considering all factors, does not exceed the 7 degrees heretofore awarded.

The order of the Hearing Officer is affirmed.

WCB #70-642 June 29, 1970

ALICE M. HAYES, Claimant.

The above entitled matter involves the procedural issue of whether the claimant is entitled to a hearing as a matter of right upon a claim of aggravation for a pre-1966 injury.

The law in effect on the date of injury, ORS 656.276(2), required an application for increased compensation to be filed within 2 years of the first final award of compensation. The first final award in this claim was issued by the then State Industrial Accident Commission on October 8, 1965. October 8, 1967 would be the last day for filing the claim under the pre-1966 procedures.

All claims arising on or after January 1, 1966 are finally closed by a determination issued by the Closing and Evaluation Division of the Workmen's Compensation Board pursuant to ORS 656.268. A request for hearing on such claims must be filed within five years of that determination date.

In this claim there has never been any such determination, the matter never having been brought before the Workmen's Compensation Board prior to this claim of aggravation.

O L 1965, Ch 285, Sec 43 provides generally that proceedings rights and remedies for pre-1966 injuries are governed by the law in effect at the time of injury. However, when the State Compensation Department (now State Accident Insurance Fund) makes an order, decision or award post January 1, 1966, the claimant is given an election whether to proceed under the pre-1966 or post January 1, 1966 procedures. In this claim, the State Compensation Department made orders on November 23, 1966, on February 28, 1967 and on September 6, 1968. The claimant, under the frequency, had 60 days from those orders within which to elect a review under either the new or prior Act. No such election was made and the last order of the State Compensation Department of September 6, 1968 is long since final as a matter of law.

The State Compensation Department has issued no new order to serve as the basis for an election of procedures. It is clear that there are no longer two choices since under the pre-1966 law any claim of aggravation was required to be filed by October 8, 1967.

Under these circumstances, without any order upon which to exercise an election, without a viable choice of remedies and without any determination pursuant to ORS 656.268, the claimant asserts that she still has the right to "elect" a hearing on a claim of aggravation under the new law.

The Board concludes that in order to permit a choice of the two procedures, the claim must be in such a posture that there is in effect a real choice available to the claimant. On the basis of an aggravation the claimant's choice of procedure expired on October 8, 1967. As a matter of review and appeal from an order of the State Compensation Department (State Accident Insurance Fund) the last right of choice of procedure expired 60 days following the order of September 6, 1968.

It should be noted that the claimant did not supply any medical report as required by ORS 656.271 and was not entitled to a hearing in any event aside from the choice of remedy considerations.

The order of the Hearing Officer dismissing the request for hearing is affirmed.

It should be further noted that pursuant to ORS 656.278 the Workmen's Compensation Board has continuing own motion jurisdiction over this and all other pre-1966 injuries. At such time as evidence is tendered to the Board from which it appears to the Board that own motion jurisdiction should be invoked, the Board will of course cause the matter to be considered further.

WCB #69-1247 July 1, 1970

CLAUDE H. TAYLOR, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 34 year old workman as the result of an incident on October 5, 1967 when the claimant was loading channel iron onto a truck and incurred some exacerbation of problems in the cervical area.

The claimant's back problems date back at least to 1962 with some indication of degenerative cervical disc disease as early as 1964. The continuity of this problem is reflected in a medical report of April, 1967, some six months prior to the accident at issue.

Pursuant to ORS 656.268, the Closing and Evaluation Division of the Workmen's Compensation Board found there to be no additional permanent disability attributable to the incident of October 5, 1967. This determination was affirmed by the Hearing Officer from whose order the claimant sought this review.

The claimant thus had evidence of permanent disability before and after the accident. Such degenerative processes lend themselves to recurrent exacerbations. The problem, following any of these incidents of exacerbation, is whether the condition has in any degree been permanently worsened or whether there was only a temporary period of increase in disability. The problem is complicated further in this instance by an automobile accident in June of 1968. Though the claimant asserts that only his shoulder was affected by the car hitting a guard rail, he admits (Tr 64) that treatments were received for the neck following that accident.

A substantial part of the evidence is based upon subjective testimony of the claimant. Much of the recitation of symptoms is found in medical history pre-dating the accident at issue. Though here is some medical expression of disability related to the accident at issue, Dr. Campagna's report does not reflect knowledge of the similar symptoms reported in 1967 prior to this accident.

The Board concurs with the Hearing Officer and concludes and finds that there was no additional permanent disability incurred in the October 5, 1967 incident while loading channel iron.

The order of the Hearing Officer is affirmed.

SAIF # BA 427810 July 1, 1970

CHARLES E. McDOWELL, Claimant.

The above entitled matter involves a 50 year old claimant whose unscheduled injuires prior thereto were the basis of a jury determination in 1954 that the claimant was permanently and totally disabled and precluded from engaging in a regular, gainful and suitable occupation.

The State Accident Insurance Fund has presented certain information to the Workmen's Compensation Board indicating that the claimant has been working regularly at a gainful and suitable occupation and based upon such assertions, the State Accident Insurance Fund seeks a modification of the award of permanent total disability.

Pursuant to the authority vested in the Workmen's Compensation Board by ORS 656.278, the Board deems the representations of the State Accident Insurance Fund sufficient to warrant holding a hearing for the purpose of taking evidence as the basis for the possible exercise of the Board's own motion jurisdiction.

It is accordingly ordered that the matter be referred to the Hearings Division and that a hearing be had on the extent of the claimant's permanent disability attributable to the accident. The burden of proof with respect to the issue of whether the award of permanent total disability should be reduced is vested upon the State Accident Insurance Fund. Upon conclusion of the hearing, the proceedings shall be transcribed forthwith and forwarded to the Workmen's Compensation Board for decision on the issue without findings or order by the Hearing Officer.

The parties are advised that if the award is not reduced, the provisions of ORS 656.382(2) are applicable for imposition of attorney fees payable by the State Accident Insurance Fund.

WCB #69-855 July 1, 1970

DARRELL G. RANGER, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of whether the claimant's condition is medically stationary for the purpose of making a claim closure and determination pursuant to ORS 656.268.

The Closing and Evaluation Division of the Workmen's Compensation Board had so closed the claim on October 25, 1968. However, following a hearing the Hearing Officer ordered:

> "...that the employer-insurer reopen this claim and provide claimant with further medical care and treatment and time loss benefits, if the latter becomes necessary, from October 25, 1968 (date of Determination) to the date that the claim is again closed pursuant to ORS 656.268. Filing a request for review by the employer or its insurer does not stay payment of compensation to claimant."

The accident involved the rather unusual situation of the claimant falling (apparently caused by fainting) from a chair while watching a rather gruesome safety film presented for the purpose of avoiding injuries. In the fall from the chair he incurred contusions over the right mastoid region and some cervical strain.

Among the symptoms related by the claimant are headaches and dizzy spells. The claimant had experienced similar symptoms before but purportedly not with the same degree of severity.

Extensive treatment including neurological testing has produced only minimal findings. One of the treating doctors has diagnosed a Petit Mal type of epilepsy probably unrelated to the accident. Another doctor, Dr. Larson, concludes that the claimant's pre-accident personality structure was such that a traumatic neurosis arose from the situation. The latter conclusion was obtained from Dr. Larson as the result of a special interrogatory submitted by the Hearing Officer. In a further hearing, being ordered, a report from Dr. Larson should reflect whether Dr. Larson was made aware of the claimant's pattern of pre-existing headaches and dizzy spells.

An earlier report by Dr. Larson in August of 1968, (Joint Exhibit 5) reflected, "He is presently having no significant symptoms. He is taking medication prescribed by his physician. I think these symptoms are benign, will disappear and there will be no residuals from the blow on his head."

That report indicates a course of improvement but a claim closure even on the basis of that report would not be inconsistent with the facts recited.

The problem the Board faces nearly two years later is just what further medical care is now required. The supplemental diagnosis of the condition obtained by the Hearing Officer does not bear with it any recommendation for further care which would warrant keeping the claim in open status. The Board deems the supporting opinion of a doctor vital toward any order requiring medical care to be provided.

The Board concludes that the matter was not completely heard or developed on this issue. The matter is accordingly remanded to the Hearing Officer pursuant to ORS 656.295(5) for further medical evidence and for such further order as the Hearing Officer may deem proper upon the entire record following the receipt of such further evidence.

No notice of appeal is deemed applicable.

WCB #69-1938 and
WCB #70-223 July 6, 1970

RICHARD G. GOSSER, Claimant.
Request for Review by Claimant.

The above entitled matter involves a chain of at least six accidents and incidents incurred by a 37 year old logger affecting his neck and cervical area starting on January 15 of 1968 when he lost control of his truck and bounced about inside the truck cab as the truck went into a deep ditch.

Three months later the claimant had returned to work for another employer and on April 23, 1968 his truck hit a rock and the claimant bounced about with sufficient force to strike his head on the cab of the truck. The employers with respect to both the January and April, 1968 accidents were insured with the State Accident Insurance Fund and claims were filed and allowed with respect to both accidents.

Both claims have been the subject of hearings proceedings and they are joined for the purpose of resolving the overlapping issues. The basic issue is one of extent of permanent disability to these accidents.

At this point the other four accidents or incidents should be noted. They may be identified as the firewood incident at home in June of 1968; the stereo accident of January, 1960; the auto seat accident of March, 1969 and the sewing machine accident of September, 1969. The stereo and sewing machine accidents apparently arose out of employment situations but no claims were filed. Apparently the claimant entered into understandings with employers that no claims would be filed if he sustained further injuries. The claimant is quite anxious to separate the auto seat accident, since he is making a claim against the auto manufacturer. The total picture is one of the claimant picking and choosing remedies by convenience rather than with regard to the rights of the various parties involved. In Keefer v. SIAC, 171 Or 405, the Supreme Court discussed successive injuries to a knee as follows:

> "Even though the injury to the plaintiff's knee caused by the accident of 1940 may have been aggravated by the 1941 accident, nevertheless the only compensation he could recover for that condition would be the award to be allowed him on a new and separate claim based solely on his injuries resulting from the later accident."

Part of the confusion surrounding the situation before the bar is the insistence of claimant's counsel in insisting that an "aggravation" by a second accident is to be treated as an aggravation claim in which the burden is born by the employer involved in the first accident rather than being processed as a new and independent accident. The quotation from the Keefer case above recognizes that a second injury may "aggravate" a first injury. The Court makes it clear, however, that this is not the basis for a claim of aggravation as to the first injury.

It has been facetiously suggested in other matters reviewed by the Board that a new accident occurs on the job, but a claim of aggravation occurs at home. Whatever little merit is involved in this approach, it is to the credit of the State Accident Insurance Fund that the incident at home in June of 1968 involving symptoms while handling wood was accepted by the State Accident Insurance Fund as a part of its continuing liability. Counsel for claimant even seeks to impose penalties upon the State Accident Insurance Fund for some unrelated remark of counsel for the State Accident Insurance Fund despite the fact that the State Accident Insurance Fund had voluntarily and without issue accepted and paid for medical care associated with the exacerbation at home while handling wood.

The claimant's admission to the hospital in January of 1969, (Claimant's Exhibit A-27) reflects that, "He has been in traction several times intermittently up to May, 1968 and since then has been relatively well. P I:

began Sunday when a stereo box fell and he caught it to break the fall causing severe pain in the neck and numbness of the right hand." As noted by the Hearing Officer, these stereo units weighed 85 pounds and were stacked four high.

The September, 1969 sewing machine accident involved incurring a distinct snap in his neck while lifting a sewing machine into a car.

The significance of the stereo, car seat and sewing machine incidents of January, March and September respectively of 1969 is that they imposed no liability upon the State Accident Insurance Fund either for medical care, time loss or permanent partial disability.

We revert now to the accidents at issue of the wreck in January of 1968 and the head bumping of April, 1968.

Pursuant to ORS 656.268, a determination issued by the Closing and Evaluation Division of the Workmen's Compensation Board finding the claimant to have permanent unscheduled disabilities of 32 degrees out of the applicable maximum of 320 degrees. Upon hearing, this award was increased to 96 degrees. The claimant urges that he is permanently precluded by that accident from regularly engaging in any gainful or suitable occupation. The claimant is obviously not totally disabled and even if he were to be found to be so disabled, it would be impossible to ignore the subsequent chain of accidents and attribute total disability to the accident of January, 1968.

The Board concurs with the Hearing Officer and finds that any permanent disability attributable to the accident of January 1968 does not exceed the 96 degrees found by the Hearing Officer.

The other proceeding before the Board involves the contention that the falling stereo accident of January, 1969 should be considered as a compensable aggravation of the truck accident of January, 1968. The incongruity of the procedural involvement is that neither of the claims accepted by the State Accident Insurance Fund for accidents in January and April of 1968 were closed until August of 1969. The claimant is in the position of attempting to now proceed on an aggravation theory with respect to an injury of January, 1969 for which he has filed no claim but he ignores the fact that the claim against which he asserts aggravation was open for another eight months. As noted above, the January, 1969 stereo incident was a new accident and is not the proper basis for a claim of aggravation. If a bona fide exacerbation occurred in January of 1969, which would otherwise justify a claim of aggravation, any issue of disability merged into the subsequent original closing of the prior accident.

The request for hearing as to the claim of aggravation was dismissed for want of a supporting medical opinion. The statements of counsel and the entire record reflect that there is no legal basis for the claim of aggravation for the reasons that any claim of aggravation was premature and further that claimant admits to a new accidental injury and mistakenly takes the position that a new accident qualified as an aggravation claim with respect to a prior accident.

For the reasons stated, the decisions of the Hearing Officer in both matters are hereby affirmed.

WCB #69-1561 July 6, 1970

FARRIS SAMPLEY, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 37 year old pond man and log scaler who fell on his back on March 2, 1968 and incurred a low back strain.

Pursuant to ORS 656.268, the Closing and Evaluation Division of the Workmen's Compensation Board determined the claimant to have no residual permanent disability. Upon hearing the Hearing Officer found and awarded 65 degrees against the applicable maximum of 320 degrees for unscheduled disabilities. The State Accident Insurance Fund on review concedes the claimant may have a minimal disability but urges that the award of the Hearing Officer is excessive.

The Workmen's Compensation Board in its de novo review of the matter is not unanimous in its findings.

The problem of evaluation is complicated by the fact that the claimant's physical disability does appear to be minimal. The claimant has emotional problems which, coupled with educational and vocational limitations, have convinced the majority of the Board that the award by the Hearing Officer is appropriate. If one were to disregard the claimant's exaggeration of his physical problems and also disregard the claimant's failure to apply his talents toward re-employment the appropriate disability award might even be greater.

For the reasons stated, the order of the Hearing Officer is affirmed by the majority of the Board.

Pursuant to ORS 656.386, counsel for claimant is allowed the fee of $250 payable by the State Accident Insurance Fund for services rendered on a review requested by the State Accident Insurance Fund.

/s/ M. Keith Wilson
/s/ Wm. A. Callahan

Mr. Redman dissents as follows:

Mr. Redman dissents for the reason that the claimant's emotional problems pre-existed the accidental injury and there is no substantial evidence to support a conclusion that those problems were materially or permanently exacerbated by the accident. The fact that a workman has a pattern of hostilities toward life situations does not render those hostilities compensable simply because an injured workman is motivated to focus those hostilities upon a minimal injury. Mr. Redman does conclude, however, that there is some residual disability attributable to the accident which he evaluates at 32 degrees.

/s/ James Redman.

WCB #70-383 July 7, 1970

The Beneficiaries of
DARRELL R. McLAWS, Deceased.

The above entitled matter involves the legal issue of whether the surviving spouse of a claimant may establish an award of compensation for permanent partial disability following the death of the workman.

The workman in this instance was working in a shingle mill and sustained severe cuts to the upper part of his body when he fell into the cutoff saw on April 8, 1966.

The claim had not been closed and the workman was being paid as temporarily partially disabled when he met his death from unrelated causes in an automobile accident on January 7, 1970.

The request of the surviving spouse to establish as award of permanent partial disability posthumously was denied by the Hearing Officer in keeping with the recent decision of Fertig v. SCD, 88 Or Adv Sh 505, 89 Or Adv Sh 75, 455 P.2d 180. The issue is a close one in light of the 4-3 decision by the Supreme Court.

ORS 656.218 is the section of the law applicable to the case. That section is restricted to those "receiving monthly payments." It is the contention of the beneficiary in the instant case that the decedent "should have been receiving the payments." The problem, of course, is that the degree of permanent disability is not determinable until maximum recovery has been obtained and the decedent in this instance was still not medically stationary at the time of his death.

The Board construes the decision of the Supreme Court to be applicable and controlling. The Court's decision on rehearing italicised the words "receiving monthly payments." The initial decision emphasized the necessity of an award. Any modification or change in interpretation should come from the Courts and not from an administrative avoidance of what appears to be a rather clear declaration of the law.

The order of the Hearing Officer dismissing the claim is affirmed.

WCB #69-1838 July 7, 1970

ORVAL BAKER, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of the permanent disability sustained by a 31 year old claimant on July 15, 1966 as the result of a crushing type injury to the left hand.

Pursuant to ORS 656.268, a determination issued finding the disability to be 109 degrees. The left thumb was amputated and an effort was made to surgically rotate the fingers to compensate for the loss of the thumb. The claimant retains the remaining digits but their strength and efficiency are severely impaired.

The accident occurred subject to the benefit schedule in effect under the law then in effect. There is a reference in the Hearing Officer order to an applicable maximum of 150 degrees. Such a maximum applies only to a separation of all five digits or a separation of the forearm. With somewhat useable four digits remaining, the applicable maximum is 121 degrees.

Reviewing the record in contemplation of the legislative maximum of 121 degrees, the award of 109 degrees by the Closing and Evaluation Division as affirmed by the Hearing Officer reflects a recognition of about a 90% loss of the forearm.

The Board concludes and finds that the disability does not exceed the 109 degrees heretofore awarded.

The order of the Hearing Officer is therefore affirmed.

WCB #69-1033 July 7, 1970

MABLE J. SULLIVAN, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues concerning the applicable rate of temporary total disability compensation benefits, whether the claimant's condition is medically stationary, if so, the extent of permanent partial disability and also whether penalties should be applied against the employer for alleged unreasonable delay in making payments.

The claimant was a 48 year old kitchen helper at an osteopathic hospital when she developed back and leg symptoms in October of 1967.

The administration of the claim has had a stormy course including a previous hearing and Board review which is apparently still pending on appeal in the Circuit Court for the County of Multnomah. The prior orders of the Hearing Officer and Workmen's Compensation Board ordered the claim reopened for further medical care and temporary total disability. An appeal from such an order does not preclude further consideration by the Workmen's Compensation Board for purposes of claim closure while the first order is pending on Court appeal.

The last closure by Closing and Evaluation of July 23, 1969 allowed certain limited periods of additional permanent partial disability but found no permanent partial disability attributable to this accident. Upon hearing the Hearing Officer found there to be unscheduled permanent partial disability of 32 degrees for unscheduled disabilities out of the applicable maximum of 320 degrees and made certain adjustments with respect to the compensation for temporary total disability paid and found to be overpaid.

One matter of note not signalled out for special comment by the Hearing Officer is the report of Dr. Kiest of March 29, 1969 at the first hearing. The claimant was observed graphically performing certain motions without difficulty which she alleges caused her problems.

The order of the Hearing Officer covers approximately six pages. The proceedings are sufficiently involved and complex that any independent recitation might serve to confuse rather than to clarify the issue.

The Board, in arriving at its decision, has considered the proceedings at both hearings including the proceedings in the case now on appeal to Court.

The Board, by reference, adopts the history of the case and the findings and conclusions of the Hearing Officer as the findings and conclusions of the Board.

The order of the Hearing Officer is therefore affirmed.

WCB #69-1911 July 7, 1970

SAM BITTNER, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability incurred by a 40 year old mushroom farm laborer as the result of being struck in the lower back by the scoop bucket of a tractor while working on March 5, 1968.

Pursuant to ORS 656.268, a determination issued July 31, 1969 finding the claimant to have a disability attributable to that accidental injury of 48 degrees against the applicable maximum for unscheduled injuries of 320 degrees.

Much of the issue at hearing and on review involves the question of the factor of loss of earnings following the decision of Ryf v. Hoffman Construction. The Hearing Officer concluded that the physical impairment was 96 degrees and that a further factor of 60 degrees should be added for a purported earnings loss of 18.7%.

Prior to the accident the claimant was earning $2.35 per hour but was working a 54 hour week. The claimant has now taken state employment as a building custodian at $447 per month. There is no indication that the claimant could not continue his former employment or that his new work as a custodian is less onerous. Actually the rate per hour on the new work appears to be higher than the work at which he was injured. The current dimunition of total earnings on a comparative basis appears to be based upon the choice of occupations. Further, as a civil service position, the expectation is that the present work will automatically become more remunerative and so called fringe benefits affect the comparison favorably to the state work.

The Board finds that this relatively husky workman is now precluded from the heaviest type of work but that he is still able to do moderately heavy chores. The Board also concludes from the foregoing that no factor of earnings loss should be applied.

The Board concludes and finds that the initial determination of 48 degrees is a proper evaluation of disability. The order of the Hearing Officer is therefore set aside and the order evaluating the permanent disability at 48 degrees is reinstated.

No compensation paid by virtue of the Hearing Officer order pending review is repayable pursuant to ORS 656.313.

Counsel for claimant is authorized to collect a fee from the claimant of not to exceed $125 for services in connection with the employer initiated review.

WCB #69-2187 July 7, 1970

DAVID G. OBERMAN, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 22 year old laborer who sustained some low back difficulties as the result of lifting cement forms on April 15, 1969.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent disability attributable to that incident of 16 degrees out of the applicable maximum of 320 degrees.

Upon hearing this determination was increased to an award of 64 degrees.

The claimant's situation is one that involves a preexisting, but basically asymptomatic, degenerative back prior to the incident. The graphic display in claimant's brief upon review is not an accurate picturization of the facts. There was some forward displacement of the vertebral body, a defect purportedly common and associated with man's anthropological development in becoming an erect creature. The problem in evaluating disability is that some defect in the physical structure exists before an accidental injury even though it may be nonsymptomatic. The avoidance of further work situations which could produce recurrent injury is not dictated by the fact that symptoms developed. Such avoidance is related primarily to the basic underlying defect. However, there is obviously some degree of disability attributable to the accident in this instance. The Board concludes and finds that the disability so attributable in this instance does not exceed 32 degrees.

The order of the Hearing Officer is modified accordingly and the claimant is found to have an unscheduled disability of 32 degrees.

WCB #69-1986 July 8, 1970

ROYCE JIMISON, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 32 year old claimant sustained a compensable hearing loss as the result of being struck in the chest and chin by a plank while helping load a tractor on September 12, 1967.

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 for such injuries. This award was affirmed by the Hearing

Officer taking into consideration chest pains, high frequency hearing loss and problems due to loss of a small portion of the tongue. If there was a measurable compensable hearing loss it should, of course, be segregated for separate award as a scheduled injury. There is a serious doubt whether there is any hearing loss attributable to the accidental injury. If there is any such loss it is characterized as slight and is in the ranges not normally affecting a workman's work capabilities.

The Workmen's Compensation Board has no judicial appellate guidelines on this issue. There is, however, judicial basis for the proposition that pain per se, for instance, is not compensable unless it is disabling pain. The human ear is capable of detecting noise in terms of cycle measurements upwards to 20,000 cycles. Ordinary communication is limited to 3 or 4,000 cycles. A good example of the principle is the use of specialized whistles for dogs which are audible to the dog but not to the ordinary person. It is conceivable that some workman might be engaged in an occupation requiring hearing capabilities in exceptionally high ranges. The Board will not establish as fixed policy a proposition that losses of hearing in ranges beyond normal use are never compensable.

The Board adopts a construction of the law that in order for a hearing loss to be compensable it must appear that the claimant has sustained a loss of some degree of useful normal hearing. It is significant that with regard to hearing losses, the Legislature has chosen to qualify the compensability by use of the words "normal . . . hearing."

The Board concludes and finds that the claimant has not sustained a loss of normal hearing and further that any loss of hearing is so slight as to constitute no measurable compensable loss.

The order of the Hearing Officer is affirmed.

WCB #70-438 July 8, 1970

ROBERT H. ROBBINS, Claimant.
Request for Review by Claimant.

The above entitled matter involved a procedural issue following a low back injury on September 23, 1967 subsequent to which the claimant was determined on April 30, 1969 to have an unscheduled disability of 32 degrees. The claimant applied for and received a lump sum settlement pursuant to ORS 656.230. The claimant subsequently sought a hearing on the determination order. The request for hearing was dismissed upon the basis of ORS 656.304 precluding appeals following lump sum or accelerated award payments.

The claimant requested a review and pending review the parties have submitted a stipulation which is attached and by reference made a part of this order.

Pursuant to that stipulation the claimant's award for unscheduled disabilities is increased from 32 to 64 degrees, certain medical charges of Dr. Schlichting are to be paid and counsel for claimant is to receive a fee from the increased compensation in the sum of $200.

The stipulation is hereby approved and the matter is closed upon a basis conforming to that stipulation.

WCB #69-1996 July 8, 1970

RICHARD RODERICK, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of whether the claimant has sustained a compensable aggravation with respect to a crushing injury to the left foot incurred March 16, 1966.

Pursuant to ORS 656.268 on April 30, 1968, a determination issued by the Closing and Evaluation Division of the Workmen's Compensation Board finding the claimant's condition to be medically stationary and finding permanent disability of 50% loss of use of the foot.

The claimant's injuries entitled him to proceed against a third party and settlement was obtained. As noted by the Hearing Officer, the settlement of a third party claim does not preclude a subsequent claim of aggravation for increased benefits and the recovery from a third party is not used as an offset against further benefits from the compensation claim.

The employer's position is that the claimant's condition has not worsened. The claimant has been reluctant to submit to surgery to remove portions of his foot. The employer urges that since there was some indication that this might come to pass that the eventual recourse to surgery was part of the original closure and not an aggravation.

The Board interprets the totality of the evidence to reflect that the condition was still improving when the claim was closed and that the condition became worse to the point that surgery was the choice of necessity.

Whether the employer could have required a retention of some of the third party distribution as part of the reasonably to be expected future expenditures (ORS 656.593(1)(c)) is now moot. Settlement was made apparently without reservations. The claimant's condition worsened to the point that portions of the foot were surgically removed.

The Board concurs with the Hearing Officer and finds and concludes that the evidence supports a compensable claim for aggravation.

The matter is remanded to the employer for the payment of benefits including medical services and associated time loss. The claim is to be re-submitted pursuant to ORS 656.268 when the condition is again stationary.

Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed the further fee of $250 payable by the employer for services on this review.

WCB #69-2157 July 8, 1970

ROBERT LEE SMITH, Claimant.
Request for Review by Claimant.

The above entitled matter apparently involves the compensability of an incident of angina pectoris incurred by a 44 year old cook on September 15, 1969, nearly two hours after he quit working but while waiting at his place of employment for a ride home. There apparently was no coronary infarction or other physical change in the heart. The specific cause in this case is medically unknown. What is medically accepted is that for a short time the heart was deprived of blood supply to the heart muscle. This produced what is known as anginal pain and associated illness. When the circulation is restored the situation returns to normal. The issue is thus restricted to the compensability of the temporary period of distress experienced by the claimant.

The claimant's brief urges that he had been working a double shift prior to September 15th. This is true only in contemplation that August is prior to September 15th since the double shift ended with August.

The claimant's activities in the critical period of time preceding the early Monday morning attack involved the following events. He quit work at midnight. He stayed at the club until 2:30 a.m. He then visited a fellow employe's home after arriving there at between 3:00 and 3:30 a.m. He listened to records and talked with children for as long as an hour and a half and went home. He got up at 8:30 a.m. to attend church. He arrived home from church at 11:00 a.m. and again went to bed for about three hours. He then met his former wife for an outing at the lake. He then reported to work at 6:00 p.m. Sunday, as usual, involved a light work load. The claimant spent a substantial part of his time working crossword puzzles.

There is some medical evidence of long term stress, using a period of eight years, far beyond the employment situation at issue and far beyond any concept of accidental injury. Any long term stress concept cannot ignore the domestic difficulties which admittedly existed and played a substantial part in his problems.

The medical testimony in support of the claim with respect to whether the activity was a material contributing factor is qualified by limiting such a factor as "only inasmuch as it was one more day." Every person who works is under a degree of work stress even if decisions are limited to selecting the small bolts from the big bolts. The degree of work stress on Sunday evening of September 14th could hardly have been less. The claimant, rather than being under stress, resorted to crossword puzzles to relieve the monotony.

The Board concurs with the Hearing Officer and finds and concludes that the claimant did not sustain a compensable accidental injury arising out of or in course of employment.

The order of the Hearing Officer is affirmed.

WCB #69-1241 July 8, 1970

OWEN R. BROWN, Claimant.
Request for Review by Employer.

The above entitled matter basically originally involved only a few days of temporary total disability incurred when the 22 year old log truck driver sustained injuries to his right shoulder, back, head and hands on May 15, 1969 as the result of his truck turning over.

Despite seeing a doctor on the day of injury, the claimant was not released by his doctor to return to work until May 23rd, a Friday. The claimant returned to work on the following Monday, the 26th.

The contention of the employer is that the workman could have physically returned to work and that his failure to do so was due to the alleged lack of another truck.

It is interesting to note that the injury was of sufficient severity to require several stitches behind the right ear and that the treating doctor on the original report indicated that there would be 7-10 days of time loss.

No time loss was paid. In the course of events the claimant returned to work and following allowance of his claim he was fired. Following this he sought a hearing.

The Hearing Officer found the employer had unreasonably delayed and unreasonably refused to pay compensation and assessed penalties and attorney fees conforming to ORS 656.262.

It is unfortunate that the limited liability for temporary total disability compensation has ballooned into a controversy of significant financial consequences. The legislative purpose would be defeated if employers or insurers were permitted to avoid the consequences of unreasonable delays. This was not a case involving a questionable injury. There was substantial trauma and ample evidence of injury. Some workmen have undoubtedly returned to work with greater injury if for no other reason than to display a showing of manliness. The record clearly reflects a claim where the doctor recommended against immediate return to work.

The Board concurs with the Hearing Officer and finds and concludes that the employer unreasonably delayed and refused to pay compensation to which the claimant was entitled.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed the further fee of $250 payable by the employer for services rendered in defense of an unsuccessful appeal by the employer.

WCB #69-1554 July 9, 1970

STUART O. McDOWELL, Claimant.

Workmen's Compensation Board Opinion:

The above entitled matter involves the claim of a 36 year old machine operator engaged in the manufacture of glass bottles who contends that respiratory difficulties were compensably related to his occupational exposure.

The matter has heretofore been the subject of an appeal to the Circuit Court. The matter was subsequently referred to a Medical Board of Review despite dispute over whether the Circuit Court had resolved the issue adversely to the claimant.

The Board is not in receipt of the findings and explanatory report of the Medical Board of Review which are attached, by reference made a part hereof and declared filed by the Workmen's Compensation Board as of July 3, 1970.

Pursuant to ORS 656.812, the duty of the Workmen's Compensation Board in such matters is to file those findings which by ORS 656.814 are declared final and binding.

The Board notes for purposes of the record that the Medical Board finds the claimant does not have an occupational disease and further finds that the claimant's smoking of tobacco is the primary identifiable factor in the etiology of his chronic obstructive pulmonary disease.

Medical Board of Review Opinion:

A Medical Board of Review consisting of Drs. Edward Eberdt, Donald Olson, and myself met to review the WBC file on this 36 year old man on the afternoon of June 15, in the Board Room of Medical Center Hospial (sic), Portland. Our answers to the five questions are enclosed. The history and findings we obtained are reviewed below.

The patient was employed at the Owens-Illinois Glass Company from April, 1962 until June 12, 1969. He was an apprentise for 3½ years, then a machine operator for the manufacture of glass bottles. He worked at the "hot end" of the line, where he felt he was exposed to "fumes of oil and sulfur" as well as to heated air. He threw elemental sulfur into the molds frequently. This part of the plant was often hazy, and he says that it was poorly ventilated. He was required to swab the machines with oil and grease frequently.

He became aware of mild fatigue and shortness of breath on exertion in 1967, but it became rather abruptly more troublesome in the summer of 1968, and progressively more severe. He developed a chronic cough, mostly in the mornings and while at work, associated with some wheezing, especially on exertion. These symptoms gradually began to persist after work. Early in 1969, he began to have episodes of pain in the anterior midchest, with pleuritic exacerbations, lasting up to an hour at a time, and occurring probably two

or three times a month. These sometimes seemed to be brought on by leaning over the machine and lifting. His usual weight had been 164 lbs., but it fell to about 150 lbs. in the summer of 1968, and to about 140 lbs. when he quit work in June of 1969. He seldom missed work for the first six years with this company, but then would often miss one or two days, especially at the first or last of the work week, because of shortness of breath and fatigue.

He started smoking at age 16, and was up to a package of cigarettes a day by age 19. He smoked at least two packages of cigarettes a day for about seven years before seeing Dr. Eberdt in May, 1969. He now smokes a pipe two or three times a day, small cigars two or three times a day, and cigarettes about 6 times a day, but does not inhale the smoke.

He had bilateral pneumonia at age 6; no past history of pleurisy. He has "chest colds" about once a year, most recently in December, 1969 and February, 1970. He has had no significant gastrointestinal symptoms since his hospitalization at Holladay Park Hospital in July (where a hiatal hernia was found). There is some mild chronic nasal obstruction and anterior nasal discharge, but no significant post-nasal drainage or sinusitis pain.

Prior to working for Owens-Illinois, he worked variously as a railroad switchman, janitor, cosmetic salesman, and engineer's aid. He has not been exposed to silica or asbestos.

On physical exam, this tall 36 year old man seemed to be in no apparent distress. His palms were sweaty. An occasional expiratory wheeze was heard bilaterally. Rib motion and breath sounds were satisfactory, as were the heart sounds. There was moderate protuberance of the abdomen; no signs of congestive heart failure.

Chest films taken at Holladay Park on 7/2/69 were reviewed and noted to be essentially negative (interposition of the colon between the diaphragm and liver was noted). Ventilatory tests then showed a normal forced vital capacity, but the first second expired volume which was only 1.34 liters, was 33% of predicted. There was a corresponding reduction of the flow rates. No eosinophilia was present in the blood.

A forced expiratory spirogram at the Thoracic Clinic on June 15 showed a normal forced vital capacity (4.7 liters). His first second volume was 3 liters, about 80% of predicted normal. He exhaled 64% of his forced vital capacity in the first second, representing a mild to moderate reduction, compatible with the presence of mild expiratory airway obstruction. His maximum voluntary ventilation, measured with the Pulmonor, was 93 liters per minute, 73% of predicted normal.

The panel concluded that Mr. McDowell does have chronic obstructive pulmonary disease of mild degree, with mild chronic bronchitis and

bronchospasm. He would be placed in Class II of the AMA classes of respiratory impairment, with an estimated 20% impairment "of the whole man". We feel that smoking has been the primary identifiable factor in etiology.

/s/ Edward C. Eberdt, M.D.
/s/ Donald Olson, M.D.
/s/ John E. Tuhy, M.D.

WCB #69-843 July 9, 1970

SONNY BOY HILLS, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 38 year old laborer who slipped and fell and injured his back while carrying a back pack load of seedling trees up a hill on February 8, 1968.

The claimant had a longstanding problem with his back and at one time received an award for permanent disability to his back under the State of Washington Compensation Law.

When the claim was initially closed by the Closing and Evaluation Division of the Workmen's Compensation Board pursuant to ORS 656.268, no award was made for permanent disability on the basis that none was due to this injury. Had the Washington injury been one incurred in Oregon with an Oregon award, possible application of ORS 656.222 would be in order.

The Hearing Officer properly concluded that ORS 656.222 could not be applied. In evaluating the disability attributable to the accident of February 5, 1968 the Hearing Officer found that the claimant's disability in his back was substantially increased and made an award of 80 degrees out of the applicable maximum of 320 degrees.

The State Accident Insurance Fund has sought a review of this award of 80 degrees contending that it is excessive. The Board in its de novo review on issues of the extent of disability deems it proper to evaluate the disability without regard to the party bringing the matter before the Board. An award may be reduced upon a claimant's request for increase or an award may be increased upon the employer's or State Accident Insurance Fund's application for reduction.

In this instance the Board concludes that the claimant sustained a substantial loss in earning capacity attributable to this accident.

The percentage evaluations of doctors are not binding upon the Board and are in fact discouraged. It is interesting to note in this case that Dr. Cooper, long time member of the staff of the State Accident Insurance Fund, expressed disability in terms of the present unscheduled rating system as 50% of the workman. This would be 50% of 320 degrees. However, he attributes at least 20% of this 160 degrees to prior disabilities which would leave 128 degrees attributable to the accident at issue. Dr. Kimberley, a

recognized orthopedist of standing, also has an established background in compensation matters. He utilized the former standard of loss of an arm in his expression of 40%. When the arm as the former maximum is translated to 40% of the new maximum, the degrees again compute to 128 degrees.

Though counsel for claimant did not cross appeal, they did urge that consideration be given the loss of earning factor required by the recent Court decisions starting with Ryf v. Hoffman. The claimant's earning capacity appears to have declined from 2.25 per hour to 1.75 per hour. This computes to a wage loss of 22%. This factor is also applied to the maximum degrees payable. The Board concludes that the degrees to be awarded should be the 128 plus 71 for a total of 199 degrees.

The Board concludes and finds that the claimant's unscheduled disability attributable to this accident is 199 degrees. The order of the Hearing Officer is modified accordingly to increase the award from 80 degrees to 199 degrees.

The request for review having been initiated by the State Accident Insurance Fund, counsel for claimant is awarded the fee of $250 payable by the State Accident Insurance Fund pursuant to ORS 656.382(2) for services upon review.

Counsel for claimant was allowed a fee upon hearing from claimant's compensation which amounts to $1,100. Counsel is allowed the further sum of $150 payable from the increased compensation to bring the total fee to $1,500 of which $250 is payable by the State Accident Insurance Fund and the balance from 25% of the increased compensation as and when paid.

The Board's administration of vocational rehabilitation is normally not activated when a claim results in no award of permanent partial disability as in the initial award in this claim by Closing and Evaluation. The claimant was able to perform his work as a laborer. His limited educational background coupled with the elimination of heavier labor, requires further efforts toward vocational rehabilitation. The Board, by copy of this order, directs its administrator to coordinate the facilities of the Workmen's Compensation Board with the other public agencies to establish the feasibility and implementation of a program of vocational rehabilitation for this claimant.

WCB #68-2087 July 9, 1970

BENJAMIN TASKINEN, Claimant.
Request for Review by Claimant.

The above entitled matter upon hearing involved issues of the extent of temporary total disablity and permanent partial disability sustained by a 42 year old log truck driver as the result of a wreck with a loaded log truck on August 7, 1967. In addition to multiple bruises and lacerations, the claimant incurred fractures of five ribs on the left and several fractures of the right leg.

Pursuant to ORS 656.268, a determination issued July 25, 1968 finding temporary total disability to February 19, 1968, temporary partial disability

from that date to April 16, 1968 and a stationary condition of that date with a permanent partial disability of 30 degrees against the applicable maximum for complete loss of a leg.

Upon hearing the determination order was affirmed by the Hearing Officer. The claimant, without filing a brief, states the issues as an irreconcilable request for further temporary total disability, permanent partial disability and permanent total disability.

The claimant returned to work as a log truck driver and was working as a mechanic's helper at the time of injury, thus ruling out further temporary total disability or permanent total disability. Further there is no medical evidence to support any claim of need for further medical care at this time. Any future need for such care is conjectural at the time and the claimant is adequately protected by law with respect to any such required care in the future.

The disability is limited to the leg and is basically a limitation of motion in the knee and ankle but the disability does not preclude the effective use of the leg either as a truck driver or mechanic's helper.

The Board concludes and finds that the claimant is not totally disabled either from a temporary or permanent basis. The Board concurs with the Hearing Officer and finds and concludes that the claimant does have a permanent partial disability limited to the right leg and that this disability does not exceed the 30 degrees heretofore awarded.

The order of the Hearing Officer is affirmed.

WCB #69-1002 July 9, 1970

FRANK C. BANTA, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of whether the claimant was entitled to compensation for a period of alleged temporary total disability. The claimant is a 51 year old truck driver who was injured August 19, 1968 when his truck went out of control on a hill and rolled over.

The initial injuries appeared to be superficial with a forehead laceration and some pain in the right shoulder and left leg. Four days later the treating doctor found the claimant to be medically stationary with about one week of temporary total disability and no permanent injuries.

As of the date of hearing on November 10, 1969, the claimant had not returned to work and the employer's insurer had paid temporary total disability from August 22 to September 30, 1968.

The claim, as of the date of injury, had not been processed pursuant to ORS 656.268. The Board notes that pending this review, a determination has issued March 16, 1970 finding there to be no residual disability. That determination is not subject to this review.

The Hearing Officer found, despite the initial treating doctor's conclusion of only a week of temporary total disability, the totality of the evidence in retrospect warranted temporary total disability to December 5, 1968. However, the Hearing Officer found that the employer acted properly upon the information available and that the claimant was substantially responsible for the delay in payment. Penalties for late payment and attorney fees for unreasonable resistance were not applied.

The administration of the claim was beset by unrelated problems including a tumor of the mouth for which the claimant was hospitalized and treated by the Veterans Administration. The claimant's list of symptoms allegedly due to the accident has progressed and grown. The unrelated problems include domestic, emotional and drinking factors. The failure to return to work has long since lost any causal relationship to the accident except as an excuse. Medically the claimant has already been given the benefit of the doubt by the Hearing Officer continuance of temporary total disability to the date of an examination by Dr. Bachhuber.

The Board concurs with the findings and conclusions of the Hearing Officer finding that the claimant is not entitled to temporary total disability beyond December 5, 1968. Whether the claimant is entitled to any permanent partial disability is subject to possible hearing and review with respect to the determination order of March 16, 1970.

The order of the Hearing Officer is affirmed.

WCB #69-2186 July 9, 1970

EARL C. MANNING, Claimant.
Request for Review by SAIF.

The above entitled matter involves a claim of alleged back injury purportedly incurred on October 9, 1969 while lifting sheets of pulp from a broken bale.

The claimant has a history of back problems dating back at least until 1958 with intervening hospitalizations and surgeries. There is thus no question but that the claimant has back troubles. The issue is whether on October 9, 1969 the claimant had a further compensable accident which caused renewed or increased disability.

The claim was denied by the State Accident Insurance Fund but subsequently ordered allowed by the Hearing Officer. The Board is not unanimous in its conclusions following its de novo review.

The majority of the Board conclude that the claimant did not incur any new accidental injury as alleged. If the Hearing Officer had confidence in the claimant's veracity the majority of the Board would be reluctant to reverse the decision. The issue goes deeper than the matter of veracity.

The chronology starts with the claimant telling a foreman, "I think I hurt my back." There was no association with the job in this expression. Coming from a claimant with over 11 years of back complaints it could have

meant many things. Coupled with those words was an expressed desire to move to another job which was known to entail more difficult work.

The claimant took one of his regular days off on October 10th, worked the next three days, took the following two days off. By the 22nd when he called in he requested that the normal work days taken off be considered as vacation.

The next consideration is the history of the claimant's visits to the doctor. On October 10th, the day following the alleged back injury, he reported "pain in the heel of the right foot--he had no pain in the back." The diagnosis of the heel pain was possible stone bruise but there is no claim for heel injury or any work history which would be consistent with a heel injury. As a matter of fact the claimant is even quite inconsistent with regard to whether the heel was quite painful or simply numb (painless).

Somewhere in the midst of wanting to be transferred to a more difficult job and being denied that choice by the employer and somewhere in a problem with his heel of dubious origin, the claimant's longstanding back problem was imported into the picture. The majority of the Board concludes that no new injury was incurred attributable to the employment.

The order of the Hearing Officer is reversed and the denial of the claim by the State Accident Insurance Fund is upheld.

Pursuant to ORS 656.313, no compensation paid by virtue of the order of the Hearing Officer is repayable.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan dissents as follows:

It should be obvious to any reviewer of this record that claimant is a person of only modest intelligence. When subjected to cross-examination concerning happenings of long ago, a person of superior intelligence would not be able to give accurate answers to questions propounded to him, when such questions are taken from the records as documented at the time of occurrence.

The hearing was held February 2, 1970. Counsel for the employer began cross-examination by asking claimant to remember back to 1958. Counsel for the employer wanted to make the claimant "look bad," to cast doubt upon the claimant's veracity. This may be a way to win a case, but justice is not well served by taking advantage of a person such as this claimant.

From previous experience the claimant had remembered pain in a foot coming from an injury to the back. A person of higher intelligence would not have attempted to "play doctor" and diagnose his own troubles. No doubt claimant did as poor a job of telling the doctor as he did under cross-examination at the hands of the skillful counsel for the employer.

Consideration must be given to a person of modest intelligence such as this claimant. It has been repeatedly stated by our Supreme Court that the Workmen's Compensation Law should be interpreted liberally in favor of the injured workman. A liberal understanding must be used in all matters in a workman's compensation claim.

It should be noted that the claimant reported to his immediate supervisor the same shift. Mr. Booth testified (Tr 45) that the claimant told him, "I think I hurt my back."

The claimant sought medical treatment the next day. It is conceded that the doctor reported a stone bruise on the heel. The self-diagnosis by the claimant was probably responsible for that. However, within a few days the real source of trouble was recognized as the back.

The claimant completed a form 801 which he signed October 17, 1969, eight days after the injury. It should be noted that the reported injury is to the back. In the employer's portion is typed: "Lifting broken bales by hand. (These pieces are large and heavy to lift by hand.)"

Claimant's acceptance of a check charged to his earned vacation should not be held against him. The testimony of Mr. Mathews (Tr 51) tells about issuing the check as vacation pay. During the same telephone conversation on October 14 (Tr 52) Mr. Mathews states he learned the claimant was claiming to have sustained an injury on the job. Issuing a check for vacation pay to a workman for a period for which it is known that time loss is being claimed for an on-the-job injury puts the claimant in an unfavorable position. This workman of modest intelligence would not realize that.

There are facts that stand out, and are fully supported by evidence, which cannot be ignored:

1. Claimant verbally reported to his foreman on the same shift.

2. Medical attention was sought the next day.

3. A written notice, form 801, was given to the employer 8 days later, well within the 30 days.

4. Claimant received medical treatment. Surgery is not required to constitute medical treatment.

The claim is compensable. The order of the Hearing Officer should be affirmed.

/s/ Wm. A. Callahan.

WCB #69-1609 July 10, 1970

The Beneficiaries of
DALTON L. HOBBS, Deceased.
Request for Review by Claimant.

The above entitled matter involves the compensability of a claim by the widow of a 40 year old salesman. The salesman died of a myocardial infarction on Sunday, October 27, 1968.

The deceased workman's underlying arteriosclerotic disease was first diagnosed in April of 1965. At that time he was hospitalized but returned to full time employment in about three weeks. Thereafter and up until the

fatal termination he had exercised regularly, observed dietary restrictions and took medicines as prescribed.

The evidence reflects that, as usual, Sunday was not a day of work. At best it appears that after a rather sedentary day, the decedent went out to his car with an intention to drive to Vancouver, Washington as a matter of convenience to pick up some items from a customer. However, he never left the driveway and returned into the house and suffered the coronary infarction. Had the trip commenced and an accident occurred enroute, there might well have been a question whether the claimant was in the course of employment. There is certainly no serious contention that the activity of simply entering the car and turning a switch precipitated the attack.

The beneficiary seeks to establish a compensable relation upon stress but the evidence simply does not reflect that the deceased was subjected to any material stress in his work. On the fatal Sunday, the decedent had breakfast, read the Sunday paper, supervised the mowing of the lawn including doing the repairs on the mower, ate lunch, drove the car to a car wash and had a take home Chinese dinner. It is interesting to note that the decedent apparently was quite phlegmatic since he was not upset by the fact that his son hit the garage with the car as the son drove in with the food from the Chinese restaurant.

There is evidence of record from Dr. Owen Richards, an internist and Dr. Wayne Rogers, a cardiologist. If the hypothetical question upon which Dr. Owen Richards made certain conclusions coincided with the established facts there would be a greater degree of discrepancy in the conclusions of the doctors. However, the answer by the doctor to a question including facts not established by the evidence greatly weakens whatever conclusions are expressed. It is questionable whether Dr. Richard's testimony, if it was the only medical testimony, would suffice to establish compensability of the claim.

Taking the record in its entirety and in consideration of the expertise of Dr. Rogers, the Board concurs with the Hearing Officer and concludes and finds that the decedent's coronary infarction was not materially related to and did not arise out of or in the course of employment.

The order of the Hearing Officer is affirmed.

WCB #69-601 July 13, 1970

ROSE P. BICKNELL, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of whether the claimant sustained a compensable accidental injury on or about March 15th or 16th of 1968 while carrying a container of coleslaw into a walk in cooler at a Kentucky Chicken restaurant. The broad issue encompasses questions of whether the incident occurred, if the incident occurred did it cause any injury and even if it did occur and did cause injury, should the claim be barred for failure to notify the employer in the manner required by ORS 656.265.

The claim was denied by the State Accident Insurance Fund as insurer of the employer but the claim was ordered allowed by the Hearing Officer. One question not raised upon hearing is whether hearing should have been granted in the first instance. No claim was made by the claimant for approximately one year, no benefits of any sort were ever paid. Request for hearing was not filed until April of 1969. By virtue of ORS 656.319(1), the claimant was not entitled to a hearing at the time the State Accident Insurance Fund issued the denail on March 24, 1969. The question then becomes one of whether a claimant who waits a year or several years to initiate a claim and has otherwise lost the right to hearing is entitled to a hearing if the employer or the State Accident Insurance Fund denies the claim with respect to which jurisdiction was otherwise lost. Despite the reference in ORS 656.319(1) to ORS 656.319(2), the Board doubts whether it was the legislative intent to grant the right to hearing under the second section once lost under the first.

The Board will proceed, however, to the merits of the issues outlined in the first paragraph of this order.

This file reflects more than a wait of almost one year before initiating the claim. Despite the alleged mid-March incident of 1968, the claimant first visited a Dr. Zupan in July of 1968 and Dr. Thompson nine months later on January 20, 1969 and made no mention of any alleged back injury to either doctor. She was referred to Dr. Vinyard to whom she complained of heavy work done back in December of 1967. She complained of persecution by the employer as the basis for quitting work. It is not until March of 1969 that the alleged incident even appears in Dr. Vinyard's history obtained from the claimant.

Part of the Hearing Officer decision is based upon a report by Dr. Rockey who conditioned possible relationship upon her being previously asymptomatic prior to the alleged injury and being symptomatic from that time on. The Hearing Officer also relied upon two witnesses who testified that the claimant was asymptomatic prior to March of 1968.

Against this is the testimony of the claimant herself. She admitted (page 61, June transcript) of back hurts since December of 1967 and taking pain pills for her back since December of 1967. Dr. Currin reports complaints by the claimant of back pain in February of 1968. The claimant at pages 110-115 explains away and denies an alleged incident of pushing a car in February of 1969 by testifying that she sat in the car while it was stuck and testifying, "I was on the inside of the car. My back had been hurting me, and he knew it for over a year." So much for any origin of the back problem in March of 1968.

The Hearing Officer accepted and relied upon the testimony of two lay witnesses that the claimant was previously asymptomatic despite the several admissions of the claimant of back troubles and pain pills for at least three months. This mistaken reliance upon lay witnesses against the obvious admissions of the claimant is then used as the basis for construing Dr. Rockey's medical opinion as one of medical causation. It is more significant that once the hypothesis of no prior symptoms was destroyed, the opinion of Dr. Rockey becomes a conclusion that the alleged injury was simply a "fortuitous recall."

There are over 300 pages of transcript coupled with numerous exhibits with hearings taken over a period of two months. The order of the able Hearing Officer was then delayed for exhibits and briefs for more than five months following the last formal hearing. The Board notes that the Hearing Officer makes decisions without the benefit of a transcript of testimony. It matters not if a witness testifies with a convincing demeanor if the record in the cold light of day reveals irreconcilable material conflicts. The favorable impression made by claimant upon the Hearing Officer must yield to an analysis of the entire record.

The hypothesis Dr. Rockey used before he would concede the matter was other than a "fortuitous recall" also conditioned the matter on a continuity of symptoms following the alleged incident. The claimant sought and obtained medical consultations following March of 1968 without mention of any back problem.

The record contains many pages of testimony not germane to the issues other than to reveal some animosities which cloud the reliability of most of the witnesses.

The claimant's testimony about the coleslaw incident is so vague that it is questionable whether any incident occurred. The testimony about reporting the March incident to the employer is also vague and no different from testimony of prior occasions in February of 1968 when she relates she was also told to "take a pill." There is much to be said for the chain of events in later February of 1969 immediately preceding this claim with reference to testimony of the claimant's son that his mother had been pushing the car. The Board does not find it necessary to resolve the truth of these conflicting stories.

The Board concludes that regardless of whether the claim was barred by untimely written notice as a matter of law, no employer or insurer could possibly avoid prejudice in the administration of a claim under these circumstances. The claimant had been having back pains for three months. Something could have happened in March of 1968 to exacerbate those conditions. Who can tell now? The fact that her back hurt the day of the alleged coleslaw is not proof of an accidental injury. At best it simply proved that the hurts she was having since December had not yet gone away.

The Board concludes and finds that the claimant did not sustain a compensable accidental injury, that the employer was prejudiced by delay in pursuing the claim if in fact an accident occurred and the proceedings may well have been conducted without jurisdiction.

The order of the Hearing Officer is reversed.

The substantial compensation paid to claimant to date is not repayable pursuant to ORS 656.313.

Counsel for claimant is authorized to collect a fee from his client for services on an unsuccessful review of not to exceed $125.

WCB #69-862 July 13, 1970

ARTHUR E. MAGNUSON, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a then 47 year old logger who was injured September 22, 1967 when thrown from a tractor causing him to roll down a rough hillside.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 48 degrees. This determination preceded the confusion created by the implications of the Ryf decision with respect to the loss of earnings as a factor in the determination of disability. The first hearing resulted in an increase in the award to 128 degrees. The Workmen's Compensation Board on review first attempted to apply the earnings factor by order of January 16, 1970, but that order was set aside for the special purpose of taking additional testimony on the earnings loss.

The difficulty of determining earnings loss is exemplified by the situation in this claim. The claimant previously was a catskinner. However, his work assignment was as a utility man which paid a somewhat lower rate. In the interval since the September, 1967 accident there have been increases in the rate of pay applicable. The Hearing Officer concludes that there had been an earnings loss of 3.86% and the Board accepts this figure as the proper compensation. The Hearing Officer, however, rounded the factor to 4% and in turn converted the 4% to 4 degrees, overlooking the fact that the unscheduled disability has a base of 320 degrees.

The Board concludes that the proper disability evaluation is 48 degrees plus the factor of an earnings loss of 3.86% as applied to the 320 degrees or 12.35 additional degrees.

The order of the Hearing Officer is accordingly modified and the permanent disability is determined to be 60.35 degrees.

Counsel for claimant is allowed a fee of 25% of the increased compensation payable therefrom as paid.

WCB #69-1111 July 13, 1970

WILLIAM A. BOWLES, Claimant.
Request for Review by Claimant.

The above entitled matter involves a claim of aggravation by a now retired former employe of the City of Albany whose claim at issue arose January 28, 1966 when the street sweeper claimant was operating was struck from behind. The claim was initially closed on February 10, 1966. The claimant had sustained no loss of time from work and was determined to have no residual permanent disability. The claimant, from a previous rear end, compensable accident on December 14, 1964 was awarded permanent disability for a loss function of 25% of the left arm and unscheduled low back distress equal to the loss function of 25% of an arm. In keeping with ORS 656.222, these prior awards of permanent disability are of some significance in evaluating present compensable disability.

The claimant was retired because of age at age 65 in September of 1967. He is described as somewhat obese and has a pre-existing degenerative arthritis. The problem of evaluation is to determine whether the accident of January 28, 1966 set in motion any process which over three years later may be said to be in some degree responsible for some of the present disability. Compensation would not be payable on an aggravation claim for pre-existing disability nor could the initial closing order of no residual permanent disability be impeached by these proceedings. Similarly any natural progression of debilitative processes would not be compensable unless that natural progression was in some material manner hastened by the accident of January 28, 1966.

The Hearing Officer in this case found that there was a compensable aggravation and ordered the payment of certain medical care and an award of 19.2 degrees permanent partial disability. The Hearing Officer discusses the history of the matter from 1965 predating the injury at issue. He concedes that any worsening is subtle and greater than it was on February 10, 1966 when the claim was closed. One problem with this hypothesis is that there was no disability on February 10, 1966 to be worsened.

The claimant seeks this review urging greater disability than that allowed by the Hearing Officer.

The Board concludes and finds that the claimant has already received the benefit of a substantial doubt whether there has been an increase of disability where none existed heretofore on this claim. Any such disability, if it exists, does not exceed the 19.2 degrees awarded.

The order of the Hearing Officer is affirmed as to the issue of disability.

Another issue on review is whether attorney fees should be assessed against the State Accident Insurance Fund. The rules of procedure adopted with reference to aggravation claims contemplates that such claims be first processed to the State Accident Insurance Fund or employer. The evidence, as noted by the Hearing Officer, does not reflect that this was done. By indirection the institution of proceedings for hearing might at some point have alerted the State Accident Insurance Fund to its potential liability but the Board does not feel that attorney fees should be levied under the present state of the record. The rules as amended on May 15, 1970 impose a greater duty upon the State Accident Insurance Fund and employers in such matters but those should not be applied retroactively. The request to impose attorney fees on the State Accident Insurance Fund is therefore denied. The Hearing Officer order is affirmed in all respects.

WCB #70-834 July 14, 1970

MARVIN D. PEARSON, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of whether the employer and its insurer are subject to the imposition of increased compensation and attorney fees with respect to a claim of aggravation which was accepted by the employer-insurer somewhat contemporaneously with the request for hearing.

The request for hearing was dismissed on the basis that the claim of aggravation had been allowed and that 11 issues were thereby resolved.

Counsel for the claimant requested the review and counsel for the employer concedes a hearing should have been held without conceding there was merit to the question to be resolved.

It is apparent to the Board that the matter should not have been summarily dismissed as long as the issue was pending of penalties and attorney fees for alleged unreasonable delay and resistance.

The procedure on claims of aggravation was modified by the amended Workmen's Compensation Board Rules of Procedure which were not executed and filed until May 15, 1970. This case is governed by the rules prior to amendment.

The matter is remanded to the Hearing Officer for hearing on the merits of the unresolved issue.

No notice of appeal is deemed applicable.

WCB #69-1592 July 14, 1970

CLARENCE E. SMITH, Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue of whether the claimant sustained a compensable hearing loss as the result of a blow to the right cheek on December 12, 1968. He immediately sustained a severe headache and ringing in his ears.

Pursuant to ORS 656.268, a determination issued May 28, 1969 by the Closing and Evaluation Division of the Workmen's Compensation Board finding the claimant to have a 28% loss of hearing in the right ear.

The claimant sought a hearing and the Hearing Officer affirmed the determination.

Interestingly, the State Accident Insurance Fund did not join in the request for hearing but upon the conclusion of the hearing, the State Accident Insurance Fund concluded that the claimant had sustained no hearing loss attributable to the injury and it was the State Accident Insurance Fund which requested this review.

Though the claimant denied any problem with his hearing prior to the accident, the medical records including pre-employment audiograms definitely establish a pre-existing degenerative hearing loss. It is also true that there is a measure of conjecture injected by some of the medical opinion over whether the increase in hearing loss over prior audiograms is related to this injury. That conjecture expressed does not reduce the situation to one of mere speculation.

The Board concurs with the Hearing Officer and concludes and finds that the medical opinions, considered in light of the circumstances, support the conclusion that the claimant sustained an increase in his hearing loss and that this loss was properly evaluated at 28% loss of hearing in the right ear.

The order of the Hearing Officer is affirmed.

WCB #70-86 July 14, 1970

RICHARD S. CLIFFORD, Claimant.
Request for Review by Claimant.

The above entitled matter basically involves issues arising out of procedures in the administration of claims including demands by the claimant for further medical care and temporary total disability and for assessment of penalties and attorney fees upon the basis that the payments of compensation had been improperly terminated.

Upon hearing, the Hearing Officer found that compensation had been wrongfully terminated but since the claim had not been processed as required by ORS 656.268, the matter was remanded to the Closing and Evaluation Division of the Workmen's Compensation Board for the administrative evaluation of disability.

The claimant urges that the power of a Hearing Officer is practically unlimited and challenges the authority of the Hearing Officer to so remand a claim.

The Board takes administrative notice of its own proceedings and notes that on April 2, 1970 an order of determination issued finding certain temporary total disability and permanent partial disability relating to the accident. The claimant has one year from the date of that order to request a hearing from which he could in turn request review by the Board and appeal to the Circuit Court.

In light of the recent decision of Hiles v. SCD, 90 Or Adv Sh 1425, Or App 470 P.2d 165 (1970), and other authority cited therein, the Board deems the order of remand by the Hearing Officer in this case not to be an appealable order.

The order of the Hearing Officer is affirmed and the request for review is dismissed.

In light of the case cited, no notice of appeal rights is appended to this order.

All issues on the merits of the compensation to which claimant may be entitled may be raised upon further hearing upon the order duly issued pursuant to ORS 656.268.

WCB #69-2367 July 15, 1970

GEORGE E. TIFFANY, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 49 year old warehouseman who incurred an injury to his right knee on December 22, 1967.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent disability of 38 degrees against the applicable maximum of 150 degrees for total loss of a leg and 32 degrees for associated unscheduled disability against the maximum of 320 degrees.

Upon hearing the award for the leg was increased to 60 degrees.

Neither party has favored the Workmen's Compensation Board with any brief on appeal, electing to "stand upon the record."

The record reflects a workman who only weighed 215 pounds when injured but despite injury to a weight bearing extremity, he has permitted his weight to range from 245 to 251 pounds. It does not appear that the claimant is seriously motivated to return to work. The Hearing Officer conjectured that the combination of social security and workmen's compensation benefits contributed to this lack of motivation. The Hearing Officer's observation of the claimant as a witness also led to a conclusion of gross exaggeration of symptoms. There is a possibility that an elective type surgery may be a choice in the future. This is not the basis of an increased award. The disability may actually be lessened since improvement would be the purpose of surgery. If surgery becomes advisable, the claimant has the right to claim reopening.

The Board concludes that any residual disability in either the unscheduled area or the leg certainly does not exceed the respective awards of 32 and 60 degrees.

The order of the Hearing Officer is therefore affirmed.

WCB #69-2164 July 15, 1970

ROBERT G. BARKER, Claimant.
Request for Review by Claimant.

The above entitled matter involves two issues. First is whether the claimant sustained a compensable injury arising out of an in course of his employment when he was injured in an auto accident while driving his personal car from home back to the place of employment during his 8:30 to 9:00 p.m. lunch break. The second issue is a contention that the order of the Hearing Officer is a nullity, not having been executed within 30 days after the hearing. The second issue will be resolved first.

The proceedings under the pre-1966 compensation law contained provisions such as the then ORS 656.284(6) and 656.276(3) whereby failure of the then State Industrial Accident Commission to act within stated times was treated as a denial of the request for purposes of precipitating appeal rights. The 1965 Act imposes certain time restrictions but sets forth no sanction for failure to comply. The Circuit Courts are under a sanction of suspended compensation but the Board is not aware that any contention was ever seriously made that a Court lost jurisdiction. The loss of jurisdiction theory propounded by claimant is fraught with too many perils to workmen. Many could have their reviews dismissed for not filing within 30 days after the Hearing Officer failed to issue an order on the deadline. The review by the Workmen's Compensation Board necessarily requires an order by a Hearing Officer. There is no basis for substitution of the Workmen's Compensation Board as the first adjudicator. The Board makes no excuses for failure of its Hearing Officers to make their decisions within the time provided by law. The remedy for such delay is by Board insistence that its Hearing Officers comply with the law. The proper remedy is not reading into the statute a non-existent "loss of jurisdiction." The recent decision of Hiles v. SCD, 90 Or Adv Sh 1425, Or App, 470 P.2d 165 (1970), clearly establishes that even the Circuit Court does not have jurisdiction in the absence of an order by the Hearing Officer.

Upon the merits of the facts simply reflect that the claimant had the election to have eaten his lunch on the premises, to have gone to a nearby restaurant or to have gone home. The facts do not support a contention that the claimant was paid for his lunch period. The railroad tracks did not constitute a special employment hazard. The tracks were only one of numerous hazards common to the public. The claimant was using his own conveyance for which he received no compensation and was performing no duty.

The Hearing Officer opinion and the briefs of the parties discuss numerous authorities with reference to the several exceptions within which a claimant is deemed to be in course of employment while going to and from home.

The latest lunch hour decision by the Supreme Court is White v. SIAC, 236 Or 444. White was injured crossing the highway adjacent to the school on his way back from lunch. As a school teacher he was paid by the month and even sought to bring in a work association on the basis of authority to supervise students off the school grounds and crossing streets.

The Board concurs with the Hearing Officer and finds and concludes that the claimant's injury was not within any of the exceptions to the going and coming rule. The Court of Appeals in the Jordan case did not depart from previous Supreme Court decisions such as White and make all "going and coming" compensable.

The Board concludes and finds that the claimant did not sustain an injury arising out of or more particularly not in the course of employment.

The order of the Hearing Officer is affirmed.

WCB #69-254 July 16, 1970

DELBERT SNEAD, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issues of further medical care or, in the alternative, of the extent of permanent disability sustained by a 33 year old truck driver who incurred injuries to his right shoulder and upper back on April 1, 1968 when he started to sit on the forks of a fork-lift truck just as they were being lowered.

Pursuant to ORS 656.268, a determination issued February 5, 1969 finding claimant's condition to be medically stationary with residual unscheduled permanent disabilities of 32 degrees out of the applicable maximum of 320 degrees.

There is some conflict with respect to whether the claimant is in need of further medical services. In any event, the Hearing Officer concludes that the failure of the claimant to obtain those services was basically a matter of choice made by the claimant.

The matter of further medical care arose post hearing at which time the claimant had not obtained or sought medical care for several months. With due respect to the qualifications of the able doctors involved, the Board concurs with the Hearing Officer that the facts do not reflect either an inability to return to work or a need for further medical care. There is no recommendation for any particular care. The claimant admits to an ability to drive. The most appropriate solution is an effort to return to work which to date is entirely lacking.

The Board concludes and finds that the claimant's condition is medically stationary as heretofore found and that the disability does not exceed the 32 degrees heretofore awarded.

The order of the Hearing Officer is affirmed.

SAIF Claim # A 708092 July 16, 1970

EVERETT GROGAN, Claimant.

The above entitled matter involves the claim of a workman injured December 30, 1958 when struck on the head by a large rock. The blow caused him to fall over a cliff with resulting multiple bodily injuries.

The workman received the maximum compensation payable for unscheduled injuries which were less than totally disabling.

A request has been filed with the Workmen's Compensation Board to exercise its own motion pursuant to ORS 656.278, supported by a medical report from Dr. Howard Cherry indicating the disability is now totally disabling.

It appears to the Board that the request so supported by a prima facie medical report warrants a hearing to enable the parties to present evidence upon which the Board may make a decision with respect to whether former orders or awards should be modified or changed.

The matter is therefore directed to the Hearings Division for the purpose of holding a hearing to obtain evidence with respect to the extent of claimant's disability attributable to the accidental injury of December 30, 1958.

Upon conclusion of the hearing a transcript of the proceedings shall be made and certified to the Board by the Hearing Officer together with a summary of the matter prepared by the Hearing Officer, including his observations and recommendations in the matter.

WCB #69-1801 July 17, 1970

EUGENE E. FIELDS, Claimant.
Request for Review by Claimant.

The above entitled matter involves another of the claims raising the issue of the medical-legal relationship between work effort and a myocardial infarction.

The claimant is a 63 year old heavy construction carpenter who became ill April 30, 1969 shortly after commencing work at 7:00 a.m. The illness came on contemporaneously with an exertion in attempting to pry a 5' x 8' form from a 7' stack of such forms. He drove himself home, arriving there at 7:25 a.m.

The claim was denied and this denial was affirmed by the Hearing Officer.

There is of course a difference of opinion between the medical experts with reference to the effect of the work effort. A Dr. Vorheis, the attending physician, has practice in the field of internal medicine but is not certified by the Medical Board which certifies specialists in that field. Dr. Heyerman is so certified as a specialist and at this point another factor in the controversy becomes important. There is some discrepancy in the enzyme studies

which are significant to medical experts in determining whether and when a myocardial infarction has occurred. Without going into the technical detail, it is Dr. Heyerman's conclusion that the infarction occurred prior to the work effort. Though Dr. Heyerman is apparently of the opinion that greater stress is required to produce the infarct than some doctors. It is not the relative degree of stress that influences the Board in this case. Dr. Heyerman accepts the validity of the enzyme test and concludes that the infarct preceded the work. No other test in point of time would now be valid. Dr. Vorheis' only explanation of the SGOT test was that it was possibly "premature." In this area the greater expertise of the Board certified specialist must be given greater weight. It is a test which physiologically requires a period of time between the infarct and positive readings. It is not a test which would register "premature" findings by the testimony of Dr. Heyerman. It is a test which proves that an infarct occurred but it also proves that the infarct, in time, occurred prior to any work incident.

The Board concurs with the Hearing Officer and concludes and finds that in this instance the coronary infarct did not arise out of the employment.

The order of the Hearing Officer is affirmed.

WCB #69-1469 July 17, 1970

C. L. METHVIN, Claimant.
Request for Review by SAIF.

The above entitled matter basically involves the issue of whether injuries to the metatarsal area of the foot are to be evaluated in terms of injuries to the toes or to the foot.

The claimant in this case on November 22, 1968, sustained a fracture to four of the five metatarsal bones, leaving only that of the big toe unfractured.

Pursuant to ORS 656.268, a determination issued by the Closing and Evaluation Division of the Workmen's Compensation Board finding the claimant to have a disability of 27 degrees out of the maximum applicable for injuries for the loss of one foot at or above the ankle joint. Upon hearing, the award was increased to 40 degrees upon the basis of the claimant's inability to return to his former occupation and the limitations in walking, standing and weight bearing.

The Board is not unanimous in its interpretation of the statute. The majority of the Board notes that if the claimant is limited to disability for his toes he could receive only the maximum of 34 degrees, four for each toe other than the big toe which has a maximum value of 18 degrees.

The majority notes that awards have heretofore been made for the "foot" despite the limitation of the injury to the metatarsal bones of the toes. However, past departures from application of the clear words of the statute should not justify a continued departure. The foot, by statute, is defined to include at or above the ankle joint. The injury in this case does not involve at or above the ankle joint. An award restricted to the toes appears financially inadequate. However, the adequacy of benefits for specific

injuries is up to the legislature and is confined to legislative schedules. Sympathy with grievously injured claimants should not lead to administrative removal of the legislative boundaries. The award should be reduced to within the maximum permitted for injuries not affecting the ankle, namely those established for the toes. The award by the Closing and Evaluation Division of 27 degrees represents an approximate loss of 80% of the maximum award for the toes.

The order of the Hearing Officer is accordingly modified and the determination of 27 degrees disability is reinstated.

Counsel for claimant is authorized to collect a fee of not to exceed $125 from the claimant.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan dissents as follows:

I do not agree with the majority of the Board that the words of the statute require a rating on the toes when the disability is to the metatarsal bones of the foot and the injury does not extend into the ankle joint. Such an interpretation would leave several other bones and adjacent soft tissues without means of rating disability.

Even if the words of the statute should be clarified, there is no need to make such a decision. I have personal knowledge that disabilities to areas of the foot, other than the toes proper, have been rated on the foot since May, 1954, and I am reliably informed by old-time employees of the State Industrial Accident Commission before my time that the practice was of long standing before that date.

A statute should be interpreted, if at all possible, to accomplish the purpose for which the law was enacted. This long standing interpretation is justification for continuance if it is deemed necessary to change the wording of the statute.

Dr. Wilmer C. Smith, former Chief Medical Advisor for the State Industrial Accident Commission, did not interpret the law for the State Industrial Accident Commission, but he did express what was the official interpretation of the law at the time he wrote his "Principles of Disability Evaluation" which was copyrighted in 1959. On page 120, Dr. Smith expresses what he deems proper as to the evaluation of toes and feet:

> "TOES. These radicals include the digits of the lower extremity as far proximal as their metatarsalphalangeal articulations (see Fig. 1). Disability present in these members should be evaluated in terms of percentage loss of function of the respective digit or digits. Amputations should be evaluated in accordance with the schedule provided for the fingers (see Fig. 2).
>
> "FOOT. The distal boundary of this radical includes the metatarsal phalangeal articulations, while its proximal boundary lies just distal to the knee joint (see Fig. 1). The foot, then, is a legal division which begins with the metatarsalphalangeal articulations and extends

to, but does not include the knee joint. Evaluations of disability lying within this area should be expressed in terms of percentage loss of function of the respective foot. * * * "

This was the interpretation prior to my time as a Commissioner of the State Industrial Accident Commission, during such time, and has continued until the present time.

There has been some change of wording in the applicable sections of the law. For the convenience of a reviewer, the former and revised sections are reproduced.

1954
ORS 656.214(d) "For loss by separation of one foot at or above the ankle joint, 104 degrees, or for the permanent and complete loss of use of one foot 64 degrees." (Emphasis supplied)

(e) "For the loss by separation of a great toe, 18 degrees; or any other toe, four degrees."

The statute was silent regarding a partial loss of use. It was necessary to make awards for a partial loss of use and it was done by administrative interpretation following the same procedure as outlined by Dr. Smith.

Later the number of degrees was increased. In 1967 the distinction between loss by separation and loss of use was eliminated.

The present wording of the same numbered sections and letter subsection is:

ORS 656.214(d) "For the loss of one foot at or above the ankle joint, 135 degrees, or a proportion thereof for losses less than a complete loss." (Emphasis supplied)

(e) "For the loss of a great toe, 18 degrees, or a proportion thereof for losses less than a complete loss; for any other toe, four degrees, or a proportion thereof for losses less than a complete loss."

Attention is called to the word "foot" which includes the ankle joint. There is no requirement that the disability be in the ankle joint and unless the disability includes the ankle joint, the disability be rated on the toes. To do so would eliminate a considerable area of the foot that is susceptible to injury.

I am attaching to, and by reference making it a part hereof, a reproduction of the bones of the foot and showing and naming the bones other than the toes or phalanges. One can readily see the area of the foot below the ankle joint and before the metatarsals are encountered.

Long standing administrative practice has rated disabilities of the metatarsals and other bones between the metatarsals and the ankle joint as a portion of the foot. Many sessions of the legislature have become history since this practice began; no one has sought legislative action to change this practice of many years. It must be recognized that there has been

acquiescence over such a long period of time so as to constitute legislative approval.

It is possible that the metatarsals of the foot are being confused with the metacarpals of the hand. It is practice to consider the metacarpals as part of the fingers. In other words, the fingers extend to the wrist joint by combining the phalanges and the metacarpals. However, there are no other bones between the phalanges plus metacarpals and the wrist joint. I am attaching, and by reference making it a part hereof, a reproduction of the bones of the hand.

It should be noted that the subsection of ORS 656.214 pertaining to the hand and fingers does not use the word "hand." Instead it refers to the forearm.

> ORS 656.214(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."

Although it is true that the bony rays of the fingers extend to the wrist joint, there have been problems to the extent that the Board has requested the Industrial Accident Advisory Committee to study this with the hope that a change be made that will solve some of these problems. A legislative interim committee is also studying the problem.

For the reasons set forth above, I must respectfully disagree with the majority of the Board and file this dissent.

The award of disability should be made on a proportionate loss of a foot. The award of the Hearing Officer should be affirmed.

/s/ Wm. A. Callahan.

WCB #70-110 July 20, 1970

MICHAEL T. GOETZ, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claimant has sustained a compensable aggravation of disability since June 20, 1967.

The claimant is a 25 year old laborer who sustained multiple injuries from a falling beam on January 17, 1966. Pursuant to ORS 656.268, the determination of June 20, 1967 found the claimant to have unscheduled disabilities evaluated as equal to the loss by separation of 5% of an arm.

The current proceedings were initiated on January 16, 1970 with a request for hearing on a claim of aggravation accompanied by a medical report from a Dr. Charles Grossman.

The State Accident Insurance Fund contended the medical report was insufficient to meet the requirements of ORS 656.271 but the matter proceeded to hearing on the merits.

At the time of hearing it appears the claimant had been working steadily in the shipyards in addition to about 27 hours of classes per week as a student at Portland State.

In addition to being able to perform heavy manual work with minimal difficulty and concurrently engaging in a major course of college study, the claimant professes to be able to ski proficiently to the point of seldom ever falling while skiing.

The claim of aggravation, including the report and testimony of Dr. Grossman, is based upon the purely subjective testimony of the claimant that he hurts more now than he did before. If there was any evidence that there was any increase in the claimant's disability, the complaints might serve as the basis for an increase in the award.

The one purpose of the administrative compensation system is to distinguish between the alleged disabilities and the real disabilities. No claimant should be compensated for non-existent disabilities simply because of complaints. Neither should the real disability accepted without complaint go without award.

The facts of this case reflect a young workman who has been able to engage in heavy manual labor for a long period of time with only minimal residuals attributable to the accident. In fact the claimant's work record is quite remarkable in light of his congenital anomalies aside from the effects of the accident. There is some conjecture by Dr. Grossman about possible future exacerbations. The proper time is when and if they do occur and are related to the accidental injury herein.

The Board concurs with the result reached by the Hearing Officer and concludes and finds that the claimant has not sustained a compensable aggravation of disabilities attributable to this claim.

The order of the Hearing Officer is affirmed.

WCB #69-18 July 20, 1970

ROBERT J. GENT, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether a pre-existing inguinal hernia was compensably exacerbated by work on December 3, 1968.

The claim was first denied by the employer on December 9, 1968. The claimant then attempted to process a claim under the Blue Cross coverage for off the job incurred problems, but this apparently was also denied. The claimant later did recover some money for loss of time from another policy of insurance apparently conditioned on non-employment relationship. The claimant never abandoned his claim of work relationship.

The Hearing Officer affirmed the denial of the claim.

It appears to the Board that the primary issue to be resolved from the medical and legal authority involves the question of a "sudden" strain.

The claimant is a 40 year old barker whose work occasionally involved turning heavy logs to properly place the log on a conveyor. On the night in question over a period of one or two hours the claimant developed a pain and an increase in the size of the bulge which necessitated trading off work with his fellow employes.

The compensation law has a special provision with regard to hernias. Prior to 1957 what is now ORS 656.220 conditioned compensation of hernias upon proof (1) "That the hernia did not exist prior to the date of the alleged accident" and, (2) "That it was immediately preceded by an accident." The 1957 session also deleted the general requirement from the law requiring violent and external means. The standard became whether there was, in retrospect, an accidental result.

It appears to the Board that the posture of the employer in this case seeks to administratively restore to the law the prerequisite removed by the 1957 amendment. There is no indication that in contemplation of the word "sudden" that slowly turning a log would be any less productive of strain damage than if the maneuver was accomplished more quickly,--assuming the degree of strain is equal in either event. The same 1957 amendment to the hernia statute also removed the requirement that there be evidence that to be compensable, there must also be an immediate symptom of pain following the then prerequisite accident.

The Board, taking the evidence from its four corners, concludes that the claimant had a pre-existing hernia and that the most logical cause of the exacerbation requiring surgical repair was the strain entailed in turning logs in the early morning hours of December 3, 1968.

The order of the Hearing Officer is accordingly reversed. The employer is ordered to pay compensation to which the claimant is entitled under the compensation law.

Counsel for claimant, pursuant to ORS 656.386, is allowed a fee of $750, payable by the employer, for all services rendered upon the hearing and review.

WCB #69-2012 July 20, 1970

CLYDE OVERSTREET, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 52 year old laborer as the result of a low back injury incurred while pulling lumber on a green chain on June 18, 1969.

The claimant had prior back problems for which he had undergone surgery to fuse unstable vertebrae. Also involved is certain natural degeneration of the spine not materially caused or affected by the accident at issue. The claimant contends that his condition is not medically stationary and, alternatively, that the permanent disability is greater either on a partial or total basis.

Pursuant to ORS 656.268, a determination issued finding the claimant to have no residual disability attributable to the accident at issue. Upon hearing, the Hearing Officer found the claimant to have substantial disability but also found that some of the disability was pre-existing and some was due to an unrelated progression of degenerative processes. The injury is unscheduled and ORS 656.214(4) requires a comparison of the workman to his pre-injury status. Regardless of whether every phase of disability is established and evaluated, it is clear that only the disability attributable to the accident at issue is compensable. If that additional disability renders the claimant temporarily or permanently disabled on a permanent basis, the precise measure of contribution of the current accident is unimportant so long as that contribution is material in producing the total disability. Where the disability is only partial, the part played by the accident at issue becomes quite important in measuring the benefits to be paid.

The Hearing Officer, who observed the demeanor of the claimant as a witness noted that "his credibility is seriously impaired." The films reflect that the claimant was able to perform motions with his back without obvious difficulty. A person may have his "good" days with any chronic problem and a film of the nature produced here could have been misleading. This is not the posture of the evidence, however. The claimant testified that he had trouble handling the tires. The film reflects numerous bending, stooping and tire handling movements without any obvious distress. The history upon which some of the medical opinions rest did not give the doctor the benefit of the facts revealed by the hidden camera.

There is too much dependent upon the confidence required by the doctors and administrators to lightly cast aside discrepancies or exaggerations in the testimony of the claimant. The Board is not certain that it can adopt the complete findings of the Hearing Officer in allocating various phases of the disability picture. The Board does concur with the Hearing Officer and concludes and finds that the claimant is neither temporarily not permanently disabled on a permanent basis. The Board also concurs and concludes and finds that the disability is partial only and the disability attributable to this accident does not exceed the 32 degrees found by the Hearing Officer.

The order of the Hearing Officer is affirmed as to the result.

WCB #70-566 July 21, 1970

JOHN E. JOHNSON, Claimant.
Request for Review by Claimant.

The above entitled matter basically involves an issue arising from an interpretation by the employer's insurer of a judgment order issued by the Circuit Court of Lane County in remanding a previous appeal for further psychiatric aid, vocational rehabilitation of the claimant and ordering the payment of temporary total disability.

The claimant is a 51 year old logger with a history of prior back injuries whose current injury occurred January 25, 1968 when he slipped on the snow while pulling on a log. His claim was the subject of a determination on August 15, 1968 pursuant to ORS 656.268 finding the claimant to be medically

stationary with residual disability of 13.5 degrees of one leg and 32 degrees of unscheduled disability. Following hearing held April 23, 1969, the Hearing Officer found the claimant to be permanently and totally disabled. Upon review the Workmen's Compensation Board found the claimant not to be permanently and totally disabled, ordered the permanent partial disability reinstated and directed the matter be referred for coordination of re-employment facilities of the public agencies involved. This order in turn was set aside by the Circuit Court which found the claimant's condition to be not medically stationary and ordered reinstatement of temporary total disability.

The claims supervisor of the employer interpreted the Circuit Court order to require reinstatement of temporary total disability as of February 10, 1970, the date of the Court order. Apparently there was no communication between counsel for the respective parties nor any effort to have the judgment order clarified. Instead the claimant sought a new hearing. At this point the Hearings Division of the Workmen's Compensation Board apparently also interpreted the order of the Court to require reinstatement of temporary total disability as of the date of the order of the Court. This resulted in a summary dismissal of the request for hearing on the basis that the issue was already determined by the Court.

The Board, on review, notes that there is no indication in the record that the Circuit Court had before it any evidence beyond that upon which the appeal was based which was established at a hearing on April 23, 1969. The Workmen's Compensation Board order of October 16, 1969 was based upon the record established April 23, 1969. The Court recited that its consideration of the record so established was as of December 17, 1969, though the judgment order was not executed until February 10, 1970. The Board finds it difficult to give a construction to the Court's order of an effective date for temporary total disability of February 10th, when the Court's decision was based upon a record of the claimant's physical condition established as of the prior April 23rd.

It is the conclusion of the Board that the order of the Hearing Officer in summarily dismissing the matter is in error. The record available reflects that the claimant had not worked from his last surgery in March of 1968 to the date of the hearing on April 23, 1969. It thus appears that the effect of the Court order would be to reinstate time loss on a continuing basis from at least March of 1968 through April of 1969, and thereafter as claimant's condition warranted under the order of the Court until again terminable by virtue of medical report, return to work or finding of the Workmen's Compensation Board pursuant to ORS 656.268.

<u>The order of the Hearing Officer is reversed and the Board directs the employer to pay temporary total disability upon the basis set forth in the above paragraph</u>, and subject only to credit for payments of permanent partial disability which may be reclassified as payment of temporary total disability. Counsel for claimant, by order of the Court, received a fee of 25% of the compensation so payable.

The Board has studied the various statutes pursuant to which attorney fees or penalties might possibly be levied against the employer. There was some basis for the interpretation made by the employer and it cannot be said that any delay was unreasonable or that the employer was resisting an order of the Court.

There was an immediate course of action available to the claimant when question arose over interpretation of the order of the Court. That remedy was by communication to opposing counsel and the Court for clarification. In lieu thereof the interpretation of the Court order was made a matter of administrative proceeding by the claimant. The major delay in retrospect appears basically to be the punitive pursuit of penalties and attorney fees rather than the simple course of clarifying the order of the Court. An order requiring the employer to pay attorney fees, even if authorized by statute, would appear to reward the contentious approach to the resolution of problems.

WCB #69-1697 July 21, 1970

MACON PUCKETT, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claimant sustained a compensable injury arising out of an in course of employment. The claimant, a 52 year old drill press operator, was discovered lying on the ground near a gate between the employer's buildings and the employer's parking lot. Sometime after lunch on this day he had been told to go home by supervisors who concluded that the claimant had been drinking and could not work effectively.

The claimant refused offers of assistance, when found, and got into his pickup truck and successfully drove home though he has no recollection of having done so. Early the next day the claimant checked into a hospital and was diagnosed as having a recent compression fracture at the L-2 vertebra.

Not only does the claimant have no recollection of how he got home, his recollection is worthless of how he got to the ground and whether he fell and, if he fell, whether he fell on his stomach or his back.

The claim was denied by the employer and this denial was affirmed by the Hearing Officer. A substantial part of the record and briefs involves a controversy over whether the claimant was intoxicated and, if so, the effect of intoxication upon the validity of the claim. The Board does not deem it necessary to determine these factors. He related to a doctor that he fell off a high curb and forcibly flexed his spine. This version is impeached by the fact his lunch pail was not at the scene despite claimant's testimony at page 8. At page 11 is another speculation over whether he fell or passed out after pulling himself up the fence with his hands. It is also at variance with his reply to those who found him that any trouble he was having was an old injury he had lived with for years. The claimant also related that he had been helped to his feet by unidentified persons and fell through the gate when they released him, but his counsel disavowed any claim on this basis. The claimant is so unsure of the course of events that the testimony of those with a positive recollection is to be preferred. Upon this basis the Board concludes that the claimant had somehow placed his lunch box in the pickup before being found inside the gate. The Board also concludes that the area where claimant was found was lighted rather than dark.

The situation in essence is that any accident was unwitnessed and, if an accident occurred, there is no evidence that it was employment related. The mere occurrence of an accident upon an employer's premises is not sufficient to make a claim compensable. Certain inferences may be utilized to support an unwitnessed occurrence, but in this instance the best that can be said is that the claimant was found lying down and at the time did not even claim to have fallen. The claimant, in fact, denied any job relation to whatever his problem may have been when found reposing on the ground.

The Board concludes that the recent decision of Moore v. U. S. Plywood, 89 Or Adv Sh 831, Or App, 462 P.2d 453 (1969), should be applied. The alleged incident was unwitnessed and the surrounding circumstances including the obviously vague, conflicting and uncertain testimony of the claimant are such that the Board concludes and finds that the claimant did not sustain an accidental injury either in course of or arising out of employment.

The order of the Hearing Officer is affirmed.

WCB #69-1140 July 21, 1970

MAX T. NEATHAMER, Claimant.

The above entitled matter involved an issue of the extent of permanent disability sustained by a 35 year old cat skinner when he jumped from a caterpillar which got out of control. This incident, on August 7, 1968, resulted in rib fractures and associated arm and shoulder injuries, primarily as the result of a log rolling on him.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a loss of 25% of the left arm. Upon hearing an additional award of 32 degrees was made for unscheduled injuries.

The claimant requested a review of this Hearing Officer order, but has now withdrawn the request.

The withdrawal of the request for review is approved and the matter is hereby dismissed.

WCB #68-1170 July 21, 1970

CARLOS WHEELER, Claimant.

The above entitled matter involves a request for allowance of attorney fees with respect to representation of the claimant for an injury of August 19, 1967. The claimant's right hand was pinched by a machine cover.

The claim was closed December 8, 1967 with temporary total disability to August 28, 1967 and without permanent partial disability.

Claimant, with aid of counsel, requested a hearing with respect to the December 8th closure on July 15, 1968. On March 5, 1969 the parties stipulated that the claim be reopened and the hearing request be withdrawn. No provision was made for attorney fees in this order.

Pursuant to ORS 656.268, a further determination was made May 20, 1970 allowing further temporary total disability from June 9, 1969 to April 30, 1970 (less time worked) plus an award of permanent partial disability of 15 degrees.

Counsel for claimant advises that he has received no fee in the representation of his client and requests the allowance of $100 plus $15 costs incurred on behalf of the claimant.

The matter of the fee should have been included in the stipulation and dismissal by the Hearing Officer. However, the Board recognizes that counsel has performed services of value to the claimant and that the requested fee and item of costs are reasonable.

Counsel is allowed a fee of $100 plus reimbursement of medical examination fee of $15 payable from compensation yet payable. If no compensation remains payable, counsel is authorized to collect said amounts from his client for such representation.

WCB #69-1966 July 21, 1970

JOE M. REEVES, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether an altercation between the claimant and a son-in-law produced injuries which arose out of and in course of employment. The altercation took place upon the premises of a restaurant operated by the claimant. The restaurant was a partnership operation between the claimant and his wife and the claimant was insured by the State Accident Insurance Fund pursuant to ORS 656.128 permitting partners to obtain status as workmen by special election.

There is no question but that the claimant fell over a metal can at the restaurant on September 8, 1969 as a part of the altercation and fractured his hip.

The chain of circumstances leading up to the incident involves a rather stormy domestic history. The claimant and his partner in the restaurant business were first married in 1954, divorced and remarried to each other in 1961 and separated in 1969 with two suits for divorce pending concurrently in Marion and Wasco counties.

The disposition of various property interests is not complete, but the parties had agreed that the wife was to have a trailer house which had been parked near the restaurant and rented by the disputants to restaurant employes. The claimant's wife failed to remove the trailer by the date tentatively agreed upon. The claimant caused the trailer house to be moved to a nearby truck stop. Inextricably connected was the sale of a personal automobile, the $300 proceeds to go to the wife. On Sunday, September 7, the day before the altercation at issue, the claimant went to the home of one Ramey Thompson, the son-in-law with whom claimant's wife was staying. He gave his wife a check for $260 as part of the car proceeds, and gave her a second check for $40 made out to the truck stop as payment for the expense

of moving the trailer. After some dispute the claimant gave his estranged spouse another $30 or $40 in cash, depending upon whose version is accepted.

The next scene involved a visit by the son-in-law the next day to the restaurant. The son-in-law was upset because his pregnant wife was in tears from the claimant's visit the day before. The son-in-law had been unsuccessful in obtaining money to pay the mother-in-law's medical bills. He returned the $40 check which fell to the ground. When the claimant attempted to stuff the check into the son-in-law's shirt pocket the action became more violent and the broken hip followed.

The claim was denied. The Hearing Officer affirmed the denial.

The Board concludes and finds that the only connection between the injury and the employment was that the happening was at the place of employment. The claimant's quarrel with his wife and the son-in-law did not arise out of or in course of the employment. The trailer had become the property of the wife by agreement. The trailer, at best, had had only a former tenuous association with the restaurant business. The reason for the broken leg was obviously a bitter family quarrel outside the course of employment.

The order of the Hearing Officer is affirmed.

WCB #69-2338 July 22, 1970

STELLA GILMER, Claimant.
Request for Review by Employer.

The above entitled matter basically involves an issue of the extent of permanent disability sustained by a 47 year old potato processing plant laborer who slipped on a wet floor on September 2, 1967 and struck her left buttock on a wooden step. She returned to work on September 16, 1967, still experiencing some residual soreness and worked until the end of the processing season in the late spring of 1968. She again worked in a cannery in Payette, Idaho for about a month in August of 1969. She has neither worked nor sought work since to the date of hearing herein on February 17, 1970. She lives with and does most of the housework for her sister.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a loss of 7.5 degrees, (5% of a leg). Upon hearing the evaluation was increased to 45 degrees.

The employer requested review and sought to have further evidence introduced. The claimant did not cross appeal for review but indicates that upon further hearing, she would seek further relief.

The Board is concerned that the factor of earnings loss and re-employability were not fully developed upon hearing. The Board particularly desires to obtain the benefit of an examination of this claimant by the Physical Rehabilitation Center of the Workmen's Compensation Board.

The matter is accordingly remanded to the Hearings Division with direction that the employer provided for the claimant to be examined by the Physical Rehabilitation Center at employer expense. Upon hearing the report of the Physical Rehabilitation Center and any additional evidence reflecting on disability, particularly with reference to earnings loss, shall be considered by the Hearing Officer and such further order shall issue as deemed warranted by the Hearing Officer.

SAIF Claim # B 102200 July 24, 1970

HENRY FAIRBAIRN, Claimant.

The above entitled matter has been brought to the attention of the Workmen's Compensation Board with respect to whether the Board should exercise its own motion jurisdiction pursuant to ORS 656.278 to order the claim reopened for the purpose of further medical care and other compensation.

The claimant had a low back injury in 1964 with only minimal time loss and a history of return to relatively heavy work for a substantial period of time.

The Board has conflicting medical reports with respect to the causal connection between the claimant's present problems and his low back injury of 1964.

Pursuant to ORS 656.278, the matter is referred to the Hearings Division of the Workmen's Compensation Board for the purpose of taking evidence upon this issue. Upon conclusion of the hearing, the Hearing Officer shall forthwith cause a transcript of the proceedings to be made and forwarded to the Board together with a memorandum and recommendation of the Hearing Officer in the matter. Decision upon the merits of own motion proceedings is a matter reserved by law to the Board proper.

WCB #69-2049 July 24, 1970

ALVEY D. STANFORD, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of whether the claimant sustained any compensable injury to his heart associated with symptoms experienced during his work on August 15, 1969.

A claim for alleged injury was denied by the employer but ordered allowed by the Hearing Officer.

The claimant, then 57 years of age, was engaged in general maintenance and repair work about a motel. On the day in issue the claimant had been working with springs and mattresses. At about 10:30 to 11:00 a.m. while the claimant had been engaged in relatively light work for at least 20 minutes he experienced shortness of breath and pain in the jaw, chest, shoulders and arms. He returned to work and did not seek medical attention for five days.

As indicated, the question is not whether a myocardial infarction was sustained. The question is whether any physiological injury occurred which was compensably related to the work.

The Board is not in agreement. The majority interprets the medical evidence to reflect that there was no such physiological injury.

The medical evidence is supplied by a Dr. G. Scott Jennings, an osteopath in general practice; by Dr. Fred C. Lorish, an internist; and Dr. Ray Casterline, also a specialist in internal medicine. Dr. Jennings diagnosed a "left ventricular strain and possible myocardial infarction." The diagnosis of Dr. Jennings was based upon his interpretation of a single electrocardiogram. The testimony of the two specialists in internal medicine clearly indicates that the single electrocardiogram was not reliable and that no infarct in fact occurred.

It is also the clear import of the testimony of Doctors Lorish and Casterline that the claimant was the victim of a longstanding progressive deterioration in his arterial circulation which was not caused or exacerbated by his work effort. At best the claimant simply experienced a transitory or "evanescent" symptom of that underlying insufficiency which was coincidental with, but not caused by, his work. There is even some suggestion that the pain pattern may have been associated with a degenerative deterioration in intervertebral spaces which is capable of producing intercostal or chest pain. This is significant in the fact that the claimant is able to perform equivalent of walking up several flights of stairs in the Masters two-step test without pain.

The majority of the Board concludes that the Hearing Officer has read into the evidence of Dr. Casterline a medical opinion that there was damage which "faded out." The words of the doctor should not be picked apart to reach an opinion clearly contrary to the import and conclusion of the doctor. The Board interpretation of the medical testimony in its entirety is that the work effort was not a material contributing cause of the symptoms experienced on that date and that no injury in fact occurred--only transitory symptoms of a long-standing problem were felt.

The order of the Hearing Officer is reversed.

Pursuant to the attorney fee regulations, relating to reduction of compensation on review, counsel for claimant is authorized to collect a fee from claimant of not to exceed $125.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan dissents as follows:

This is a denied claim. We are not concerned with whether there is any permanent disability. That is to be determined by the Closing and Evaluation Division. We are only concerned with whether or not there was an injury which arose out of and in the course of employment. The injury may be temporary, it may be "evanescent." We are all aware of a sprained muscle; there are hundreds, if not thousands of these, every year which after treatment leave

no permanent damage. These are compensable claims. Our problem is reduced to the simple question: Did the employment activity send the workman to the doctor for treatment?

There was much discussion about whether there was an infarction, or a coronary insufficiency. The employer's expert testified (tr. 96), "I call it a transitory injury." Particular attention should be paid to Dr. Caterline's report in the next to the last paragraph on page 7:

> "I do not doubt his history of having experienced the chest discomfort while on the job, but I would seriously question his having done any excessive work activity, * * * "

We are not concerned with whether or not there was excessive work activity. For purposes of determining the compensability of the claim we are only concerned with whether or not the work activity was what sent the workman to the doctor for treatment, and did the doctor treat him for that?

In the final complete paragraph on page 7, Dr. Casterline continues:

> "Therefore, I believe that I could state that the work activity in which he was engaged on August 15, 1969, at the time of his sickness, did not constitute a material contributing factor to the episode of rather limited area of myocardial infarction, which, quite possibly was evanescent enough * * *"

Again, it must be remembered we are only concerned with whether or not the work activity was what sent the workman to the doctor, not an infarction.

In the paragraph at the top of the last page of the report:

> " * * * but one might expect that this could very readily have occurred at any other location where he was performing equivalent work, which was not above and beyond his ordinary level of work activity."

The facts are that it did not occur "at any other location." It occurred on the job.

Dr. Casterline testified at the hearing (tr 97):

> "So it is difficult for me to say exactly what was the time when this occurred, because he may very well, with the pains the preceding days, and doing something else, may very well have had this situation develop."

It should be noted that on page 99 Dr. Casterline is very cautious in his answers to questions. A reviewer is referred to the Supreme Court case of Clayton, wherein the Court recognizes that the more eminent the medical witness the more cautious he will be.

At page 99 of the transcript and subsequent pages there is discussion of the meaning of the word "material." Employer's counsel would have us believe that "material" means "excessive." Dictionaries do not support this. "Material" is defined as "being relevant, having some noticeable effect."

It is not defined as being the most important, or being more than 51 per cent.

The Supreme Court has not required that there be some unusual activity. Employer's counsel in his brief refers to Svatos. That was not a Supreme Court case.

On page 103 of the transcript, Dr. Casterline testified:

> "* * * If the man had stayed in bed, as I indicated with his blood pressure elevation he probably might not have had it, but doing something, whatever the equivalent work load, he likely would have had it. But he happened to be there * * *"

When Dr. Casterline's report and testimony are taken as a whole, I agree with the Hearing Officer. There was an injury, however "evanescent" it may have been. It arose out of and in the course of employment. Because of this the workman sought and received medical treatment.

The claim is compensable.

/s/ Wm. A. Callahan

WCB #69-1870 July 24, 1970

STEPHEN A. JOHNSON, Claimant.

The above entitled matter at this point involves a procedural issue based upon the fact that the order sought to be reviewed was issued by the Hearing Officer on May 27, 1970 with an amending order issued on May 29, 1970, each mailed to the claimant on said dates. The request for review was mailed by the claimant on July 15, 1970. ORS 656.289 provides that the order of the Hearing Officer is final unless the part requests a review within 30 days after the Hearing Officer order is mailed to the parties.

The claimant has been advised by his counsel that the time has lapsed within which to request a review. His request for review seeks to have the time limitation be ignored for the reason that in moving about, he did not actually receive the copy of the order in time to appeal.

The Board is sympathetic to those who lose their day in Court by procedural lapses and defaults. The Board, however, is bound by the statutory direction making the order of the Hearing Officer final.

The request for review is accordingly dismissed.

WCB #70-56 July 28, 1970

CHARLES GREEN, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent partial disability sustained by a 26 year old claimant on April 18, 1969, when he fell from the second story of a building under construction on which he was employed as a carpenter, resulting in two compression fractures of his thoracic vertebrae.

The Closing and Evaluation Division of the Workmen's Compensation Board determined pursuant to ORS 656.268 that the claimant was entitled to an award of permanent partial disability of 64 degrees of the maximum of 320 degrees provided for unscheduled injuries. The claimant requested a hearing upon the issue of the adequacy of this award of disability. The Hearing Officer's order entered following the hearing affirmed the determination of disability of the Closing and Evaluation Division. The claimant, remaining dissatisfied with the disability award, requested this review by the Board of the order of the Hearing Officer, contending that the Hearing Officer failed to take into account the impairment of the claimant's earning capacity resulting from the injury.

The medical evidence relative to the physical impairment resulting from the injury, which is uncontroverted, consists of the reports of Dr. Gill, the treating orthopedic physician. The medical reports reflect that the claimant sustained compression fractures of the 11th and 12th thoracic vertebral bodies, which have healed with satisfactory alignment. The compression of the T-12 was minimal and the compression of the T-11 was more marked. The height of the T-11 was diminished approximately one-third of normal, resulting in a very slight hump or prominence posteriorly, causing some superficial tenderness in this region. Flexion was normal but extension was restricted approximately 15 degrees. The thoraco lumbar spine was otherwise completely normal. The history obtained from the claimant indicated that he was experiencing little difficulty with his back other than occasional aching in the thoraco lumbar region after prolonged or heavy activity, and that he was getting along reasonably well in his employment as a truck driver. Dr. Gill was of the opinion that the claimant had sustained only minimal functional impairment as a result of his injury.

The principal question to be resolved in this matter involves whether any earnings impairment has resulted from the injury. The claimant's pre-injury employment history covers a period of approximately five years. During the initial three years he was employed as a carpenter. The following two years he operated a service station and was employed as a service station attendant. Three weeks prior to his injury he had resumed work as a carpenter. His earnings as a service station operator and attendant did not exceed $450 per month. His wages as a carpenter were $5.28 per hour which approximates $800 per month. Whether the claimant's resumption of employment as a carpenter for a short period prior to his injury constitutes a realistic pre-injury wage basis upon which to compare his probable future earnings capacity involves determining whether it is reasonable to assume that he would have continued to work as a carpenter had he not been injured.

Following his recovery from his accident, the claimant returned to work as a truck driver for a company engaged in the business of moving mobile homes. The necessity for this change of employment is unsupported by any medical evidence and is founded solely upon the claimant's own belief that he is incapable of continuing employment as a carpenter. During his first two months employment as a truck driver, his earnings averaged $400 per month. This brief post injury earning period, however, occurred during the slack season of the mobile home moving business and includes a one week leave of absence from work. The claimant's ultimate goal should he continue in the mobile home moving business is to own his own truck under a lease back arrangement with the company which would result in greater earnings.

The claimant contends that earnings impairment should be calculated on the mechanical formula of a comparison of the wages earned immediately before and immediately after the injury. Earnings impairment is determined, however, by the comparison of the actual earnings before the injury with the earning capacity after the injury.

The determination of the post injury earning capacity involves making the best possible estimate of the future ability to earn based upon all available evidence. The ultimate objective is to arrive at a realistic and fair approximation of the workman's probable future earning capacity during the remainder of his working lifetime. While short term post injury wage experience may under some circumstances be consistent with future earning capacity, under other circumstances actual earnings for a short period following the injury are non-representative and constitute an unreliable measure of future earning capacity.

It is clear from the evidence of record in this matter that the claimant's initial post injury earnings do not accurately reflect his true future earning capacity and do not form a valid basis of comparison with pre-injury earnings for the purpose of ascertaining the existence or extent of an earnings impairment. That the claimant's future earning capacity is substantially greater than is indicated by his short term post injury actual wage experience is not only readily apparent from the evidence but is recognized and conceded by the claimant. Taking all of the available evidence bearing upon the question by its four corners, the evidence is insufficient in the judgment of the Board to support a finding that earnings impairment is a factor to be taken into account in the evaluation of the claimant's permanent disability resulting from his injury.

The Board finds and concludes from its de novo review of the record and briefs in this matter that the claimant's unscheduled permanent partial disability attributable to the injury involved herein does not exceed the 64 degrees heretofore awarded by the determination order of the Closing and Evaluation Division and affirmed by the order of the Hearing Officer.

The order of the Hearing Officer is therefore affirmed.

SAIF Claim # B 33038 July 28, 1970

STEVE R. GARDNER, Claimant.

The above entitled matter involves the claim of a workman injured December 2, 1963. The first final order of the then State Industrial Accident Commission allowed temporary total disability for a period of four days. The claim was reopened June 10, 1964 and again closed April 28, 1965 with further temporary total disability and an award of permanent partial disability for back disabilities equivalent to 40% of the loss function of an arm.

No further order has been issued by the State Accident Insurance Fund or its successor in interest as the insurer, the State Compensation Department now known as the State Accident Insurance Fund.

Information has been presented to the Workmen's Compensation Board seeking the exercise of the Board's own motion jurisdiction in such matters pursuant to ORS 656.268. It is contended that the claimant's condition related to the accident was worsened and that compensation should be increased.

The information including medical reports is of such nature that the Board deems it advisable to refer the matter for a hearing to enable the claimant and the State Accident Insurance Fund to be heard.

The matter is accordingly referred to the Hearings Division for the purpose of taking evidence with respect to whether the claimant has incurred a compensable aggravation of his injuries of December 2, 1963. Upon conclusion of the hearing, the Hearing Officer shall forthwith cause a transcript of the proceedings to be prepared for Board consideration. The Hearing Officer shall not issue an order on the merits, but shall make a report of the proceedings and include therein his recommendation in the matter. Decision on the merits is reserved as a matter of law to the Workmen's Compensation Board.

WCB #69-1707 July 28, 1970

The Beneficiaries of
JACKIE DEE RHODES, Deceased.

The above entitled matter involves a claim by the parents of a workman killed in the course of employment that at the time of the fatal accident they were dependent upon the workman and thus are entitled to be compensated as dependents, there surviving neither wife nor child to qualify as beneficiaries.

The claim of the parents was denied and this denial was affirmed by the Hearing Officer.

The factual situation reflects that the parents may well have been substantially dependent upon their son in the years from 1962 to 1965. However, at that point he became a penitentiary inmate. Upon release from the penitentiary, the decedent lived with his parents, the claimants herein,

from February 28 to and including April 6, 1969. The evidence is that the parents were existing on social security funds in the amount of $1,548 per year or an average daily income of about $2.12 each per day. During the 37 days the decedent lived in this household, he contributed a total of $40. His contribution to the total income was thus only $1.08 per day. Averaging the money available for the support of three persons in the household, the money per day available to each would be slightly in excess of $1.77. This, of course, is somewhat less than was available per person before the son joined the household.

There is much evidence concerning support in earlier years and of an intention to contribute more in the future. ORS 656.204 provides the measure of benefits once dependency is determined. Benefits are limited to 50% of the average monthly support actually received during the 12 months next preceding the fatal injury. The beneficiaries concede that as much as $10 should be deducted as a "proper" share of the costs of the deceased to the household and that the beneficiaries had become dependent with respect to the $30. Even if the claimants were dependent, the benefits would be limited by statute to fifty per cent of the 12 months average of $2.50 or $1.25 per month.

The Board concurs with the Hearing Officer that the factual situation does not support a claim that the parents were dependent upon this workman. The Board notes an interesting facet of the case not commented upon by the Hearing Officer. The decedent had seven brothers and a sister ranging in age from 20 to 43. None of these lives at home and if the total annual income of the parents was the $1,548, as represented, we must conclude that the eight other children contributed absolutely nothing.

It would be unfair to recite that these parents "lived" upon the limited sums received from social security. "Existed" would be a better choice of words. However, adding one more person to this meager existence whose total contribution to the entire household expense was $1.08 per day could hardly be classified as a benefit to form the basis of a dependency. As noted, the money available per person actually declined.

The Board concludes and finds that the claimants were not dependent upon the deceased workman.

The order of the Hearing Officer is affirmed.

WCB #69-2281 July 29, 1970

A. D. EVANS, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 46 year old lumber mill worker as the result of a jerking type trauma which injured his shoulders, neck and thoracic spine on October 23, 1967.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 48 degrees out of the applicable maximum of 320 degrees. Upon hearing, the award was increased by the Hearing Officer to 80 degrees.

The claimant has sustained no loss of earnings upon return to work. The record reflects that he lost only three days temporary total disability. His earnings have actually increased but this is due primarily to the increase in wage scales.

The claimant does have some progressive degenerative pathology. This is not due to the accident but is compensable to the extent it was exacerbated by the accident at issue. The history of symptoms and medical examination in 1968, recited by the Hearing Officer, is not as significant as the medical findings at the time of claim closure in June of 1969. In addition to holding down his former job without significant difficulty, the claimant was able to be instrumental in building a four room addition to his house. The medical information indicates the disability is more than mild, but less than moderate. The 48 degrees allowed by the Closing and Evaluation determination is within that range. The award by the Hearing Officer exceeds that limit.

The pre-existing degeneration, the post injury development not medically associated, and non-disabling aspects of the claim do not serve as the basis for award of disability.

The Board concludes and finds that the disability does not exceed the 48 degrees previously awarded. The order of the Hearing Officer is set aside and the prior award of 48 degrees is reinstated.

Pursuant to rule where compensation is reduced on appeal by the employer, counsel for claimant is authorized to collect a fee from his client of not to exceed $125 for services on review.

WCB #69-2223 July 29, 1970

ROY E. TATE, Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 64 year old school custodian as the result of a low back injury incurred on January 27, 1969.

The claimant underwent surgery called a laminectomy. He has not returned to work and at his age has apparently decided to retire after a rather active life.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 64 degrees against an applicable maximum of 320 degrees. Upon hearing, the State Accident Insurance Fund was ordered to pay claimant compensation for permanent total disability.

The Hearing Officer skirts the ultimate question and makes no finding on the basic proposition of whether the claimant is able to work regularly at a gainful and suitable occupation. The latest medical report from Dr. Tsai, who performed the surgery, indicates that he has placed a limitation of weight bearing above 30 pounds and precluding moving of heavy furniture.

The Board is called upon to decide whether a 64 year old workman with a background of heavy work is totally disabled when limited to lifting weights of 30 pounds. The Hearing Officer based his award on the "realities of the external world." There are of course many people regularly and gainfully employed with no more formal training and with work lifting capacities of less than 30 pounds. Among the realities of the modern world is also the fact that many people of that age are motivated to retire rather than to continue employment. This is particularly true where some change in employment enters the picture. One cannot disregard that reality in evaluating disability.

In this instance the claimant has not sought re-employment. The evidence of claimant's physical capabilities does not reflect a workman so seriously injured that he would be unable to work. He has made the choice of not working any further and seeks to establish this as equivalent to an inability to work.

The Board concludes and finds that the disability though permanent, is only partially disabling and that the disability does not exceed the 64 degrees heretofore established in the order of determination made pursuant to ORS 656.268.

The order of the Hearing Officer is set aside. The award of 64 degrees permanent partial disability is reestablished.

The review having been requested by the employer and the award of compensation reduced, counsel for claimant is authorized to collect from the claimant a fee of not to exceed $125 for services on review.

WCB #69-1402 July 29, 1970

HERBERT W. KURRE, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 53 year old service manager of a machinery company sustained a compensable injury arising out of and in course of his employment.

The symptoms upon which the claim is based were experienced on June 5, 1969, when the claimant was simply walking across the employment premises. The claimant felt an abdominal pain and collapsed. The problem was diagnosed as a nerve root compression secondary to a protruded intervertebaral disc in the lumbar area.

There is conflicting medical opinion on the relationship of the work effort to the back difficulty. All of the medical evidence supports the conclusion that the claimant had a pre-existing degenerative lumbosacral disc disease. Dr. Campagna expressed a generalized conclusion, without explanation, to the effect that there was a relationship based upon "stress, pressure and fatigue." Dr. Spady, on the other hand, takes the position that under the circumstances the rupture of the intervertebral disc was spontaneous and only coincidental with work. Dr. Spady explains that the relevant mechanics would require some bending, lifting or twisting to associate the work effort as a causal factor in the development of the ruptured disc.

With due respect to the able doctors, it is noted that it was over six months following the incident before Dr. Campagna expressed the theory of "stress, pressure and fatigue." The situation has been likened to the dispute in medical areas over the relationship of stress to coronary infarction. There is a vital difference in that there does not appear to be substantial opposing schools of doctors at odds over the issue.

The Board concurs with the approach taken by the Hearing Officer to the problem at hand. One medical opinion is rather categorical and without supporting explanation. It attached some work relationship on a generalized basis without any apparent association to the work being done. Upon this basis every such degeneration which reached symptomatic levels would be compensable regardless of where it happened. Dr. Spady approached the problem from the standpoint of what the pre-existing problem was and what physical motion was required to associate the exacerbation with work effort.

The Board concludes and finds that the claimant did not sustain a compensable injury as alleged.

The order of the Hearing Officer is affirmed.

WCB #69-1653 July 30, 1970

ALVIN G. BAKER, Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue of whether the claimant sustained a compensable injury on July 10, 1969 when he was trimming branches on small trees in a nursery. The claimant is a 58 year old unskilled farm laborer who alleges he turned and twisted his back while so trimming trees.

The claim was denied by the State Accident Insurance Fund as insurer of the employer, but was ordered allowed by the Hearing Officer.

One point in dispute is a prior automobile accident in November of 1968 which was the subject of a complaint for damages. The Hearing Officer discounts the residuals of that accident. The Board does not adopt the Hearing Officer's statement relative to the practice or purpose of lawyers in drafting such complaints. Any person subscribing under oath to such matters should not be permitted to lightly cast aside his oath. Another issue is the fact that the claimant was able to operate a rototiller for a short period of time following the alleged accident at work.

The real issue is not whether the claimant previously injured his low back or whether the work injury was less severe than claimant asserts. Those are matters which properly go to issues of the extent of disability if the claimant did in fact incur an injury while trimming trees.

The testimony of claimant that he did sustain some definite exacerbation at work was supported by his stepdaughter who heard an expression of pain at the time and by his wife. He sought medical help the next day and also advised the employer on the day following the alleged accident. The fact that the doctor delayed relaying the information to the State Accident Insurance Fund does not detract from the immediate complaint to that doctor.

There are some inconsistencies but the Board concludes that those inconsistencies are not material and that in the final analysis the situation is such that the Board should not substitute its evaluation of the testimony of the witnesses for that of the Hearing Officer who had the benefit of a personal observation.

The Board believes that the claimant did have some low back pain as early as December of 1968. This would be consistent with the fact that degenerative arthritic changes were noticeable at that time and at least one doctor refers to pain the same area. (sic) As noted above this does not preclude additional injury being caused while trimming trees which qualifies as a compensable injury.

For the reasons stated, the Board concludes and finds that the claimant sustained a compensable accidental injury, as alleged.

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 for services on this review pursuant to ORS 656.382 and 656.386.

WCB #69-973 July 30, 1970

JAMES A. ANDERSON, 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 logger as the result of a back injury sustained on June 11, 1968.

Pursuant to ORS 656.268, the claimant was determined to have an unscheduled disability of 16 degrees. Following a hearing the award was increased to 48 degrees.

The claimant had a previous industrial injury which was in the unscheduled area and was evaluated as equal to the loss of 60% of an arm. Despite that accident and award, the injuries did not preclude the claimant from the rather arduous activity of bucking logs. Despite numerous rib fractures of several spinous transverse processes, the claimant again returned to logging for a time.

It is the claimant's contention that due to a limited education he is now precluded, at age 44, from ever again engaging regularly in gainful and suitable employment. The physical findings with respect to the low back are minimal. The findings with respect to the upper back are basically consistent with residuals of the earlier injury of 1965. There is an expression by one doctor that the claimant is totally disabled but this conclusion was made without the benefit of knowledge of activities in which the claimant engaged.

Films were taken of the claimant working upon an automobile. The films are not of the best quality. In conjunction with the testimony of the investigator, the films do show activity in bending over the motor in the car, of

exerting jerking motions with a wrench while in this position and, finally, showing the claimant working in a squatting position under the hood on top of the motor.

This obvious demonstration may have been limited to one occasion on which the claimant could be seen under such surveillance. This is not the only basis for questioning the reality of claimant's complaints. Dr. Serbu reports a "stocking type" hypesthesia. Such complaints do not follow known anatomical patterns and are thus considered as not pathologically related to the alleged source of the pain. The long term familiarity with the claimant by Dr. Serbu must be given greater weight than the limited opportunity afforded Dr. Stainsby.

The claimant, though seeking permanent total disability, is not so convinced in asking for permanent total disability that he can never work again. He admits to seeking out his former partner for the purpose of returning to logging. It is not clear why he left his last job but, whatever the reason, it was not because the claimant is physically incapable of returning regularly to suitable work.

The Board concurs with the Hearing Officer that the claimant is not totally disabled and that the initial determination of 16 degrees for this injury is inadequate. The Board taking cognizance of prior injuries and the award, therefore also concurs with the Hearing Officer that the permanent disability attributable to this accident does not exceed 48 degrees.

The order of the Hearing Officer is affirmed.

WCB #68-1453 July 30, 1970

MARY GREGOROFF, Claimant.
Request for Review by Claimant.

The above entitled matter involves the question of whether the claimant sustained any permanent disability as the result of falling and injuring her left knee on September 18, 1966.

Her claim was closed on October 31, 1967 without award of permanent disability. The request for hearing on that closing order was not filed until September 3, 1968. The actual hearing was not held until March 25, 1970. This unusual delay involved numerous postponements by the parties. The Board editorializes by declaring such leniency in continuances of proceedings to be contrary to Board policy and the purpose of the Compensation Law. Attention is directed to rules of procedure 5.06 A and 5.06 B.

The claimant was injured in a frozen foods plant. She was off work only five days and worked until the end of the 1966 season and worked the full 1967 season. She did not work in 1968 due to problems with the right leg and back. She had surgery in 1968 for the back and there is no relation of these problems to the 1966 injury. In 1969 she broke the right leg and this also is unrelated to the 1966 accident.

The claimant, on review, challenges the medical opinion of Dr. Anderson that the claimant's weight of 220 pounds on a 5' 4" frame contributes to her

present problem. No medical evidence was adduced to counter this, nor did claimant choose to question the doctor on this issue. The medical report claimant seeks to disown was in fact solicited by and introduced by the claimant.

It is interesting to note in the medical history that the claimant's complaints did not interfere with her work. She worked without impairment. She had a "burning sensation" while at rest or at night, but this subsided when working. It is well established that only disabling pain is compensable.

The claimant by letter and recital to her doctors has attributed some of her subsequent problems to the 1966 injury. There is no basis in the evidence in this claim to accept any such proposition. At best the claimant sustained a soft tissue injury to the knee which did not affect her work ability. Subsequent symptoms have basically been subjective.

The Board concurs with the Hearing Officer and concludes and finds that the claimant did not sustain a permanent injury as the result of her accident of September, 1966.

The order of the Hearing Officer is affirmed.

WCB #70-834 July 31, 1970

MARVIN D. PEARSON, Claimant.
Request for Review by Claimant.

The above entitled matter was heretofore the subject of a Board order on July 14, 1970 remanding the matter to a Hearing Officer for the purpose of taking evidence on whether increased compensation in the nature of a penalty and attorney fees should be assessed.

The Hearing Officer had summarily dismissed the matter on the assumption that all issues had been resolved. The claimant requested review.

The present issue is whether claimant's attorney fees are chargeable to the employer for services upon review. There is broad language in the case of Peterson v. SCD, 90 Or Adv Sh 983, 467 P.2d 976 (1970), upon which the claimant relies. Both the Peterson case and the Printz decision cited by Peterson concern denied or rejected claims.

The question before the Board is thus whether the broad language of the Peterson case should be extended to allow attorney fees in other than denied or rejected claims. There is special statutory authority for allowance of such attorney fees in denied and rejected claims. The Court ruled that the claimant did not have to prevail "finally" in the ordinary sense and that prevailing upon a procedural issue also warranted allowance of attorney fees.

The Board concludes that the statutory authority to assess attorney fees for "denied" or "rejected" claims does not apply to this claim.

There is a further question which should be resolved if this matter is appealed. That is whether the penalties claimant seeks pursuant to ORS 656. 262 (8) constitute "compensation" if fees are otherwise found payable.

The request to modify the Board order of July 14, 1970 is accordingly dismissed.

The usual notice of appeal is appended but reference is also made to ORS 656.388 as possibly applicable.

WCB #69-1546 July 31, 1970

LESTER E. PARKER, Claimant.

Workmen's Compensation Board Opinion:

The above entitled matter involves an issue of whether the 55 year old welder has a compensable occupational disease. Both silicosis and siderosis had been diagnosed.

At the time of hearing, the employer admitted liability for the siderosis. The Hearing Officer subsequently found that the disease was siderosis and rule out silicosis upon the basis that silicosis was not proved by the evidence and that the requisite five years' exposure in Oregon was not established.

The claimant rejected the order of the Hearing Officer thereby appealing to a Medical Board of Review. The matter was concurrently appealed to the Circuit Court for resolution of the legal issues not determinable by a Medical Board.

The Workmen's Compensation Board is now in receipt of the findings of the Medical Board including its answers to the questions required to be answered pursuant to ORS 656.812. Those findings are attached and by reference made a part hereof.

Pursuant to ORS 656.814 the findings of the Medical Board are declared filed with the Workmen's Compensation Board as of July 27, 1970. Those findings, which conclude that the claimant has both siderosis and silicosis arising out of and in course of regular employment, are final and binding upon the parties.

Medical Board of Review Opinion:

Re: Mr. Lester E. Parker, Case No. 69-1546

On July 13, 1970 at 9:00 in Portland, Oregon, Drs. James Speros, Lawrence Lowell, and myself, Dr. James Mack, met to discuss the case of Mr. Lester E. Parker.

Enclosed with this letter are the five questions and our relevant answers.

In summary, we would like to say that it is the unanimous opinion of this Medical Board of Review that it is hard to be exact and state what per cent of this man's lung disease is due to siderosis and what per cent is due to silicosis. The siderosis will definitely not progress if he is not exposed to it. What silicosis is present most likely will progress. At the present time he does not seem to have any

functional impairment but if the silicosis does progress in the future, there may develop some functional disability. We would be in a much better position in approximately five years to repeat his chest x-ray and to repeat his breathing test in order to give an accurate estimate of what the future has to hold. We do not know if the Board has any policy in handling cases like this, but we feel it would be pertinent in this case and maybe in other cases also.

We also agree that this man could continue his present line of work if the proper precautions are taken to insure that he would not have an added exposure to either iron or silica. Also, he should avoid any heavy air pollution. We feel this could be accomplished with the proper type of face masking, blowers, etc., that are usually used in occupational hazards such as this. If this cannot be provided, then we would recommend that he not be involved in this type of employment.

/s/ James Mack, M.D.; James Speros, M.D.; Lawrence Lowell, M.D.

WCB #70-450 July 31, 1970

HERBERT T. BURGESON, Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 62 year old auto mechanic who injured his right leg on December 4, 1967. The claim is one of aggravation asserting that the claimant's condition has become compensably aggravated since the last order or award of compensation. On May 9, 1969, upon a previous hearing, the disability was evaluated as equal to the loss of 35% of the leg, or 52.5 degrees.

The claimant can stand, walk, drive a car and otherwise use the leg for purposes not requiring major strength and endurance. The Hearing Officer concluded, however, that the claimant was precluded from working and awarded the total loss of use of the leg despite the fact that the leg is obviously not useless.

The real issue is the extent of aggravation between May of 1969 and April of 1970. There is medical evidence to support some worsening but it falls far short of reflecting an increase in disability from 35% to 100% of a leg.

The claimant obviously became motivated to retire. The leg has been a problem for nearly all of claimant's life. He worked with the disability. The Board concludes that the claimant could still work. On his last job he was eliminated in a work reduction but takes the position he would have quit in any event.

The factor of wage loss cannot be properly applied where a claimant is motivated to retire and thus reduce actual earnings to zero despite retaining useable function of the affected member.

The Board concludes and finds that the increase in disability since May of 1969 does not exceed 22.5 degrees or 15% additional loss of the leg.

The order of the Hearing Officer is accordingly modified and the award of disability is established at 75 degrees representing a loss of 50% of the leg.

The award of compensation having been reduced on a request for review by the employer, counsel for claimant is authorized to collect a fee of $125 from claimant for services on review.

WCB #69-2159 July 31, 1970

CHARLIE DALE HAWES, Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 35 year old cabinet maker on May 1, 1968, as the result of an accident on that date when the claimant wrenched his back while carrying two sheets of 1/8 inch plywood.

The claimant had prior difficulties with his low back and had undergone an operation in 1959 to relieve a ruptured intervertebral disc.

The claimant in connection with the present claim had been examined by the Back Clinic of the Physical Rehabilitation Center maintained by the Workmen's Compensation Board. It was the concensus of the Physical Rehabilitation Center Discharge Committee that the claimant had minimal disability due to a back instability caused by chronic strain and that the claimant should avoid heavier types of work. Pursuant to ORS 656.268, a determination issued finding the disability attributable to the accident at issue to be only 16 degrees out of the applicable maximum of 320 degrees for unscheduled disability. This determination obviously considered the prior history and the then apparently minimal additional disability.

Upon hearing, the award of disability was increased from 16 to 160 degrees.

The claimant is intelligent and comparatively young at 35 years. He is taking a drafting course and is maintaining good grades. There is no indication that there will be any reduction in his earning capacity upon his vocational rehabilitation.

There is evidence reflecting that claimant's disability attributable to the accident is greater than the 16 degrees originally awarded. The evidence involves developments following discharge by the Physical Rehabilitation Center. The Board, however, does not concur with the Hearing Officer finding that the workman is disabled to the point of 50% of the workman on the scale of 320 degrees. ORS 656.214(4) requires a consideration of the workman prior to the accident and without such disability. The workman, in reality, had a pre-existing unstable back. The recommendation to avoid heavy work is not chargeable to the accident at issue. That accident was an indication of the advisability of seeking lighter work.

As noted, the Board does agree that the disability attributable to the accident is more than minimal. Considering the prior history and the favorable prognosis for successful vocational rehabilitation, the Board concludes that the disability attributable to the accident is 80 degrees.

The order of the Hearing Officer is therefore modified and the award of disability is reduced from 160 to 80 degrees.

Counsel for claimant is authorized to collect a fee from the claimant of not to exceed $125 for services on a review initiated by the employer resulting in reduced compensation.

WCB #69-1302 July 31, 1970

CLAYTON E. MOORE, Claimant.

Workmen's Compensation Board Opinion:

The above entitled matter involves a claim for a skin rash diagnosed as a contact dermititis related to the employment of the 23 year old claimant in a sawmill at Philomath, Oregon.

The real issue is which of two insurers is responsible for a current episode of the dermatitis.

The claimant was employed at the mill in January of 1968. In September of 1968 he contracted the dermatitis. He was treated through December of 1968. The claim was closed pursuant to ORS 656.268 on April 18, 1969. The employer was insured as to that claim by Argonaut Insurance Company.

Apparently the employer's status as a Direct Responsibility Employer with Argonaut as the insurer ended in December of 1968 and the State Accident Insurance Fund became the insurer.

The condition recurred in April of 1969. The State Accident Insurance Fund first accepted responsibility but withdrew acceptance when it learned of the previous incident. The State Accident Insurance Fund then denied liability. Upon hearing the State Accident Insurance Fund obtained joinder of the Argonaut Insurance Company to the proceedings. [1]Footnote

The Hearing Officer determined that the condition was essentially an extension of the first exposure and claim and ordered the Argonaut Insurance Company to assume responsibility.

The Argonaut Insurance Company thereupon rejected the order of the Hearing Officer and a Medical Board of Review was empanelled to answer the statutory questions set forth in ORS 656.812.

The Medical Board of Review has now made its findings which are attached, by reference made a part hereof, declared filed as of July 27, 1970 and made binding upon the parties by operation of ORS 656.814.

The Workmen's Compensation Board interprets the findings of the Medical Board of Review to find that the dermatitis had cleared following the 1968 exposure and that the dermatitis incurred in 1969 was due to new exposure in 1969 and thus it became the responsibility of the State Accident Insurance Fund as the insurer at that time. The Medical Board of Review has thus reversed the Hearing Officer.

The Workmen's Compensation Board accordingly relieves Argonaut Insurance Company of the responsibility placed upon that insurer by the Hearing Officer and directs the State Accident Insurance Fund to assume responsibility for medical services and other benefits to which the claimant may be entitled for the episode of contact dermatitis in 1969.

The Workmen's Compensation Board further relieves the Argonaut Insurance Company for attorney fees assessed by the Hearing Officer and orders the State Accident Insurance Fund to reimburse Argonaut Insurance Company any compensation or benefits or fees Argonaut may have paid pursuant to the order of the Hearing Officer.

The attorney fee allowed by the Hearing Officer in the sum of $375 is increased to $500 by virtue of the further services rendered by counsel for the claimant and is ordered paid by the State Accident Insurance Fund in keeping with the foregoing order.

If right of appeal exists the following is deemed applicable.

FOOTNOTE

1

Administrative Order 5-1970 filed June 3, 1970 now provides a procedure for employers or carriers in such disputes to apply to the Board for direction as to which party or insurer pays benefits pending disposition of such disputes. Carriers are not made parties by statute and the Board rule was executed to expedite payments to claimants and provide an administrative forum to first hear the issue.

Medical Board of Review Opinion:

The medical board of review appointed for the examination of Mr. Clayton Moore convened July 8, 1970 at 11:15 a.m. in the office of Dr. William Service of Eugene. The board members were William J. Hemphill, M.D., Chairman, William W. Service, M.D., and Jerome S. Maliner, M.D. all of Eugene.

After examination of Mr. Moore and discussion among the members of the board the following conclusions were reached.

1) The claimant does suffer from an occupational disease.
2) The patient has had two episodes of occupational dermatitis, the first starting approximately August, 1968 and the second about the end of March, 1969.
3) The occupational disease was caused by and arose out of the course of the claimants regular actual employment at the Hobin Lumber Company.
4) The disease is disabling at this time.
5) The degree of disability at this time is rated as minimal. The moderately severe dermatitis must cause some loss of efficiency. The presence of vesicles, pustules, and fissures exposes the claimant to the additional hazard of secondary infection. Such secondary infection would make him 100% disabled for brief periods of time.

After careful questioning of Mr. Moore and examination of the records it was concluded that the claimant did actually clear up completely following his visit to Dr. Wagner of October 25, 1968. At that time, according to the claimant, Dr. Wagner told him that he did not need to return and that the claim was closed. Mr. Moore is quite positive in his statement that he was completely clear without treatment of any kind for at least three months after Dr. Wagner discharged him. The next episode of dermatitis appeared rather suddenly around the end of March, 1969. He first saw Dr. Grant on April 2, 1969. The next notation available in the records is that he saw Dr. Wagner sometime during December, 1969. As indicated above Mr. Moore is quite sincere in his statement that Dr. Wagner had discharged him about the end of October, 1968 and that after that he had cleared up completely with no sign of any dermatitis and no medication in the form of either pills or ointments. Apparently he did not see any doctor during this time so that there is no medical record of his actual condition.

In summary, after examination, and review of the history with Mr. Moore on July 8, 1970 and careful examination of the previous records as submitted by the Workmen's Compensation Board, it is the finding of the medical board of review that Mr. Moore suffered a new episode of the dermatitis of his hands in March, 1969 rather than a continuation of the original episode of dermatitis which began in August, 1968. The board adjourned at 12:30 p.m.

/s/ William J. Hemphill, M.D.
/s/ William W. Service, M.D.
/s/ Jerome Maliner, M.D.

WCB #70-96 August 4, 1970

GLEN McVICKER, Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 40 year old butcher when struck on the right shoulder and neck by a quarter of beef as it proceeded down an incline from an overhead track.

The claimant worked for three days following the accident of July 7, 1969 before seeking medical consultation. His first medical consultant was Dr. Bruce Flaming, osteopath, who used diathermy, massage, analgesic and muscle relaxants on four visits from July 10th through July 17th. The claimant was next treated by Dr. Buell. He reported to Dr. Buell that he had low back pain starting three days following the accident which would coincide with the first visit to Dr. Flaming. Dr. Flaming reports no low back pain for the period of July 10th to 17th.

His claim was eventually closed on December 22, 1969 pursuant to ORS 656.268 with an award of 16 degrees for unscheduled disability against the applicable maximum of 320 degrees. Upon hearing, the Hearing Officer noted that the complaints were quite subjective and somewhat exaggerated but the Hearing Officer attached enough validity to those complaints to increase the award to 64 degrees.

It is now the duty of the Workmen's Compensation Board to review the evidence de novo on this issue.

The claimant is no longer engaged as a butcher. The Board, however, concludes that there is no material permanent loss in earning capacity of this claimant. He is interested in becoming a professional dog handler. In the meantime he is engaged in helping build fireplaces. He mixes mortar and brings the bricks and mortar to the bricklayer. He testifies that he probably could not carry a full load of 10 bricks for more than a couple of hours and would carry reduced loads.

The Board, of course, does not have the advantage of a personal observation of the claimant as a witness. The Hearing Officer did conclude that the claimant's symptoms were somewhat exaggerated. This, the Board believes, places an even greater weight upon the reports of the examining physicians. Dr. Spady, for instance, finds little to explain the complaints and finds it hard to believe there is significant disability. These reports reflect a disability which at best is just beyond being minimal. Coupled with the labors associated with being a mason's helper, it is difficult for the Board to find or associate substantial disability with the reported accident.

The Board concludes and finds that the compensable disability does not exceed 32 degrees.

The order of the Hearing Officer is accordingly modified and the award of disability is reduced from 64 to 32 degrees.

Counsel for claimant is authorized to collect from the claimant a fee of not to exceed $125 for services rendered on a review at the request of an employer resulting in a decrease in compensation awarded.

WCB #69-1096 August 4, 1970

ELBERT F. WALLS, 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 construction laborer who sustained a low back injury on October 30, 1967. The claimant has had a series of occupational and non-occupational injuries dating back to at least 1954. He has been diagnosed as having a diffuse degenerative athritis throughout the lumbar spine. The problem is one of measuring the permanent disability imposed by the strain of the instant injury upon the degenerative processes.

Pursuant to ORS 656.268, a determination found the claimant to have a compensable disability of 112 degrees out of the applicable maximum of 320 degrees for unscheduled injury. This award was affirmed by the Hearing Officer.

The claimant is retirement oriented, having applied for both social security and union pension benefits. The Hearing Officer found the claimant to have a complete lack of motivation to work.

The record includes a short film which shows the claimant jerking and being jerked by a balky horse. The film completely belies the protestations of claimant that he is reduced to light labor of short duration. The claimant showed no signs of distress in a situation which would necessarily have reflected substantial obvious objective evidence of disability, if the claimant's disability is as great as he contends. The claimant asserts that the Hearing Officer placed too much emphasis upon the report of Dr. Short. The report is certainly one of the most comprehensive of record and is certainly fortified with information not made available to some of the other doctors. As Dr. Short notes the claimant himself asserts that he has a poor memory with respect to some material aspects of his past problems.

Taking the evidence in its entirety, the Board concludes and finds that any disability attributable to the accident at issue including any exacerbation of pre-existing problems does not exceed the 112 degrees heretofore allowed.

The order of the Hearing Officer is affirmed.

WCB #69-2038 August 5, 1970

LIVINGSTON C. BANKS, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability sustained by a 54 year old foundry grinder whose hands were caught under a heavy casting on September 18, 1967. In addition to injury to fingers, the claim involves cervical and low back problems.

The claimant returned to work in November of 1967 and worked until rendered unable to work by a non-industrial cerebellar vascular accident in March of 1968.

Pursuant to ORS 656.268, the disability attributable to the accident of September 18, 1967 was evaluated as a loss of 10% of the left ring finger. This award was affirmed by the Hearing Officer.

The claimant was involved in a series of accidents dating back to at least 1952 as a result of which he had continuing problems with his neck and low back which did not prevent him from working. There is also an indication of a gradual degeneration associated with age. It appears to be a settled issue that at the time his fingers were caught by the casting he experienced at least a temporary exacerbation of the previous problems.

Viewed in the light of the medical experts, whose first hand knowledge of the claimant's condition extends over the years, it does not appear that the accident with the casting added any material or measurable permanent disability other than the finger. The claimant's work capabilities following the casting incident and prior to the stroke were not diminished. The stroke was a most unfortunate incident but it was not causally related to his claim.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's permanent disability attributable to the accident of September 18, 1967 is limited to the left ring finger.

The order of the Hearing Officer is affirmed.

WCB #70-62 August 5, 1970

WILLIAM R. CANDEE, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability attributable to numerous injuries sustained by the 28 year old claimant as the result of a fall from a scaffold on September 17, 1968.

The claimant's numerous fractures required an initial four hour operation with casts applied to both arms and the left leg. A subsequent open reduction and new cast was required a week later for the right elbow injury. A fracture of the right clavicle was discovered on October 30.

The claimant's history is that of a star athlete with participation in the rugged sports of football and rugby. As noted by the Hearing Officer, the claimant's remarkable recovery is attributable to his excellent physique and motivation. The claimant returned to work in mid-January of 1969.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 38 degrees out of an applicable maximum of 192 degrees for permanent injury to the right arm, 53 degrees out of an applicable maximum of 150 degrees for the left forearm and 8 degrees out of an applicable maximum of 150 degrees for disability to the left leg. These awards were affirmed by the Hearing Officer.

Considered from a standpoint of the activities in which the claimant is able to engage and from a standpoint of no apparent loss in earning capacity, the claimant, compared to the average citizen, would appear to have little disability. He hunts, water skis, jogs, does pushups, fishes for 100 pound sturgeon and satisfactorily performs his regular rigorous work.

This record of accomplishment is not made in the absence of disability. It is made in spite of disability. The Board does not interpret the recent decisions on the factor of earnings or earning capacity to deprive a claimant of compensation for obvious impairments despite no apparent loss of earnings. The medical reports confirm that the claimant has impairment, resulting from the accident, in both arms and the left leg. The medical reports also reflect a distinct impairment of the right shoulder for which no award has been made. Even if the initial evaluation contemplated that the award for the right arm included problems in the right shoulder, the Board concludes that the award as to the right arm is reasonable for the residual disabilities to the arm proper. Upon that basis a further award must be made for unscheduled disabilities associated with the shoulder. The Board concludes and finds that the claimant has a permanent unscheduled injury to the right shoulder of 32 degrees.

The award of the Hearing Officer is therefore affirmed as to the awards for the arms and leg and modified by granting a further award of disability of 32 degrees for the shoulder.

Counsel for claimant is allowed a fee of 25% of the additional compensation payable by this order, payable from the increased compensation as paid.

WCB #69-1421 August 10, 1970

The Beneficiaries of
HOWARD MILLER PATRICK, Dec.
Request for Review by Employer.

The above entitled matter involves the issue of the compensability of a myocardial infarction which was sustained by a 60 year old oil burner serviceman shortly after completing work on a gas furnace in an attic on May 21, 1969. The heart attack resulted in death. The claim of beneficiaries of the decedent was denied by the employer but ordered allowed by the Hearing Officer.

The claim does not involve the dispute sometimes encountered between medical experts. The issue is narrowed to whether the facts support the hypothesis upon which the medical opinions are based and particularly whether the temperature in the area where the decedent was working was high enough to be a material factor in the development of the myocardial infarction.

The outdoors temperature on the day in question increased from 69 degrees when work commenced to 81 degrees within an hour after the work in the attic was completed. The attic was not ventilated. At the place where the work was done there was some eight feet of clearance. The domed roof had a maximum of 15 feet elevation above the first floor ceiling. There was an access hole into the attic some 2 feet by 2 feet. The downstairs area was sufficiently warm that both outside doors has been opened for cooling and ventilation. No one took the temperature in the attic space nor was any evidence adduced as to any test of the temperature under similar circumstances. There is testimony from a witness who had been in the attic on previous occasions and that the temperature was described "extremely hot" and "beastly hot."

The decedent had a medical history including a previous myocardial infarction. The medical testimony supports a conclusion that one with such a previous history would be even more likely to be the subject of a further infarction under adverse temperatures which were either too warm or too cold. Dr. Griswold selected a temperature of 90 degrees as within the range likely to produce harm. However humidity, such as would be encountered in an enclosed non-ventilated attic, is also a factor which would lower the degree of temperature required.

The employer contends that upon this state of the record it is necessary to resort to conjecture and speculation as to whether the attic was warm enough to be a causative factor under the guidelines of the expert medical opinion.

If it is essential to pinpoint temperature to within a degree or so, the Board concurs with the defendant's assertion that more exact proof is required. However, the Board concludes that evidence that the attic was "beastly hot" under similar circumstances is acceptable proof that the attic did become substantially and uncomfortably warmer than the concurrent outside temperature. Under ordinary circumstances one can accept as a matter of natural consequences the fact that the temperature of an unventilated attic under a roof exposed to direct sunlight will be appreciably higher than concurrent outside temperatures. Temperatures taken by the weather observers are not taken by exposing

thermometers to direct sunlight. They measure air temperatures. The roof exposed to the direct sun would have a higher temperature than would be measured by a shielded thermometer. The trapped still air under that roof would have a substantially higher temperature than would be recorded for free moving external air. It does not take expert testimony to establish such a fact from ordinary experiences in life.

The Board concurs with the Hearing Officer and concludes and finds that the proof of temperature of the attic coupled with the testimony of Dr. Griswold establishes a medical and legal causation between work and the myocardial infarction sustained by the decedent.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed the further fee of $250 payable by the employer for services rendered in connection with this review.

WCB #70-196 August 13, 1970

RALPH D. GRAY, Claimant.
Request for Review by Claimant.

The above entitled matter basically involves the issues of whether the claimant qualifies as a subject workman under the Workmen's Compensation Law and, if so, whether his delay in not instituting a claim until January 15, 1970 should bar claim for injuries allegedly received seven months before on May 5, 1969. There is also the issue of whether the disability claimed is related to the incident of May 5th.

The claimant was 54 years of age and was self-employed in a welding shop that was self-operated without any employes. The welding shop burned on May 2, 1969. The claimant filed a previous claim for smoke inhalation from fighting the fire. This claim was accepted by the State Accident Insurance Fund without raising the issues posed in a post fire episode on May 5th. The claimant was retrieving some tools from a pickup when a gust of wind blew a temporary plywood wall over upon him. He did not seek medical attention until September 16th for alleged injury to the left shoulder. A swelling was diagnosed as a ganglion type tumor. In December, 1969 he again sought medical attention. This time it was for pain in the left hip which he had not mentioned in the September visit.

ORS 656.128 does permit a sole proprietor who is subject to ORS 656.001 to 656.794 as an employer to make application for and be insured as a subject workman. The question raised is whether a sole proprietor who is not subject as an employer can in effect obtain insurance under this provision. If so the Workmen's Compensation Law has been extended completely outside the realm of the master-servant relationship to include a personal health accident type of insurance.

There are further restrictions imposed by ORS 656.128 if a claim is otherwise compensable. That restriction requires corroborative evidence. Rather than corroborate, the medical evidence strongly supports the conclusion that the claimant's problems are not related to the incident of May 5th.

It has been argued that an employer, so insured, is both the employer and workman and thus is not bound to give notice when an injury occurs as required by ORS 656.265. In his dual entity he has personal knowledge of the injury as soon as it occurs. Any such tenuous argument is offset by the requirement of ORS 656.262(3) that the employer notify the State Accident Insurance Fund within 5 days after knowledge of any accident which may result in a claim. The claimant was making efforts to obtain favorable medical reports from the doctor to support a claim months before any report was ever made to the State Accident Insurance Fund.

The Board concludes and finds that the claimant did not sustain a compensable injury on May 5, 1969, as alleged, further concludes and finds that the claimant was not a subject workman or a subject employer, further concludes and finds that if his claim was otherwise compensable it should be barred for late notice to the State Accident Insurance Fund and finally concludes and finds that even if the claim was otherwise compensable it should be denied for lack of corroborative evidence contemplated in claims of self-employed insurers.

The order of the Hearing Officer denying the claim is affirmed.

WCB #70-254 August 13, 1970

RICHARD L. GREEN, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 24 year old claimant sustained a permanent disability as the result of a low back injury while employed as a lift truck driver for Forest Industries on September 3, 1968. The claimant returned to work in August of 1969 for Haley's Foods. His work as a warehouseman included lift truck driving and a wide range of functional activity in lifting and bending. On October 30 the claimant was removing cross members from a box car. While bent over with the cross member, he incurred a pain which prevented him from straightening up and caused him to fall down.

This claim proceeding was based upon the contention of the claimant that the incident at Haley's Foods in October of 1969 is compensable as part of the claim for injuries incurred at Forest Industries in September of 1968.

Upon hearing the Hearing Officer concluded that the claimant's problems from the incident at Haley's Foods in October of 1969 constituted a new injury and that the claimant's ability to engage in vigorous work for several months reflected a complete recovery from the prior injury of September, 1969.

The order of the Hearing Officer was made without benefit of knowledge of the fact that a claim had been processed and accepted by Haley's Foods for the October 30th incident of 1969. The claimant's signature was not available. The Board assumes, however, that the claimant received his copy of the form submitted to the Workmen's Compensation Board by Continental Insurance Companies which shows the claim for new injury of October 30, 1969 was accepted.

The Board also notes for the record that the claim for the October 30, 1969 injury is subject to a request for hearing regardless of whether the claim is reopened by the insurer for Haley's Foods.

The Board has recently promulgated rules pursuant to which both employers would be joined for resolution of issues such as this claim presents. The situation in this claim, however, is not one which the Board deems should be remanded for such joinder.

The Board concludes and finds that the claimant is not entitled to further compensation as the result of the accidental injury of September, 1968 at Forest Industries.

The order of the Hearing Officer is affirmed.

WCB #69-2023 August 13, 1970

BONNIE L. LANDERS, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issues of whether the 29 year old claimant is entitled to further medical care and compensation with respect to a minor back sprain sustained June 19, 1968, in the course of her work as a presser in lifting bundles of fabric at Jantzen, Inc. There is also a procedural issue.

Pursuant to ORS 656.268, the claimant was found to have had some temporary total disability, but that her condition had become medically stationary without any permanent residual disability.

Upon hearing, this determination was affirmed. The Hearing Officer noted that the claimant occasionally has mild symptoms but that these are not disabling and therefore do not warrant the allowance of an award of permanent disability.

The claimant relates pains in her arms and legs, but there is no medical substantiation that these are in any way causally related to the accident at issue. Neither is there any support from any medical authority indicating any need for further medical care associated with the incident of June, 1968.

The claimant has not returned to full time work but this appears basically to be a matter of choice. With three children of tender years, she occasionally works as a baby sitter in addition to taking care of her own home and family.

The Board concurs with the Hearing Officer and concludes and finds that the claimant is not entitled to further medical care or compensation at this time as a result of the minor strain in June of 1968.

The claimant sought this review without benefit of counsel. The order subjected to review was issued April 13, 1970. The request for review was received by the Workmen's Compensation Board on May 13, 1970. However, the claimant has not disputed the statement of counsel for the employer that she failed to mail a notice of the request for review until May 14th. The date of

mailing of the Hearing Officer order being April 13th, May 13th was the 30th and last day on which service could be obtained of a notice of request for review.

The Board concludes that for this procedural reason the order of the Hearing Officer became final. The Board has proceeded to review the matter on its merits despite the procedural issue.

For the reasons stated, the order of the Hearing Officer is affirmed.

WCB #70-351 August 13, 1970

JOHN MANKE, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 37 year old molder as the result of a heavy casting dropping upon the toes of his left foot. There is no question concerning the fact that the toes not amputated are essentially useless. The question is whether there is disability in the foot or at above the ankle joint and whether compensation is payable for other than toes for injuries below the ankle joint.

From an anatomical viewpoint, illustrated by viewing a skelton (sic), the fingers extend into the palm of what is called the hand and the toes include a major part of what is called the foot.

The Board is not in agreement upon the issue. The majority conclude that there is no disability at or above the ankle joint and further concludes that there is no ambiguity in the statute with reference to establishing the disability for the foot "at or above the ankle joint." This wording, incidentally, requires rating the entire leg below the knee to and including the ankle joint as "the foot." There is no more incongruity in the required rating of a fractured tibia or fibula as a "foot" than in excluding the area below the ankle joint. These are the yardsticks established by the Legislature. The adequacy of the benefits within such "yardsticks" is a matter for legislative determination. The Board on other occasions has noted that sympathy with grievously injured claimants should not lead to an administrative removal of the clear legislative boundaries.

There is another consideration in this case. Recent appellate decisions have emphasized the importance of the factor of earnings loss in evaluating disability. The claimant in this case, despite having an obvious physical disability, has sustained no loss in earnings. In jurisdictions where earnings are the main factor in disability rating there might be no award for permanent disability under the circumstances.

The majority of the Board concludes and finds that the disability is confined to the toes and that the award payable for injuries in this case is 34 degrees being the total allowable for total loss of all toes.

The original determination made pursuant to ORS 656.268 was 54 degrees and this was affirmed by the Hearing Officer. The matter having come before

the Board for de novo review, the Board orders that the award of disability be reduced from 54 to 34 degrees.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan dissents as follows:

I do not agree with the majority of the Board that disability in this case must be confined to awards made on the toes.

There is a distinct difference between the provisions of the statute regarding awards for disability to a foot and disability to a forearm. There is no need to consider, in any way, the provisions applicable to a forearm when the matter under consideration is disability to a foot.

For the convenience of a reviewer the statutes applicable to both forearm and a foot will be set forth.

> ORS 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.
>
> (3) *** "The loss of any digit shall be rated as specified with or without the loss of the metacarpal bone and adjacent soft tissue." ***

The metacarpal bones are the bones of what is ordinarily thought of as the hand and extend from the base of the fingers to the wrist joint. The word "hand" does not appear in this section. The "fingers" extend to the wrist joint. This is the provision of the statute at the present time and must be followed in rating what are commonly known as hand injuries. Unless the disability extends into the wrist joint, the disability must be rated on the fingers. If the disability is at or above the wrist joint, the disability is rated on the forearm. There is no "hand," as such, by the provisions of the statute. The Industrial Accident Advisory Committee is presently studying this matter because there have been problems.

It should be noted, however, that ORS 656.214(2)(b) provides that loss of all five digits (fingers and thumb) shall be awarded the same rating of disability as for a forearm.

There is different wording as regards to a lower extremity.

> ORS 656.214(2)(d) "For the loss of one foot at or above the ankle joint, 135 degrees, or a proportion thereof for losses less than a complete loss." (Emphasis supplied)
>
> (e) "For the loss of a great toe, 18 degrees, or a proportion thereof for losses less than a complete loss; of any other toe, four degrees, or a proportion thereof for losses less than a complete loss."

There is no special provision for loss of all five toes, but there is a provision for losses less than the complete loss of a foot. There is no statement that the toes include the metatarsals which correspond to the metacarpals of the upper extremity.

The loss of all five toes is certainly a greater disability than the sum of the degrees of disability of the individual toes added together. The loss of all five toes certainly handicaps the claimant and is shown by the need to use the prosthetic device called an orthopedic "anterior heel."

There is a stub of the proximal phalanx of the great toe remaining. This is not enough to lessen the consideration of loss of the great toe.

It has been administrative practice for many years to rate disabilities of the lower extremity on the foot whenever the foot back of the toes was affected. In this case the Closing and Evaluation Division of the Workmen's Compensation Board followed that long standing administrative practice.

The report of Dr. Case, an orthopedist, dated August 20, 1969, which was used by the Closing and Evaluation Division, refers to some disability in the metatarsal area of the foot. This is justification for awarding disability on the basis of a partial loss of the foot. There is no requirement that the metatarsal bones be considered part of the toes, as the metacarpal bones are required to be part of the fingers. The word foot appears in the statute and partial losses of the foot are expressly provided for.

For the reasons set forth herein, I must respectfully disagree with the majority of the Board. This position is supported by at least 16 years of administrative practice that I am personally aware of and is compatible with logical interpretation of the statute.

The order of the Hearing Officer should be affirmed.

/s/ Wm. A. Callahan

WCB #69-2051 August 13, 1970

NORMAND LOBEK, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 41 year old carpenter has sustained a compensable aggravation of injuries incurred on June 14, 1966. The initial injury involved the digits of the right hand, left shoulder and collar bone.

The claimant appealed the original determination of disability entered pursuant to ORS 656.268 and the last award of compensation is the order of the Hearing Officer of November 3, 1967, finding a shoulder disability of 10% loss function of the arm and awards for losses of 60% for the right middle finger, 45% of the right ring finger, 30% of the right little finger and 35% of the right thumb.

This claim of aggravation involves a contention that a herniated cervical intervertebral disc problem is causally related to the 1966 injury. There is a conflict in the medical opinion.

The Hearing Officer concluded that Dr. Buck's opinion of causal relationship was based upon an erroneous concept of the history obtained from

the claimant which is not supported by the facts of record. The Hearing Officer also concluded that the background and experience of Dr. Phifer represents a greater expertise with respect to the problem at hand. With these factors, the Board agrees.

It appears that the symptoms of the current problem first appeared in August of 1969, nearly three years after the accident at issue. It also appears that no significant trauma is required to produce the disc problems diagnosed in 1969. It is thus not necessary to find that some other intervening event caused the 1969 problem. Neither is it logical to conclude that mere proximity of a prior problem is sufficient to relate all subsequent problems.

The claimant, upon review, seeks to extend the record by inclusion of a special supplemental report solicited by counsel from Dr. Hockey on the possibilities of the situation. The administrative process will be without end if parties wager on the outcome of hearings and then seek to bolster a losing cause by futher inquiry of certain witnesses. The claimant seeks to establish that even with an erroneous "history" there could be a causal connection. The Board concludes there was a possible association but that probably there was not a causal relation.

The Board concurs with the Hearing Officer and concludes and finds that the development of the cervical disc problem was not causally related to the accidental injury of June, 1966 and that the claimant has not sustained a compensable aggravation.

The order of the Hearing Officer is affirmed.

WCB #69-2196 August 14, 1970

TILLMAN VILLINES, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 50 year old sugar plant laborer who fell from a ladder on January 25, 1968 and landed on his buttocks causing compression of the third through fifth lumbar vertebrae.

Pursuant to ORS 656.268, a determination issued finding the claimant to have unscheduled disabilities of 80 degrees out of the allowable maximum of 320 degrees. Upon hearing, the award was increased to 150 degrees from which the State Accident Insurance Fund sought review.

The claimant made an unsuccessful attempt to work in a mobile home factory but could not tolerate the lifting and bending required in the work. He has engaged in cleaning septic tanks which is work he can perform unless there is an unusually heavy cover to be removed. This is somewhat seasonal work.

The Board concludes and finds that taking the record in its entirety, the disability approximates that found by the Hearing Officer.

One aspect of the case does concern the Board. There is a reference in Dr. Tanaka's report that it would be useless to seek vocational rehabilitation at claimant's age. The claimant is a resident of Idaho. This Board has noted on other occasions references to an administrative policy in Idaho which apparently excludes the claimant's age bracket from vocational rehabilitation. Dr. Tanaka was probably speaking of Idaho policy. There is no such policy in Oregon and the Oregon Board knows of no reason why the claimant, though a resident of Idaho, should not receive the full benefit of rehabilitative efforts in Oregon for a compensable Oregon accident.

The Board concludes that the claimant should be examined by the Physical Rehabilitation Center maintained by the Board for the purpose of evaluating the claimant's residual potentials for vocational rehabilitation. The matter is being referred to Mr. R. J. Chance, Administrator of the Workmen's Compensation Board, with directions to have the claimant brought to the Board's facilities at the Physical Rehabilitation Center to determine the possibilities of vocational rehabilitation and to coordinate the services of other public agencies toward the ends of any such rehabilitation which may thereafter be deemed feasible. This action, however, has no bearing upon the issue now before the Board.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed the fee of $250, payable by the State Accident Insurance Fund, for representation upon this review, the award not having been reduced as requested by the State Accident Insurance Fund.

WCB #69-2198 August 14, 1970

DOUGLAS H. BEEDLE, Claimant.
Request for Review by SAIF.

The above entitled matter involves issues of the extent of compensable disability sustained by the 49 year old claimant as the result of a low back injury incurred May 2, 1966. The claimant had prior compensable injuries in October, 1953, February, 1955 and January of 1963. As a result of the 1955 injury the claimant received an award for unscheduled injuries of 75% of the maximum award payable for such injuries based upon a comparison to the loss of function of an arm.

In the present claim the determination made pursuant to ORS 656.268 made no award of permanent partial disability on the basis that the combined effect of the two injuries did not cause disability in excess of that theretofore awarded. This is in keeping with ORS 656.222. An interesting side light is that there is medical evidence that the disability exceeds the disability from the 1955 injury, but that the disability does not exceed the award. In other words, the doctors impeach the prior award by concluding that the combined effect of the two injuries does not exceed the prior award.

Upon hearing, the Hearing Officer concluded that the condition was such that the claimant is now unable to ever again engage regularly in gainful and suitable work. The quest of a prior award for partial disability is

immaterial if the last injury alone or in conjunction with prior disability renders the claimant unable to work. The claimant was thereupon granted an award of permanent total disability.

The claimant is not one of those whose opportunities in life are restricted to heavy manual labor or nothing at all. The record reflects that he is a high school graduate with good intelligence. The claimant benefitted once before from an award of disability which proved to be less disabling than the award he received. His motivation is questionable. He expressed concern at termination of social security benefits. Though Dr. Cherry, for instance, mentions permanent total disability, it is in reference to matters for which the claimant has training and experience. This is not the proper basis for evaluating the remaining work capabilities of an intelligent workman of claimant's age.

Reviewing the record, there are numerous doctors whose findings indicate the claimant's condition is only partially disabling. These doctors and the Physical Rehabilitation Center of the Workmen's Compensation Board all reflect that the claimant is eligible and possesses the physical and mental capabilities to be vocationally retrained and reemployed.

The majority of the Board concludes and finds that the claimant is not disabled to the point that he can never again work at gainful and suitable employment. The order of the Hearing Officer must be modified.

This brings the issue to the extent of permanent partial disability. Applying ORS 656.222 to the facts in this claim, the Board concludes that the unscheduled disability does not exceed the prior awards for the combined effect of the two injuries and that there is thus no additional compensable unscheduled disability.

The brief of the State Accident Insurance Fund concludes and the record reflects that there is an area of increased disability attributable to this claim for which claimant has received no award. The claimant has disability of a loss function of the legs attributable to this accident of May, 1966 which the Board determines to be 35 degrees of each leg against the applicable maximum of 110 degrees for each leg.

The order of the Hearing Officer is therefore set aside and claimant, as a result of the accident of May, 1966, is found to have a disability of 35 degrees for each leg.

Counsel for claimant is allowed a fee of 25% of the compensation heretofore paid as permanent total disability on the order of the Hearing Officer to be reclassified as permanent partial disability.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan dissents as follows:

The question to be determined is whether or not the claimant is permanently and totally disabled.

The legal definition of "permanent, total" is found in ORS 656.206(1)(a):

"* * *or other condition permanently incapacitating the workman from regularly performing any work at a gainful and suitable occupation." (Emphasis supplied)

If we give consideration to the clear words of the statute, we must recognize that to "regularly" perform work means that claimant must be able to hold some position day after day and for the full duration of the working shift. This means an 8-hour day, working alongside other workmen doing the same work. A "gainful" occupation must mean that the job be such as the workman could make a reasonable living from it. Being "suitable" would mean that it is something that the particular workman could reasonably expect to obtain in the ordinary employment market and fulfill the requirements of the job to the satisfaction of his employer.

Dr. Parsons believes there are types of light work that claimant could do. He also stated that if claimant were employed it would be necessary that claimant's work be limited very severely. He believed claimant could sit on a stool 2 or 3 hours but would then require a break. This does not sound like "regularly performing any work," to quote the words of the statute. Dr. Parsons admits claimant could not bend over more than 10 to 15 times daily. It should be noted that Dr. Parsons did not mention any particular job that he believed claimant could do. Dr. Parsons examined claimant the day before he testified; he found muscle spasms on both sides of claimant's back.

Dr. Kimberley believed claimant was not medically stationary, but qualified this by stating he would not recommend further surgery and believed that it would be best to consider claimant stationary. Dr. Kimberley believed that, unless claimant had a job where he could move around, he would have great difficulty putting in 8 hours of work per day. Despite the limitations Dr. Kimberley placed on the claimant he believed there were some jobs claimant could do. It would be a great help if Drs. Kimberley and Parsons would tell us where these jobs may be found.

Dr. Kimberley states that, other things being equal, a treating doctor has an advantage over a doctor who sees a claimant only during an examination. He does not explain what he means by "other things."

Dr. Cherry has treated the claimant. He has seen the claimant many times over a long period of time. Dr. Cherry is a board certified orthopedist, as is Dr. Kimberley. This is a case where it must be acknowledged that the opinions of the treating physician, having a much greater experience with his patient than an examining physician could possibly have, must be given more weight than the examining doctor.

Dr. Cherry, being the treating physician and having had an opportunity to know the claimant over a long period of time, and being highly qualified as an orthopedist, states with no hesitation that the claimant is permanently and totally disabled. He also stated that the claimant was permanently and totally disabled for any job he could be trained for. The doctor believed claimant's complaints were consistent with his physical condition as the doctor knew it to be. Dr. Cherry did not believe claimant exaggerated his

complaints. The doctor would not perform any further surgery, which would need to cause more scar tissue.

Dr. Cherry testified that at the time of last examination claimant had severe back spasm, that on claimant's good days he might be expected to be on his feet 20 minutes and to sit for half an hour. He could lift 20 to 30 pounds perhaps 12 times per day, but not on a regular basis. Medication taken by claimant is prescribed by the doctor.

The testimony by Dr. Cherry must be give far more weight than other doctors who have seen him only for examination purposes. When this is done, the logical conclusion is that the claimant is permanently and totally disabled.

/s/ Wm. A. Callahan

WCB #69-644 August 14, 1970

VELMA CRAWFORD, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of (1) whether the employer was in a complying status under the Workmen's Compensation Law at the time of the alleged injury, (2) whether the claimant sustained a compensable injury as alleged, and (3) whether, if the claimant did receive an injury, the claim should be barred by reason of prejudice to the employer for late notice of the claim to the employer.

The claim involves an alleged back injury by a 48 year old bartender who claims to have been injured when a hand hold on a case of beer tore loose as she picked it up on October 9, 1968. The date of alleged injury was changed mid hearing when the claimant found she did not work on the first day alleged.

The dispute between the employer and claimant is such that the Hearing Officer who observed the witnesses recites that he placed little belief in the testimony of either the claimant or her employers.

Before discussing the alleged accident the Board, upon the first issue, finds that the employer had failed to secure compensation to his employes in either of the methods provided by ORS 656.016. The employer had been insured with the State Accident Insurance Fund but permitted that insurance to lapse without payment of the annual fee or minimum premium pursuant to ORS 656.444. The employer in fact submitted a written admission to representatives of the Workmen's Compensation Board that insurance coverage had been inadvertently permitted to lapse. The reason for the lapse is immaterial. The employer failed to assure that his workmen would receive compensation for injuries as provided by ORS 656.016. Any compensable injuries to workmen then became payable pursuant to ORS 656.054 whereby compensation is paid by the State Accident Insurance Fund subject to reimbursement from the employer in the first instance or the Workmen's Compensation Board if not recoverable from the employer. If a compensable injury was incurred by the claimant, the compensation would be paid by the State Accident Insurance Fund but would be

a liability of the employer. The Board concurs with the Hearing Officer in finding the employer to have been a subject noncomplying employer at the time of the injury to the claimant therein.

The next issue is whether the claimant sustained a compensable injury. The Hearing Officer concluded that the claimant did sustain the injury, but barred the claim due to the six months delay in prosecuting a claim. The Board is not unanimous in its conclusions upon this issue. The majority of the Board, noting the various material discrepancies recited by the Hearing Officer, are also influenced in consideration of the entire record by the fact that the Hearing Officer in observing the claimant, placed no reliance upon her testimony. The claimant, furthermore, had a long-standing history of low back complaints. In addition the claimant, after the accident at issue and prior to asserting this claim, was observed by a reliable witness to have fallen to the floor while at another establishment known as the "Sundowner" The claimant urges that this incident preceded the accident at issue. The Board accepts the Hearing Officer's evaluation of the witness as "reliable" who dated the incident in December of 1968. The claimant's daughter testified that prior to the alleged accident at issue her mother was as well as anybody. This is despite the obvious history of low back complaints.

The majority, in discarding the testimony of the claimant do not import to accept the employer's testimony which the Hearing Officer found unreliable. The majority may even accept the proposition that some incident occurred and that the claimant was sick to her stomach. This does not carry with it a conclusion that the claimant sustained a compensable injury.

When the claimant first visited a doctor on October 14, 1968 she related a history of pain for three years but she did not related any trauma or triggering event. When it became an issue, she testified she had told the doctors of the incident. The majority relay upon the accuracy of the doctors' recorded history.

The majority of the Board does not reach the third issue as to whether the claim should be barred for late notice. The Hearing Officer concluded that instituting a claim for a date when the claimant was not employed was in itself prejudicial to the employer's administration of the claim.

For the reasons stated, the Board concurs with the result reached by the Hearing Officer and finds the employer to have been a subject noncomplying employer and further finds that the claimant did not sustain a compensable accidental injury.

The order denying the claim is affirmed for the reasons stated.

/s/ M. Keith Wilson
/s/ James Redman

Mr. Callahan dissents as follows:

The employer was clearly noncomplying. However, a noncomplying employer is not relieved of the duties imposed upon employers that have complied with the law. The employer cannot shift his responsibilities to his bookkeeper; nor can he avoid his responsibility to report an injury because he is not in compliance with the law.

There was no allegation of prejudice. The State Accident Insurance Fund could not claim prejudice when the employer knew of the injury. The employer states that he was informed of the injury when the notice was presented February 17, 1969. This statement is in conflict with other evidence. The employer does not deny that he was at the tavern the night of the injury. The testimony of the claimant that Peterson appeared mad and stomped behind the bar is not refuted. Peterson had no reluctance to sign the form for the Teamsters insurance although it was stated clearly that the injury was on the job. When one sifts the mass of evidence, much of which is conflicting, it is evident that Peterson, the employer, had knowledge of the injury.

The testimony of Doris DeLong is enough to establish the injury sustained by the claimant.

The confusion about the date of the injury would not exist if the employer had fulfilled his obligations.

The incident at the Sundowner was disposed of by another witness.

The testimony of Dr. Tepper via deposition, consisting of references to another doctor's sketchy notes, does not shed useable light on the problems.

Whether the claimant was married at the time is totally irrelevant.

There is a great deal of contradictory testimony, not all of which can be truthful. When the testimony as a whole is carefully considered, I find the following facts.

1. The claimant sustained an injury arising out of and in the course of her employment.

2. The employer had knowledge of the injury, thereby nullifying the matter of late notice.

3. There can be no prejudice because the employer had knowledge of the injury and, further, no prejudice was claimed.

4. The employer was, at the time of the injury, a noncomplying employer and is responsible for the costs of the claim.

The claim is compensable.

/s/ Wm. A. Callahan

WCB #69-1871 August 14, 1970

ANDY BUSTER SCOTT, Claimant.
Request for Review by Employer.

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 a fall on November 4, 1966, which caused injuries to his tail bone, left shoulder and left arm. The issue includes the question of whether the claimant's injuries are such that he never again can work regularly at a gainful and suitable occupation.

The claim was first processed pursuant to ORS 656.268 and a determination issued finding the claimant to have an unscheduled disability compared to the loss by separation of 35% of an arm or 67.2 degrees out of the applicable maximum of 192 degrees. Upon hearing the claimant was found unable to again work regularly at gainful and suitable work and the award was increased to permanent total disability.

There are two factors which pose a serious problem in evaluating not only the extent of disability but also whether such disability is entirely the responsibility of the employer. The first factor is that the claimant's problems are not entirely physical. It is obvious, in fact, that the claimant has only minimal to moderate physical disabilities. There is a large functional factor. The claimant's complaints are primarily subjective and out of proportion to objective findings. To a large extent the issue becomes one of whether the claimant's conclusion that he is totally disabled controls the situation.

Since the accident at issue the claimant sustained a non-occupational trauma which was severe from both physical and psycho neurotic aspects. He was the victim of a 410 gauge shot gun blast which rendered the claimant unconscious and severed a major artery in the right leg.

The Board notes that the Hearing Officer order in the matter is quite persuasive, up until its concluding major paragraph, that the disability was short of being totally disabling. The Board acknowledges the valuable contribution of the clinical psychologist. However, in weighing the total problem, the Board concludes that the psychological report should not outweigh the conclusions to be drawn from the reports of the various physicians of record.

The Board concludes and finds that the claimant's permanent disability is partial only. In light of the claimant's limited education and intellectual resources, the Board concludes that the combined physical and psychiatric limitations attributable to the accident at issue warrant an award of unscheduled disability of 192 degrees on a basis comparable to the loss of an arm by separation.

The order of the Hearing Officer is accordingly modified and claimant's permanent disability is determined to be unscheduled partial disability of 192 degrees.

Whether the compensation actually to be received by the claimant is reduced by such modification, of course depends upon the claimant's longevity,

The compensation in either event is increased substantially over the prior award by Closing and Evaluation. Counsel for the claimant shall receive 25% of the increase in compensation above the initial award of 67.2 degrees payable from the increase as paid, but not to exceed the maximum of $1,500.

WCB #70-746 and
WCB #70-747 August 14, 1970

DWAIN A. RAYBURN, Claimant.

The above entitled matter involves procedural rights with respect to an accidental injury of December 4, 1969, and a subsequent incident at work on February 26, 1970 which was either a new accident or an exacerbation of the problems following the December injury.

The claimant sought a hearing with respect to both claims and both requests for hearing were dismissed.

The matter is complicated by a denial of a claim issued by the State Accident Insurance Fund on April 1, 1970. Unfortunately the form used by the State Accident Insurance Fund fails to identify even the date of the accident being denied and the records of the Workmen's Compensation Board do not contain the employer's letter answering questions 36 and 55 on the form 801. Furthermore, the State Accident Insurance Fund in response to the claimant's protest of the claim denial, in effect advised the claimant that he had not filed a claim or signed the one made out by the employer. It is assumed that the denial of the non-claim is for the incident of February 26, 1970 for the purpose of this review.

The Hearing Officer, on the record, considered both matters as in effect claims of aggravation with respect to the December, 1969 injury. The lack of a supporting medical report required by ORS 656.271 was used as the basis for dismissing both matters.

A determination was issued on January 28, 1970 by the Workmen's Compensation Board pursuant to ORS 656.268 finding the claimant to be medically stationary and without residual permanent partial disability. That determination, by ORS 656.268(4), was subject to a hearing as a matter of right for one full year. Use of the word "aggravation" does not destroy the right to a hearing on the merits of the closure order in January, nor does it require a claimant to make a prima facie case before hearing will be allowed.

Similarly, the use of the word "aggravation" in connection with the incident of February 26th does not automatically remove the claimant's right to a hearing on the issue of whether a new compensable injury has been sustained.

It appears that the Hearing Officer was unduly precipitate in dismissing both requests for hearing by assuming that the law and rules pertaining to claims of aggravation controlled. The matter has therefore not been fully developed or heard.

Pursuant to ORS 656.295(5), both matters are remanded to the Hearing Officer for hearing (1) upon the merits of the extent of claimant's disability resulting from the injury of December 4, 1969, and (2) whether the claimant's

exacerbation of February 26, 1970 constitutes a new compensable injury or an extension of disability associated with the accident of December 4th.

As a remand for further proceedings, the foregoing is not deemed to be an appealable order.

Pursuant to Petersen v. SCD, 90 Or Adv Sh 983, 467 P.2d 976, fees upon review are payable by the State Accident Insurance Fund under the posture of these proceedings. It is accordingly ordered that the State Accident Insurance Fund pay to claimant's counsel the sum of $250 for representation in connection with this review of these two matters.

WCB #70-864 August 14, 1970

CLYDE R. COLE, Claimant.

The above entitled matter involves the procedural issue of whether the claimant has a right to hearing on an issue of the extent of permanent disability with respect to an accidental injury sustained on February 7, 1963. The first final order of compensation was issued by the then State Industrial Accident Commission on March 2, 1964. The time within which the claimant could have a hearing as a matter of right on a claim of aggravation expired in March of 1966, two years following the initial claim closure.

The revised Workmen's Compensation Law effective generally on January 1, 1966 permitted an election of remedies with respect to claimants whose claims were in such a posture that the claimant could avail himself of the former procedures including trial by jury or the new procedure without jury trial but a five year right of aggravation.

Though the State Accident Insurance Fund granted further benefits to the claimant in 1970, the right to a hearing on the issue had long since expired. No request for hearing was filed with the Workmen's Compensation Board for over six years following the first closure of the claim. As noted above, present procedures for accidents occurring on or after January 1, 1966 require the request for hearing to be filed within five years from the initial determination. Claimant here is asserting even greater rights with respect to an injury of 1963 than is allowed for a post January 1, 1966 accident.

The fact that the State Accident Insurance Fund has voluntarily assumed further responsibilities should not be used as a technical base to urge that the State Accident Insurance Fund has thereby exposed itself to litigation. Such a construction might be a deterrent to employers and insurers voluntarily reopening claims with respect to which hearing rights have otherwise expired.

There is a continuing jurisdiction vested in the Workmen's Compensation Board which is authorized to exercise own motion jurisdiction to reopen claims regardless of the vintage of the claim. That, however, is not a matter of right upon any request. It is addressed to the discretion of the Workmen's Compensation Board. The request for review herein confuses the insuring agency, the State Accident Insurance Fund, with the new Workmen's Compensation Board. The actions of the State Accident Insurance Fund are not actions of the Workmen's Compensation Board. The brief discusses the voluntary allowance

of compensation by the State Accident Insurance Fund as though it was an action by the Workmen's Compensation Board. Further, once the time for filing a claim for aggravation expired, the claimant no longer had a choice of remedies upon which to exercise an election of remedies.

The Board concludes that the request for hearing was properly dismissed. The order of the Hearing Officer is affirmed. This dismissal is without prejudice to any assumption by the Workmen's Compensation Board of own motion jurisdiction.

WCB #69-2196 August 14, 1970

TILLMAN VILLINES, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 50 year old sugar plant laborer who fell from a ladder on January 25, 1968 and landed on his buttocks causing compression of the third through fifth lumbar vertebrae.

Pursuant to ORS 656.268, a determination issued finding the claimant to have unscheduled disabilities of 80 degrees out of the allowable maximum of 320 degrees. Upon hearing, the award was increased to 150 degrees from which the State Accident Insurance Fund sought review.

The claimant made an unsuccessful attempt to work in a mobile home factory but could not tolerate the lifting and bending required in the work. He has engaged in cleaning septic tanks which is work he can perform unless there is an unusually heavy cover to be removed. This is somewhat seasonal work.

The Board concludes and finds that taking the record in its entirety, the disability approximates that found by the Hearing Officer.

One aspect of the case does concern the Board. There is a reference in Dr. Tanaka's report that it would be useless to seek vocational rehabilitation at claimant's age. The claimant is a resident of Idaho. This Board has noted on other occasions references to an administrative policy in Idaho which apparently excludes the claimant's age bracket from vocational rehabilitation. Dr. Tanaka was probably speaking of Idaho policy. There is no such policy in Oregon and the Oregon Board knows of no reason why the claimant though a resident of Idaho, should not receive the full benefit of rehabilitative efforts in Oregon for a compensable Oregon accident.

The Board concludes that the claimant should be examined by the Physical Rehabilitation Center maintained by the Board for the purpose of evaluating the claimant's residual potentials for vocational rehabilitation. The matter is being referred to Mr. R. J. Chance, Administrator of the Workmen's Compensation Board, with directions to have the claimant brought to the Board's facilities at the Physical Rehabilitation Center to determine the possibilities of vocational rehabilitation and to coordinate the services of other public agencies toward the ends of any such rehabilitation which may thereafter be deemed feasible. This action, however, has no bearing upon the issue now before the Board.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed the fee of $250, payable by the State Accident Insurance Fund, for representation upon this review, the award not having been reduced as requested by the State Accident Insurance Fund.

WCB #69-1496 August 17, 1970

The Beneficiaries of
DONALD F. GRABNER, Deceased.
Request for Review by SAIF.

The above entitled matter involves the issue of whether the decedent workman's death from a coronary insufficiency was legally and medically materially caused by the decedent's work. The claim was denied by the State Accident Insurance Fund but ordered allowed by the Hearing Officer.

The decedent's work was basically that of a foreman of a woods products remanufacturer. The heart attack occurred shortly after lunch. The decedent was at some point in the process of changing a "dado head," a process involving a crescent wrench with occasional need of a "persuader" in the form of a block of wood applied forcibly to the outer end of the wrench. The fact that the progress of the work was not observed leads to the major issue on review. The heaviest effort would have been the effort with respect to use of the wrench but that part of the job might have been completed prior to lunch.

The issue is thus a little broader than the normal issue of whether a known degree of effort was a material factor in production of the failure of the heart. One starts with the proposition that there were defects in the circulatory system to start with. The normal heart is not subject to failure with even substantial stress. Added to the pre-existing pattern is the fact that ingesting food such as at lunch places a substantial burden upon the heart and the blood supply. At this point the opinion of Dr. Harris supports the proposition that even the minimal period of exertion associated with use of the wrench was probably a material factor.

Assuming the facts upon which Dr. Harris relied, the Board, taking into consideration the expertise of Dr. Harris in the field of cardiology, feels the greater weight should be extended to Dr. Harris.

The State Accident Insurance Fund likens the situation to basing an inference on an inference, a practice ruled out by McKay v. SIAC, 161 Or 191. The broad rule announced in McKay is not necessarily the law in Oregon. In Eitel v. Times, 221 Or 585, the Supreme Court questioned whether the rule is in fact applied. The better rule is one against drawing tenuous inferences. The question is whether the evidence is sufficient or relevant to prove the fact in dispute.

Applying this concept to the facts of this case, the Board concludes that the facts upon which the opinion of Dr. Harris was based were sufficiently relevant to overcome the assertion that the opinion was based upon tenuous inferences. The Board is not concerned with comparing the physical effort or medical opinion in this claim with other cases. The concern is whether

the medical expertise in this case applied to the facts warrants a conclusion of a material medical-legal causal relationship to the injury.

The Board concurs with the findings of the Hearing Officer and concludes and finds that the decedent's death was materially hastened by the work effort as alleged.

The order of the Hearing Officer is affirmed.

Counsel for claimant pursuant to ORS 656.382 and 656.386 is allowed the further fee of $250 payable by the State Accident Insurance Fund.

WCB #69-1799 August 17, 1970

GLADYS MILLER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the primary issue of the extent of permanent partial disability sustained by a 39 year old mother of nine children employed part time as a school bus driver, when she fell while cleaning the windshield of the school bus on April 2, 1969, injuring her right knee. The matter also involves the issue of additional temporary total disability for a five day period.

The claimant was granted an award of permanent partial disability of 15 degrees of the maximum of 150 degrees scheduled for the loss of one leg by the determination of the Closing and Evaluation Division of the Workmen's Compensation Board pursuant to ORS 656.268. This determination of the claimant's disability was found to be a fair evaluation and was affirmed by the order of the Hearing Officer. The claimant has now requested that the Board review the order of the Hearing Officer.

The claimant sustained a tear of the posterior portion of the medial meniscus of the right knee, necessitating an operation for the excision of the medial meniscus. Dr. Spady, the treating orthopedic physician and surgeon, reports that the claimant retains a full range of motion in her knee and reasonably normal use of her knee, although she has some difficulty in squatting and some pain from the repeated forceful use of her knee. Her knee is somewhat weaker than formerly and there is definite atrophy in the right quadriceps. Dr. Spady is of the opinion that the claimant has sustained some permanent partial disability as a result of the injury to her right knee.

The claimant initially undertook the employment as a school bus driver in order to supplement the family income. The job involved approximately three and one-half hours work each school day and she earned approximately $200 per month. A short time prior to her accident, the claimant became separated from her husband and at the time of the hearing divorce proceedings were pending.

Following her accident and her release to return to work the claimant was employed for a period of three months as a waitress from which employment her earnings were approximately $150 per month. Since that time the claimant has been supported through assistance under the public welfare program, which by reason of the eight minor children living with her, provides

an income substantially more remunerative than her earning ability from any employment that is within her capability. Earning impairment as a factor in the determination of disability becomes wholly conjectural and meaningless in this matter, since it is unlikely that the claimant will abandon the assistance received as a welfare recipient in order to return to work, when her maximum earning capacity, which is substantially identical to her pre-injury earning ability, is less than half of her present welfare assistance payments.

The claimant's permanent partial disability, to the extent that it is documented by the medical evidence of record, is fully reflected in the disability award of the Closing and Evaluation Division and the Hearing Officer. The claimant has sustained some permanent disability, but there is no credible evidence in the record which convinces the Board that she has sustained more than a nominal permanent disability or that she is precluded from resuming appropriate regular employment.

There is a contention that compensation should be paid for a non-disabling scar. The workmen's compensation laws of not less than 30 states or jurisdictions expressly provide for awards of compensation for disfigurement. The Oregon Workmen's Compensation Law neither expressly so provides, nor may it reasonably be construed to authorize awards of compensation solely for disfigurement or cosmetic defects. In the absence of statutory authority making disfigurement compensable, the Board is of the opinion that such disfiguring effect as the scar on claimant's knee may involve must be considered in conjunction with and embraced within the disability award made for the impairment resulting from the claimant's injury.

Dr. Spady authorized the claimant's return to regular employment on September 15, 1969. The temporary total disability was terminated as of that date. The claimant actually returned to work on September 20, 1969, and seeks additional temporary total disability for this five day period. The period of temporary total disability terminates at such time as the injured workman's condition has become medically stationary and the workman has become able in the opinion of the attending physician to return to regular employment. A workman's delay for any reason in actually returning to work after medical authorization to resume regular employment, does not extend the period of temporary total disability. The Board believes that the claimant's period of temporary total disability was properly terminated on the date that her attending physician approved her return to regular employment.

The Board finds and concludes in the exercise of its own independent judgment from its de novo review of the record and briefs that the period of temporary total disability was properly terminated on September 15, 1969, and that the 15 degrees of the maximum of 150 degrees for the loss of a leg awarded to the claimant by the order of the Hearing Officer, which affirmed the determination of the Closing and Evaluation Division, properly evaluates the claimant's permanent partial disability attributable to her accidental injury.

The order of the Hearing Officer is therefore affirmed.

WCB #69-2135 August 17, 1970

WILLIAM HORMANN, Claimant.

The above entitled matter involves the question of whether the refusal of a hearing officer to order another party joined to a pending proceeding is a matter which should be the subject of Board review.

The Board concludes that the recent decision of Hiles v. SCD, 90 Or Adv Sh 1425, 470 P.2d 165 (1970), has some bearing. That decision held a final order to be required in order to establish jurisdiction for Court appeal in an occupational disease claim. The wording of the procedure in accidental injuries differs but still retains references to review of Hearing Officer orders following the conclusion of a hearing and refers to orders which become final.

It may be that the Board, with the entire record before it, would deem it proper to join other parties. Board review contemplates a record upon which a final decision can be made. If the Board declined to join a party, would such a preliminary interim question then delay the entire process until a Court review?

The board concludes that the better policy is to avoid injecting the Board into matters of joinder of parties, admissibility of evidence or other interim matters until a final order has been issued at which time any material errors remain subject to review.

The request for a stay of proceedings and joinder of other parties is denied.

WCB #69-747 August 19, 1970

CARMA J. REED, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 40 year old waitress sustained a compensable injury allegedly incurred in attempting to move an ice cream freezer following a gas line break early in November of 1968.

Interestingly, the claimant had a stiff leg from a previous auto accident and had a history of prior back trouble. Her employment had been conditioned upon the claimant being excused from arduous labor.

The versions of the claimant's problems as related by the claimant and her employer are strikingly divergent. No written notice was given to the employer for at least three months. The first visit to the doctor following the alleged incident was made without mention of any trauma such as moving the freezer. It appears quite clear that the incident did not occur following the break in the gas line, since moving the freezer was an event which occurred on a prior date. The claimant admits that she had related to some customers that she had injured her back while shovelling snow. She explains these statements as being a rumor she started herself because she was being teased.

The Hearing Officer, with the benefit of an observation of the witness, concluded that the claimant did not sustain a compensable injury to her back as alleged. The record is such that the Board should not attempt to substitute its evaluation of the witness, particularly with respect to whether she was joking or telling the truth as to the origin of her physical problems.

The order of the Hearing Officer denying the claim is affirmed.

WCB #69-943 August 19, 1970

MARJORIE WILCOXEN, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether a 48 year old school teacher sustained a compensable injury with relation to a respiratory problem which was allegedly precipitated by an insect repellent which had been sprayed in the classroom on September 26, 1968.

The classroom was sprayed during the noon hour with an insect repellent identified by the trade name "Raid." When she returned to class, the mist from the spray had settled but an odor remained. The windows were opened and the claimant was in the room until 4:00 p.m. She also taught all day Friday, but again opened the windows since she found the residual odor disagreeable. On Saturday she developed severe respiratory distress and was hospitalized. Before going to the doctor, she used medications as previously obtained from a doctor to control phlegm.

The claimant was previously hospitalized for a condition diagnosed as asthma during December of 1967 and January of 1968. She was a long time smoker with symptoms of chronic bronchitis especially in the month prior to this episode. The diagnosis of the condition for which she was treated was an acute severe bronchospasm which was probably on the basis of bronchitis.

The evidence reflects a claimant with a smoking and bronchial problem. A school custodian, for not to exceed two or three minutes, used a small hand sprayer which emitted rather heavy droplets of an insect repellent. The medical evidence reflects that it is possible that such an insecticide could precipitate a bronchospasm. There is no evidence, however, that the claimant at any time was exposed to any inhalation of anything more than a residual odor.

The claimant had been treated since September 5 of 1968 for a recurrence of the choking and wheezing she has experienced at the begining of the year. Under the circumstances, the medical evidence reflects that her problem was one of development of her bronchitis and not exposure to the residual odor of a spray which required treatment.

The Board concurs with the Hearing Officer and concludes and finds that there is insufficient evidence to relate the development of the existing bronchitis to the rather limited exposure to the residual odors of a spray.

The order of the Hearing Officer is affirmed.

WCB #69-1129 and
WCB #69-1130 August 19, 1970

HERMAN P. LINGO, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability sustained by the 49 year old claimant as the result of two accidents. On June 5, 1967 the claimant fell and incurred a fracture of the left heel bone. On September 30, 1968 the claimant was caught between a crane bumper and tree and sustained multiple bruises of the back and pelvic area.

The claimant, prior to the first injury of June 5, 1967, had lost all of the toes of his left foot by surgery. The State Accident Insurance Fund concluded that complaints by the claimant with reference to the right foot were not compensably related to the industrial injury. On February 4, 1969 the State Accident Insurance Fund denied any responsibility for medical care or compensation with reference to the right foot. This is referred to as a partial denial where an employer or insurer accepts responsibility for certain conditions but denies other areas of alleged responsibility. The matter is covered by Rule 3.04 of the Rules of Procedure of the Workmen's Compensation Board and was not challenged in the recent decision of Melius v. Boise Cascade, 90 Or Adv Sh 731, Or App, 466 P.2d 624(1970). The claimant did not seek a hearing upon that denial within the 60 days permitted, but attempted to assert the "denial" was not authorized and thus not binding.

Determinations pursuant to ORS 656.268 were made with respect to the two accidents on March 18 and 20, 1969. It was determined that the claimant had a 25% loss of function of the left foot at or above the ankle joint from the June, 1967 injury and no permanent residuals from the subsequent accident of September, 1968.

The Hearing Officer affirmed these findings of disability and further excluded consideration of possible association of the right foot by virtue of the failure to timely contest the denial. The 60 days within which to request a hearing has been extended to 180 days by a 1969 amendment provided the claimant can show good cause for the delay. The 180 days expired prior to the effective date of the 1969 amendment.

The Board concurs with the Hearing Officer in all of these issues and finds that the matter of any possible association of the right foot was properly excluded and that the only permanent disability from the two accidents does not exceed the award for a loss of use of 25% of the left foot.

WCB #70-237 and
WCB #70-238 August 19, 1970

EDWARD WALTERS, Claimant.
Request for Review by Employer.

The above entitled matter involves issues of the extent of permanent disability arising from two separate accidents in January of 1969 while the 55 year old truck driver was employed by Hudson House.

The injury of January 4 was diagnosed as a sprain of the cervical and lumbar areas of the spine. The subsequent injury of January 29 was diagnosed as contusions to the right arm and shoulder and the fracture of a calcific spur of the right elbow.

During the administration of the claim, the employer on August 4, 1969 denied any responsibility for problems the claimant was experiencing with spells of "blacking out" and with his vision. No request for hearing followed this denial. The claimant also has problems with diabetes, gout and hypertension. Following a return to work he was discharged, following a series of minor vehicle accidents.

Pursuant to ORS 656.268, determinations of disability were made by the Closing and Evaluation Division of the Workmen's Compensation Board. It was determined that claimant had no residual disability from the January 4th injury, but that he did have a residual disability of 10 degrees out of an applicable maximum of 192 degrees for total loss of an arm for the right arm.

Upon hearing the Hearing Officer found the claimant to have an unscheduled disability of 16 degrees from the January 4th injury and 20 degrees for the injury to the right arm on January 29.

The employer, on review, challenges the conclusions of the Hearing Officer as essentially unfounded in the recitals and findings of the Hearing Officer. The claimant testified to an increase of loss of motion in the upper arm. This increase in symptomatology was not related to the doctor. The medical reports reflect an almost normal use of the arm. The impairment is so small that it is to all intents and purposes insignificant.

The claimant admittedly has other medical problems and these serve as a deserving basis for sympathy. It is difficult, however, to find any substantial basis for a conclusion that the claimant has sustained any material permanent injury from either accident. Only the award of 10 degrees for the right arm appears to be substantiated as a bona fide disability related to the two accidents.

The Board concludes and finds that the claimant sustained a permanent disability of only 10 degrees for the injury of January 4, 1969. The order of the Hearing Officer is set aside and the orders of determination theretofore issued for each claim are respectively reinstated.

Pursuant to ORS 656.313, no compensation paid to claimant by virtue of the order herewith set aside is repayable.

Counsel for claimant is authorized to collect from the claimant a fee of $125 for services in connection with a review instituted by the employer which resulted in a reduction of compensation.

WCB #70-247 August 19, 1970

FRANCIS P. PIETERS, Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 34 year old service station attendant as the result of low back injuries incurred February 15, 1968 while pushing a car.

The claimant had experienced at least seven prior injuries to his back and neck. In 1950 he was in a body cast for six months. In 1959 he fell from a railroad bridge. He was the beneficiary of at least one award for prior industrial injuries to the extent of unscheduled injury comparable to 35% loss function of an arm. In addition to the previous accidents, the claimant, shortly after surgery connected with this claim, fell while visiting a tavern. He was next involved as a passenger in a car that was rear-ended in November of 1968.

Pursuant to ORS 656.268, the disability of 48 degrees out of the applicable maximum of 320 degrees and 15 degrees for a 10% partial loss of the left leg. These awards were affirmed by the Hearing Officer.

The question then is one of sorting out the impairment and disability attributable to the incident of February 15, 1968. The claimant is undergoing a full time vocational rehabilitation program to become an accounting clerk. The prospect is a probability that the work should be more remunerative than the former work in the service station. There is no basis for actual present comparison but the issue is one of probable disabilities upon a permanent basis.

The Board concurs with the Hearing Officer and finds and concludes that the disability attributable to this accident does not exceed the 48 degrees unscheduled and 15 degrees for the leg heretofore awarded.

WCB #70-358 and
WCB #70-359 August 20, 1970

DONALD L. DOWNING, Claimant.
Request for Review by Claimant.

The above entitled matter involves two claims before the Hearing Officer with reference to a low back problem. The claimant is a 33 year old logger with a history of back complaints dating back at least ten years.

On October 1, 1968 the claimant incurred an acute lumbosacral sprain while changing head gaskets on a large truck motor. This claim was closed by order of determination pursuant to ORS 656.268 finding there to be no residual permanent partial disability.

In December of 1969 the claimant sought medical care for his low back problems and sought to have his claim reopened. The claimant related to a doctor that his continuing problems had been exacerbated by an incident on November 9, 1969 of falling down hill while carrying a saw. At this point his efforts to have the earlier claim reopened were answered with a suggestion from a representative of the State Accident Insurance Fund that he prove a

new claim against the insurer of the employer responsible for the November 9th accident. It developed that the State Accident Insurance Fund was the insurer of the employer involved in the November 9th accident. After first accepting the claim, the State Accident Insurance Fund subsequently denied the claim for a new injury.

There is no evidence that the claimant's back problems were ever caused or exacerbated by any injury not subject to insurance by the State Accident Insurance Fund.

The Hearing Officer affirmed the denial of the claim for a new accidental injury on November 9th and ordered the claim reopened as a responsibility of the employer involved in the accident of October, 1968. [Note: The order of the Hearing Officer is in error in directing responsibility directly to the employer where the employer is insured by the State Accident Insurance Fund. The State Accident Insurance Fund has the primary responsibility for such claims. Employers electing not to be so insured are denominated Direct Responsibility Employers and when one so classified has injuries to subject workmen, such employers are properly ordered to assume responsibility.]

The real issue raised on review is whether the State Accident Insurance Fund, in refusing to reopen the claim and in seeking and then denying a new claim, should be subjected to penalties and attorney fees for unreasonable delay in payment of compensation.

A recent decision of the Court of Appeals in Lemons v. SCD, 90 Or Adv Sh 779, 467 P.2d 129 (1970), became involved in the disposition of the case. Lemons had a compensable back injury but fell on some steps in a subsequent non-occupational incident. Despite the fall on the steps, the Court ruled that if the evidence reflected the industrial injury was a material contributing cause, the State Compensation Department was responsible for the required surgery. It was not necessary that the industrial injury be the sole cause. Lemons, incidentally, testified that his back was not injured in the fall on the steps.

The Workmen's Compensation Board interpretation of the Lemons decision would be that if Lemons' fall on the steps had been in the course of employment and had also contributed to the need for surgery, there would be two compensable injuries. A need might arise to apportion any resultant disability award but it would not result in clearing the insurer as to the latter accident.

The Board concludes and finds that on November 9, 1969 the claimant fell as alleged while carrying his saw and exacerbated his previous susceptible back problem so as to constitute a new and compensable claim.

The obligation, whether related to October of 1968 or November of 1969 is that of the State Accident Insurance Fund. The order of the Hearing Officer imposing liability upon D & E Trucking Company is modified to impose the liability upon the State Accident Insurance Fund as the result of the injury of November 9, 1969.

The claim of November 9th now having been allowed attorney fees become payable by the State Accident Insurance Fund. Counsel for claimant, pursuant

to ORS 656.386, is allowed the fee of $750 payable by the State Accident Insurance Fund. To the extent to which attorney fees have been deducted from compensation paid under the order of the Hearing Officer, the claimant shall be reimbursed out of the fee made payable by this order. The Board concludes, however, that penalties should not be imposed under ORS 656.262(8).

WCB #69-989 August 20, 1970

HERBERT L. BASCO, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 18 year old mill worker is in need of further medical care or whether he sustained any permanent injury as the result of a lumbar muscle strain incurred on October 28, 1969. The claimant was last examined medically on November 18, 1968 and has received no treatment since that time. His employment was terminated on January 3, 1969 for failure to report to work.

Pursuant to ORS 656.268, the claim was closed in May of 1969 without award of permanent partial disability. The claimant promptly sought a hearing by application in June of 1969. At the time and place first set in August for hearing, the claimant failed to appear and the matter was continued. The claimant also failed to keep an appointment for medical examination. His excuse was a "strep throat," but he admits he made no effort to obtain another appointment.

There is substantial rhetoric concerning the obligations of the employer and the duty of the Workmen's Compensation Board in processing claims. These obligations and duties are set forth by law.

An injured claimant also has responsibilities with respect to his claim. That responsibility is not met by the lack of any evidence reflecting either a need for further medical care or disability related to the claim. Nor is the responsibility met by attempt to shift the burden of proof to someone else.

The Board concurs with the Hearing Officer and concludes and finds that there is insufficient evidence to warrant directing further medical care or finding that the claimant has a residual disability attributable to the injury.

The order of the Hearing Officer is affirmed.

WCB #70-106 August 21, 1970

CHARLES T. SCHROEDER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 45 year old workman who fell from a ladder while employed as a journeyman painter on August 7, 1968.

Though the initial injuries included a pelvis fracture as well as a compound fracture of the left olecranon process, the pelvic fracture appears to have healed without residual disability attributable to the injury.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a residual disability of 10% of the left arm, or 19.2 degrees. Upon hearing, the Hearing Officer affirmed the lack of residual unscheduled disability but increased the award for injury to the left arm to 40 degrees representing a loss slightly in excess of 20% of the arm.

The issue on review largely revolves about the factor to be applied with reference to earnings loss. When the determination order issued the claimant had returned to his former employment. That employment later terminated for lack of available work and the claimant became a truck driver. Though there was some dimunition in pay beginning as a truck driver, it was a vast increase in earnings compared to being laid off, since being laid off was not due to his injury but to reduction in employment opportunities. The claimant admits to being able to lift 100 pounds and probably more but qualifies this by reciting that it takes both hands.

The extent of disability urged seems inconsistent with an ability to competently and safely drive a truck. There is no indication that the claimant's disabilities preclude the satisfactory operation of a truck.

The Board concludes that the Hearing Officer gave the claimant the benefit of the doubt in increasing the previous award. The Board finds that the residual disability does not exceed the 40 degrees awarded by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #69-2207 August 21, 1970

MELVIN F. TONEY, Claimant.
Request for Review by Claimant.

The above entitled matter involves the question of whether the 35 year old carpenter has any permanent disability attributable to an incident of March 28, 1969. At that time the claimant experienced an onset of back pain while driving stakes with a sledge hammer.

The claimant is apparently susceptible to recurring episodes of back problems with a history of an incident in December of 1964 while pushing a wheelbarrow and another incident in January of 1968. The claimant was also

involved in an auto accident in April of 1969, shortly following the sledge driving incident on which this claim is based. The claimant asserts the back was not affected by the auto accident.

The claimant does have a recurrent problem but is presently taking no medication and receiving no treatment. He has sustained no apparent loss of earnings. Despite an 11th grade education, he has been described as illiterate. On the other hand his capabilities are such that he has been continued in employment as one of the more valuable workman whose abilities more than overcome the periodic problems with the back.

The question is not whether the claimant has occasional problems with the intervertebral discs. The question is whether the claimant has a permanent disability arising out of his employment which is attributable to the incident of March 28, 1969.

The Hearing Officer concluded that there was insufficient evidence to indicate that the incident of March 28, 1969 caused more than a temporary exacerbation of the underlying problem. The claimant's symptoms at the time of hearing were primarily subjective and there is no basis for concluding that a degree of permanent disability was incurred in the incident of March, 1969, a year prior to the hearing herein.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has not sustained a permanent disability from the accident at issue.

The order of the Hearing Officer is affirmed.

WCB #69-1373 August 21, 1970

FLOYD V. OSTERHOUDT, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of alleged disability with relation to an accidental injury of November 28, 1967 when a piece of metal dropped on the left foot of the 47 year old claimant fracturing the distal phalanx of the little toe. The next day pain developed in the left calf where a thrombophlebitis had developed. Subsequently the claimant had recurring pains in the left leg which were diagnosed as related to an arthritic development in the lumbar area of the spine.

With the discovery of the low back involvement which was first manifested in May of 1969 (according to the claimant's testimony), the State Accident Insurance Fund issued a denial of any responsibility for any claim of back injury. The request for hearing initially involved just this denial of the back problem. The claim had been originally closed in May of 1968 with a determination that claimant had a loss of function of 5% of the leg. The claim has been reopened and was again closed in July of 1969 without additional award of permanent partial disability. The hearing, in addition to the back issue, also included consideration of the question of the extent of disability for the leg injury.

It does not appear that any claim has ever been filed for a back injury. If the claimant's back problems arose from some work incident or exposure, other than the accident to the toe, it would be contrary to the law to broaden the scope of these proceedings to encompass whether for any reason at some time the problems with the back may have had an inception at work. There is no medical testimony relating the problems with the back to the toe incident.

On the other hand, the venous problem which was associated with the toe appears to have substantially cleared. There is no need presently for further medical care.

The Board concurs with the Hearing Officer and concludes and finds that the claim with respect to the back problem was properly denied, that any residual disability attributable to the injury does not exceed the established award of 5% loss function of the leg and finally that claimant's condition for problems compensably related to the claim is medically stationary.

The order of the Hearing Officer is affirmed.

WCB #69-1475 August 21, 1970

GWEN THURBER, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 42 year old grocery checker who sustained a back injury while lifting cases of frozen food on April 7, 1967. There is also an issue, in the Board's opinion, over the refusal of the Hearing Officer to continue the hearing to permit the production of further medical reports with reference to a situation in which the claimant disowned certain statements purportedly made with reference to a subsequent nonoccupational accident.

The claim was first closed June 20, 1967 pursuant to ORS 656.268, without award of permanent partial disability. The claim was reopened and again closed with the last closure on March 5, 1969. Upon this second closure, the claimant was found to have an unscheduled disability of 19.2 degrees out of the applicable maximum of 192 degrees. Upon hearing the award was increased to 80 degrees.

Though the Board has been critical from time to time of delays encountered in disposition of hearings, it takes note that hearings are routinely continued to obtain additional information. In the case at issue the claimant admitted to signing a statement concerning an automobile accident which contained words that, "I suffered from injuries to my lower back and neck." The claimant would would not authenticate the written and subscribed statement unless the offensive words were stricken. Counsel for the employer, obviously taken by surprise by the claimant disowning the signed statement, then sought permission to obtain a report from the doctors with reference to what was reported to him by the claimant when seen the day of the auto accident. She admittedly got a couple of good jolts and was so shaken she couldn't drive. The Hearing Officer refused to permit a continuance and sustained the objection of claimant's counsel to the introduction of evidence from the doctor. Despite the claimant's protests, the Board notes that the claimant's request for a hearing in this matter recites that she "had x-rays taken of my back to ensure I hadn't been hurt further then my already existing back injury."

The Board considers the request to continue the matter for 48 hours to obtain the medical report to have been a reasonable request upon the unforeseen turn of events. The protests of claimant's counsel with respect to delays and cross-examination were not well made. The issue at this point, with the claimant's disavowal of her written statement, was simply whether she reported "lower back and neck injuries" to the treating doctors immediately following the auto accident. The matter, as it stands, was incompletely heard.

There are other factors from which the Board concludes that the award of 80 degrees substantially exceeds the disability attributable to the accident at issue. The claimant bowls regularly without use of a back brace. Her basic work experience has been in sales and administrative types of work. She has a history of back complaints dating back at least to 1962. She had substantial periods of re-employment which she was able to perform. Since the matter is to be remanded for further evidence, the eventual award of disability is dependent upon further hearing and such award as may be warranted by the evidence now of record together with the record to be made upon further hearing.

The record actually does not contain a request for hearing on the extent of disability or with respect to the Workmen's Compensation Board order of March 5, 1969. The hearing was initiated over a letter from the employer's insurer on July 18, 1969 denying a claim for aggravation due to the auto accident. No claim of aggravation is of record. Claimant's counsel, upon hearing, stated the issues to be an allegedly inadequate award of disability in the award order by the Closing and Evaluation Division of the Workmen's Compensation Board on March 5, 1969.

The order of the Hearing Officer is set aside. The claimant shall continue to receive such compensation as may be due upon the initial award of 19.2 degrees or if that since has been paid, the claimant shall not be required to repay any compensation paid to date due to the order of the Hearing Officer.

The matter is remanded for further proceedings to complete the record and clarify the procedural issues noted by this order.

Pursuant to the rule on an appeal initiated by the employer with a resultant reduction in award, counsel for claimant is authorized to collect from his client a fee of not to exceed $125 for services rendered on this review.

This order is not final and all issues remain subject to further hearing and review and appeal of the order to be issued following further hearing. No notice of appeal is deemed appropriate.

SAIF Claim # HB 103925 August 21, 1970

WILLIE E. HARGROVE, Claimant.

The above entitled matter involves the claim of a 46 year old foundry worker whose injury to his low back was incurred in January of 1965 while lowering a heavy mold to the floor.

The claim was a responsibility of the then State Industrial Accident Commission and the matter comes before the Workmen's Compensation Board pursuant to possible exercise of the own motion jurisdiction of all workmen's compensation claims vested in the Workmen's Compensation Board by the 1965 Act.

The claimant returned to foundry work until 1968 when he undertook brush painting. He was laid off in March of 1970 due to an employment shut down. In the administration of the claim he was eventually awarded a permanent disability equal to the loss function of 30% of an arm.

The claimant was referred to the Physical Rehabilitation Center facility maintained by the Workmen's Compensation Board for special evaluation of the current back problem in July of 1970. The conclusion of the doctors comprising the back clinic of the Physical Rehabilitation Center is that the claimant has a mild partial disability, but that the claimant would benefit from a period of supervised physical therapy in his doctor's office with injections to the left of the lower lumbar spine if approved by his treating doctor.

The now State Accident Insurance Fund has advised the Workmen's Compensation Board that it is willing to pay only for the above physical therapy and injections if approved by the treating doctor.

It is accordingly ordered that if and when the claimant obtains the therapy or injections recommended by the back clinic of the Physical Rehabilitation Center, the State Accident Insurance Fund is to assume responsibility therefore.

Counsel for claimant is authorized to collect from the claimant a fee not to exceed 25% of the value of the medical services obtained by virtue of this order.

Pursuant to ORS 656.278, any right to hearing or possible appeal with respect to this order is limited to the State Accident Insurance Fund, no reduction in benefits being involved to allow hearing or appeal by the claimant.

WCB #69-1068 August 24, 1970

ROBERT C. BARBER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether a 26 year old claimant sustained any permanent partial disability as a result of a compensable accidental injury on September 27, 1968. Shortly following his employment as a second loader for a logging company, the claimant was struck on the left side of the head by a log being loaded onto a log truck, knocking him down and unconscious. His injuries were initially diagnosed as consisting of contusions to his head, cervical spine and left leg and a ligamentous strain of his left ankle. It was subsequently determined that he had additionally sustained a fracture of the proximal third of the fibula of the left leg and a mild cervical and lumbar strain.

The determination order of the Closing and Evaluation Division of the Workmen's Compensation Board entered pursuant to the provisions of ORS 656.268, determined that the claimant was entitled to compensation for temporary total and temporary partial disability, but that he had not sustained any permanent partial disability as a result of his accidental injury. Following a hearing requested by the claimant, the determination order as affirmed by the order of the Hearing Officer. The claimant has now requested a review of the order of the Hearing Officer by the Workmen's Compensation Board.

The accident occurred in the State of Washington where the claimant was temporarily working incidental to his employment in this state. However, it is undisputed that the claimant sustained a compensable injury for which he is entitled to the benefits of ORS 656.001 to 656.794 as though he were injured within this state.

Following initial medical treatment in the State of Washington, the claimant returned to his home in Tillamook and came under the care of his family physician, Dr. Kaliher, who referred him to Dr. Case, an orthopedic specialist, for treatment. In addition to the initial diagnosis of contusions to the head, cervical spine and left leg and a strain of the left ankle, Dr. Case was of the impression that the claimant had additionally suffered a mild cervical and lumbar strain, from which there has been a complete recovery without residual disability. Dr. Case also ascertained the presence of the fracture of the proximal third of the fibula of the left leg which has healed solidly in excellent position. Despite extensive callus formation and slight tenderness at the fracture site, the claimant retains a full and painless range of motion of his left knee and ankle. Dr. Case is of the opinion that there is no permanent disability.

Dr. Kimberley, an orthopedic physician and surgeon, based upon his examination of the claimant and his review of the prior medical reports, including the two reports of Dr. Case, reported findings and conclusions relative to the claimant's condition which are in substantial accord with those of Dr. Case, and his opinion coincides with that of Dr. Case to the effect that no permanent partial disability has resulted from the claimant's accidental injury.

Dr. Kaliher initially reported that no permanent impairment would result from the accident sustained by the claimant. He subsequently declined to

offer an opinion in deference to the opinion of Dr. Case. A short time prior to the hearing, he consented to the claimant's request to make an evaluation and submit a report. Dr. Kaliher's report reflects objective findings of a restriction in forward bending of about 75% of normal, reduced lateral flexion and extension, confirmation of numbness in the left lower leg, and the subjective symptoms related by the claimant. He concludes that all of the symtoms and findings are causally related to the claimant's accidental injury, that they are due to an inflammatory process caused by the accident, and that they will subside so slowly and slightly that they may be classed as permanent.

The Board in weighing the medical evidence in order to resolve the conflicts between the medical reports of Dr. Case and Dr. Kimberley and the medical report of Dr. Kaliher is convinced that the greater weight should attach to the findings and conclusions of Doctors Case and Kimberley by reason of their more extensive qualifications and experience and the thorough, well-grounded and reasoned basis for arriving at their conclusion that no permanent disability resulted from the claimant's accidental injury.

The Board from its appraisal and consideration of the entire record in this matter is unable to attach any significant weight to the subjective symptoms related by the claimant which are corroborated in part by lay witnesses and supported by the medical report of Dr. Kaliher, which is relied upon heavily by the claimant.

Nothing in the claimant's post-injury work history suggests to the Board either physical or earnings impairment. The claimant initially assisted in the operation of his father's business while his father was hospitalized and then worked as a truck driver for an asphalt paving company with some minor problems through the summer and fall until his job was terminated due to slack conditions during the winter. Due to adverse economic conditions in the Tillamook area, the claimant remained unemployed for a period of time until securing part-time but steady employment as a security guard at a large sawmill. The claimant's post-injury employment problems are due to the adverse economic conditions which have adversely affected the availability of employment in the Tillamook area and are not due to his physical condition.

The claimant's need for further medical care and treatment is a further issue raised in this matter, although the claimant has neither received nor required any medical treatment for a period of a year, more or less, prior to the hearing and although all of the doctors are of the opinion that no further medical treatment is required, subject to Dr. Kaliher's exception: ". . . other than such pain relievers and local applications as may from time to time cause him to feel better." The issue appears to basically involve the question of whether the medical services to which a claimant is entitled under ORS 656.245 include future medical services which are palliative in nature after his condition has become medically stationary and his claim closed. The portion of ORS 656.245 providing that the medical services which shall be furnished to the claimant include such medical services as may be required after a determination of permanent disability, is not construed by the Board as overruling the case of Tooley v. SIAC, 239 Or 466 (1965), decided prior to the enactment of the Workmen's Compensation Act in 1965, as contended by counsel for the claimant. The Board is of the opinion that had the Legislature intended to overturn the Tooley decision in the enactment of ORS 656.245 that it would have by some affirmative language provided for the inclusion of palliative treatment.

Based upon its de novo review of the record and briefs in this matter, the Board concurs with the order of the Hearing Officer affirming the determination order of the Closing and Evaluation Division and finds and concludes that the claimant has sustained no permanent partial disability as a result of his accidental injury.

The order of the Hearing Officer is therefore affirmed.

WCB #69-1967 August 24, 1970

DOUGLAS M. FREENY, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 25 year old shingle sawyer who lacerated his left ring finger and left middle, or long, finger in the saw on March 21, 1969. The claimant had previously injured the digits of the same hand including the thumb and tip of the long finger. A further issue is whether, if further compensation be found payable, whether the employer is entitled to a credit for the sum of $500 voluntarily paid to the claimant.

The disability award in this case was for 20% loss of the ring finger and 6 degrees out of the maximum of 22 degrees payable for total loss of a long finger.

Some issue is made of an alleged loss of earning capacity. To the extent that it may be applicable, any such loss of earnings would not permit an award in excess of the statutory schedules for the affected digits. Though the claimant is making less money, it does not appear to be due to the accident but due to the fact the former employer is now out of business. The claimant remains a good sawyer whose earning capacity at his former work appears to be substantially the same.

The issues as to residual disability is restricted to additional disability attributable to this accident. The claimant is not entitled to include previous disabilities within the measurement of disability caused by this accident. Similarly, loss of opposition of digits is with respect to loss of opposition of the normal use of the digits. In this instance the normal opposition between the primary digits of the thumb and index finger has not been adversely affected.

The Board concurs with the Hearing Officer and concludes and finds that the disability does not exceed the 8 degrees heretofore awarded.

Upon this basis the question is moot as to whether the employer is entitled to credit against further compensation for the $500 voluntarily paid. The Board notes that this is a question of first impression to the best of the Board's knowledge. There is substantial authority in other jurisdictions that any sums paid voluntarily and without identification as compensation does not operate as a credit against compensation later found to be due. In this instance the employer was non-complying and as such is liable pursuant to ORS 656.054 to repay the costs incurred from a claim by a subject

workman while the employer was thus noncomplying. For purpose of any appeal that may be taken from this order the Board concludes under the circumstances, that the employer is not entitled to a monetary credit against future awards for moneys in excess of those then due heretofore paid.

The order of the Hearing Officer is affirmed.

WCB #69-787 August 24, 1970

JERRY SITTNER, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of whether the 33 year old claimant has sustained a compensable aggravation of injuries incurred in an auto collision on January 5, 1966. The issue of aggravation dates from the last prior final order of July 5, 1967. If claimant's condition has been compensably aggravated, the issue is the extent of such disability. Also at issue on appeal is the obvious error of the Hearing Officer in applying the schedule of awards for unscheduled disability applicable only to accidents occurring after July 1, 1967.

The claim of aggravation is largely based upon headaches. The part played by a subsequent auto accident in December of 1968 is also an issue. The claimant admits to a lifetime count of 30 or 36 accidents though most of them are minor.

It is the contention of the claimant that the 1968 auto accident merely temporarily exacerbated the residuals of the 1966 injury. This contention was accepted by the Hearing Officer. Chronologically it should be noted that the request for hearing on this claim of aggravation was filed May 5, 1969. On July 24, 1969, more than two and a half months later, the claimant filed a complaint against the parties responsible for his accident of December, 1968. That accident, incidentally, occurred when the claimant was stopped at a stop light and his vehicle was rearended with sufficient force to propel it some 60 feet. Despite the contention of "temporary exacerbation" the claimant's complaint in that case contains the following allegations:

> "As direct and proximate result of the negligence of the defendants, as hereinabove alleged, plaintiff was rendered sick, sore, lame and disabled and injured in his health, strength and activities in that he suffered and sustained a severe wrenching and twisting of the cervical spine, a tearing, wrenching, twisting and damaging of the tendons, ligaments and nerves thereof, causing disarrangements of the vertebral bodies, an acute muscle sprain of the cervical area and aggravation of a pre-existing arthritic condition of the back and of a prior cervical fracture; and that said injuries are permanent and progressive, recovery therefrom being uncertain and indefinite."

If the Board is asked to disregard the allegations of this complaint filed following the commencement of this aggravation claim, it cannot give much weight to the conflicting contentions made for the purpose of these proceedings.

Regardless of the role played by the auto accident of December, 1968, the claimant's versions of the origin and history of his headaches are quite inconsistent.

At page 83, Tr. the claimant swore that he hadn't had a headache at all from 1956 or 1957 until 1966 to my knowledge. Yet Dr. Paxton's report of January 8, 1969 relates, "This patient has had chronic headaches for many years." Dr. Marxer's deposition relates a history of severe headaches for seven years with gradual improvement.

Headaches are of course basically a purely subjective complaint. At page 76 of the transcript, the claimant admitted he had the same complaints at the time of the hearing on the prior claim closing. At page 81, he relates, "It just occurred to me they were getting worse." The claimant's headaches admittedly come on when he frowns and when he is faced with some problem. The etiology of this type of headache is of the tension type with the long pre-accident history. There may have been some degree of trauma type headache but the evidence does not support a conclusion that any headache from such etiology would be permanent or would get worse with the passage of time. The prognosis for these is one of improvement.

As noted above, the accident occurred in January of 1966. At that time the awards for unscheduled disability were compared to the loss of an arm with a maximum of 192 degrees. Pursuant to ORS 656.268, the last award of compensation in this claim was 15% loss of an arm. If the claimant's disability attributable to the accident was compensably aggravated, the evaluation is required to be computed upon the maximum base of 192 degrees rather than the 320 utilized by the Hearing Officer.

That error becomes moot, however, and the Board concludes and finds that the claimant has not sustained a compensable aggravation.

The order of the Hearing Officer is set aside.

Pursuant to ORS 656.313, no compensation paid pursuant to the order of the Hearing Officer is repayable.

WCB #69-1999 August 24, 1970

ETHEL MARTEN, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of whether the 19 year old waitress claimant sustained a compensable low back injury on June 24, 1969 while handling a 50 pound sack of sugar in the course of making some jam.

The claim was denied by the State Accident Insurance Fund, as insurer of the employer, but was ordered allowed by the Hearing Officer following hearing in the matter.

There are several items in dispute such as whether jam was being processed on the morning in question and also with respect to the fact that the claimant recited other circumstances that occurred while employed that day which

possibly were causative factors. As noted by the Hearing Officer, the attempt to defeat the claim by assertion of "horseplay" on the part of employes and instructions not to lift sacks full of sugar would not operate to defeat the claim under the facts.

In large measure the decision in such a case must often turn on the credibility of the witnesses. Though the Hearing Officer made no specific finding on this factor, it remains obvious that following his observation of the witnesses, he concluded that the claimant sustained the injury as alleged. The Board is entitled to give weight to this conclusion, particularly in the absence of compelling circumstances which would call for a contrary conclusion.

The Board concurs with the Hearing Officer and concludes that the claimant sustained a compensable injury as alleged.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed a fee of $250 for services upon Board review payable by the State Accident Insurance Fund.

WCB #69-1324 August 24, 1970

The Beneficiaries of
CLYDE L. HOKE, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of the compensability of an occlusive coronary arteriosclerosis which resulted in the death of a 65 year old potato cutter while installing a drive belt on the machine he operated at 4:50 p.m.

His work on the morning of the fatal day was somewhat more exacting. It involved operating a "jigger" and entailed lifting sacks of spuds weighing from 60-70 pounds. He experienced some numbness in his arms at his lunch hour at home. The afternoon, until the seizure, involved repairing and lubricating the potato cutter.

The claim was denied by the employer, allowed by the Hearing Officer and the Board, on review, was again reviewing conflicting medical opinions with respect to the medical relationship of the work effort and the coronary occlusion.

Pending review, the parties negotiated a settlement of the issue pursuant to ORS 656.289(4). A copy of the joint petition for settlement is attached, by reference made a part hereof and is hereby approved by the Workmen's Compensation Board.

The pending matter is accordingly dismissed and the rights and liabilities of the parties and beneficiaries are determined by the settlement.

WCB #70-212 August 26, 1970

SHIRLEY K. MORRIS, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 26 year old utility millworker whose right hand was caught in some machinery on March 11, 1969. The index, middle and little finger admittedly sustained permanent injuries. There was no physiological injury to either the little finger or the thumb nor was there any injury at or above the wrist joint.

Pursuant to ORS 656.268, a determination issued rating the disability upon the schedules in effect for the three affected fingers.

The claimant urges that it is unfair to rate disabilities with respect to the fingers when the use of the hand is affected. At one time the schedule of compensation did have a separate schedule for the hand. The compensation which could be awarded was not necessarily greater and the compensation payable for loss of digits could exceed an award for the total loss of use of a hand. The present statute, ORS 656.214, makes no provision for a hand as such and treats the fingers on a skeletal basis. Thus a "finger" includes the metacarpal bone and adjacent soft tissue which in common understanding constitutes what people commonly denominate "the hand." Whether a given award under these circumstances is "fair," if one follows the clear intent of the Legislature, is not a matter for administrative review. Arguments upon that score must be addressed to the legislative branch. The Supreme Court in Graham v. SIAC, 164 Or 626, prescribed limitations with respect to when an award could be made on the greater portion of the extremity when a smaller portion is affected. Any finger injury affects the usefulness of the forearm and arm proper. It is only where there are unexpected complications reflecting a distinguishable disability in the greater member that one can depart from the schedule established for the finger.

The schedule for fingers now in effect does provide for an allowance for loss of opposition with respect to an uninjured finger. This exception has been used to urge awards greatly in excess of the obvious residual usefulness of the fingers. It should be noted that the statute is with respect to uninjured fingers. A value cannot be established for an injured finger and a compounding award added for loss of opposition by that finger.

In the instant case the initial evaluation pursuant to ORS 656.268 established awards of 4 degrees for the right index finger out of a possible maximum of 24 degrees, 7 degrees for the right middle finger out of a possible maximum of 22 degrees and 2 degrees for the right ring finger out of a possible maximum of 10 degrees. Upon hearing, the three awards just listed were increased, respectively, to 12, 11 and 5 degrees. The Hearing Officer also granted an award representing a 50% loss of the thumb despite the fact the thumb was uninjured and there remains an effective opposition with all digits.

The Board, in reviewing the evidence and particularly in light of the reports of the treating doctor, concludes that there is no basis in this case for an award for loss of opposition of the thumb. The Board, however, concurs with the Hearing Officer and the treating doctor that the original awards with respect to the three fingers were inadequate.

There appears to be no wage loss factor involved. The claimant attempted some work on a green chain which she had never done before, but has been able to do similar work as an offbearer on a wet veneer machine pulling and lifting veneer weighing from 25 to 29 pounds. Of all the varied functions of the fingers, the only restrictions are those of making a tight fist, hyperextension of the fingers and some loss of grip strength.

The Board concurs with the Hearing Officer and finds that the disabilities of the right index finger is 12 degrees, the right middle finger is 11 degrees and the right ring finger is 5 degrees. These represent 50% of the function of each finger. The order of the Hearing Officer as to these three digits is affirmed. The order of the Hearing Officer is modified by deleting the award for the thumb.

Counsel for claimant is authorized to collect a fee of not to exceed $125 from claimant for representation upon review in a matter where an employer appeals and an award is reduced.

WCB #70-69 August 26, 1970

ERNEST LITTLEJOHN, Claimant.

The above entitled matter involves the issues of the claimant's need for further medical treatment or in the alternative the claimant's entitlement to an award of permanent partial disability.

The 41 year old laborer on the public docks sustained a sprain of his left ankle on April 10, 1969, when he stepped off of an 18 inch high plank onto some loose rock and twisted his ankle. Following a short period of medical treatment, he returned to his former employment on May 19, 1969. He worked steadily, except for a short period following the death of his son in an automobile accident, until July 23, 1969, when he sustained an injury to his back. He has not worked since he sustained the back injury. The back injury involves a separate claim. The medical evidence consisting of the reports of the general practitioner who treated the claimant, and the orthopedic surgeon who examined the claimant for the evaluation of his disability, is consistent and undisputed in concluding that no permanent disability resulted from the claimant's ankle injury.

The Closing and Evaluation Division of the Workmen's Compensation Board determined pursuant to ORS 656.268, by its determination order of November 10, 1969, that the claimant was entitled to compensation for temporary total disability to May 19, 1969, but that no permanent partial disability resulted from the injury. The claimant was dissatisfied with the determination of the Closing and Evaluation Division and requested a hearing which resulted in an order of the Hearing Officer affirming the determination order. The claimant remains dissatisfied and has requested this review by the Board of the order of the Hearing Officer.

On February 8, 1970, the claimant sustained a fracture of the left ankle when he fell while ascending the front steps of his house. The claimant contends that his ankle had continued to be weak and painful following the original injury, entitling him to an award of permanent partial disability.

He further contends that his subsequent fall at his home was due to the weakened condition of his left ankle, that the subsequent injury is therefore causally connected to the initial injury, and that the medical treatment and disability resulting from the subsequent injury is thereby compensable. The State Accident Insurance Fund contends that the claimant's ankle was restored to its pre-accident condition without residual disability. The Fund further contends that his fall on the front steps of his residence was a new non-occupational accident in no way related or traceable to the original injury and that any medical treatment or permanent disability resulting therefrom is accordingly not compensable. The Fund theorizes that the claimant's fall occurred because of his intoxicated condition upon his return home in the early morning hours after an evening at a tavern.

The resolution of this matter rests to a substantial degree upon the credibility of the claimant's testimony and the corroborating testimony of his sister and the woman with whom he cohabits as husband and wife. The Hearing Officer emphatically and unqualifiedly rejected the claimant's testimony and that of his corroborating witnesses. Although not bound by the Hearing Officer's evaluation of the credibility of the witnesses, based upon the weight which the Board gives to the findings of the Hearing Officer who saw and heard the witnesses, together with its own independent evaluation of the weight to be given to their testimony from its review of the transcript, the Board is of the opinion that the Hearing Officer accurately evaluated the credibility of the witnesses. Moore v. U. S. Plywood Corp., 89 Adv Sh 831, ____, Or App 462 P.2d 453 (1969); Hannan v. Good Samaritan Hospital, 90 Adv Sh 1517, ____ Or App 471 P.2d 831 (1970).

The Board finds and concludes from its de novo review of the evidence of record, together with its consideration of the briefs submitted by counsel for the respective parties, that the claimant's initial ankle injury incurred on April 10, 1969, was a relatively minor sprain from which the claimant has fully recovered without the need for further medical treatment and without any residual permanent disability. The Board further finds and concludes that the claimant's fall on the front steps of his house on February 10, 1970, as a result of which he sustained a fracture of his left ankle, was a non-occupational injury in no way traceable or causally connected to the original accidental injury.

The order of the Hearing Officer is affirmed.

WCB #70-533 E August 26, 1970

LESTER A. JOHNSON, Claimant.

The above entitled matter involves an issue over the distribution of a third party settlement pursuant to ORS 656.593.

The workman was in the course of employment when the vehicle he was driving was rear ended. His claim for workmen's compensation benefits had not been closed pursuant to ORS 656.268 when the claimant, with the approval of the employer, settled the case against the third party for $7,200.

The claimant's cost and attorney fees were deducted from the recovery as provided by ORS 656.593(1)(a). The claimant was then paid 25% of the

balance as provided by subparagraph (b). The employer was then repaid its costs of $1,573.12. This distribution left a surplus in excess of $2,000. This surplus was paid to the claimant without any understanding of the parties concerning future expenses in connection with the claim.

The claim was then processed for closing pursuant to ORS 656.268 and a determination issued finding the claimant to have a disability of 48 degrees with a monetary value of $2,640. The claimant asserts he is entitled to an additional $2,640 and the employer asserts that the $2,000 retained from the third party settlement should be offset against the award.

It is clear that the employer could have qualified such an arrangement as a part of the agreement to approve the settlement. It appears equally clear that the finding of the disability was unexpected by both parties.

The parties by stipulation have submitted the issue to the Board pursuant to ORS 656.593(3).

The statute appears quite clear that had the claim been initially closed any unexpected further expense stemming from a claim for aggravation would be a further responsibility of the paying agency. There is no provision requiring a paying agency to accept an amount less than its costs or permitting a claimant to obtain a double recovery beyond the 25% distribution except in a claim of aggravation. The paying agency may willingly waive a portion of the recovery otherwise payable to the paying agency but there is no evidence that the paying agency so waived any portion in this instance.

The Board concludes that it is the legislative intent that the statutory scheme of distribution be followed and that only a claim of aggravation is unaffected by the prescribed distribution.

It is the order of the Workmen's Compensation Board that the paying agency is given credit and offset against the further compensation found payable by the award of permanent disability to the extent of the $2,000 retained by the claimant from the third party proceeds over and above the 25% authorized by law.

WCB #70-1171 August 26, 1970

LESTER E. SPENCER, Claimant.

The above entitled matter involves the claim of a 57 year old logger. The claimant sustained a compensable injury on March 23, 1970. The injury was diagnosed as a left inguinal hernia.

Based upon competent medical evidence indicating that surgical repair of the hernia was deemed to be medically inadvisable because of the claimant's physical condition, a determination was entered by the Closing and Evaluation Division of the Workmen's Compensation Board granting the claimant an award of 10 degrees in full and final settlement of the claim.

The claimant requested a hearing in the matter in which the issues were indicated to be the need for further medical treatment and the extent of permanent partial disability.

The Hearing Officer entered an order dismissing the matter without a hearing in reliance upon the record reflecting that the claimant had been awarded the full compensation authorized by ORS 656.220 which provides in pertinent part as follows:

> "However, in claims where the physician deems it inadvisable for the claimant to have an operation because of age or physical condition, the claimant shall receive an award of 10 degrees in full and final settlement of the claim."

The claimant's attorney thereafter filed an affidavit with the Hearings Division of the Workmen's Compensation Board in support of his request that the matter be reinstated and set for hearing in which he deposed and said that the claimant had sustained disability as a result of his accidental injury in addition to the disability from the inguinal hernia which additional disability was not embraced within the award of 10 degrees for an inoperable hernia provided by ORS 656.220.

Thereafter and on the same date, the claimant filed a request for review by the Board of the Hearing Officer's order of dismissal and the Hearing Officer entered an order setting aside his prior order of dismissal and ordering the matter scheduled for hearing.

The attorney for the claimant has now advised the Board by letter that the claimant's request for review has become unnecessary and asks that it be withdrawn.

The matter is accordingly dismissed.

WCB #70-306 August 26, 1970

ROBERT D. GRIFFITH, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of whether the claimant sustained any permanent injury as the result of being struck in the groin area by a portion of a tank he was testing which exploded as a result of pressure being applied within the tank. The injury was sustained December 5, 1968, erroneously recited in the Hearing Officer order as December, 1969.

Pursuant to ORS 656.268, a determination issued on May 12, 1969 finding the claimant to have sustained only temporary disability without residual permanent partial disability. About nine months later the claimant requested a hearing seeking further medical care, further temporary total disability, permanent partial disability and penalties.

Upon hearing, no medical evidence was submitted by the claimant other than certain hospital records. Upon review, the claimant has filed no brief. Without explanation the claimant now seeks an examination of the claimant by an "independent physician" or a remand of the claim for the purpose of receiving more medical evidence. The claimant cites Sahnow v. Fireman's Fund, 90 Or Adv Sh 1537, 470 P.2d 378(1970), in support of his position. In the Sahnow case there was a specific area of the testimony upon hearing sought

to be clarified. If every claim without adequate supportive medical testimony is remanded "for further medical" there may be no end to the proceedings. This is particularly true where the request is for further exploratory examination to determine whether some of the claimant's problems are possibly related to the trauma. There is definite diagnosis of other problems unrelated to the trauma. There is also a conflict in the claimant's testimony with respect to whether subsequent re-employment was terminated due to residuals of his injury.

The situation is not one in which the claimant should wager at hearing whether he can prove an association between various complaints and a prior trauma without the benefit of medical testimony and then seek a remand from the administrative or judicial review for "further medical." The claimant's symptoms are substantially all medically explained as caused by conditions neither caused by nor exacerbated by the trauma in issue.

The Board concludes and finds that the claimant is not presently in need of further medical care associated with the accident at issue and further concludes and finds that the claimant is disabled neither from a temporary or permanent partial basis with respect to that injury.

The order of the Hearing Officer is affirmed.

WCB #70-1148 August 26, 1970

ALBERT L. JONES, Claimant.

The Board has examined the affidavit of personal bias filed August 24, 1970, by Bernard Jolles, counsel for the claimant, and concludes the Board should not remove the Hearing Officer assigned to hear the matter at issue.

IT IS SO ORDERED.

As an interim order, the matter is deemed not appealable and no notice of appeal is appended.

WCB #69-1373 August 26, 1970

FLOYD V. OSTERHOUDT, Claimant.

The order of the Board heretofore issued August 21, 1970, referred to an award for the left leg. The sole purpose of this amending order is to clarify that the award and findings of the Board were with reference to the claimant's left leg below the knee commonly designated for compensation purposes as the foot.

WCB #68-338 September 9, 1970

JOSEPH F. HUSKIE, Claimant.

The above entitled matter involves the claim of a then 41 year old workman who was struck by a rock from a power shovel on October 10, 1963. The matter came to the attention of the Workmen's Compensation Board for possible exercise of the own motion authority of the Board pursuant to ORS 656.278.

The workman's claim was allowed by the then State Industrial Accident Commission, closed, reopened and again closed in 1965 with allowance of awards of permanent disability equivalent to the loss of use of 20% of an arm for unscheduled disability. An attempt to reopen the claim for aggravation as a matter of right was dismissed in 1968 as being untimely filed.

The Board has carefully reviewed the entire record, particularly with respect to whether the claimant's present condition constitutes a compensable aggravation of the injuries sustained in October of 1963. It is noted that medical reports indicate the claimant has some arthritic changes in the interval since claim closure but there is no indication that these developments were in any measure precipitated by the injury of some seven years past. Such arthritic developments are commonly found in persons of claimant's age. Some of the arthritic development is in the area of the right shoulder which was injured in an automobile accident in June of 1968.

The Board deems the evidence insufficient to warrant exercise of the Board's own motion jurisdiction and it is so ordered.

No change in prior orders is made and no appeal lies from this order pursuant to ORS 656.278.

SAIF Claim # B 136813 September 9, 1970

WILLIAM M. CARNAGEY, Claimant.

The above entitled matter involves a claim for low back injury sustained by a then 55 year old logger in July of 1965. The question is whether the claimant's condition is such that the Workmen's Compensation Board should exercise its own motion jurisdiction pursuant to ORS 656.278 to order the claim reopened.

The claim has been closed since 1966 at which time the claimant was allowed an award of unscheduled disability compared to the loss of function of 55% of an arm.

The claimant was recently examined by Dr. Pasquesi. Despite appearing for examination wearing a back brace, which he had available for a long time, it was obvious the brace had not seen substantial useage. The claimant, now 60, does reflect a progression of degenerative symptomatology, but the disability attributable to the accidental injury appears to be unchanged. The claimant, for some time, has been classified as disabled for purposes of social security.

The Board, after reviewing the records, concludes that there is insufficient evidence to warrant any additional compensation for disabilities attributable to the injury of July, 1965. The own motion jurisdiction of the Board will therefore not be presently exercised with respect to this matter.

No action being taken on the claim, no appeal right is attached to this order, conforming with ORS 656.278.

WCB #69-2067 September 9, 1970

CLYDE W. BIVENS, Claimant.
Request for Review by Employer.

The above entitled matter basically involves the issue of whether a 51 year old logger and powder man is unable to again work at a gainful and suitable occupation as the result of substantial trauma sustained when struck by a large rock on May 23, 1967.

The claimant essentially recovered from the physical injuries. The issue as to whether the claimant is permanently and totally disabled stems from questions about the claimant's motivation to return to work, the probability that the claimant would need to work at occupations other than that in which he is experienced, the functional aspects of the claimant's problems and the degree to which psychogenic pain, as distinguished from traumatically induced pain, may preclude a return to work.

Pursuant to ORS 656.268, a determination issued finding the claimant to have unscheduled disability of 38.4 degrees against the applicable maximum of 192 degrees. The Hearing Officer found the workman to be permanently and totally disabled. Dr. Jens expressed such an opinion but qualified that opinion with respect to occupations for which the claimant was trained.

One of the obligations imposed upon workmen is to utilize their remaining capacities. The inability to perform a given arduous occupation is not the guide to whether the workman is able to perform regularly at a gainful and suitable occupation. It is clear that in the claimant's case the physical limitations clearly do not preclude a return to work. This narrows the issue to an evaluation of the role played by poor motivation and psychiatric problems.

The Board on the state of this record, concludes that this 51 year old claimant should not be relegated to the scrap pile as totally disabled until every effort has been exhausted to salvage his obviously substantial physical attributes. His physical disabilities were thought to be so minimal that the channels of vocational rehabilitations were deemed closed.

The Board concludes and finds that the claim was prematurely closed and that the claimant has been temporarily and totally disabled since the accident from the combination of the physical and psychiatric problems.

It is accordingly ordered that the order of determination finding permanent partial disability and the order of the Hearing Officer be set aside and the claimant, with appropriate offset for compensation paid as permanent partial disability and permanent total disability, be reinstated as temporarily and totally disabled.

It is further ordered that the claimant report to the Physical Rehabilitation Center maintained by the Workmen's Compensation Board for the institution of psychological and psychiatric consultation and treatment as found suitable by the Physical Rehabilitation Center directed toward the resolution of the psychiatric problems as they affect the possible return of this workman to some suitable employment. The expense of this procedure is to be a claim cost to the employer.

Upon the conclusion of such psychological and psychiatric consultations as are deemed appropriately a part of the claimant's rehabilitation, the matter shall again be referred to the Closing and Evaluation Division of the Workmen's Compensation Board for re-determination of the extent of claimant's disability. Such re-determination is of course to be subject to hearing, review and appeal.

The Workmen's Compensation Board deems this to be an interim order and not finally determinative of the issue of the extent of claimant's permanent disability.

Counsel for claimant is to receive as a fee 25% of the increase in compensation associated with this award which combined with fees attributable to the order of the Hearing Officer shall not exceed $1,500.

It is not determinable whether this order of the Board entails an eventual reduction in compensation. At this point, it would appear that the effect of the order may be to so reduce compensation though payment at the rate of temporary total disability exceeds the rate of permanent total disability. No further order is made with respect to attorney fees on review.

Against the possibility this order may be appealable, the usual notice of appeal is attached.

WCB #68-1277 September 9, 1970

DON MAYFIELD, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 52 year old logger to his scrotum, pelvis, right thigh and leg.

Pursuant to ORS 656.268, the claim was closed July 22, 1968 finding the claimant to have sustained temporary total disability of about one month without residual permanent disability. The matter was initially heard on October 31, 1968, but for various reasons the hearing process was not concluded until the Hearing Officer order of March 19, 1970. The Hearing Officer also found the claimant to have no residual disability. Limited further temporary total disability associated with medical examination was allowed.

The claimant has not returned to work since the injury. Despite avoiding return to work as a logger, the claimant has participated in contests of skill involving loggers in the interim such as axe throwing and log bucking contests. He professes to be able to do high climbing without the aid of spurs or ropes.

It is easy to conclude from such exaggerated, bizarre and contradictory factors that the claimant has no residual disability attributable to the accident.

The Board is concerned, however, by the fact that the claimant may have a mental state of functional overlay caused by the injury which does presently operate to preclude the claimant from a return to logging. The clinical psychologist whose services were engaged in connection with the Physical Rehabilitation Center facility of the Workmen's Compensation Board recommended psychological counselling as an approach to the problem. None has been provided. If the claimant has a traumatic neurosis or mental quirk caused by the injury, the avenues of psychological counselling should at least be explored. The Board is not sufficiently impressed by the evidence, however, to authorize and direct the temporary total disability be paid for the period in excess of two years while this matter was being delayed.

The Board concludes and finds that the claimant should have the benefit of the doubt arising from the rather unusual situation to the extent of at least extending psychological counselling. It is accordingly ordered that the claimant report to the Physical Rehabilitation Center maintained by the Workmen's Compensation Board and that psychological counselling be undertaken subject to the administration of the Physical Rehabilitation Center with temporary total disability to be reinstated when the claimant reports for such services and continue until discontinued as authorized pursuant to ORS 656.268. At such time the claim should be re-evaluated pursuant to ORS 656.268 and the parties may thereupon seek further hearing and subsequent review and appeal on the issues of the disability allegedly resulting from the injury.

Counsel for claimant is to receive as a fee for services upon hearing and review 25% of the additional temporary total disability compensation paid pursuant to this order and payable therefrom but not to exceed the sum of $1,500.

Whether appeal lies from this interim order is questionable but the usual notice of appeal rights is appended.

WCB #69-2383 September 10, 1970

ELMO A. WILLIAMS, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent partial disability sustained by a then 59 year old sheet metal worker in a sign manufacturing shop when he fell from a ladder on January 23, 1969, resulting in a fracture of his left leg and left wrist.

The determination order of the Closing and Evaluation Division of the Workmen's Compensation Board granted the claimant an award of 45 degrees of the 150 degrees scheduled for the loss of a leg at or above the knee joint, and 30 degrees of the 150 degrees scheduled for the loss of a forearm at or above the wrist joint. The hearing held as a result of the claimant's request for a hearing on the determination made pursuant to ORS 656.268 culminated in an order of the Hearing Officer affirming the award of 45

degrees for the partial loss of the claimant's left leg and increasing from 30 degrees to 45 degrees the award for the partial loss of the claimant's left forearm. The claimant remains dissatisfied with the disability awards granted to him and has requested this review by the Board of the order of the Hearing Officer.

The injuries sustained by the claimant which have resulted in permanent disability consisted of a cominuted intertrochanteric fracture of the left leg and a comminuted fracture at the distal end of the radius of the left wrist with some posterior tilt of the lower articular surface, known as a Colles fracture.

The intertrochaneric fracture of the left femur healed with a fairly solid union and abundant callus formation in excellent position and alignment, but with approximately 15 degrees lateral angulation. The left leg measures 1/4 inch shorter than the right leg and requires the use of a lift in the heel of the left shoe. There is a noticeable pelvic tilt to the left side although he stands fairly well erect. He walks with an antalgic gait in which he lurches toward the left with an outward rotation of the left foot. The left leg demonstrates considerable weakness.

Measurement of the range of hip joint motion disclosed some restriction of motion. The range of flexion from full extension was 100 degrees with the left hip compared to 110 degrees with the right hip. External rotation measured 45 degrees for the left hip compared to 55 degrees for the right hip. Internal rotation was not measurable with either hip.

Abduction was 20 degrees with the left hip compared to 45 degrees with the right hip. Adduction was equal at 20 degrees in both hips.

The claimant experiences frequent pain in his left hip which is aggravated by excessive walking. Constant or frequent walking causes his left leg to become tired. He is less active both in the performance of his work and in home and recreational endeavors. He is unable to completely bend down or squat and is unable to climb or work from higher ladders.

The Hearing Officer found from his consideration of the claimant's testimony relative to the impairment of his left leg and from his observation of the claimant's demonstration of the impairment of his left leg, that the evidence adduced at the hearing was substantially in accord with the subjective symptoms and objective findings contained in the medical report of Dr. Case, the orthopedic surgeon by whom the claimant was examined for the evaluation of his permanent disability. The Hearing Officer concluded that the 20% loss of leg or 45 degrees awarded to the claimant properly evaluated the permanent partial disability sustained to the claimant's left leg as a result of his accidental injury.

The Colles fracture of the left wrist has healed with all bone fragments solidly united. Measurements of the range of wrist joint motion reflected some restriction of motion. The range of dorsi-flexion present was 40 degrees and the range of palmar-flexion retained was 20 degrees. The radial and ulnar deviation of the wrist joint measured 25 degrees and 15 degrees, a total of 40 degrees. The claimant experiences occasional pain in his left wrist which is aggravated by stress and various movements or positions. He lacks both strength and mobility in the use of his hand and wrist.

The Hearing Officer found from his observation of the claimant's demonstration of the range of motion present in his left wrist joint together with his consideration of the claimant's testimony relative to the impairment of his left wrist, that there was a noticeably greater restriction of motion in the wrist joint at the time of the hearing than that measured by Dr. Case at the time of his examination of the claimant. The Hearing Officer attributed the diminished motion to the deterioration of the claimant's range of wrist joint motion since the time of claim closure. The Hearing Officer concluded, therefore, that the 20% loss of a forearm or 30 degrees awarded to the claimant in reliance upon the medical report of Dr. Case inadequately evaluated the permanent disability disclosed to be presently existing in the claimant's left wrist and increased the disability award for the partial loss of the left forearm to 30% loss of a forearm or 45 degrees.

The claimant has resumed his former employment with his former employer. His wages are now greater than his wages at the time of his injury due to a cost of living increase in the wage scale. No earnings impairment has resulted from the claimant's accidental injury. The claimant with some limitations is able to regularly carry out the relatively demanding work involved in his employment as a sheet metal worker in the manufacture of signs and retains a substantial work capability. Such limitations as exist with respect to his ability to perform his work have been fully recognized in the disability awards granted to him.

The fracture in the intertrochanteric area of the claimant's left leg was confined to the leg and the disability resulting therefrom is manifested by symptoms and impairment which are confined to the left leg. The claimant's disability in this regard is therefore properly evaluated on the basis of the loss of a leg.

The Board finds and concludes from its de novo review of the record in this matter and its consideration of the briefs submitted that the Hearing Officer has realistically and correctly evaluated the claimant's two areas of permanent partial disability attributable to his accidental injury of January 23, 1969.

The order of the Hearing Officer is therefore affirmed.

WCB #70-70 September 16, 1970

LEONARDO ORTIZ, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of whether the claimant should have surgery performed on his right elbow.

The elbow was injured November 16, 1968 when the 27 year old claimant grabbed a 40 pound nursery plant as it started to fall from a barrel.

The claim was closed April 30, 1969 with a finding of disability of 9.6 degrees representing a loss of function of 5% of the arm.

One of the specific responsibilities imposed upon employers and insurers under the compensation law is the responsibility for continued medical care required due to the injury. ORS 656.245. If the record in this case reflected that the claimant had a medical condition which requires further surgery desired by the claimant and recommended by the attending and examining doctors, the Board would be compelled to reverse the decision of the Hearing Officer. The record is equivocal with reference to the need for the surgery as well as the claimant's desire for surgery and the doctor's recommendations.

Affirmance of the Hearing Officer order will not preclude a re-examination of the problem at any time the need for further surgery becomes more well defined.

The Hearing Officer did conclude that the disability award was inadequate and increased the award to 35 degrees against the applicable maximum of 320 degrees.

The Board concurs with the Hearing Officer on both issues and concludes and finds that claimant's medical condition is stationary with a permanent disability of 35 degrees.

The order of the Hearing Officer is affirmed.

WCB #69-2018 September 16, 1970

THEODORE LUND, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 56 year old stock rustler for a plywood company.

On November 26, 1968, the claimant came in contact with and received an electric shock from an exposed electrical switch.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability rated upon the right forearm of 23 degrees. Upon hearing, this award was increased to 40 degrees by the Hearing Officer who found there to be a disability to the entire arm.

A Dr. Shumway rendered a somewhat equivocal evaluation and prognosticated possible future difficulties. Unless such a prognostication is fixed and certain, any future increase in disability is properly a subject of disability evaluation as a claim of aggravation if and when such increase in disability occurs.

The Board is more impressed with the report of Dr. Kimberley that the actual residual disability is "very small."

In the final analysis, the basic loss of function is in numbness of the index, middle and ring fingers of the affected extremity. In turn, the claimant probably does make a different use of the hand. This useage, may, from time to time, reflect symptoms beyond the fingers but this is not indicative of permanent injury beyond the fingers. One of the greatest

complaints is the interference with bowling. If all three fingers had been lost by separation, it would not be the basis of an award for the forearm or arm because of trouble in handling a bowling ball.

This claimant has returned satisfactorily and without wage impairment to the same work he has performed for 29 years. Dr. Kimberley reports the claimant as relating the major proboem to be merely an annoyance. It should be noted that Dr. Kimberley, in referring to the fingers, identifies the fingers by number differently than ORS 656.214(2)(k).

The Board concludes and finds that the disability is confined to the index, middle and ring fingers of the right hand and that this disability does not exceed 50% of the function of each of those fingers.

The order of the Hearing Officer is modified by removing the basis of the award from the arm proper and by finding a disability of and making award for the loss of function of 50% of each of the index, middle and ring fingers of the right hand being a total of 28 degrees.

WCB #70-405 September 16, 1970

JOHN DUFFY, 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 laborer who fractured the tibula and fibula of the right leg and also injured the right knee on January 22, 1969. In addition, the case also involves an issue as to when temporary total disability should properly have been terminated and when payment for the residual permanent partial disability should have been instituted.

There is no question concerning the fact that the claimant's injury is such that he cannot return to his regular employment. The claimant has not yet returned to work and due to some misunderstanding or lack of communication, the claimant gave up on efforts at vocational rehabilitation.

The claimant, on review, seeks a continuation of temporary total disability until the claimant has returned to work. This is not the test. The claim is to be closed when the workman's condition becomes medically stationary. Normally, this occurs at or near the time when further medical care will not serve to improve the condition. In connection with the administration of claims, the Workmen's Compensation Board has approved the use of a physicians report, form number 828. Question 6 inquires, "Is the patient's condition medically stationary? [ ] Yes [ ] No." A Dr. Langston executed such a form in this claim on October 20, 1969 by checking the yes box in answer to question 6. However, Dr. Langston offered the following additional remarks. "Patient will not be able to return as a laborer. The injury of the right knee joint will become more severe. He will become permanently disabled." A further report, Hearing Officer Exhibit 1, shows that Dr. Langston authorized return to regular work on October 15, 1969. The only medical evidence later than this October 20th report is an examination by a Dr. Nudelman of November 14, 1969, who also indicated that further medical treatment is not indicated.

The State Accident Insurance Fund relied upon these reports to terminate temporary total disability as of October 15, 1969. The Closing and Evaluation Division of the Workmen's Compensation Board, pursuant to ORS 656.268, determined that the claim was properly closed as of October 15, 1969 so far as entitlement to temporary total disability.

The Hearing Officer was obviously disturbed by the fact that this chain of circumstances deprived the claimant of any compensation between October 15, 1969 and the date of the Workmen's Compensation Board determination on February 10, 1970. The Hearing Officer, without any evidence of record to support finding a continuation of temporary total disability, ordered payment of temporary total disability for the interval between October 15, 1969 and February 10, 1970.

The Workmen's Compensation Board concludes that the State Accident Insurance Fund improperly relied upon a simple check mark on the report of the doctor. The report of the doctor should have been evaluated by the State Accident Insurance Fund from "its four corners." The doctor obviously advised that the claimant could not return to his former regular employment and that there would be permanent disability. Under these circumstances the delay in obtaining permanent partial disability compensation for this workman was the responsibility of the State Accident Insurance Fund. The proper remedy was not to order payment of temporary total disability when the claimant was no longer temporarily disabled. ORS 656.262(8) authorizes a penalty of not to exceed 25% of compensation payments unreasonably delayed. That provision is deemed applicable to the facts in this case.

Upon the issue of the extent of permanent disability, the claimant has been allowed an award of 60 degrees representing a proportionate loss of 40% of the leg. The Board concurs with the Hearing Officer and concludes and finds that the disability is properly evaluated at 60 degrees. If the leg worsens, as the evidence indicates it might, a re-determination upon a claim of aggravation will be in order.

Upon this state of the record, the order of the Hearing Officer is modified to delete the provision for temporary total disability between October 15, 1969 and February 10, 1970. Payments made to the claimant for that period are reclassified as permanent partial disability. However, the compensation payable for that period is increased by 25% pursuant to ORS 656.262(8).

Since the record on review developed a factor of unreasonable delay in payment of compensation, the Workmen's Compensation Board also concludes that the attorney fees upon review should be paid by the State Accident Insurance Fund. It is accordingly ordered that counsel for claimant be allowed a further fee in the sum of $250 for services in connection with this review and the fee for services upon hearing is limited to 25% of the increased award for permanent partial disability, the additional temporary total disability having been disallowed.

WCB #69-2232 September 16, 1970

MAURICE BUTLER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of additional permanent disability incurred by a 53 year old roofer with respect to an accidental injury sustained October 27, 1967 which affected a back beset by a long history of disability.

Pursuant to ORS 656.268, a determination issued finding the claimant to have additional unscheduled disability attributable to the 1967 injury of 64 degrees being 20% of the maximum applicable to unscheduled permanently partially disabling injuries. The claimant, for prior injuries, had been the recipient of a previous award of 50% of the then maximum award for permanent injuries. Upon hearing, the claimant's award in this claim was increased to 35% of the maximum, an additional 48 degrees. The combination of the awards for permanent unscheduled injury thus represents an 85% of the maximum.

The claimant's position on review is that the condition is now totally rather than partially disabling.

There is no question concerning the fact that his prior injury in 1962 was of sufficient severity to make it advisable to avoid future heavy labors. In the administration of that claim, the claimant was directed toward vocational rehabilitation. A short illness interfered and the claimant never returned. For a period in 1965 he was classified as totally disabled by the social security administration. That was not permanent as evidenced by the subsequent work record prior to this claim. The claimant is again drawing social security and urges this fact as the basis for his demand that the compensation system acknowledge the social security award as proof of permanent and total disability. The Workmen's Compensation Board may consider such an award by another agency but is not bound thereby. The temporary character of the previous social security award reflects the inherent fallacy of such an approach.

The greatest concern of the Workmen's Compensation Board is the avoidance by this claimant to approach to vocational rehabilitati on.(sic) The claimant has at least average intellectual resources in verbal areas and a bright normal level with verbal materials. In the words of the examining psychologist, "He certainly has the intellectual and the verbal resources necessary for the type of work which interests him." At this point, the claimant had expressed interest in obtaining a real estate agent's license or in becoming a real estate appraiser.

The claimant then undertook vocational training in marine technology, but this time the program was interrupted by problems due to working on a marine survey boat.

The question then boils down to whether the claimant is justified in refusing to futher his own rehabilitative efforts and classify his obviously substantial residual resources as useless toward regular re-employment. The Hearing Officer is not impressed that this is the fact and the Board, upon its review of the record, also concludes that there is regular and

suitable work available within the reasonable capabilities of this workman which he can obtain. The Board concurs with the Hearing Officer that the claimant is not permanently and totally disabled.

The remaining issue then is one of permanent partial disability. The Board considers the previous award of 50% of the maximum unscheduled disability to be the basis for consideration of the combined effect of the two injuries. Upon this basis the Board further concludes and finds that the additional disability of 20% of the maximum allowable for permanent partial disability to represent a fair evaluation of the additional disability attributable to this accident when considering the workman, prior to this accident, to have a 50% unscheduled disability.

The order of the Hearing Officer allowing an additional 15% or 48 degrees disability is modified by reducing the award to the 20% or 38.4 degrees found by the determination order pursuant to ORS 656.268.

WCB #70-414 September 16, 1970

JOHN R. WATTS, Claimant.

The above entitled matter involves an issue with respect to disability sustained by a 42 year old custodian who injured his right elbow on October 3, 1968.

Pursuant to ORS 656.268, a determination issued January 27, 1970 finding claimant's condition to be medically stationary as of January 13, 1970, with permanent disability of 10 degrees for partial loss of function of the right arm.

Upon hearing, the Hearing Officer, by order of August 7, 1970, ordered the State Accident Insurance Fund to concurrently (1) furnish such further medical care and treatment as Dr. Cherry shall in the future prescribe, (2) to pay benefits for temporary partial disability until the earliest of the alternatives of February 10, 1971, or until claimant returns to full time work, or until treatment is concluded and (3) an award of permanent partial disability of 33 degrees.

The State Accident Insurance Fund has requested a review of the matter and by Motion seeks a preliminary order clarifying the responsibility of the State Accident Insurance Fund under the order of the Hearing Officer in view of the prohibition of ORS 656.268(1) forbidding closure of claims until the workman's condition becomes medically stationary and the requirement of ORS 656.313 that compensation ordered paid by a Hearing Officer be paid pending review.

The Board does not have a transcript of the proceedings and is unable to review the merits of whether the claimant's condition is medically stationary. It is obvious from the face of the Hearing Officer order that the order is in error. The award of further temporary disability carries with it the finding that the condition has not yet reached the maximum degree of recovery. Any award of permanent disability at this point must be speculative and conjectural. [Note Helton v. SIAC, 142 Or 49].

The motion of relief from the Hearing Officer order includes an offer by the State Accident Insurance Fund to pay the temporary partial disability and the medical care offered. This removes any issue as to temporary disability and medical care. There then being no issue as to temporary disability and medical care and the claim being prematurely closed, the issue of residual permanent disability cannot be resolved on the basis of review of the complete record.

At the suggestion of the State Accident Insurance Fund, the order of the Hearing Officer is affirmed as to the medical care and temporary partial disability. The order of the Hearing Officer with respect to the extent of permanent partial disability is set aside. When the claimant's temporary disability is concluded, the matter shall again be presented by the State Accident Insurance Fund for determination in the manner provided by ORS 656.268. Any residual issues following re-determination remain subject to hearing and review.

To the extent that appeal may possibly lie from this interim order, the usual notice of appeal is attached.

WCB #69-1312 September 16, 1970

ERNEST J. KRAKE, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of disability sustained by a 44 year old logger who was struck in the back by a falling snag on March 25, 1968.

As a result of the accident the claimant has been advised to seek lighter work than is involved in falling and bucking timber. He has attempted to return to falling and bucking but gave up in deference to the difficulty experienced. At the time of hearing the claimant's medical condition was stationary but he had not obtained a new steady vocation.

Pursuant to ORS 656.268, a determination issued finding claimant to have an unscheduled disability of 64 degrees representing 20% of the allowable maximum of 320 degrees where such disability is partially disabling. Upon hearing the award was increased to 96 degrees and the request for allowance of disability for the left arm was denied due to the fact that the medical evidence reflected no loss of function in the arm due to the accident.

The Board concurs with the findings and conclusions of the Hearing Officer in the matter. The evidence with respect to the factor of earnings loss is inconclusive. The Board finds and concludes that the disability does not exceed the 96 degrees allowed by the Hearing Officer and the order of the Hearing Officer is therefore affirmed.

Though issues of vocational rehabilitation are not the subject of hearing and review, the Workmen's Compensation Board does have responsibilities in this area. It appears from this record that the claimant has not had the advantage of examination and counselling with respect to vocational rehabilitation. It is accordingly ordered that the file be directed to the Physical

Rehabilitation Center facility of the Workmen's Compensation Board and that arrangements be made by that facility for the claimant to be brought to Portland for evaluation by the Physical Rehabilitation Center with respect to vocational rehabilitation. The costs of such arrangements, evaluation and claimant's maintenance during evaluation is to be a rehabilitative expense assumed by the Workmen's Compensation Board.

WCB #69-2330 September 16, 1970

ROGER W. STORY, Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue of whether the 22 year old laborer in a nickel refining plant incurred an injury to his knee on November 17, 1969 when he allegedly stumbled as he descended some stairs.

The employer was insured by the State Accident Insurance Fund. He reported the claim to his employer on November 19, 1969. The employer questioned the validity of the claim because of the claimant's refusal to be examined by a doctor ordinarily employed by the employer.

At this point the Board wishes to emphasize that the right of a workman to a free choice of doctors granted by ORS 656.245(2) does not permit the workman to deny to the employer a right of examination by a doctor of the employer's choice. ORS 656.325 not only gives the employer that right but carries a sanction of suspension of benefits if the workman refused to permit examination. Under certain circumstances, the refusal of the workman could be the circumstance which, weighed with other evidence, would justify a denial of the claim.

No purpose would be served in a lengthy review of the other factors in this claim. The claimant did obtain medical attention on November 19th and the examining and treating doctor found that the claimant had an injury at that time. Whether the condition was compatible with the claimant being able to run without noticeable difficulty at the end of his working shift on the day of the alleged injury is one of the factors weighing against the claimant. The Board is not as confident as the Hearing Officer that a dispute with the employer over other issues would not lead to a claim of dubious merit.

The factual situation is certainly one in which the observation of the witness is important for a resolution of the issues. The Board yields to the conclusion of the Hearing Officer which was based, in part upon such a personal observation.

The Board therefore concludes and finds that the claimant sustained a compensable injury as alleged. The order of the Hearing Officer is affirmed.

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.

CHESTER A. BLISSERD, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of whether the claimant sustained a compensable accidental injury to chest wall muscles in early December of 1968 and if so, whether the claim should be barred for failure to notify the employer as provided by ORS 656.265.

Chronologically, a claim was first filed by the claimant signed August 18, 1969 alleging a chest muscle injury. The date of the alleged accident was not shown and the State Accident Insurance Fund apparently accepted the claim. However, on October 20, 1969 the claimant executed a second claim form alleging an accident "during the first week of December, 1968 lifting a trailer." This was not presented to the employer until November 5, 1969 and was not presented to the State Accident Insurance Fund until November 6, 1969. The State Accident Insurance Fund then denied the claim.

The first time the claimant sought any medical care for his problem was January 30, 1969 on the day following a heavy snowfall, during which the claimant participated in shoveling the three foot snowfall from a driveway at least 10 feet wide and at least 30 yards long. The claimant was hospitalized with substantial chest pains. The initial diagnosis was of angina pectoris, osteoarthritis of the spine and possible peptic ulcer. There is testimony from a daughter that the claimant, while so hospitalized, was told by her father about the trailer incident nearly two months before. At this point, however, the claimant told none of the many examining doctors concerning the alleged trailer incident, but did recite that symptoms were concurrent with shoveling snow. The claimant filed a claim and received benefits for his hospitalization as an off the job medical problem.

The claimant and his wife posed serious diagnostic problems to the doctors to the point that psychiatric consultation was recommended but not obtained.

Regardless of whatever problem was encountered in diagnosing the condition, it is clear that at least by July 22, 1969 Dr. Keene had diagnosed and assured the claimant that there were no cardiac involvements and that the problem was one of muscle strain. The picture is thus one of a claimant who incurred chest symptoms while shoveling snow on January 29, 1969. While hospitalized, he tells his daughter about the trailer incident but fails to mention this incident to any doctor. Claim was not made until November of 1969 despite his being advised in July of 1969 that his problem was one of muscle strain.

The claimant's brief urges that his failure to notify the family of the accident was consistent with his "taciturn, noncomplaining character." This "noncomplaining character" had not slept with his wife for some time prior to the alleged accident because he moaned and groaned so much. Tr. p. 67.

The claimant urges that he was justified in delaying the claim because he was not aware of the nature of the injury until August of 1969. There is no explanation for the delay in not filing the claim until November other than that he had received benefits from another insurance company and returned to work and did not need time loss compensation. He also seeks to excuse

mentioning the injury to the employer since it is not good practice to report every little pain. However, it was months following diagnosis before the major pain was reported. These facts hardly justify failure to notify the employer of an accident which was allegedly so severe that it caused the subsequent chain of events.

The Hearing Officer, in allowing the claim, made his decision on the basis that he was particularly impressed by the testimony of the daughter with respect to the history of the trailer accident while in the hospital. This, of course, undermines the theory that the family was unaware of the accident and poses a great problem as to why the alleged incident was first related to a doctor by a hypothetical question from claimant's counsel.

The Board does not believe that this claimant or his family is attempting to fabricate a fake claim. The claimant has had aches and pains for years. The strong psychological overlay, including a subservient role in the family, has undoubtedly convinced the claimant that it was the trailer incident in early December and not the snow shoveling in late January which precipitated his need for medical attention. Observation of the witnesses is not the important key to this case.

The question is not whether an incident with the trailer occurred. The issue is whether, if it occurred, there was any compensable disability associated with that incident. The fact that claimant had prior minor problems in the same area would not make problems related to shoveling snow the responsibility of the prior minor incident. This is particularly true where the problem is more psychological than physical. Upon this basis, the Board concludes that the muscle wall strain requiring treatment was related to the non-compensable incident of shoveling snow.

The Board is also of the opinion that the evidence supports a conclusion that the delay from August to November in reporting the claim following diagnosis was not justified by any of the exceptions to ORS 656.265 and that the State Accident Insurance Fund was prejudiced in its defense of the claim by this delay.

Whether the Board would have the authority to prevent this claimant from retaining the duplicating benefits from both insurers is questionable, but now moot. If the decision of the Board is appealed and if the Court concludes that a compensable accidental injury occurred, the Board hopes that some judicial expression will be made upon this aspect of the case.

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

Claimant, pursuant to ORS 656.313, is not required to repay any compensation paid pursuant to the order of the Hearing Officer.

WCB #70-200 September 21, 1970

GERALD E. MURPHY, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent partial disability sustained by a 42 year old window washer on December 18, 1968, when he fell from a ladder while washing the second story windows of a building. As a result of the fall the claimant sustained a comminuted fracture of the upper right femure, a fracture of the right pubic bone, a comminuted fracture of the right os calcis and a fracture of the fifth metatarsal of the right foot. Additionally, there was a possible chip fracture of the right wrist and a possible re-injury of former compression fractures of the lumbar spine.

This incident was the claimant's second major accident in the course of his long time employment as a window washer. Approximately ten years earlier in 1958 as a result of a similar fall from a ladder, he sustained compression fractures of one or more of the lumbar vertebrae and a fracture of the os calcis of the left foot, from which injuries he ultimately recovered without permanent disability.

The Closing and Evaluation Division of the Workmen's Compensation Board, in accordance with the procedure for determining awards for permanent disability under ORS 656.268, determined that the claimant was entitled to an award of 38 degrees for the partial loss of his right leg of the statutory maximum of 150 degrees for the complete loss of one leg, and an award of 32 degrees for the unscheduled disability in his low back of the statutory maximum of 320 degrees for other cases of injury resulting in permanent partial disability.

A hearing requested by the claimant culminated in the entry of an order of the Hearing Officer affirming the Closing and Evaluation Division's determination of disability. The claimant has now requested a Board review of this order of the Hearing Officer.

The fractures sustained by the claimant have healed in excellent position and alignment. Although the claimant has made an excellent recovery from what obviously were, and are conceded to have been, initially extensive and serious injuries, it is recognized and acknowledges that residual disabilities have nevertheless resulted. In instances where the initial injuries involved are of a dramatic and severe nature, it is imperative to clearly distinguish between the temporary nature of the injuries sustained by the claimant and the permanent disability resulting from the injuries after the surgical repair and healing process has been completed. Awards of compensation are made with reference to the permanent disability ultimately resulting from an accidental injury.

The objective medical evidence of physical impairment reflects that the principal limitations of joint motion consist of a restriction of extreme inversion of the right foot, a limitation of flexion of the right knee and a restriction of internal rotation of the right hip. Additional objective findings include some atrophy of the musclature of the calf and thigh of the right leg, a slight decrease in quadriceps strength in the right leg, a definite

limp in the claimant's walk and an inability to squat with the right leg. Physical examination of the claimant discloses no further or additional findings of any appreciable or significant physical impairment.

The subjective complaints of the claimant include an occasional sensation or feeling of pins and needles in the heel and of a bar beneath the toes of his right foot. His right ankle is weak and unstable with occasional stiffness and swelling. He has pain in his right leg centered in the ankle area with occasional radiation into the knee in addition to a more or less constant dull ache in the knee. Instability of his knee is an occasional problem. Prolonged sitting causes blockage of the circulation in his right leg which is relieved by straightening the leg. He has nearly constant discomfort in his low back with occasional radiation into the hip and thigh of his right leg. Bending, stooping and lifting activity aggravates the condition and causes soreness in his low back.

Primarily on the basis of indications that the claimant should avoid the hazards of window cleaning that resulted in his two accidental injuries from falls from elevated locations, the claimant was considered to be eligible and a good candidate for vocational rehabilitation. The claimant had previously completed approximately two years of college and has now returned to college with the objective of obtaining a bachelor's degree in accounting. In addition to attending college, the claimant is working part time in the evening and full time during college vacations as a window washer for his former employer at the regular wage rate which has increased since his accident. He does not presently wash windows at elevated locations. A beneficial result of the claimant's injury is the opportunity which it provides him to belatedly elevate his employment capability from an unskilled laborer to a professional status, together with the potentially greater earning ability which he may command as an accountant in contrast to his prior earning ability as a window washer. The vocational retraining of the claimant under the circumstances of this matter operates to negative earnings impairment as a pertinent factor in the evaluation of the claimant's permanent disability. Additionally, it would appear that the claimant's physical impairment will constitute a lesser handicap to his future employment capability following his vocational retraining as an accountant.

The Board from its de novo review of the record made at the hearing and its consideration of the briefs submitted by counsel for the respective parties on review, finds and concludes that the awards of permanent partial disability of 38 degrees for the partial loss of the claimant's right leg, and 32 degrees for the unscheduled disability of the claimant's low back, originally determined by the Board's Closing and Evaluation Division and affirmed by the Hearing Officer's order are neither liberal nor conservative awards, but are fair, equitable and realistic awards of compensation commensurate with the actual permanent disability sustained by the claimant as a result of the accidental injury involved herein.

The order of the Hearing Officer is therefore affirmed.

WCB #70-233 September 22, 1970

THOMAS M. TATTAM, Claimant.

The above entitled matter involves a claim for injury sustained by a safety representative employed by this Board. On September 11, 1969 he was struck a glancing blow on the chest by a large piece of concrete as it fell from near the top of the new Georgia-Pacific Building. Some confusion in the record is caused by reference to an earlier accident of October 11, 1968. However, that claim had been closed pursuant to ORS 656.268 for more than a year prior to the request for hearing here involved.

A further confusion was caused by erroneous identification of the Georgia-Pacific incident as SAIF No. AC 294868, when in fact the correct number is AC 204968. This claim was processed on September 30, 1969 by the Workmen's Compensation Board as involving only medical care without temporary or permanent disability.

The request for hearing on the claim was filed by the claimant on February 5, 1970 seeking allowance of medical care, temporary total disability and any other pertinent issues. On April 15, 1970 a hearing was held but the claimant was absent due to illness. Just prior to that hearing, the State Accident Insurance Fund on March 2, 1970 had issued a denial of any responsibility for the claim and there is no record of a request for hearing having been filed with respect to this denial. It would appear proper that whether any injury was incurred would properly be joined as part of the pending hearing process. The insurer, of course, is required to deny if it does not wish to be in the posture of accepting the fact of an injury. The claimant could be deprived of a right to hearing if issue was not joined.

Concurrent with these claim proceedings, the claimant in January of 1970 undertook to obtain retirement under the State Retirement System as totally disabled due to terminal cancer and chest injuries from the Georgia-Pacific incident.

The claimant died May 12, 1970. A claim was filed by the widow on June 18, 1970 and denied by the State Accident Insurance Fund on July 3, 1970. Request for hearing is now pending before the Hearings Division of the Workmen's Compensation Board on the denial of that claim.

On August 13, 1970, an order of the Hearing Officer issued abating and dismissing the pending proceedings on the workman's claim on the basis that workmen's compensation benefits do not survive. On August 24, 1970, the widow, apparently without benefit of counsel, requested a Board review of the Hearing Officer order.

The only issue really before the Workmen's Compensation Board by virtue of the record is whether any benefits are payable on the claim of the workman which can now be resolved. It is true that an undetermined permanent partial disability could not now be evaluated and paid to the widow. Fertig v. SCD. The early Supreme Court decision of Heuchert v. SIAC, 168 Or 74, is authority making compensation accrued to time of death an asset subject to claim by the personal representative. The claim subjected to dismissal by the Hearing

Officer asserted there is temporary total disability and medical care benefits due to the workman. If so, this would remain a viable issue. The situation would require a substitution of parties, but did not warrant a dismissal without consideration on the merits.

It is accordingly ordered that the order of abatement and dismissal be set aside. The matter is remanded to the Hearings Division for possible substitution of the personal representative if and when one is appointed and seeks substitution. The matter is of course subject again to dismissal in the absence of substitution of parties but should not have been summarily dismissed on the basis that no issue remained.

Though the parties will technically differ upon hearing of benefits due prior to death and subsequent to death, the issue of the two proceedings is such that both requests for hearing should be joined and resolved in a single proceeding.

The matter is therefore remanded for further proceedings in keeping with this order.

SAIF Claim # BA 447879 September 22, 1970

JOHN ROTH, Claimant.

The above entitled matter involves the issue of whether the claimant's fall on April 2, 1970, at home resulting in a fracture of his right leg was causally related to an industrial injury of November, 1954. The claimant has been drawing compensation as permanently and totally disabled since about June of 1958. The fall at home allegedly was due primarily to the injuries for which he was drawing permanent total disability.

The matter was referred to a Hearing Officer for the purpose of taking testimony.

The Board concludes and finds that but for the industrial injury, the claimant would not have sustained the new injury to the previously injured leg and that the further medical care and hospitalization is thus a continuing responsibility of the State Accident Insurance Fund as insuring successor to the former State Industrial Accident Commission.

The matter is before the Workmen's Compensation Board pursuant to the own motion jurisdiction vested in the Workmen's Compensation Board over such prior claims by ORS 656.278, 656.726(4) and Ch 265 O L 1965, Sec 43(2).

It is accordingly ordered that the State Accident Insurance Fund accept responsibility for the medical care associated with the claimant's injury to his leg at home on April 2, 1970.

Counsel for claimant is authorized to collect from his client a fee of not to exceed 25% of the monetary value of the medical services claimant is relieved of paying by virtue of this order.

ORS 656.278 permits a hearing to an employer where compensation is increased under such proceedings. If appeal lies, the Board assumes that appeal would be subject to the usual right of appeal and the usual notice is therefore appended.

WCB #69-1292 September 22, 1970

LOLA D. SEAMSTER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 60 year old seasonal fruit sorter is now medically stationary following a low back injury on October 10, 1968 and, if so, whether the claimant has any residual permanent disability attributable to that injury.

Pursuant to ORS 656.268 the claim was closed July 1, 1969 without award of residual permanent disability. This determination was affimred by the Hearing Officer.

The claimant presents a picture of a 60 year old woman whose weight at 200 pounds upon a 5 foot 5 inch frame places her in medical terms as obese. She is admittedly a highly nervous person. There is no objective evidence of physical disability. Though she is not characterized as malingering, the treating doctor is of record as concluding that it is quite possible that a settlement of her case will produce a quicker cure than medical management.

The subjective complaints may, of course, suffice to support a finding of permanent disability in the absence of objective symptoms. In such cases an observation of the witness becomes important. In this instance the Hearing Officer was not impressed by the demeanor of the claimant that she had any real or permanent disability.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's condition is medically stationary and that she has no residual physical disability attributable to the accident of October 10, 1968.

The order of the Hearing Officer is affirmed.

WCB #69-2354 September 22, 1970

GRACE WOODLEY, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 59 year old cook as the result of a cervical injury incurred November 21, 1966. The injury occurred while employed in a potato shed, the potato harvest being a source of employment in addition to her general work as a cook in restaurants and on ranches.

Pursuant to ORS 656.268 the claimant was determined to have a permanent disability of 19 degrees for unscheduled disability against the applicable maximum of 192 degrees. This determination was affirmed by the Hearing Officer.

The claimant had a pre-existing cervical arthritis. The question becomes one of determining the degree to which the injury at issue may have permanently exacerbated the cervical degeneration. In this connection it is interesting to note that the claimant has developed low back and leg pains which are completely unrelated to the cervical problem. The evaluation of disability is also made difficult by the claimant having sustained a subsequent cardiac deterioration.

In examining the problem, the Hearing Officer was impressed by the fact that until the cardiac problem interfered, the claimant had resumed her general employment as a cook with little evidence of disability.

The Board concurs with the conclusion of the Hearing Officer and concludes and finds that the work exposure upon which this claim is based is only partially disabling and does not exceed the 19 degrees heretofore awarded in administration of this claim. The order of the Hearing Officer is affirmed.

WCB #69-2117 September 22, 1970

EDWARD F. SCHOCH, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the loss of hearing attributable to exposure to excessive noises. A claim was filed in February of 1967. The claim was last closed on August 25, 1967 pursuant to ORS 656.268 with a finding that claimant had a binaural hearing loss of 48% but that an 18% loss existed in each ear prior to the exposure on which the claim was based. The claimant was then awarded compensation for a binaural loss of hearing or 35%. The award became final for lack of appeal but contains an obvious error in calculation in favor of the workman.

The instant proceedings are by way of a claim of aggravation which was denied by the Hearing Officer. The claim is one for occupational disease. However, there is no question concerning the validity of the claim, only as to the extent of hearing loss. There appeared to be no issue which could be resolved by a Medical Board of Review. The Workmen's Compensation Board deems issues of disability on occupational disease, including aggravation, to be amenable to ORS 656.268, hearing and Board review.

The Hearing Officer concluded that the claimant's subsequent employment involved exposure to less noise and that any increase in hearing loss would necessarily be an aggravation from prior exposure. If any increase in hearing loss is due to subsequent trauma it would not appear to be a compensable aggravation but the basis for a new claim. If the medical testimony indicated that the thickening of the membrane from the earlier trauma, for instance, was causing a progressive loss it would be a proper claim for aggravation.

Dr. Hodgson's report of August 15, 1969 recites, "I also advise against exposure to excessive noises. This apparently is causing increase in his hearing loss." The medical evidence thus indicates that if there is a compensable increase in hearing loss it is due to new exposures.

The crux of the issue, however, is whether the claimant has a compensable hearing loss in excess of that for which award has already been made. Dr. Hodgson on March 19, 1970 reports that as of February 4, 1970 there has been no significant change from February 1, 1969. The February 1, 1969 report reflects a hearing loss of 44% in both ears. As noted above, 18% of the loss in both ears was pre-existing, non-compensable and ruled out by a previous order long final for want of appeal.

The claimant has received compensation for a binaural hearing loss of 35% which is in excess of the 26% to which he is entitled by the presently established levels of hearing loss. If an increased loss was incurred in separate exposure for a different employer and constituted a separate claim it would still be subject to consideration under ORS 656.222 in evaluating the combined effect of the separate injuries and past awards therefore.

For the reasons stated and modifying the Hearing Officer conclusions as to the matter of aggravation, the Board concurs in the result and affirms the denial of the claim of aggravation.

WCB #69-1978 September 22, 1970

HARVEY L. ELLERBROEK, Claimant.

The above entitled matter involved an issue of whether the 46 year old claimant sustained permanent disability to his low back as the result of injuries incurred July 5, 1968.

Pursuant to ORS 656.268, a determination issued August 18, 1969 finding there to be no residual disability. Upon hearing, an award of 64 degrees was made for unscheduled disability out of the maximum allowable of 320 degrees.

Request for review was filed by the claimant but stipulation has been filed for Board approval for the matter to be dismissed.

WCB #70-751 September 22, 1970

WILLIAM H. WHITEHEAD, Claimant.
Request for Review by Claimant.

The above entitled matter involves the claim of a 45 year old chipper operator who was injured May 12, 1969 while operating a dump truck. A hoist broke causing the loaded bed of the truck to fall back on the truck frame with a resultant jarring of the claimant in the cab of the truck.

Pursuant to ORS 656.268, the claim was closed April 18, 1970 with a finding of permanent unscheduled disability of 32 degrees. Upon hearing, the unscheduled award was increased to 36.8 degrees and an additional award was made of 20 degrees for a partial loss of the use of the left arm.

The claimant requested a review, but the parties have now submitted a stipulation advising the Board that the claim has been reopened for further medical care.

The stipulation is approved and the matter is hereby dismissed. When the claimant's condition becomes medically stationary, the matter is to be re-submitted for re-determination pursuant to ORS 656.268.

WCB #70-189 September 22, 1970

DON NYBERG, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 55 year old construction laborer as the result of back and right leg injuries incurred March 8, 1968. The claimant slipped on the top of a flight of stairs and bounced down about 14 steps with most of the trauma to his buttocks.

Pursuant to ORS 656.268, the disability on January 14, 1970, was evaluated at 96 degrees against the applicable maximum of 320 degrees for unscheduled injuries. Upon hearing, the award was increased by the Hearing Officer to 220 degrees from which award the employer initiated this review. The claimant asserts the evidence would warrant a finding of permanent total disability or of the maximum permanent partial disability of 320 degrees and defends the award of the Hearing Officer as more than adequately supported by the evidence.

The claim involves a peculiar problem with respect to the claimant's rehabilitation. His age and mental capabilities are such that he should be able to perform work within his reduced physical capacities which now preclude heavy labor. The claimant's wife is quite old and now a semi-invalid to the point that the claimant could not take advantage of the Physical Rehabilitation Center facilities maintained by the Workmen's Compensation Board at Portland. The claimant's family circumstances should not enter into disability evaluation but they do explain the failure to be further advanced toward re-employment.

Considering the restrictions upon further work for which the claimant is qualified by reason of training, experience and education and the consequent apparent loss of earning capacity coupled with obvious physical limitations, the Board concurs with the Hearing Officer and concludes and finds that the claimant's disability was appropriately evaluated at 220 degrees. The order of the Hearing Officer is affirmed.

The Board would be remiss in its duties if the matter of this claimant's vocational rehabilitation were to be left in limbo due to the family situation precluding the absence which would be required if the claimant was to go to Portland for evaluation and consultation. It is accordingly ordered that this matter be directed to the attention of R. J. Chance, Director of the Workmen's Compensation Board, for coordination with the Eugene Office of the Division of Vocational Rehabilitation with respect to the feasibility of vocational rehabilitation of this workman from funds available by the Workmen's Compensation Board for such purposes.

Pursuant to ORS 656.382, counsel for claimant is allowed a fee of $250 payable by the employer for services on a review precipitated by the employer and resulting in no reduction in compensation.

WCB #70-1474 September 22, 1970

JOHN PETTY, Claimant.

The above entitled matter involves the issue of whether the claimant is entitled to a hearing as a matter of right with respect to a claim for accidental injuries incurred October 7, 1964. The claim was accepted by the then State Industrial Accident Commission and the only order of record with respect to the claim is the order closing the claim of February 23, 1966. The claimant made no election at the time of that order to choose the procedures applicable under Ch 265 O L 1965. Sec 43 of Ch 265 O L 1965 permitted such an election when an order issued by the State Compensation Department, now the State Accident Insurance Fund. The procedures in effect as of the date of injury thus control and the claimant was required on a claim of aggravation to request a hearing within two years of February 23, 1966. If a determination had issued by the Workmen's Compensation Board subsequent to January 1, 1966, the claimant would have had five years within which to request a hearing pursuant to ORS 656.271.

Even if the claimant had been injured subsequent to January 1, 1966, he would not be entitled to a hearing on the posture of this record. Any such claim under current procedure requires a supporting medical opinion setting forth facts which in effect establish a prima facie conclusion that there are reasonable grounds for the claim. ORS 656.271. Larson v. SCD, 251 Or 478.

The State Accident Insurance Fund is not correct in asserting that the Workmen's Compensation Board is without jurisdiction since ORS 656.278 grants to the Workmen's Compensation Board a continuing jurisdiction over all such prior claims. The parties are not entitled to hearing unless the prior award is changed and such matters are addressed to the discretion of the Workmen's Compensation Board. As noted, however, the Board has jurisdiction but whether hearing is allowed is a matter of discretion.

The Workmen's Compensation Board concludes that the claimant has not established that he has a right to a hearing. The order of the Hearing Officer dismissing the matter is affirmed.

WCB #69-2170 September 22, 1970

TERRY D. McCALLISTER, Claimant.
Request for Review by SAIF.

The above entitled matter involves the issue of whether the now 23 year old steel foundry laborer sustained a compensable aggravation of a low back condition originally incurred as a result of an accidental injury on December 9, 1968.

A determination order of the Closing and Evaluation Division of the Workmen's Compensation Board entered on June 16, 1969 pursuant to ORS 656.268 awarded the claimant time loss but no permanent partial disability as a result of his accidental injury.

A hearing upon the determination of the Closing and Evaluation Division was held on September 5, 1969, at the claimant's request. The determination

order was affirmed by the order of the Hearing Officer entered on October 4, 1969. No appeal was taken from this order of the Hearing Officer and it has become final by operation of law.

During the course of the hearing the Hearing Officer became aware that the claimant was scheduled for a further medical examination by Dr. Eckhardt following the hearing and by reason thereof, continued the hearing for the receipt of Dr. Eckhardt's further medical report. Dr. Eckhardt's further examination of the claimant was reported in his medical report dated September 29, 1969. The Hearing Officer found from his consideration of the matters set forth therein that, "It would appear from the report that the claimant has suffered either a recent aggravation of his condition or a new injury." The Hearing Officer therefore excluded Dr. Eckhardt's report from consideration and determined the matter on the basis of the other evidence relative to the disability resulting from the initial accidental injury as of the time of the hearing and prior to the occurrence of the new accident or aggravation.

Thereafter on November 25, 1969, the claimant initiated this proceeding by the filing of a claim for increased compensation on account of aggravation. The claim for aggravation was supported by Dr. Eckhardt's September 29, 1969 medical report.

The record of the proceedings at the hearing of the aggravation claim reflects that following several jobs of short duration, the claimant resumed employment as a laborer in the steel foundry of another employer on June 4, 1969. His duties in the steel foundry involved the same strenuous activity and heavy lifting that resulted in his initial low back injury. During the month of August of 1969, he again commenced to experience low back difficulties as a result of his on the job activities culminated by an employment related incident involving bending down to pick up a shovel which occurred near the end of August of 1969.

The Hearing Officer found that such injury and resultant permanent disability as the claimant may have sustained in the course of his employment during the month of August, 1969 was the result of a new and independent accidental injury arising out of and in the course of his employment for the subsequent employer and conversely was not a compensable aggravation of the claimant's condition caused by the prior compensable injury while in the employ of his former employer.

The Board in the exercise of its own independent judgment from its de novo review of the record arrives at the same conclusion as was reached by the Hearing Officer upon the aggravation or new accident issue. The Board is of the opinion that the evidence of record clearly establishes that the claimant's subsequent low back problems were sustained as a result of a new accident rather than an aggravation of his condition suffered from the original accident.

Where, as here, the order of the Hearing Officer upon the original claim for compensation has not been appealed and has become final by operation of law, and the claimant has thereafter filed a claim for increased compensation on account of aggravation of his condition resulting from the original injury, the issue of the extent of the claimant's permanent partial disability resulting from his initial injury cannot be litigated or re-litigated at the

hearing on the aggravation claim. The case law in this state is to the effect that the Hearing Officer's order determines the issues involved in the matter as of the time of the hearing and that all disability which existed at the time of the hearing is included in the Hearing Officer's determination relative to the extent of permanent disability. The issues at the hearing of an aggravation claim are limited to the conditions and disability arising subsequent to the time of the hearing on the original claim for compensation and the determination of disability made by an order of a Hearing Officer which has become final cannot be re-tried or impeached in proceedings on an aggravation claim. Hisey v. SIAC, 163 Or 696 (1940); Cicrich v. SIAC, 143 Or 627 (1933); Grunnett v. SIAC, 108 Or 178 (1923); Workmen's Compensation Practice in Oregon (1968), Aggravation Section 10.21; see also Mansfield v. Caplener Brothers, ____ Or Adv Sh ____ (1970).

If the claimant did in fact sustain permanent disability as a result of his compensable injury which existed as of the time of the hearing of the original claim for compensation before the Hearing Officer, for which permanent disability the claimant has for any reason failed to receive an appropriate of compensation, and which error with respect to the disability award cannot now be corrected through review or appeal since the order of the Hearing Officer has become final by operation of law, the claimant's sole remedy for the rectification of the error is through the exercise by the Board of its continuing power and jurisdiction to modify and change former orders and awards upon its own motion where in its opinion such action is justified. It is the objective of the Board to exercise own motion jurisdiction in all matters where hearing, review and appeal rights have lapsed or expired, and where all of the facts and circumstances involved in the matter disclose that the Board is justified in the realistic exercise of its sound discretion to alter some earlier action with respect to a claim in order to achieve substantial justice therein.

The Board finds and concludes by the exercise of its independent judgment from its de novo review of the record in this matter and its consideration of the briefs submitted by counsel for the parties to this proceeding, that the order of the Hearing Officer subjected to this review which awarded the claimant 64 degrees for unscheduled disability, constitutes and results in the impeachment of the order of the Hearing Officer entered on October 14, 1969, since it involves the re-litigation of the original disability award in an aggravation claim and that the order being reviewed herein is therefore in error and must be reversed.

The order of the Hearing Officer is reversed and the claim for increased compensation on account of aggravation is denied.

WCB #70-365 September 22, 1970

EDWARD A. CONROY, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 32 year old warehouseman as the result of a teno-synovitis condition in the left elbow incurred February 5, 1969.

Pursuant to ORS 656.268, a determination issued February 6, 1970 finding the claimant to have a permanent disability of 10 degrees against the applicable maximum of 192 degrees for the complete loss of an arm.

Following hearing, the Hearing Officer increased the award to 65 degrees from which award the employer sought this review.

On page three of the Hearing Officer order there is an expression by the Hearing Officer in the second paragraph following the "Opinion" heading to the effect that "Any disabling condition remaining after that date (date of terminating temporary total disability) is by law presumed to be permanent." The Board is aware of no provision of law or Court decision presuming disability to be permanent upon termination of temporary total disability. The length of time disability exists may be taken into consideration with respect to whether the disability is permanent. Claim closure is not to be made until the claimant has been medically restored as near as possible to a condition of self support as an able bodied workman. Many cases involve workmen who still have symptoms which are not permanent at the time of claim closure.

The condition which claimant suffers is a type of inflammation of a tendon due to strain imposed upon the origin of the extensor muscles of the forearm. It is the sort of thing that will recur with a similar pattern of strain and subside without such strain. One of the problems in evaluating cause and effect and responsibility of the industrial exposure is the fact that during the pendency of the claim, the claimant also engaged extensively in house building.

The concluding comments of Dr. Campbell's report of November 4, 1969 are as follows:

> ". . . It is felt that if this patient is able to avoid the activities that require heavy use of the left upper extremity with the forearm in pronation and the wrist held stable, his symptoms should be well-controlled and the underlying inflammation of the tendon gradually subside. It is unlikely that further treatment will be necessary unless the patient resumes the type of activity that would tend to cause a recurrence of the symptomatology."

The Hearing Officer granted the increase in award despite a recitation that the claimant did, during the hearing, "rather deliberately and ostentatiously guard the left elbow against movement which seems inconsistent with Dr. Campbell's finding of no discomfort on passive motion." The Hearing Officer then regarded this as a result of "natural human tendency of some claimants to 'puff' disability at compensation hearings." The Board expects witnesses in compensation matters to be honest and forthright. Puffing disability claims should never be the basis of an award or reward.

There are other questions apparent in this record without explanation. The claim is based on an incident allegedly occurring February 5, 1969. Dr. Edgerton first treated this claimant on January 31, 1969. The claim itself and the claimant reflect that actually the condition "built up over a period of time." As between tenosynovitis caused by trauma and by prolonged exposure it is obvious that the claim is for the latter rather than trauma from a hand truck on February 5, 1969. It is also obvious that the on the job work was not the only causative factors.

Taking all of these factors into consideration, the Board concludes and finds that the condition is only minimally disabling and that the fact that claimant is susceptible to reinjury was not caused by this episode nor does that susceptibility warrant finding a major disability in the arm.

The Board concludes and finds that the disability does not exceed the determination of 10 degrees made pursuant to ORS 656.268. The additional award of 55 degrees made by the Hearing Officer is set aside provided that, pursuant to ORS 656.313, no part of such award as may have been paid pending this review is repayable.

Counsel for claimant is authorized to collect a fee of not to exceed $125 for representation on review in connection with an employer instituted review which results in reduced compensation.

WCB #69-1666 September 24, 1970

GENE E. EMERSON, Claimant.

The above entitled matter involves a claim of injuries arising from an accident of May 6, 1966. The claim was last closed September 8, 1969 with award of temporary total disability to August 30, 1969 and a finding of unscheduled disability of 48 degrees out of the applicable maximum of 192 degrees.

On November 7, 1969, through attorney Jon A. Joseph, the claimant requested a hearing. The matter was set for hearing and postponed. The matter was still pending when in June, the claimant discharged his counsel but did not advise the Workmen's Compensation Board with respect to any substitution of counsel.

On July 29, 1970 counsel for the State Accident Insurance Fund advised the claimant his claim was being reopened and on July 31, 1970 the State Accident Insurance Fund sought dismissal of the pending matter upon that basis. Accordingly, on August 5, 1970, an order issued from the Hearings Division dismissing the matter on the assumption that issues were then moot.

On September 2, 1970 a request for review was filed with the Board through new counsel, Coons & Malagon. It now appears that there is an issue with respect to whether temporary total disability was payable for a period of time prior to the reopening of the claim. This was certainly a residual issue. It is not to the credit of the parties that the Hearings Division was not advised concerning the residual issue. The order could easily have been withdrawn by the Hearings Division to avoid the matter being made a subject of proceedings for review.

It is accordingly ordered that the matter be and the same hereby is remanded to the Hearings Division for resolution of the issue of temporary total disability, if any, payable prior to claim reopening.

Counsel for claimant seek allowance of an attorney fee in keeping with Peterson v. SCD, 90 O.A.S. 983, 467 P.2d 976 (1970), for prevailing in connection with obtaining a hearing. The Board is advised that the Supreme Court has allowed a writ of review upon the Peterson decision. In order to avoid forcing parties to appeal the allowance or denial of attorney fees pending final resolution of that issue, the Board deems it advisable to order payment of fees contingent upon the resolution of the review by the Supreme Court as to whether attorney fees are payable upon prevailing with respect to an interim issue. The usual fee for prevailing upon Board review is $250 which is herewith ordered paid if and when the issue with respect to such fees being paid upon other than a final order is resolved by the Supreme Court.

WCB #70-272 September 24, 1970

PEGGY A. ORMSBY, 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 store employe who was struck in the back by some falling boxes of rubbing alcohol on May 19, 1968.

Pursuant to ORS 656.268, a determination order issued finding the claimant to have a residual disability of 8 degrees for partial loss of the left leg out of the applicable maximum of 150 degrees and unscheduled back injuries of 32 degrees out of the applicable maximum of 320 degrees.

The claimant, despite her age and education, has limited her work efforts to a one and one half year stint as a nurse's aide and a similar period working as a clerk for the store where injured. The claimant has had other medical problems unrelated to this injury. There has been some question concerning a possible intervertebral disc problem but claimant at first ruled out the diagnostic procedures and following the diagnosis, she and her husband ruled out recommended surgery following the diagnostic procedure. The refusal to first undergo diagnostic procedure and then major surgery is seldom characterized as unreasonable. The decision to "live with" certain discomfort is, however, a factor which may be legitimately considered in weighing the disability the claimant is willing to "live with." The surgery recommended is conditioned upon the inability to live with the pain.

The claimant and her husband bought a pleasure boat three days prior to hearing. Some point was made of how claimant was helped into the boat. Of greater significance is the choice of this source of recreation if the claimant is as disabled as she claims.

As noted by the Hearing Officer, it is only disabling pain which is compensable. The claimant admittedly "can do most of the things now she could do before" in the observation of her husband. He qualifies this with a description of accompanying "horrible pain." The husband, despite this attempt to assist with testimony, appears from some medical reports to be

a part of claimant's overall problem. None of the "horrible pain" is reflected in these medical reports. Generally speaking the symptoms found by the doctors are mild in character.

The Board concurs with the Hearing Officer and concludes and finds that the permanent disability attributable to the injury at issue does not exceed the respective awards of 8 degrees for the leg and 32 degrees unscheduled.

The order of the Hearing Officer is affirmed.

WCB #69-1205 and
WCB #70-75 September 24, 1970

MELVIN G. WAYMIRE, Claimant.
Request for Review by SAIF.

The above entitled matter involved issues upon hearing concerning whether either of two heart attacks involved "an accidental personal injury within the provisions of the Workmen's Compensation Law" or whether the "condition requiring treatment is the result of the activity described." Such was the basis of the denial of claims for separate heart attacks sustained by the claimant on March 24th and September 20, 1969.

The State Accident Insurance Fund did not deny the claim of September 20, 1969 on the basis that the claimant was not a subject workman as to that claim, but that is the only issue raised on appeal. This issue seems in fact to be an issue raised as an afterthought by counsel for the State Accident Insurance Fund following the hearing proper. As noted, the denial of the claims did not conform to ORS 656.262(6) requiring that reasons for the denial be provided in written notice to the claimant.

The Hearing Officer allowed both claims and also dealt with the issue raised post hearing by counsel for the State Accident Insurance Fund. At page 35 of the transcript, counsel first made inquiry into a matter that may have first come to his attention but was nevertheless a matter of record with his client and the Workmen's Compensation Board. As late as page 150 of the transcript, counsel for claimant was unaware of any reason for inquiry into the ownership of the property on which the claimant was working on September 20, 1969 when the heart attack at issue occurred.

The insertion of the latent issue was due to the fact that the claimant operated as an individual in the building business until July 1, 1969. Prior to July 1, 1969 he had insured himself pursuant to ORS 656.128. The business was incorporated on July 1, 1969. The State Accident Insurance Fund now attempts to defeat the claim for the September 20th incident on the basis that the claimant was a corporate officer. The Hearing Officer found that the claimant occupied a dual capacity under the doctrine of Carson v. SIAC, 152 Or 455. The Workmen's Compensation Board upon its inception in January of 1966 adopted the dual doctrine as to corporate officers as an administrative interpretation of the exclusion of corporate officers under the 1965 Act. The Board concurs with the finding and conclusions of the Hearing Officer upon this phase of the case.

The State Accident Insurance Fund brief raises questions concerning the insured status of the claimant with the State Accident Insurance Fund. The only evidence of record, however, was provided by the claimant's wife as secretary-treasurer of the corporation. At page 153 she testified claimant was on the payroll and working for the corporation. At page 154 she testified that both the claimant and herself had elected to be covered by workmen's compensation and were paying premiums to the State Accident Insurance Fund. Also at page 154 she testified the claimant was being paid out of the corporation's check book. At pages 153, 154 the secretary-treasurer of the corporation testified it was the purpose of the corporation to build houses on the property being cleared with the property to be purchased on a lot by lot basis.

A letter submitted by counsel for the State Accident Insurance Fund reflects that the State Accident Insurance Fund merely substituted the corporation for the individual employer entity. The State Accident Insurance Fund is in the position of now contending that it left the claimant uninsured in this shuffle but the record reflects the State Accident Insurance Fund continued to collect premiums on the risk.

There is an applicable section of the law not mentioned in the Hearing Officer order or the briefs. ORS 656.039 permits an employer of nonsubject workmen to make them subject workmen. This is not the same as ORS 656.128 under which the claimant was insured prior to July 1, 1969. Corporate officers are defined as nonsubject. The election by the employer converts such nonsubject workmen to subject workmen. If the corporation did not so elect, the State Accident Insurance Fund should have produced its records rather than now controvert the testimony of the secretary-treasurer of the corporation. As it stands, the uncontroverted testimony is that the claimant was insured by the State Accident Insurance Fund for the previous and succeeding business ventures.

The Board concurs with the Hearing Officer and concludes and finds that the claimant sustained compensable accidental injuries with respect to both claims and that he was a subject workman as provided by ORS 656.128 as to the March, 1969 claim and was a subject workman as provided by ORS 656.039 as to the September accident.

The order of the Hearing Officer is affirmed for these reasons and for the further reason that the issue raised on review by the State Accident Insurance Fund was not incorporated in its denial of the claim. If the denial had been properly issued, the Board further concludes from the evidence that the claimant as a specially insured corporate officer was pursuing work of the corporation making it immaterial which of the dual purposes of corporate officer activity was being pursued.

The order of the Hearing Officer is affirmed.

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 rendered in connection with this review.

WCB #70-82 September 24, 1970

RONALD G. HOAGLAND, 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 assistant soft drink bottler who incurred a low back injury on August 5, 1968.

Pursuant to ORS 656.268 the claimant was determined to have a residual permanent disability of 48 degrees unscheduled disability against the applicable maximum of 320 degrees. This award was affirmed by the Hearing Officer.

The claimant, on review, challenges the Hearing Officer's conclusions with respect to factors of earning capacity and lack of motivation.

The record reflects a claimant who at 5'11" and over 200 pounds is medically described as obese. Despite testimony of inability to run, a short bit of otherwise useless film does depict the claimant agilely and swiftly avoiding traffic without indication of any difficulty. The lack of substantial residual disability as well as poor motivation is well substantiated in various medical reports. The claimant testifies he left certain employment due to back problems but these were not relayed to the employer as a reason for quitting. A loss of earnings, to become a factor in disability ratings, must be a real permanent loss attributable to the accident. The Hearing Officer properly weighed the claimant's work record and motivation in assessing whether the facts in their totality warranted an increase in disability rating.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's permanent disability attributable to the accident at issue does not exceed the 48 degrees already allowed.

The order of the Hearing Officer is affirmed.

WCB #69-1782 September 24, 1970

EDWARD G. HAMILTON, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 56 year old logger sustained any permanent disability from an accidental injury incurred August 21, 1968 when he fell backwards in haste to escape a rolling log. The claimant had been off work since 1965 due to a previous industrial injury and this accident happened only two weeks after his return to work from the long disability.

Pursuant to ORS 656.268 the claim for the accidental injury now at issue was closed on August 15, 1969, finding there to be no permanent disability. This was affirmed by the Hearing Officer.

The record reveals that the claimant had already decided to quit his employment the day before the injury at issue due to residuals from his previous injury. The medical reports reflect no disability or minimal factors at best from the accident at issue. The subjective symptoms are not entitled

to serious consideration upon the basis of the high degree of exaggeration attributed to the claimant with respect to his various complaints.

The Hearing Officer had the benefit of a personal observation of the claimant. There is nothing in the various medical reports which would serve as a basis to offset the conclusion of the Hearing Officer, from his observation, that the claimant's complaints are exaggerated and that whatever pain does exist is not causally related to the accident at issue.

The Board concludes and finds that the claimant has no residual permanent disability attributable to his accident of August 21, 1968.

The order of the Hearing Officer is affirmed.

WCB #69-2108 September 25, 1970

ARTHUR R. HOUGH, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 62 year old heavy equipment operator as the result of a low back injury incurred November 25, 1968. The claimant had prior low back problems dating back at least to 1954 when he underwent the fusion of lumbar vertebrae to stabilize that area of the back.

Pursuant to ORS 656.268, the additional disability attributable to the injury of November 25, 1968 was determined to be 96 degrees. Upon hearing this determination was modified and increased to 160 degrees out of the applicable maximum of 320 degrees.

It is the claimant's contention that by virtue of the claimant's age, experience and the physical disabilities imposed by this injury that he is now precluded from ever engaging in a gainful and suitable employment and should therefore be determined to be permanently and totally disabled.

The claimant has physical problems unrelated to the accident at issue. A careful study of the medical reports reflects that some of the diagnostic procedures indicate that claimant's restrictions are not as great as claimed. Some complaints have nothing to do with the accident at issue and are not disabling but loom large, as indicated, in the complaint category. Among these, for instance, is the alleged clicking in his back. The element of exaggeration noted in some medical reports as well as the serious medical doubts with respect to whether certain complaints are genuine were major factors in the conclusion of the Hearing Officer that the claimant was less than totally disabled as a result of the accident. The Hearing Officer, of course, also had the advantage of a personal observation of the claimant.

The Board concludes and finds that the Hearing Officer properly increased the finding of disability from 96 to 160 degrees, and also concludes and finds that the disability is only partially disabling and does not exceed the 160 degrees awarded by the Hearing Officer.

WCB #70-107 September 25, 1970

TED WELTER, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 44 year old laborer and truck driver who incurred low back injuries on November 26, 1966 in the process of unloading boxes of powder from a truck with use of a hand truck.

Pursuant to ORS 656.268 a determination issued May 18, 1969 finding the claimant to have an unscheduled disability of 28.8 degrees out of the applicable maximum of 192 degrees. The matter was ordered reopened by the Hearing Officer upon the first hearing. A re-determination on December 8, 1969 found there to be no permanent disability in excess of the prior award of 28.8 degrees. The Hearing Officer, however, found the disability to be 96 degrees.

The record reflects that the claimant had a history of back troubles attributable to degenerative disc disease. It is a condition with a prognosis of further degeneration and intermittent problems. The employer, of course, takes a workman as he finds him. The degenerative condition of claimant's back in nowise precluded compensation for either the temporary disability or increased disability attributable to his injury. On the other hand, not all of the claimant's present or possible future problems are attributable to the incident with the hand truck.

In terms of any factor of earnings loss in the disability evaluation process, the claimant appears to have a minimal decrease in earnings. He operates ably as a Pinkerton guard. The claimant is restricted from heavy lifting but this is a limitation that the natural degenerative process was placing upon the claimant without regard to the incident at issue.

The Board agrees with the employer's contention that the claimant has not suffered a disability of 50% of the maximum allowable for unscheduled injuries. The Board, however, concludes and finds that the initial determination did not adequately evaluate the residual disability and now finds that the claimant has a disability of 50 degrees out of the allowable maximum of 192 degrees.

The order of the Hearing Officer increasing the award is modified by limiting the increase to 21.2 degrees for an award of 50 degrees. Claimant's counsel's fee is 25% of the increase of 21.2 degrees as paid and counsel for claimant is authorized to collect an additional $125 from the claimant for services in connection with an employer's request for review resulting in a decreased award.

WCB #70-123 September 25, 1970

LLOYD PEPPERLING, Claimant.
Request for Review by SAIF.

The above entitled matter upon hearing involved the issue of whether the 60 year old laborer in an onion packing plant sustained injuries to the cervical area of his back and affecting his left arm as the result of handling sacks of onions on or about November 14, 1969.

Following an order by the Hearing Officer finding that the claimant had sustained a compensable injury as alleged, the State Accident Insurance Fund requested a review.

The Workmen's Compensation Board is now in receipt of a notice from the State Accident Insurance Fund that its request for review is withdrawn and requesting the matter be dismissed.

There being no request for cross review, the withdrawal by the State Accident Insurance Fund is acknowledged herewith, the matter is dismissed and the order of the Hearing Officer, by operation of law, is declared final.

WCB #69-1979 and
WCB #70-1 September 25, 1970

DARRELL R. HANKEL, Claimant.
Request for Review by Claimant.

The above entitled matter involves a long and complicated matter of industrial and non-industrial injuries to the back of a 54 year old crane operator. Five documented injuries date from December 13, 1954. An injury on August 10, 1963 resulted in an award of 50% of the maximum allowable for an unscheduled disability. A third injury on March 1, 1966 involved a lip of the foot while shoveling. This claim was closed March 3, 1967 without further award of permanent partial disability. It is this claim with respect to which the claimant now seeks to impose further responsibility upon the State Accident Insurance Fund. On August 18, 1966 the claimant was in an auto accident which resulted in low back surgery. The fifth injury of April 26, 1968 involved another compensation claim, this time insured by Argonaut Insurance Company. Argonaut was joined in these proceedings before the Hearing Officer.

The Hearing Officer appears to have made a careful study of this long and complicated history. He relieved both the State Accident Insurance Fund and Argonaut of responsibility for current problems upon which the claimant seeks further compensation. Upon review the claimant centers his efforts on attempting to relate current problems to the relatively minor incident of March 1, 1966. That March 1, 1966 injury involved no permanent partial disability and only 23 days of time loss. The claimant returned to arduous work. The claimant now seeks to have the subsequent major injuries disregarded.

No purpose would be served in again recounting all of the history. The Hearing Officer has given an accurate accounting of what was a difficult and involved matter. The primary problem is a deterioration associated with post surgical problems stemming from surgery necessitated by the auto accident.

The Board concurs with the Hearing Officer that upon the basis of this record there is no basis to assess current problems to an accident of more than four years ago from which the claimant returned to work without permanent partial disability only to have subsequent major intervening injuries. The claimant's brief is directed primarily at the March, 1966 injury but the Board also concurs with the Hearing Officer exclusion of further responsibility against Argonaut Insurance, the claimant having failed to appeal a denial of responsibility issued by the insurer.

The order of the Hearing Officer is affirmed in all respects.

WCB #69-1953 September 25, 1970

JOHN C. REESE, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue with respect to the permanent disability sustained as a result of injury on April 12, 1966 when the then 51 year old claimant bumped his leg. An abrasion subsequently ulcerated and the lesion has recurred from time to time with an indication that this is to be a continuing pattern.

The problem is one basically caused by an underlying vascular deficiency. To the extent the minor trauma triggered the particular lesion, the disability is compensable without regard to the pre-existing problem. To the extent that the accident in no way caused the vascular deficiency, the basic disability which was neither caused nor exacerbated is not a responsibility of the injury.

Pursuant to ORS 656.268 a determination issued finding the claimant to have no permanent disability attributable to the accident. The Hearing Officer found the claimant to have a permanent disability attributable to the injury of 68 degrees out of the 150 allowable for a complete loss of a leg.

The disability is clearly limited to the leg. Under the restrictions of the statute as interpreted by Jones v. SCD, 250 Or 847, the claimant has no basis for his claim of permanent total disability with disability limited to the leg. It is also obvious that the accident has not deprived the claimant of the use of the leg despite the aggravation attendant the recurring lesion.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has some residual permanent disability which the Hearing Officer properly rated at 68 degrees, an increase of 68 degrees from the initial determination finding no permanent disability.

The order of the Hearing Officer is affirmed.

WCB #70-426 September 30, 1970

RICHARD A. GILMER, Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue with respect to rating the extent of permanent disability as the result of injuries incurred to fingers of the left hand by a journeman sheet metal worker.

The left hand was caught in some machinery on May 29, 1969. In terms of ORS 656.214(1)(k), the fingers are identified as first to fourth from the index to little finger. The order on review uses a common identification using the thumb as the first and the remaining digits starting with the index finger become identified as the second through fifth. Following the statutory identification, the claimant lost by separation at the palm the 2nd, 3rd and 4th fingers. The first finger was not amputated but does have some residual disability. The thumb was not injured. There was no injury at or about the wrist.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 98 degrees basing the evaluation against the maximum of 150 degrees allowable for loss of all five digits or complete loss of the forearm.

Upon hearing, the award was increased to 128 degrees. The State Accident Insurance Fund requests this review.

The Board has adhered to a policy interpretation that involvement of only the digits and confined to less than all five digits is restricted by statute to awards allowable for the digits. The digit, by statute, includes to metacarpal bones and soft tissues normally referred to as the hand.

There is no basis for an award upon the forearm under the evidence in this case with an uninjured thumb. The claimant in losing the statutory 2nd, 3rd and 4th fingers is entitled to the respective 22, 10 and 6 degrees established for these fingers. The first finger has lost some but not to exceed 50% of its use. Upon this basis the claimant is entitled to 12 degrees for partial loss of the first finger. The law does permit a further award for the uninjured thumb due to the loss of opposition. The loss of opposition in this case is quite substantial and is evaluated at 40 degrees.

The Board, as anyone else must be, is sympathetic to any workman sustaining multiple finger injuries. That sympathy cannot serve as a basis to convert multiple injuries to less than all five digits to a basis of a forearm injury.

The prior evaluation and order of the Hearing Officer is therefore reversed and the claimant's disability is determined to be 90 degrees total based upon the evaluations set forth above.

The State Accident Insurance Fund, having appealed an award reduced on review, counsel for claimant is authorized to collect a fee from the claimant of not to exceed $125 for services on review.

WCB #69-1302 September 30, 1970

CLAYTON E. MOORE, Claimant.

The above entitled matter was heretofore the subject of a claim of occupational disease involving a dermatitis affecting the claimant's hands.

The matter was submitted to a Medical Board of Review which affirmed the existence of the compensable claim for occupational disease. The answers by the Medical Board of Review were filed by the Workmen's Compensation Board as of July 27, 1970.

A question of interpretation has now arisen with respect to the findings of the Medical Board of Review with respect to Question 5. The question to the Medical Board and its answer are as follows:

> "5. If so, to what degree is claimant disabled by such occupational disease?
>
> Minimal at this time - 10%
>
> Acute flare - 100% "

The answer cannot be converted to conform to the Workmen's Compensation Law. The disability is restricted to the arms and the finding of disability must be in terms of permanent disability to each of the affected members of the body. In keeping with Sowell v. WCB, 90 Or Adv Sh 1495, the Workmen's Compensation Board has a duty to obtain adequate answers to the questions.

It is accordingly ordered that the above entitled matter be and the same hereby is remanded to the Medical Board of Review for further answer to the question relating to the extent of claimant's disability.

WCB #69-2289 September 30, 1970

DALTON B. FOX, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claimant sustained any permanent disability as a result of a compensable injury incurred on October 25, 1968. The now 67 year old logger and tree thinner sustained three fractured ribs while employed as a knot bumper for a logging company when he lost his footing on a log which was slippery from frost and fell into a gulley striking a broken off limb of a log.

The Closing and Evaluation Division of the Workmen's Compensation Board determined pursuant to the procedure set forth in ORS 656.268 that temporary total disability, but no permanent disability resulted from the claimant's accidental injury. The Hearing Officer found following a hearing held at the claimant's request that no permanent disability had been sustained by the claimant as a result of his compensable injury. The claimant has requested a review by the Board of the Hearing Officer's order.

The claimant has made a full and complete recovery from the rib fractures sustained as a result of his accidental injury and there is no permanent disability attributable to the fractured ribs.

The claimant had a pre-existing but latent and nondisabling emphysema condition. Following the accidental injury, the claimant developed respiratory and lung problems which constitute the basis of his claim of entitlement to a permanent disability award. The claimant contends that his pre-existing lung condition was either directly or indirectly aggravated by the accidental injury, and that there is permanent disability which resulted from such aggravation which is a natural consequence of the injury and is compensable.

The medical evidence is conflicting with respect to the existence or non-existence of a causal relationship between the compensable injury and the resultant permanent disability. The question to be resolved in this matter, therefore, is whether the claimant's pre-existing but latent and non-disabling emphysema condition was aggravated by his accidental injury resulting in compensable permanent disability.

Dr. Newton, the treating physician and a general practitioner, provides the strongest support for the claimant's position. In his opinion it is reasonable to conclude that the accident involving trauma to the chest could cause an aggravation of the pre-existing emphysema condition. He therefore concludes that the claimant's permanent disability is causally related to the injury. Dr. Newton recognizes, however, that whether or not the disability resulted from the accidental injury is a "gray area." His opinion that the injury to the chest aggravated the pre-existing condition and that the disability is a natural consequence of such aggravation appears to be predicated primarily upon the circumstance that the claimant was able to work and carry on normal activity prior to the accident, whereas after the accident he was not.

Dr. Tuhy, a specialist in the field of lung disease, as a result of an exhaustive examination of the claimant and a subsequent follow-up examination, concluded that the accidental injury did not aggravate the pre-existing chronic obstructive lung disease nor produce any permanent lung damage. In his opinion there was no causal relationship between the claimant's injury and any permanent disability involving either the function or the structure of his lungs.

The extensive medical report of Dr. Mack, whose specialty is pulmonary disease, based upon his thorough examination of the claimant, concludes that the accident was not the cause of the claimant's current respiratory and lung problems, but merely the straw on the camel's back which brought them into the foreground.

The Board is of the opinion that the question of the causal relationship between the claimant's injury and disablity involves a complex question in the field of medical science within the contemplation of the rule enunciated in the case of Uris v. SCD, 247 Or 420 (1967), and that the question must be determined and resolved by medical evidence from the medical profession. The Board concludes, as did the Hearing Officer, from its consideration of the medical evidence for the purpose of resolving the conflicting opinions of the three doctors whose reports are of record herein, that the greater

weight of the medical evidence supports the conclusion that the claimant's disability is not causally related within reasonable medical probability to his compensable injury.

The Board is most convinced by Dr. Tuhy's conclusion of a lack of causal connection based upon his expertise in the field of medical science pertaining to diseases of the lungs and the thorough and logical manner in which he arrives at and supports his conclusion. Dr. Mack, although his ultimate conclusion relative to the causal relationship is indecisive, nevertheless provides substantial support to the conclusion reached by Dr. Tuhy. The Board does not discount the contrary conclusion of Dr. Newton, nor his advantage as the treating physician, however, by reason of his less extensive experience and expertise relative to lung disease, and the reasons indicated for his conclusion of a causal relationship, his conclusion with respect to the question of causation is less compelling to the Board.

Although the conclusion reached by the Board on the question of causation results in its not reaching the question of the extent of permanent disability, the Board believes it is pertinent to note as it bears upon the causal question that the medical reports of both Dr. Tuhy and Dr. Mack indicate that their objective medical findings reflect only relatively minor physical impairment of the function and structure of the lungs. They believe that the disability related to the lungs should not pose any significant problem to his employment or other activity and does not account for the more extensive complaints of the claimant. The claimant's attainment of retirement age and the decline in his physical condition and ability consistent therewith are in their opinion the primary factors which account for his indication of inability to resume his former strenuous employment.

The Board finds and concludes as a result of its de novo review of the record and the briefs submitted by counsel for the parties, that the evidence fails to establish the requisite causal relationship that the accidental injury sustained by the claimant on October 25, 1968 was responsible for his ultimate respiratory and lung disability.

The order of the Hearing Officer is therefore affirmed.

WCB #70-158 and
WCB #70-159 October 2, 1970

LEE E. OLSON, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability sustained by a 43-44 year old workman as the result of two separate accidents in March of 1966 and March of 1967.

The claimant has had a history of low back problems since 1950 requiring periodic treatment.

The March, 1966 injury required surgery in April of 1966 for a herniated disc. The claim had not been closed pursuant to ORS 656.268 when the claimant returned to work and reinjured his back working as a truck driver for a different employer in March of 1967.

Both employers were insured by the State Accident Insurance Fund. Employers so insured are not normally parties to claims proceedings since the responsibility for the administration and payment of any claims is vested on the State Accident Insurance Fund rather than the employer. Note ORS 656.262.

Pursuant to ORS 656.268 a determination issued finding the claimant to have a residual permanent disability of 19.2 degrees against the applicable maximum of 192 degrees for the injury of March, 1966, being compared to a loss of 10% of an arm. The March, 1967 injury was evaluated as equal to a further permanent loss of 38.4 degrees on the basis of a comparison to a loss of 20% of an arm. Both awards are made in contemplation only of the increase in disability attributable to each accident. The claimant is not entitled in these proceedings to awards for pre-existing disabilities, except to the extent such disabilities may have been materially increased by these injuries.

The Hearing Officer has affirmed the disability evaluations on both claims.

The claimant was able to return to work as a truck driver following the surgery to correct the disc defect found following the 1966 injury. The Hearing Officer properly noted that the surgery improved the claimant's condition. It is not clear that a disability is inherent because of surgery as analyzed by the Hearing Officer. The disability was classified as nominal. The Board concurs with the result reached by the Hearing Officer and also concludes and finds that the disability attributable to the March, 1966 injury does not exceed 19.2 degrees.

The claimant returned to work for one day following the further surgery of a fusion of lumbar vertebrae occasioned by the March, 1967 injury. The issue is more one of motivation and whether the claimant has actively sought to re-engage as a productive worker. As noted by the Hearing Officer, the claimant's condition, due to lack of exercise, is such that he is more restricted by flab and lack of conditioning than by the result of the accident.

The Hearing Officer also noted that the claimant professed a degree of disability upon hearing and posed stiffly upon hearing in a manner which was obviously exaggerated in light of the findings and reports of medical examination.

The Board also concurs with the Hearing Officer with respect to the March, 1967 injury and concludes and finds that the additional disability attributable to this accident does not exceed 38.4 degrees.

The orders of the Hearing Officer with respect to both claims are affirmed.

WCB #70-373 October 2, 1970

CHARLES W. KELLY, 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 plywood mill sanderman as the result of being struck by a fork lift truck on April 23, 1969.

The claimant has a work history of some 18 years with the employer. He had intermittent periods of low back distress for several years. Pursuant to ORS 656.268, a determination issued finding the claimant to have sustained no permanent disability as the result of this injury.

The Hearing Officer found the accident imposed unscheduled permanent injuries of 20% of the workman and awarded 64 degrees out of the applicable maximum of 320 degrees.

Despite the fact the underlying problem is one of degenerative disease there is no question but that there was some permanent aggravation of that condition.

The claimant contends that he is now permanently and totally disabled and can never again engage regularly in suitable employment. Apparently the employer did offer the claimant re-employment at work which the doctor felt was within the claimant's capabilities.

Films have been introduced by both parties. The claimant's film reflects the motion required in reaching for machinery and handling the light pieces of veneer which in multiple form when glued make up pieces of plywood.

The film presented by the employer shows the claimant doing a workmanlike job of operating a lawn mower. One could not say that the film proved no disability but it certainly demonstrated residual physical capacities far from the claimant's contention of permanent total disability.

The rib fracture incurred in this claim healed without residual problems. As noted above, the pre-existing degenerative back sustained some permanent exacerbation. The Hearing Officer concluded that the disability is not nearly as severe as the claimant contends.

The Board concurs with the Hearing Officer and concludes and finds that the residuals of the accident are only partially disabling and do not exceed the 64 degrees allowed by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #69-1386 October 2, 1970

LLOYD W. POE, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 27 year old truck driver as the result of comminuted fractures of the mid shaft of both tibia and fibula of the right leg on May 29, 1968 when forced to jump from his overturning truck.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability in the leg below the knee of 7 degrees against the applicable maximum of 132 degrees. The claimant was able to return satisfactorily to his former job without loss of earnings rate.

The post injury recuperative period was marked by rehospitalization due to initial failure of the fractured tibia to unite which required a bone graft. The operative site then became infected with further hospitalization.

Despite claimant's ability to work with the leg, there is a definite atrophy at both the calf and thigh. There is a daily experience of stiffness in the leg with more pain during cold and damp weather. He walks with a limp.

The difficulty with the knee and leg atropny above the knee warrants the rating of disability upon the schedule for the leg at or above the knee. The Hearing Officer increased the award to 46 degrees against the applicable maximum of 150 degrees. If the basis of permanent disability awards was to be made primarily on wages before and after the accident, there would be little basis for an award in this case.

One cannot ignore the real depletion in the physical capacity and function of the claimant's leg. He does have other problems not medically related to the accident but there is no question concerning the residuals to the leg.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's permanent disability is properly evaluated by the Hearing Officer at 46 degrees. The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed the further fee of $250 payable by the employer for services rendered on review.

WCB #70-592 October 2, 1970

BERNARD NIEDERMEYER, III, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 17 year old worker as the result of a wreck while driving a pickup on June 9, 1969. The chief objective symptom is an anterior compression of a dorsal vertebra.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an unscheduled disability of 48 degrees against the applicable maximum of 320 degrees.

The claimant's position on review seeking an increase in the award attempts to place an arbitrary value on the partial compression of a single vertebra without regard to the degree the compression affects his ability to function. The claimant also seeks to use a formula of wage at time of work and immediately following recovery from the accident as a factor in permanent disability. The claimant is a student. As noted by the Hearing Officer any attempt to apply a wage factor would be highly speculative.

The claimant is able to engage in the quite physical and demanding sports of swimming and skiing without difficulty. Dr. Marxer's opinion with respect to the dimunition of the vertebra in question is that claimant has "some small disability because of the potential of traumatic changes later." The disability, in Dr. Marxer's prognosis, is thus small even on a basis of future developments.

The Hearing Officer affirmed the initial determination of 48 degrees which represents a loss of function of 15% of the workman on the applicable maximum of 320 degrees.

The Board concurs with the Hearing Officer and concludes and finds that the permanent disability does not exceed the 48 degrees heretofore allowed.

The order of the Hearing Officer is affirmed.

WCB #70-1453 October 2, 1970

GEORGE WILLIAMS, Claimant.

The above entitled matter involves an allegedly compensable accidental injury sustained January 30, 1968. Only medical services were involved and an administrative closure of the claim was made by the Workmen's Compensation Board on March 12, 1968.

The claimant contacted the State Accident Insurance Fund with reference to possibly having his claim reopened. On June 12, 1970 the State Accident Insurance Fund advised the claimant that "we have decided your present condition is not related to your accident which occurred on January 30, 1968. Therefore we are not reopening your claim."

The claimant requested a hearing on this refusal. The State Accident Insurance Fund moved to dismiss on the basis the claimant was not entitled to hearing under ORS 656.319(1)(b) and that there was no medical report to support a claim of aggravation pursuant to ORS 656.271.

The Hearing Officer allowed the motion to dismiss and the claimant requests a review.

The records before the Hearing Officer contain medical reports from a Dr. Thompson dated January 27, 1970 and from Dr. Vinyard dated May 20, 1970. These reports reflect that the claimant's condition had become symptomatic and in the medical opinion the problem is definitely related to the accident of January, 1968.

Upon this state of the record the matter should not have been dismissed. The Hearing Officer order reserved rights as to ORS 656.271. It was those rights to hearing which were established by the state of the record.

It is accordingly ordered that the matter be and the same hereby is remanded to the Hearing Officer for hearing on the merits of the claim.

The claimant's counsel is entitled to a fee in the sum of $250 for services on review if the decision of the Court of Appeals in Peterson v. SCD, 90 O.A.S. 983, 467 P.2d 976(1970), is affirmed by the Supreme Court which has granted review on the issue of attorney fees on preliminary issues.

WCB #70-120 October 2, 1970

OSCAR R. McCAMEY, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claimant sustained a compensable injury in experiencing anginal pain while working on September 17, 1969.

The claimant is a 54 year old cook. Following the symptoms diagnosed as anginal pain experienced on September 17, 1969, the claimant had other episodes of such pain which were not associated with any work effort. He first sought medical attention following an episode on September 21, 1969, after he had retired to bed.

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

There is no evidence that the claimant incurred a coronary occlusion. Angina pectoris is the name given the chest pain experienced on effort by a person whose arteries have become partially obstructed by degenerative deposits upon the arterial walls. As the testimony of Dr. Harris recites at page 17 of the transcript, several things "can happen if a person has angina pectoris. In a great majority, nothing happens. His heart is just the same as it was before he had the attack of angina."

If the claimant had developed a fibrillation concurrent with the anginal attack on September 17th, there would have been a physical injury causally related to the work effort. The fact that the claimant experienced further manifestations of the underlying degenerative condition would not make the symptoms at work compensable unless the medical evidence supported a conclusion that the incident on September 17th while at work somehow produced physical changes which materially precipitated subsequent symptoms not associated with work. In other words, it is not enough to establish a claim to prove that certain work effort produced temporary pain.

The Board concurs with the Hearing Officer and concludes and finds that the claimant did not sustain a compensable injury on September 17, 1969 and further finds that symptoms on subsequent days were neither caused nor materially precipitated by the symptoms experienced on September 17th.

The order of the Hearing Officer is affirmed.

WCB #69-2029 October 2, 1970

ELSIE M. GREEN, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 50 year old electronics plant employe has sustained a compensable aggravation of a low back injury incurred July 14, 1967.

The claimant had a prior low back injury in 1965 which required surgery in October of 1966 and worked until the further accident involved in this matter.

This July 14, 1967 injury was managed by conservative therapy and the claim was closed pursuant to ORS 656.268 on June 28, 1968 with a determination of permanent disability of 32 degrees out of the applicable maximum of 320 degrees.

The claim of aggravation stems from a re-hospitalization on May 12, 1969. Part of the issue is whether the occurrence of symptoms at home while lifting a coffee pot at home precludes a finding that the problem is compensably related to the injury of July 14, 1967.

The employer denied the claim, relying substantially on the report of Dr. Pasquesi that the claimant had reported the incident at home as the triggering device. The denial was upheld by the Hearing Officer who emphasized that in the long history of back complaints with respect to an unstable back, it was not the incident of July 14, 1967 which made the back susceptible to exacerbation.

The Board, however, notes the medical report of Dr. Hutchinson which is quite positive in relating increase in symptomatology materially to the July 14, 1967 accident. There is no positive testimony to the contrary. In Lemons v. SCD, 90 Or Adv Sh 779, the Court of Appeals ruled under similar circumstances that a subsequent incident did not preclude a valid aggravation claim where the medical evidence supported a material chain of causation stemming from the accident at issue.

The Board concludes and finds that the claimant sustained a compensable aggravation on or about May 12, 1969.

The order of the Hearing Officer is reversed and the employer is ordered to accept the claim of aggravation. The employer did not unreasonably deny the claim in light of the reasonable question concerning whether a non-occupational incident was responsible. Penalties should not be applied.

Pursuant to ORS 656.382 and rules of procedure of the Workmen's Compensation Board, classifying denials of aggravation claims in the same manner as denials of claims in the first instance, counsel for claimant is allowed a fee of $750 payable by the employer for services rendered in connection with the hearing and review of this matter.

WCB #70-90 October 5, 1970

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

The above entitled matter involves the issue of whether the injuries sustained by a 25 year old insurance investigator and real estate appraiser arose out of and in course of his employment. On October 31, 1969 the claimant was admittedly in the course of his employment when he witnessed an automobile accident. He stopped to assist the parties when another party in the vicinity attempted to move the claimant's car. This good samaritan was unfamiliar with the operation of claimant's car and it went out of control to pin the claimant against a stone wall.

The real issue is whether the claimant's action in assisting the parties to an accident he had witnessed constituted a deviation from his employment to thereby preclude injuries sustained during such deviation from being deemed to have arisen out of and in course of employment.

The claim was denied by the insurer of the employer. It is evident that the general employment policy of the employer does not forbid such good samaritan activities. To the contrary, employes such as the claimant are encouraged as a matter of public relations to further the interests of the employer, but not specifically to aid at accidents.

The claimant's employment placed him in a position where, as a witness to the accident, it was his duty to at least stop and advise the parties of the fact that he was a witness. [ORS 483.602]. Stopping and advising each party of the fact that he was a witness became an integral and non-segregable part of his work simply because his work placed him in that position. If the employer had rules against doing more it is possible that at some point the claimant may be said to have deviated from his employment. No such line of demarcation appears from the facts in this case.

The employer's insurer contends that to be compensable the claimant must be driving a marked vehicle or wearing a badge or otherwise proclaiming to the world that here is an employe of X Y Z Company coming to the rescue. The Board does not construe the law to require a Madison Avenue advertising approach to bring such acts of employes within the course of employment. Company employes were given company publications commending similar activities by employes with an urging endorsement inquiring, "Can you top this?"

The Board concurs with the Hearing Officer and concludes and finds that the claimant's injuries arose out of and in the course of employment.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382 and 656.386, counsel for claimant is allowed the further fee of $250 payable by the employer for services rendered on this review.

WCB #70-210 October 5, 1970

AUGUSTUS C. GARRIS, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability sustained by a then 38 year old pattern maker in a timber fabricating plant as the result of splinters driven into the fingers of his right hand.

The claim was heretofore the subject of a hearing with respect to whether the employer's responsibility extended to back and leg difficulties. That issue was resolved in favor of the claimant by a final order of the Hearing Officer on January 2, 1969. The leg and back difficulties stemmed from an injection administered in the left hip while under treatment in the hospital and a fall while ambulating in the hospital.

The latter complications resulted in a determination pursuant to ORS 656.268 finding the claimant to have a nominal permanent disability of 8 degrees in the left leg against the applicable maximum of 150 degrees. This determination was affirmed on the hearing now on review. The claimant contends on review that the award for the leg is not adequate and that there are also residual permanent unscheduled disabilities.

The claimant was able to return to his former employment which he terminated on May 13, 1969 due to objections to the dust in the work environment. The claimant has since engaged capably as a carpenter in heavy construction work. There are some complaints but little indication of any disability impairing his ability to perform the arduous tasks of his present work.

There is some indication of a degenerative process with respect to the claimant's back but the evidence does not support any causal relation to the finger injury or the related treatment therefore.

As noted by Dr. Berg, the situation boils down to a situation where all of the complaints are subjective and the doctor was unable to explain the symptoms on any logical basis. The degenerative processes may indicate a need to avoid future injury but this is not due to the accident at issue. The claimant has college training including two years of law school.

The Board concurs with the Hearing Officer and concludes and finds that claimant's disability attributable to the accident at issue does not exceed the 8 degrees heretofore allowed.

The order of the Hearing Officer is affirmed.

WCB #68-521 October 5, 1970

JOHNNIE RUSH, Claimant.
Request for Review by Employer.

The above entitled matter basically involves the issue of whether a then 51 year old lumber mill employe was injured permanently on March 15, 1967 to the extent that he is precluded from ever engaging regularly in a gainful and suitable employment and is thus permanently and totally disabled.

The matter was heretofore before the Workmen's Compensation Board on October 21, 1969 considering an order of the Hearing Officer of January 23, 1969 finding the claimant to be so permanently and totally disabled. The Board ordered the matter remanded to the Hearing Officer for taking further evidence with respect to matters the Board deemed had not been fully developed. The factors set forth in that order of remand are as follows:

> "There are phases of the record which the Board deems to be insufficiently developed and heard. First, though the claimant had a myelogram in July of 1967, Dr. Campagna's report in June of that year reflected the claimant's condition to be improving. The last trauma of record was non-industrial and appears to have been omitted from the history given most of the doctors. At page 31 of the transcript the claimant recites an incident of September 13, 1967, when his legs went out from under him coming down a ladder from the roof of his own home, 'and I felt something in my back.' He fell to the ground cutting a knee open. Shortly thereafter the claimant, in attending the Physical Rehabilitation Center facility of the Workmen's Compensation Board, was complaining of the shoulder without revealing the cause of the shoulder complaints.
>
> "A second problem is the extent of claimant's insistence upon maintenance of his current residence may play upon the availability of employment. If the claimant's unemployment is one of choice of residence rather than physical incapacity, there may be a substantial bearing upon whether he is physically incapacitated from any regular suitable employment.
>
> "The third factor deemed incompletely heard is the part played in the claimant's over-reaction to somatic complaints coupled with medical reports reflecting moderate subjective low back disability.
>
> "The matter is therefore remanded to the Hearings Division for taking further evidence consistent with the foregoing discussion of the matter and for further order in the matter as may be affected by such further evidence."

The claimant sought a judicial review of the order of remand which was dismissed by the Circuit Court.

The further hearing was had and following such further hearing the claimant was again found to be permanently and totally disabled by the Hearing Officer. The employer again seeks Board review.

The Board is not unanimous in its conclusion with respect to the present state of the record with the exception of agreement that the further hearing did little to develop further evidence upon the factors of the case for which the matter was remanded.

The majority of the Board concludes that no good purpose would be served in a further remand. Taking the record in its entirety, the majority of the Board concurs with the Hearing Officer for the reasons set forth in both of the orders of the Hearing Officer and concludes and finds that the claimant, who apparently has been unable to work for over three years, is now permanently and totally disabled as a result of the accident as alleged.

Though some extra legal maneuvering has been involved, the Board concurs with the Hearing Officer that the fee allowed should not exceed the usual maximum heretofore allowed.

The order of the Hearing Officer is affirmed.

/s/ M. Keith Wilson
/s/ Wm. A. Callahan

Mr. Redman dissents as follows:

Mr. Redman dissents for the reason that the undeveloped factors set forth in the first order of remand remain basically undeveloped. The parties should not place the Board in the position of being required to conjecture or speculate about important phases of a claim. The record was insufficient when remanded. It remains insufficient following the second hearing. The matter should be again remanded for the same reasons it was first remanded.

/s/ James Redman.

WCB #69-1184 October 5, 1970

KATHY TACKETT, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability sustained by a 22 year old gas station attendant as the result of falling in a sitting position on some steps on November 24, 1968.

Pursuant to ORS 656.268, a determination issued finding the claimant to have no permanent disability attributable to the accident. The claimant requested a hearing asserting permanent disabilities in both legs, both arms, her head, neck and back. The Hearing Officer concluded claimant had no residual disability and affirmed the initial determination to that effect.

The claimant has a history of a prior industrial injury to her back in May of 1967. The Hearing Officer took administrative notice of the order in the prior proceedings, a copy of which is being incorporated in the transcript at this point. It is interesting to note that all of her many symptoms recited at the hearing in the previous claim went away within a month following that hearing.

The medical evidence of record strongly supports a conclusion that the claimant does not have disability attributable to the accident at issue.

The claimant's evidence is of course self-serving and must be given little weight in light of the impression of the Hearing Officer, who, after observing the claimant as a witness, concluded that he did not believe her.

The Board concludes and finds that the claimant does not have any permanent disability attributable to her accident of November 24, 1968.

The order of the Hearing Officer is affirmed.

WCB #70-441 October 5, 1970

GARTH WALSTEAD, Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 27 year old lead man who incurred severe injuries to the right hand when cut by a band saw on May 5, 1967.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 79 degrees against the applicable maximum for loss of a forearm or involvement of all five digits. Upon hearing, the award was increased to 113 degrees.

The State Accident Insurance Fund urges that the award should not have been made on the forearm, contending that the injury was limited to the hand. ORS 656.214(2)(b) refers to losses at or above the wrist joint. The evidence clearly indicates the saw injury involved the wrist and several tendons at the wrist. The evidence also reflects that further surgery at the wrist might produce some improvement, but such surgery was properly declined as a matter of choice. Further, the nature of the injury definitely impaired the function of all five digits.

The claimant's position as a supervisor is such that the injury has produced no loss of earnings. The fact that there is no loss of earnings does not preclude award for the actual physical disability. The residual disabilities include a comparison in compression strength of only 30 pounds in the injured hand as against 150 in the uninjured hand. There is no strength of pinch against any of the fingers. He is unable to pick up small objects or to hold a hammer secure enough to use. The claimant does not have a useless hand. To a limited degree, he can use it to write and even to handle some heavy objects. The Board, however, concludes that the evaluation of a 75% loss of function at or above the wrist or involving all digits is reasonable.

The order of the Hearing Officer is affirmed.

Counsel for the claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund pursuant to ORS 656.382 for services in connection with this review.

WCB #70-267 October 6, 1970

LeROY D. RICHARDSON, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 29 year old truck driver sustained a compensable low back injury while unloading sacks of grass seed at a California destination on November 10, 1969.

The employer did not have the payment of compensation to injured workmen assured as required by ORS 656.016. He was therefore a noncomplying employer under the Workmen's Compensation Law. Any accidental injury to a workman would be compensable as provided by ORS 656.054 with the employer liable to repay the costs of a claim.

In the instant case the employer denied the claimant received any injury as alleged and this denial was affirmed by the Hearing Officer.

The claimant had returned to Portland November 12th and quit his job at that time due to obtaining custody of his children. The claimant was hospitalized on about the 28th of November. A fellow driver corroborated the claimant's version of stepping in a hole but the claimant made no mention to his fellow employe of having hurt himself and gave no notice to his employer of the alleged incident until November 29, 1969.

There are several discrepancies in the claimant's versions of what happened. One version is that he stepped in a hole but otherwise he relates the injury occurred as he was straightening up. The claimant related several times to nurses and physicians upon hospitalization that the injury occurred "one week before." The claimant had not been employed by this employer for at least 17 days. The claimant takes concurrent positions that he hurt so bad he constantly complained to his co-worker but also asserts that he did not report to the employer because he did not realize he had hurt himself.

The claimant has failed to exhibit the candor required to support his version of a questionable claim.

The Board concurs with the Hearing Officer and concludes and finds that the claimant did not sustain a compensable accidental injury in the course of employment as alleged.

The order of the Hearing Officer is affirmed.

WCB #69-2283 October 6, 1970

ROBERT S. HATCH, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claimant was injured by accident arising out of and in course of his employment in a motor vehicle accident occurring September 25, 1969 when the claimant was returning to Portland, Oregon from a trip to Sparks, Nevada. The claimant is a corporate officer of Hatch, Inc. As such, the corporation had elected

pursuant to ORS 656.039 to have its officers insured, corporate officers otherwise being classified as non-subject workmen by ORS 656.027. The claimant is also a corporate officer of a separate corporation, Chicago Centre, Inc., which did not elect to have the claimant insured.

The claimant and his wife went to Sparks, Nevada where claimant's step-son, step-son's wife and new granddaughter of claimant's wife resides. On the return trip an auto wreck killed the claimant's wife and step-son and seriously injured the claimant.

The claimant contends that he performed several duties while in or near Sparks, Nevada in the interests of Hatch, Inc. and that he was bringing his step-son back to work for Hatch, Inc. which brought the trip to and from Nevada within the course of his employment. The State Accident Insurance Fund contends that the primary purpose of the trip was to visit the step-son and daughter as well as the new grandchild and to bring the step-son to Portland for medical diagnosis and treatment and that if any business was in fact transacted, it was secondary in purpose and the trip would not have been made but for the personal family purposes.

The Hearing Officer, giving due recognition to the dual purpose doctrine with respect to special travel, concluded that the primary purpose of the trip was for family purposes and would not have been made but for such family purpose. The dual purpose did not exist for purposes of making the trip one in the course of employment. The Hearing Officer upheld the denial.

Too many of the contentions of the claimant with regard to various aspects of the case are so tenuous and vague that they are basically discredited. The claimant contends that he was going to bring his step-son home to work as a valued employe of Hatch, Inc. The weight of the evidence reflects that the step-son had never been a valued employe and had in fact worked only briefly at nominal wages during a substantial period of residence with the claimant. The weight of the evidence also reflects that the purpose in bringing the step-son to Portland was for medical attention considered unavailable in the Nevada area.

The business aspects of the trip require one to believe that a trip in excess of 1,200 miles was made to talk to a man whose name the claimant does not know about a lumberyard, whose name he does not remember and to visit a non-existent gypsum or wallboard plant. The claimant obtained an advance of $100 from the company to make the trip, but the undisputed evidence is that this was a repayable loan and not a company expense.

The foregoing is not a complete resume of the facts. The failure to recite other circumstances involved is not to be considered as an omission. The Board has carefully considered all of the evidence and concludes that as an afterthought to the tragedy, various tenuous business associations were accumulated to attempt to reflect that the purpose of the trip was for business.

The Board concurs with the Hearing Officer who applied the principles adopted by the Court of Appeals in Rosencrantz v. Insurance Service Co., 90 Or Adv Sh 955, 467 P.2d 664(1970), with reference to when a trip involving some business aspects becomes sufficiently identified as a business trip to qualify an accident enroute as one arising out of and in the course of

employment. By the tests laid down in that decision, the weight of the evidence is heavily against the claim in this instance.

The order of the Hearing Officer denying the claim is affirmed.

WCB #70-467 October 9, 1970

VOLA SARFF, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claimant has sustained a compensable aggravation of disability. On July 2, 1966, the then 51 year old waitress sustained a fracture of the right wrist as a result of being struck by a swinging door in the restaurant in which she was employed.

The determination of the Closing and Evaluation Division of the Workmen's Compensation Board issued on May 9, 1967 pursuant to ORS 656.268, awarded the claimant permanent partial disability equal to 20% loss of use of the right forearm. No request for hearing having been filed, the determination order became final by operation of law.

The current proceeding was instituted on March 10, 1970 by the claimant's filing of a claim for increased compensation on account of aggravation. The claim was supported by one of a series of medical reports submitted by Dr. Rockey in connection with an intervening compensable injury involving the claimant's right wrist. On September 4, 1969, the claimant suffered a sprain to her right wrist while employed in a cannery.

At the time of the July 2, 1966 injury, the claimant had a pre-existing degenerative arthritic condition in her right wrist and to a lesser extent in her left wrist. The claim of aggravation is based upon the progressive worsening of the arthritic condition in her right wrist since the 1966 accidental injury.

At the commencement of the hearing, a motion to dismiss the aggravation claim was made by the State Accident Insurance Fund on the ground that the medical report of the physician supporting the claim was insufficient to entitle the claimant to a hearing. The Hearing Officer reserved ruling on the motion and proceeded to hear the matter on the merits. In his order the Hearing Officer concluded that the medical evidence of record was sufficient to meet the test entitling the claim to be heard laid down in Larson v. SCD, 251 Or 478 (1968). The Hearing Officer further concluded, however, that the medical evidence was insufficient to establish a compensable aggravation of the claimant's disability resulting from the 1966 injury on the merits.

The evidence in this matter consists solely of the medical reports received in evidence as exhibits. No testimony was adduced by or on behalf of the claimant nor in behalf of the employer.

In order to establish a compensable aggravation, it must appear from the evidence that the condition which resulted from the accidental injury has deteriorated and become worse following the closure of the original claim, and that such deterioration and worsening of the claimant's condition is

causally related to the accidental injury and is not the result of either subsequent accidents or natural progression.

The medical reports which comprise the entire evidence in this matter do not establish a clear or positive causal relationship between the 1966 accidental injury and the claimant's present arthritic condition. The evidence fails to establish that the compensable injury of July 2, 1966 was the cause, either in whole or in part, of the claimant's current arthritic difficulties.

The Board finds and concludes from its de novo review herein that the evidence of record in this matter, consisting solely of medical reports, no oral testimony having been offered or received on behalf of either party, fails to establish that the accidental injury of July 2, 1966 is a cause of the claimant's present arthritic problems.

The Board has reached the same conclusion as the Hearing Officer with respect to the insufficiency of the evidence to establish a compensable aggravation of the claimant's disability herein. The summation by the Hearing Officer is actually more favorable toward the claimant's position than is justified by the record. The record did not justify the matter going to hearing. Medical reports supporting a claim of aggravation must reflect a compensable aggravation. The report relied on in this case in fact ruled out relationship to the accident.

The order of the Hearing Officer is affirmed.

WCB #69-2174 October 9, 1970

JACK LUTZ, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability attributable to an ankle fracture sustained by a 42 year old truck driver whose truck driving activities were a summer interlude to his full time employment as a Junior High School counsellor and coach. Some issue was also raised with respect to whether the claimant was entitled to a further period of temporary partial disability.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent disability of 35% loss of the left foot. There is a medical report submitted by the claimant which sets a higher percentage. That medical report also recites that the claimant has "lost a lot in the revenue that comes from refereeing over the past year." This is a factor for administrative application. The claimant's teaching and coaching responsibilities have been expanded since the injury. The refereeing side income, at best, represents less than 5% of the claimant's total school salary. How much significance did this 5% play in the doctor's evaluation of "losing a lot"?

The facts present the reverse of the usual situation where a claimant by reason of age or lack of education can no longer earn commensurate with a background requiring manual labor. The claimant was injured as a truck driver but this has not diminished his income at his regular employment nor is there any showing that with his educational training, his earning capacity

is reduced due to inability to drive a truck. One employment opportunity is foreclosed but earning capacity is not determinable on a permanent basis by foreclosure from a single area of employment opportunity. The driver training in which the claimant now engages is a good example of remunerative side line work still available.

If there is a real issue of further temporary partial disability, any consideration of permanent injuries would be premature. There is no indication of a need for further medical care or of any substantial improvement following the termination of the temporary partial disability. The Board concludes that the temporary partial disability was properly terminated.

The Board also concurs with the Hearing Officer and concludes and finds that the claimant's disability does not exceed the award of 35% loss of a foot. As noted above, the claimant's chief occupational problem is in the area of coaching which he assumed following the injury. Despite problems, he has increased his income with this activity and is able to satisfactorily hold down the job. The injury is bothersome but does not reduce the claimant's earning capacity at the more arduous work thus assumed.

The order of the Hearing Officer is affirmed.

WCB #69-2035 October 9, 1970

SHARON J. JONES, Claimant.

The above entitled matter involves a procedural issue following an order of the Hearing Officer who found the claimant to have an occupational disease from exposure to epoxy resins.

The claimant did not want the matter considered by a Medical Board of Review, refused to appoint a member of the Medical Board of Review and asserted that the issues were for resolution by the Workmen's Compensation Board proper or by the Circuit Court.

The Workmen's Compensation Board thereupon abated proceedings. The claimant's appeal to the Circuit Court resulted in a ruling that the claimant did in fact have an occupational disease. Whether this was an issue of law to be resolved by the Court is questionable, but the effect was simply to affirm the Hearing Officer.

The situation thus reverts to the order of the Hearing Officer which allowed some temporary total disability and no permanent partial disability. Procedurally that issue would be reviewed by the Medical Board of Review but the claimant precluded that proceeding by refusing to place the claim in a posture for review by a Medical Board.

It thus appears that the Hearing Officer order has now become final for want of an appeal to the Medical Board of Review.

The motion of the employer to dismiss the proceedings is allowed and the order of the Hearing Officer as a matter of law is final.

WCB #69-1565 October 13, 1970

LORNA J. MAPLES, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of whether a 49 year old cosmetic saleswoman incurred a compensable injury when she moved a display case on June 23, 1969.

The claimant had a pre-existing diverticulosis which had been diagnosed in 1967. She denied ever having had a barium enema or ever having had any problems in this area of the intestinal tract before this incident (Tr. p 10). This is at odds with a medical history from Dr. Campbell under date of April 8, 1970 which records a history of a barium enema, some spasm over the sigmoid colon and minimal tenderness. The Hearing Officer, however, says the medical evidence reflects the claimant did not have any previous discomfort in the area.

It should be noted that the hearing was held January 12th and the Hearing Officer order was issued June 9th without benefit of reviewing the transcript of testimony which was not prepared until August 2nd. The Hearing Officer's recollection of claimant's testimony does not accurately portray the situation.

The claimant could have a pre-existing condition which was exacerbated by the incident at issue. The incident was not immediately reported to the employer on the explanation that "she thought it would go away." The reliability of the claimant as a historian becomes quite important with reference to a condition not normally associated with trauma. The claimant's history is that she had no problems in the area until the incident of June 23, 1969. It is clear from the medical records that claimant had a pre-existing problem for which she had been prescribed a diet. The diverticulitis could develop from a dietary indiscretion or without specific reason. There is no medical report from the operating physician of record but it does appear from secondary sources that there was an extensive area of inflammation.

The Board concludes that this is not a situation where reliance may be had upon a finding that diverticulitis following an incident was necessarily caused by it. There is no rupture or other condition reported which would account for pain associated with effort unless there was an inflammation existing when the claimant allegedly first noticed any pain.

The Board concludes and finds that the claimant's diverticulitis was neither caused nor compensably exacerbated by the alleged incident of moving the display cases.

The order of the Hearing Officer is reversed and the employer's denial of the claim is reinstated. Pursuant to ORS 656.313, no compensation paid pursuant to order of the Hearing Officer is repayable.

Counsel for claimant is authorized to collect a fee of not to exceed $125 from the claimant for services on review where compensation is disallowed.

WCB #69-1837 October 13, 1970

JOHN E. McCROREY, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 58 year old logger when he fell from a crawler tractor on February 28, 1969.

The claimant has a history of prior back difficulties including a compensation claim in 1962 which involved surgery and an award of 25% of the maximum then allowable for unscheduled injuries.

Pursuant to ORS 656.268, the claimant was determined to have a further disability of 10% of the present allowable maximum of 320 degrees. This award was increased to 20% by the Hearing Officer. On an accumulative basis the claimant has received unscheduled awards of 45% of the maximum. At his age the claimant has also experienced a degeneration of the spine consistent with the aging process.

The claimant asserts that he also has a disability in the right leg but there is no medical evidence relating the disability in the leg to the accident at issue. The medical evidence reflects a probability of a polyneuritis with a vitamin deficiency as a cause for the leg problem.

The claimant was actually self-employed and his insurance was as a sole proprietor under the provisions of ORS 656.128. It is difficult to apply a loss of earnings factor to self-employed persons engaged in a business. Profit or loss from the business may or may not be related to the proprietor's physical capacities.

The Board concurs with the Hearing Officer and finds that the claimant has sustained some additional measure of compensable disability from the accident at issue. There appears to be only a nominal increase in physical disability attributable to the accident. The Hearing Officer has given the claimant the benefit of a substantial doubt by increasing the award from 32 to 64 degrees.

The Legislature has imposed a higher standard of proof under ORS 656.128 with respect to claims by self-employed persons. There is little or no corroboration with respect to any medical substantiation of the claimant's contention that the accident at issue has precluded the claimant from ever again in engaging regularly in a gainful and suitable occupation. The advisability of avoiding heavy labors is attributable to his former accidents and deterioration.

The Board concludes and finds that the permanent disability attributable to this injury is only partially disabling and does not exceed the additional 64 degrees awarded for this injury.

The order of the Hearing Officer is affirmed.

WCB #68-1998 October 13, 1970

The Beneficiaries of
DWIGHT ALLEN, Deceased.

The above entitled matter involves the issue of whether a fatal myocardial infarction sustained by a 52 year old sawyer on August 4, 1968 was a compensable injury.

The claim was denied. A hearing was convened May 7, 1969 and continued to a further hearing on August 6, 1969. The Hearing Officer assigned to those hearings issued an order finding the infarction to have been a compensable injury. The employer sought a review but a substantial part of the reporter's records of the August 6, 1969 hearing had been accidentally destroyed by fire. A review could not be accomplished and the matter was remanded for further hearing. The first Hearing Officer had terminated his office and the matter was assigned upon remand to another Hearing Officer. Upon such further hearing, the claim was denied and the matter is now on review upon the request of the beneficiaries of the deceased workman.

The decedent had a history of heart difficulties with a myocardial infarction on April 4, 1962. In July of 1963, he was again hospitalized with myocardial ischemia. Similar symptoms in August of 1963 were diagnosed as a pneumonitis.

The incident at issue in this claim involved changing saw blades. There undoubtedly was enough effort expended to meet the minimal tests of legal causation. The issue is thus one of weighing the medical testimony. There is a difference of opinion between two rather eminent cardiologists. A Dr. White, whose specialty is skin diseases, also has opinions of record. The Hearing Officer discounted the opinion of Dr. White on the basis of a demonstrable empathy and bias. Dr. White's ambivalence in impeaching his own opinion of record as to the 1962 incident also substantially reduced the weight allowed to Dr. White's testimony in this case. Dr. White is also in the unenviable position of asserting that the ordinary work effort he approved for his patient caused the patient's death.

The opinion of the most renowned expert may of course lose much of its value when based upon an hypothesis in which several material "facts" referred to situations which normally occur every day with slabs jamming up. The evidence reflects that there was no such situation on the day at issue. Dr. Griswold was thus led into testifying that the effort of removing slabs to prevent a jamming of production was a material cause. The same was true of the saw changing episode which was quite smooth on the day in issue, but Dr. Griswold was questioned with reference to situations involving hangups in changing saws. There was also a discrepancy with regard to whether the claimant was exposed to unusual heat conditions.

The Hearing Officer was obviously more impressed with the explanations and opinions of Dr. Rogers as applied to the circumstances surrounding this claim. The Workmen's Compensation Board, with due deference to Dr. Griswold, also concludes that the medical testimony of Dr. Rogers as applied to the facts of this case is more persuasive and that the occurrence of the decedent's third coronary infarction on August 4, 1968 was not materially caused by his work.

The Board concurs with the Hearing Officer whose order is now on review and concludes and finds that the decedent did not sustain a compensable accidental injury. The order of the Hearing Officer is affirmed.

WCB #69-1087 October 13, 1970

BERTHA CARTER, Claimant.
Request for Review by Employer,
Cross Appeal by Claimant.

The above entitled matter involves issues of (1) the right to hearing following acceptance of an advance or lump sum payment of an award of permanent disability and if hearing is proper, whether (2) the claimant's condition is medically stationary; (3) if so, is there a further permanent disability and (4) does the employer's action in the matter warrant imposition of penalties.

The claimant, at age 30, injured her left shoulder in a plywood mill on March 10, 1967. Pursuant to ORS 656.268, a determination issued August 7, 1968 finding the claimant to have an unscheduled disability of 32 degrees. On September 26, 1968 the claimant requested and obtained approval for a lump sum payment from the insurer, but without approval of the Workmen's Compensation Board, of the remaining $716 then due. This is substantially less than the $1,320 the claimant could have been paid without any request and without approval of the Workmen's Compensation Board.

The instant proceedings were initiated by a request for hearing filed June 16, 1969. The claimant, but for the lump sum, was permitted one year from the August 7, 1968 order to request a hearing thereon. To the extent the request for hearing sought to impeach the issue of whether the claim was properly closed on August 7, 1968, the claimant appears to have waived her right to hearing. That waiver is limited to the issues resolved by the order on which the lump sum was obtained. There is nothing in the law which indicates that if the claimant's condition worsens he has thereby forfeited any right to further medical care, temporary total disability or possible increased award of permanent partial disability. ORS 656.245, for instance, requires the employer to provide required medical attention following an award. ORS 656.271 grants rights for further benefits on the basis of a claim of aggravation. During the course of the hearing, the theory of the claimant appears to have been established that the claim was one for aggravation. The Workmen's Compensation Board could have stayed the hearing pending receipt of supporting medical reports. Reports sufficient to establish a claim of aggravation were submitted to the employer prior to the request for hearing and introduced at the hearing. The fact that they were not submitted to the Workmen's Compensation Board as a prerequisite is now moot. The employer paid certain compensation for temporary total disability and certain medical bills with a reservation that it was not an admission of a compensable claim of aggravation.

The Board concludes and finds that the claimant sustained a compensable aggravation of her injuries and that as a result thereof she was entitled to compensation for temporary total disability at least from May 2 to September 29, 1969 and is also entitled to medical benefits required and obtained for such aggravation. The Hearing Officer, possibly by error only of semantics,

quotes Dr. Luce to the effect there had been an increase in disability. It is clear that Dr. Luce is of the opinion there is no increase in permanent disability. In the context that there was a temporary aggravation, Dr. Luce does verify an increase in temporary disability and the need for associated therapy. The Hearing Officer order is so construed. The hearing was closed as of March 19, 1970 and this order is necessarily restricted to the record made to that time. Further rights with respect to the claim are determinable pursuant to ORS 656.268 upon resubmission for further determination of disability.

To the extent that the claimant was in the posture of claiming aggravation and the employer was denying aggravation, the rules of the Board deem claims of aggravation to have the dignity of claims in the first instance. Allowance of attorney fees was proper.

The order of the Hearing Officer is modified only with respect to temporary total disability which is ordered paid for the period of May 2 to September 29, 1969. In other respects, including the allowance of the aggravation claim and attorney fees, the order of the Hearing Officer is affirmed.

Counsel for claimant, pursuant to ORS 656.382, is allowed the further fee of $250 payable by the employer for services on review.

WCB #69-1441 October 13, 1970

MAX E. LANGEHENNIG, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 34 year old mill worker sustained a compensable injury as alleged on February 13, 1969.

The accident is alleged to have occurred while the claimant was pulling a heavy timber on the green chain, but the record reflects the claimant was not working the green chain. The claimant first saw a doctor on February 28, 1969, some 10 days following the alleged accident, but gave no history of trauma. The claimant drew benefits under a union plan for non-work associated disabilities until June 10, 1969. It was when these benefits terminated that the claimant filed a claim for workmen's compensation. The evidence also reflects that the claimant had complained of similar type of pain and discomfort for a period of time.

The claimant now asserts that it is immaterial when the claimant incurred the injury as long as it was incurred in the course of employment. Accordingly, he asserts, all the inconsistencies should be disregarded and the employer should assume the burden of showing a non-industrial source of the complaints. Employers have been given the burden of proving that a delay in giving notice of injury has not prejudiced the employer. The workman, however, retains the burden of proving an accidental injury. A simple error of recollection of dates may not be material. The claimant is here relying on an alleged unwitnessed incident without corroboration from fellow workmen or any other source. His course of action has not been consistent with an accidental injury on the job. The claim was first made for an accident of March 25th. On October 15th the claimant changed the date of the alleged occurrence to February 18th. The

symptoms reported to the doctor on that date existed prior to that date according to other witnesses and no trauma was recited to the doctor.

The situation is somewhat confused and the Board, of course, is without the benefit of a personal observation of the witness. The Hearing Officer, who observed the witnesses, concluded that the claimant did not sustain the injury as alleged.

The Board concurs with the Hearing Officer and concludes and finds that the claimant did not sustain a compensable injury as alleged. Though the Hearing Officer did not pass upon the issue, it also appears that the employer was necessarily prejudiced in efforts to defend against such an uncertain claim. There was certainly no justification for the delay in giving notice.

The order of the Hearing Officer is affirmed.

WCB #69-1544 October 13, 1970

WINNARD V. WALRUFF, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue over the compensability for diagnosis and treatment of a cerebro vascular insufficiency which became symptomatic in late July of 1969. On March 28, 1969 the claimant had sustained a compensable accidental injury involving a ruptured spleen.

The State Accident Insurance Fund denied responsibility for the diagnosis and treatment of the cerebro vascular insufficiency for the reason it was not causally related to the injury to the spleen. This procedure of partial denial of unrelated conditions was approved in Melius v. Boise Cascade, 90 Or Adv Sh 731, 466 P.2d 624(1970) Or App.

The claimant was admitted to the hospital with complaints of acute headache, numbness of body members and face and difficulty in swallowing. The attending doctors diagnosed a possible cerebral vascular insufficiency and undertook a diagnostic angiogram which confirmed a cerebral insufficiency probably secondary to hypertensive encephalopathy.

One must assume that employers and insurers have a measure of risk if a concurrent condition is "masked" by an industrial injury and therefore goes untreated. Waibel v. SCD, 90 Or Adv Sh 1713, Or App., 471 P.2d 826. This contingency does not, however, make the employer liable for diagnosis and treatment of concurrent illnesses. It is only an indication that it may be prudent, on occasion, for employers to voluntarily assume some measure of diagnostic responsibility to avoid liability for the consequences of the unknown. Even management of an acute diabetic flareup, for instance, may be advisable to avoid serious consequences from an otherwise minor trauma.

Those situations are not reflected in the evidence in this case. There is some consideration of the role of hypertension which was a recognized problem of some twelve years standing for this claimant. Whether there was a cause and effect between the rupture of the spleen and the insufficiency of his cerebral

blood vessels is certainly an issue to be resolved by medical experts. The claimant exercised his right to object to the introduction of certain medical reports pursuant to ORS 656.310 with the result that the reports of four doctors are not available for review. The only medical evidence sumbitted by the claimant is a two page report from a Dr. Joel Seres. There is nothing in this July 29, 1969 report to indicate the claimant's hospitalization was in any way materially related to the preceding spleenectomy. There was clearly a failure of proof on the claimant's case.

The issue then moves to whether the testimony of Dr. Shlim and Dr. McAllister, including their cross examination, may have established claimant's case where his own affirmative efforts were deficient. A careful review of all of the medical testimony reflects that there was no material causal relation between the spleenectomy and the subsequent insufficiency in the cerebral circulation. Possibilities are presented and argued but the weight of the evidence is strongly against any causal relation. Neither is there any indication that the diagnosis was undertaken as part of the care or after care of the problem with the spleen. The only association was that the cerebral insufficiency developed four months after the accident. The fact that it developed after the accident is not enough to establish that it occurred because of the accident.

The Board concurs with the Hearing Officer and concludes and finds that the State Accident Insurance Fund properly denied responsibility for the hospitalization, diagnosis, medical care and temporary total disability associated with the development of cerebral insufficiency. The order of the Hearing Officer is affirmed.

WCB #70-427 October 13, 1970

CLIFFORD V. HUNT, Claimant.
Request for Review by Employer.

The above entitled matter involves the compensability of injuries sustained by a 34 year old steamfitter as the result of an automobile accident while driving a vehicle supplied by the employer and utilized by the workman in going to and from work. The claimant was not paid for his time in travel from home to work or for return travel to home. The vehicle used by the claimant was also used to transport certain impediments of employment to and from the jobsite.

The claim was upheld by the Hearing Officer as having arisen out of and in course of employment. The employer concedes the accident may have arisen out of employment but urges that it was not in course of employment.

Injuries received going and coming from work are normally not considered to be in the course of employment. To this broad exception are numerous exceptions within which such travel is deemed in the course of employment. Being paid for the time involved does bring many such cases back within the area of compensability. Transportation to the work site in a vehicle provided by the employer, where obviously contemplated by the contract of employment, is also an exception making most such travel time accidents compensable.

Though the Hearing Officer cited the historic Oregon decision of Lamm v. Silver Falls, 133 Or 468, he was reluctant to apply the principles upon the basis that the case was distinguishable in that the claimant riding a train was "being transported" as against the claimant "transporting himself." One would expect that if Mr. Lamm had been operating the train thereby "transporting himself," the claim would have been no less compensable. The fact that the claimant operated the truck in this instance is a distinction without a difference with respect to the legal principles involved. There was a split decision in King v. SIAC, 211 Or 40, particularly with reference to the factor of impedimenta of employment. Without speculating on where the line may be in which transportation of impedimenta is not adequate to create compensability, the Board concludes that it is an important factor in favor of finding compensability in this claim.

The Board concludes and finds that the claimant's accident arose out of and in course of employment. The order of the Hearing Officer ruling the claim to be compensable is affirmed.

Pursuant to ORS 656.386 and 656.382, counsel for claimant is allowed the further fee of $250 payable by the employer for services on review.

WCB #70-953 October 13, 1970

RAYMOND H. GORMAN, Claimant.
Request for Review by Claimant.

The above entitled matter involves the claim of a 60 year old laborer with reference to an accidental injury in a fall from a scaffold in July of 1967. The claim was closed April 2, 1968 with a determination that the claimant had permanent unscheduled disabilities of 15% of the workman, 48 degrees out of the allowable maximum of 320 degrees. The precise issue now is whether the claimant has sustained a compensable aggravation of those injuries.

The claimant asserts he experienced back pain while washing windows in early April of 1970. He was laid off from the job and a few days later reported to a Dr. E. P. Greenwood with complaints of right leg pain. Dr. Greenwood sought a referral for neurological consultation and the claimant was examined by Dr. Mark Melgard. It was Dr. Melgard's conclusion that the current complaints are secondary to an employment conflict and that physical examination does not support his complaints. By ORS 656.271 the Legislature has imposed a special standard of proof for claims of aggravation. That standard requires a corroboration by medical opinion evidence setting forth facts from which it appears that there is a reasonable basis for the claim. The medical evidence, as noted, reflects that the physical examination does not support the complaints.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has failed to adduce the required medical evidence to support his claim.

The order of the Hearing Officer is affirmed.

WCB #70-513 October 13, 1970

JAMES W. BALLWEBER, JR., Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 31 year old workman when he fell from a truck on November 8, 1968 and injured his back.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a residual disability for unscheduled injuries of 16 degrees against the applicable maximum of 320 degrees.

Upon hearing the Hearing Officer, despite reciting reason to question the claimant's veracity, found a physical impairment of 48 degrees and further found a loss of earning capacity which warranted an additional award of 56 degrees under the Ryf v. Hoffman factor of wage loss.

The medical evidence includes a report from Dr. Kunzman in June of 1969 in which he can find no organic pathology. There were no objective positive physical findings to support the complaints. Malingering is a term which is used quite cautiously, but a report from a clinical psychologist includes in his prognosis for successful restoration and rehabilitation a conclusion that it would seem to be poor "based upon the reasonable suspicion that the patient is malingering." The discharge committee of the Physical Rehabilitation Center maintained by the Workmen's Compensation Board concluded that the claimant has only minimal physical disability and that there are psychological factors unrelated to the injury which interfere with a return to work.

The Board concludes and finds that the claimant's impairment attributable to the accident is minimal and does not exceed the 16 degrees allowed by the original determination.

With such a minimal physical impairment, there is of course a serious doubt whether the injury has in fact made any real decrease in the claimant's earning capacity. The claimant was working as an apprentice. To arrive at an alleged permanent loss of earning capacity, figures were used which included the highest hourly rate to which the claimant would have advanced if he successfully continued as an apprentice and compared this to the beginning wage the claimant was to receive on a full time monthly wage basis. If loss of earnings is a factor it is inequitable to use a past hourly wage which may not be regular and compare this to a beginning wage for full time work without reference to whether there has in fact been a permanent loss.

As noted above, the claimant's motivations and minimal injury make any venture into permanent wage loss factors an exercise in conjecture and speculation.

The Board concludes that the record at the hearing does not justify disturbing the original determination of unscheduled disability of only 16 degrees. The order of the Hearing Officer is reversed and the determination order of 16 degrees disability is reinstated.

Pursuant to ORS 656.313, no compensation paid conforming to the order of the Hearing Officer is repayable on the basis of this reduction in award.

Counsel for claimant is allowed to collect a fee from the claimant of not to exceed $125 for services on a review instituted by the State Accident Insurance Fund resulting in a reduction in compensation.

WCB #69-1827 October 13, 1970

DALE McLAIN, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 37 year old logger claimant sustained a compensable injury on July 9, 1969 while clearing a fire trail. The claim is for low back injuries allegedly of such severity that claimant momentarily passed out. The alleged injury was not as the result of any trauma. It is claimed that he dropped a tool known as a pulaski and had the onset of pain as he bent over.

The claimant reported sick to the head loader and rode into town on a log truck. The day in question was the first day's work since July 3rd. The accident allegedly occurred at 8:30 or 9:00 in the morning shortly after starting to work. None of the persons involved in observing the claimant and getting him to town after the alleged incident were told anything by the claimant other than that he "was sick." The claim was not instituted until August 22, 1969 after the claimant had been first in the Hood River Hospital and then the Veterans Hospital.

The claimant did execute a report to a Dr. Wade on July 11th that he had been injured July 7th and had last worked July 9th. There is some dispute over whether the doctor's records are correct, but this does not explain the claimant's own discrepancy of two days. The doctor, furthermore, double checked his records and verified that the appointment was on the 11th as noted.

The record thus reflects an alleged accident which was unwitnessed at the beginning of a shift after not having worked for an intervening five days. Despite claimant to have been rendered unconscious by the pain with subsequent complaints of back or leg pain, the claimant only related that he "was sick." The claimant did have unrelated conditions which would explain an episode of sickness.

As noted by the Hearing Officer, a mere confusion as to the date of an injury might be immaterial. The claimant asserted he saw the doctor the day of the injury, but the weight of the evidence is that there was a two day delay. This makes the discrepancy material. There is no corroboration of the claimant's version of the course of events either by direct evidence or observation of the claimant which would tend to verify the claim. Corroboration is not required, but in light of the questionable factors the weight allowable to the claimant's story is substantially reduced.

The Hearing Officer who observed the witnesses weighed the evidence with the benefit of such observation. The Board, without the benefit of any such observation, can only conclude from the record that the claimant has failed to establish that he sustained a compensable injury as alleged.

The order of the Hearing Officer is affirmed.

WCB #69-2101 October 14, 1970

PAULINE MABE, Claimant.
Request for Review by Claimant.

The above entitled matter involves the claim of a 61 year old rubber plant worker with respect to disabilities occurring in both wrists. She had undergone operations on both wrists in 1959.

A claim was submitted February 19, 1969 for a new onset of difficulty two months prior to the claim. The claim apparently involved only medical care and was administratively closed by the Workmen's Compensation Board February 21, 1969 showing employer acceptance of the claim and with no processing pursuant to ORS 656.268. The claimant lost no time from work until July 22, 1969.

On November 12, 1969 the claimant sought a hearing by the Workmen's Compensation Board protesting "the denial of her claim by the insurance carrier." The carrier asserted the claim was not in a denied status. Apparently in oral argument not transcribed for the record, the employer's insurer raised some question concerning its liability since it ceased to be the insurer on June 30, 1969. As noted above, the claimant worked until July 22, 1969. This raises no issue as to the employer's responsibilities to the claimant. It only suggests that another insurer may be responsible for disabilities attributable to continuing exposure from July 1 through 22, 1969.

The condition from which the claimant suffers is a synovitis which is produced or exacerbated by long term repetitive movements. There is some overlapping administrative treatment of such claims. Some consider the claim as an occupational disease. Others recognize the succession of minimal traumas to consitute an accidental injury. No issue has been raised as to this point and the Board treats the matter as properly within the concept of accidental injury.

Upon hearing, the claimant was found to have a residual disability of 67 degrees for each forearm against the applicable maximum for each forearm of 150 degrees. The Griffith Rubber Mills first requested Board review but withdrew its request. The claimant also had requested review for a period of temporary total disability and consideration of award of permanent total disability.

The Board is concerned about several aspects of the case which do not appear to have been fully developed. There is no evidence concerning the claimant's separation from employment on July 22, 1969 or the extent of the employer's knowledge with respect to whether the separation was attributable to disability incurred in the employment. The evidence is also inadequate with respect to the claimant's earning capacity and re-employability.

The Board concludes the matter was incompletely heard. There appears to be a period of time commencing July 22, 1969 for which the claimant is entitled to payment of temporary total disability. The treatment of choice for the condition appears basically to be an avoidance of the heavy repetitive type stress which produces the problem.

The matter is remanded for further hearing, particularly with reference to the allowance of temporary total disability commencing July 22, 1969 and for consideration of the employer's responsibilities with respect to administration of the claim if the termination of employment was associated with disabilities attributable to the claim. Further evidence should also be adduced with respect to the claimant's employability and her earning capacity at her former work and at any suitable work she may now be able to regularly perform.

Upon conclusion of further hearing, the Hearing Officer shall issue such order as appears proper from the entire record.

The disability appears substantial enough to warrant continuance of payments on the award pending further hearing. Adjustment may be made for any period of time with respect to which compensation should be reclassified. The award is to be paid pending further hearing, particularly in view of the employer's withdrawal of its request for review.

As a remand, the Board does not deem this to be a final appealable order and the usual notice of appeal is not appended.

WCB #69-2296 October 14, 1970

LLOYD NORTON, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 57 year old sanderman as the result of a back strain incurred April 4, 1969.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent unscheduled disability of 32 degrees against the applicable maximum of 320 degrees. This determination was affirmed by the Hearing Officer.

The claimant was treated conservatively and still professes to obtain a little temporary relief from chiropractic ministrations. The treating doctor has been unable to find objective evidence to support the complaints of back pain. The claimant was examined by the Physical Rehabilitation Center facility maintained by the Workmen's Compensation Board. Upon discharge, the attending doctors concluded that the claimant had only a minimal disability.

The claimant is presently self-employed with a franchise business which involves loading and unloading cartons of a cleaning product from a van vehicle. Films are of record which show the claimant entering and leaving the van in a bent position while handling the cartons. The film appears to bear out the various medical reports that any disability is toward the minimal side.

The Board concurs with the Hearing Officer and concludes and finds that the permanent disability attributable to the accident at issue does not exceed the 32 degrees heretofore allowed on this claim.

WCB #69-1393 and
WCB #70-437 October 14, 1970

EUGENE S. MILLER, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability stemming from two accidental injuries incurred by the then 56 year old cemetery grounds keeper in 1967. Pursuant to ORS 656.268, a determination issued June 18, 1969 finding the claimant to have a permanent disability of 15% loss of the left leg. The left leg injury occurred April 7, 1967 when the claimant's left foot was caught by a mowing machine which dragged the claimant some distance before he became disengaged. The second injury on December 19, 1967 involved a fall on some ice with a dislocation of the right knee. The determination with respect to the right leg awarded a disability of 30 degrees for the right leg.

Upon hearing, the Hearing Officer affirmed the determination order of June 18, 1969 relating to the left leg with respect to the residuals from that accident. However, a further award was made for the left leg as a result of the December accident which increased the award for the left leg to 70 degrees. The Hearing Officer also increased the award for the right leg from 30 degrees to 90 degrees.

The claimant on review asserts he is permanently and totally disabled or, in the alternative, is entitled to an increase in the award of permanent partial disability.

The claimant is not in the class of laborers with minimal training who are restricted to manual or heavy duty labors. His education extended into the second year of college. Despite Dr. Schuler's evaluation of a 15 - 20% loss of function of the right knee, the Board concludes that the award of 90 degrees (60% loss of function) is a fair measure of disability attributable to the injury to that leg.

The Board, however, is unable to find a proper basis for the substantial increase in disability accorded the left leg. The medical evidence does not support a conclusion that the left leg incurred further injury or that the combined effect of the two injuries with respect to the left leg is any greater than the 15% loss of a leg awarded upon the original determination with respect to the left leg. The claimant has some problems with the left leg not attributable to either accident. It is inherent in these conclusions that the claimant has not toally lost both legs and is thus not permanently and totally disabled.

The Board finds itself in a rather anomalous position in reviewing this matter. The employer has not sought to have the award for the left leg reduced. The Board is required to review the matter de novo and to make its own evaluation. The Board would be disowning the broad authority vested in it by ORS 656.278 if it now finds the disability to be less than awarded but declares itself powerless to reduce an award the Board now finds excessive. The Board thus asserts the duty to increase an award despite review being instituted by the employer and to reduce an award despite review being instituted by the claimant.

The order of the Hearing Officer with respect to the determination of a 90 degree disability to the right leg is affirmed.

The order of the Hearing Officer with respect to the disability to the left leg is modified by reinstating the original determination of an award of 15% loss of function of the leg attributable to the accidents.

WCB #70-531 and
WCB #70-112 October 14, 1970

ARABELLA WESTGARTH, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether certain skin lesions sustained by a cannery worker allegedly caused by handling green beans. The claimant has abandoned attempts to associate the condition with an incident in 1967.

The claim was denied by the State Accident Insurance Fund and this denial was affirmed by the Hearing Officer.

Despite the aspects of the claim as an occupational disease, the claimant did not reject the order of the Hearing Officer as provided in ORS 656.808. The claimant has requested a Board review and on review the issue contended for by the claimant is that she has a compensable occupational disease. Ninety days has expired from the order of the Hearing Officer without a request for a Medical Board. The Workmen's Compensation Board is not the proper review body for an issue of occupational disease. As a matter of procedure, the Workmen's Compensation Board concludes that the order of the Hearing Officer is final. The aggravation claim based on the 1967 claim was based on an accidental injury but claimant has abandoned that claim in these proceedings.

Regardless of the procedural deficiency, the Workmen's Compensation Board has reviewed the record and herewith expresses its conclusions on the merits of the claim.

When the claimant developed skin lesions in 1969, she contacted a Dr. Buell who is an osteopath. The claimant relies on Dr. Buell's opinion that there was an occupational relationship. Dr. Buell, however, had referred the patient to a Dr. Wright, who is a dermatologist. Dr. Wright's conclusion is that there is no relationship. The condition was diagnosed as "neurotic excoriations." In simpler language, the lesions develop from scratching herself and one of the best clues to the non-industrial sensitivity is the fact that she developed the lesions in areas where there was no possibility of contact. Another doctor whose specialty is that of an allergist, conceded there was the possibility of a relationship, but his conclusion also is that there is no demonstrable contact sensitivity and thus no occupational disease.

There is one contention over an alleged error in admitting a medical report of a Dr. Miller. The Workmen's Compensation Board does not consider the report essential to the determination of the merits of the case. If it was error, it was immaterial.

The Board, to whatever extent it may have authority to pass upon the issue, concludes that the claimant's skin lesions are not compensably related to her employment. The greater weight must be accorded the dermatologist and allergist whose greater expertise was in effect conceded by the osteopath who referred the problem for the benefit of such expertise.

The order of the Hearing Officer is affirmed.

WCB #70-737 October 16, 1970

RALPH MOORE, Claimant.

The above entitled matter involves an issue of the extent of permanent disability with respect to a hearing loss sustained by a 41 year old "burner" who incurred a burn in his left ear from a piece of molten slag.

Pursuant to ORS 656.268, a determination issued finding the disability to be 7 degrees representing a loss of a fraction in excess of 10% loss of hearing.

A report from a Dr. Simons placed the hearing loss at 25.5% or 15.3 degrees upon the basis of the maximum of 60 degrees allowable for total loss of hearing in one ear.

As may be noted in the order of the Hearing Officer, the process of evaluation of hearing loss is highly technical and involves reference to a Guide to Evaluation by the American Medical Association and utilization of what are identified as ISO and ASA scales. The use of either scale should produce essentially the same result. However, the factors employed in the scales are such that each scale must be used independently and any interchange of factors utilizing both scales will produce an erroneous result.

The Hearing Officer concluded that Dr. Simons had erred in his computation of the formula and the Board, on review, also concludes that an error occurred. Without repretition, the error appears when arriving at the figure of 32, a subtraction of 15 was made which the evaluation guides indicate should have been 25. If the subtraction of 25 had been made, the hearing loss would approximate the award made by the initial determination.

The Hearing Officer properly declined to substitute his expertise for that of the doctor. However, when the Hearing Officer concluded the doctor might have made a mathematical error, the proper course, in retrospect, would have been an inquiry to the doctor.

The Board, in this highly technical area, does not deem itself authorized to implement the record by references to the various publications to support what it feels may have been a mathematical error. The only solution to the problem is to remand the matter for clarification as not fully developed.

The matter is accordingly remanded to the Hearing Officer for further evidence from Dr. Simons with respect to the formula for arriving at the hearing loss. The Hearing Officer is authorized to take other evidence on the issue and to make such further order as the evidence shall warrant following further hearing.

WCB #70-761 October 16, 1970

FREDERICK F. BENNETT, Claimant.
Request for Review by Employer.

The above entitled matter basically involves an issue of whether the claimant's exacerbation of a low back injury on March 9, 1970 was compensable as an aggravation of an injury of December of 1968. The problem is complicated by the fact that the December, 1968 incident was preceded by industrial injuries in 1965 or 1966 and in January of 1968.

Regardless of whether the claimant's problems arising in March of 1970 were caused by a new accident or by an aggravation of the December, 1968 injury, the same employer is responsible. The fact that employers are permitted to and do change insurers creates issues as to which of two insurers must assume responsibility for the claim. Insurers, except for the State Accident Insurance Fund, are not denominated as parties. The Workmen's Compensation Board deems it essential to provide the initial forum for the resolution of issues as to the responsible carrier. On June 3, 1970 the Workmen's Compensation Board promulgated Administrative Order No. WCB 5-1970, copy of which is attached and by reference made a part hereof.

The claimant in this instance elected on the advice of his counsel to pursue the position that the claim was one of aggravation. The claim of aggravation was denied by the insurer of the employer with respect to the December, 1968 injury. No appearance appears to have been made by any insurer with respect to a March 9, 1970 injury. One area of conflict in the testimony arises from a medical report of a Dr. Pasquesi that the claimant recited he had slipped and wrenched his back at work on March 9, 1970. The claimant denied that he reported to Dr. Pasquesi that he had had an "accident" on March 9th. This testimony may or may not have conflicted with Dr. Pasquesi's history obtained from the patient. The claimant's counsel had placed the claimant in the position of asserting that whatever happened it was not an accident. It may be a matter of semantics. The claimant may well have slipped and wrenched his back but his assertion that he did not tell Dr. Pasquesi of a new "accident" may be consistent with his interpretation of the semantics. Claimant's counsel's brief indicates there was a lengthy correspondence with Dr. Pasquesi. This correspondence, under the circumstances, also may be material.

The situation is one in which further evidence should have been obtained from the claimant as to precisely what was said and further inquiry should have been made from Dr. Pasquesi with respect to the history obtained of the mechanics of the incident.

If a new accident occurred, the claimant should not be left in a procedural hiatus without the proper insurer of record.

Pursuant to ORS 656.295(5), the matter is remanded to the Hearing Officer for further evidence from the claimant and Dr. Pasquesi on the mechanics of the incident of March 9, 1970 and the history thereof recited to Dr. Pasquesi. Pursuant to the procedural rule WCB 5-1970, the other insurer of the employer should be notified in order that liability may be properly assessed if in fact a new compensable injury did occur. The employer and its insurer,

Employers Mutual of Wausau, are to continue payments of compensation payable, under the order of the Hearing Officer. The Hearing Officer or the Board may order another insurer to assume responsibility and to reimburse Employers Mutual if in fact the responsibility is that of another insurer.

The employer also urges that there can be no aggravation claim without a first order of disability on the theory that zero disability cannot be made worse. This was the rule at one time under the OCLA 102-1771 in Lindeman v. SIAC, 183 Or 245. The Lindeman decision was based in part upon the prior case of Gerber v. SIAC, 164 Or 353. These cases substantially relied on the proposition that medical care was not compensation. The 1965 Act ORS 656.002(7) defines compensation to include all benefits including medical services. Futhermore ORS 656.271(2) as now written provides for aggravation claims within five years of the order allowing the claim if there has been no award of compensation. The technical objection by the employer is not well taken.

The matter is remanded to the Hearing Officer for further proceedings consistent with this order. Counsel for claimant is allowed the further fee of $250 payable by the employer. No reduction in compensation is involved and the employer and its insurer have necessitated claimant's further retention of counsel with respect to an issue which is basically immaterial to the employer's basic responsibility to the claimant regardless of which insurer is responsible.

WCB #69-1684 and
WCB #69-1583 October 16, 1970

WILLIAM SCHWABAUER, Claimant.

The above entitled matter at this point basically involves a procedural issue following a hearing which encompassed two separate accidents. The first accident occurred to the right knee December 21, 1967. Compensation for some temporary total disability was allowed but there was no award of permanent partial disability. The second injury of June 7, 1968 also involved the right knee and was closed without allowance of any permanent partial disability. The claimant, as the result of an injury in 1953 had been previously awarded compensation for the loss of use of 50% of the leg. The claimant asserted he had some back difficulties attributable to the recent injuries. This was specially denied by the State Accident Insurance Fund and the Hearing Officer upheld the denial of back complaints and also affirmed the determination that the claimant had no additional permanent partial disability attributable to either the 1967 or 1968 knee injuries in light of the previous award.

The order of the Hearing Officer herein was entered and mailed on February 6, 1970. On March 7, 1970 the claimant addressed and mailed to the Workmen's Compensation Board a request for extension of appeal time since his attorney had withdrawn. This request was interpreted by the Workmen's Compensation Board as a request for Workmen's Compensation Board review. The claimant, however, failed to comply with the procedure requiring copies of the request for review to be served upon the other party.

The State Accident Insurance Fund moved to dismiss and the claimant obtained the services of counsel. The last communication received by the

Workmen's Compensation Board in the matter was June 15, 1970 when counsel requested that no disposition be made until such time as they have the full picture.

The Board now concludes that the motion of the State Accident Insurance Fund was well taken and that the record does not justify continuing the matter further as a pending matter on review.

The matter is accordingly dismissed and the order of the Hearing Officer as a matter of law is declared final.

WCB #69-2037 October 16, 1970

JACK S. CHOPARD, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 31 year old iron worker's helper who incurred a low back strain on February 21, 1969. Pursuant to ORS 656.268, a determination issued finding the claimant had a minimal residual unscheduled disability of 16 degrees out of the applicable maximum of 320 degrees. This award was affirmed by the Hearing Officer.

The claimant had been examined by numerous doctors. None of the doctors report any significant objective findings. When one relies upon subjective symptoms, the reliability of the claimant becomes quite important. The claimant's history of the "accident" ranges from his testimony, "I didn't realize I was hurt until that night," (Tr 11) to a history to the Physical Rehabilitation Center of the Workmen's Compensation Board (Def Exhibit 14-1) that his "feet slipped out from under him and he fell to his buttocks and struck the left side of his head. He states that he was knocked unconscious for approximately ten minutes." To an examining psychologist (Def Exhibit 9-2), the claimant related a history of being struck by a piece of steel falling from an overhead crane.

There are numerous discrepancies in the claimant's stories with respect to past work experience such as having served two hitches in the Marines where apparently his military exposure was limited period with the National Guard. These discrepancies, of themselves, would have no bearing on the issue. They reflect a certain tendency to brag or exaggerate. When the exaggeration enters areas such as telling the psychologist that several doctors refused to operate for fear of causing paralysis, the story telling becomes material.

The employer's evidence includes an excellent film which clearly demonstrates that the claimant was able for an extended period of time to engage painlessly in almost every maneuver to which a back could be subjected. The film is clear proof that a back brace was not worn during activity, that the claimant could bend over rigidly without evidence of "dizziness" or fear of blackout and that he could easily bend to touch the ground without difficulty.

The claimant, on review, asserts that the film depicts only that the claimant on that day had no apparent difficulty and that the claimant could still have disablity in areas such as heavy lifting which was not depicted. The film, as noted by the Hearing Officer, justifies the conclusion that a well

tanned back is not consistent with constant use of a back brace. The film is far more reliable than the claimant's history of the accident and his subjective complaints.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has not incurred more than a minimal disability, if any, which certainly does not exceed the 16 degrees heretofore allowed.

The order of the Hearing Officer is affirmed.

WCB #70-441 October 16, 1970

GARTH WALSTEAD, Claimant.

The above entitled matter was the subject of an order of the Board on review on October 5, 1970 affirming the order of the Hearing Officer.

The claimant's injury involved the right hand and wrist. The Hearing Officer order had erroneously recited award for the left forearm. The sole purpose of this amended order is to correct the record with respect to the Hearing Officer order and confirm the fact that the injured member for which award was made was for the right hand and wrist evaluated on the basis of a forearm.

WCB #70-273 October 20, 1970

MARION B. WEBB, Claimant.
Request for Review by Employer.

The above entitled matter involves the legal issue of whether the claimant's care and custody of three grandchildren was such that the claimant stood in loco parentis to his grandchildren so as to qualify them as children.

The claimant was injured May 11, 1967 and is presently drawing benefits as permanently and totally disabled. At the time of his injury the claimant was caring for three grandchildren and did so until August 7, 1967. There was a hiatus until February 2, 1969 at which time the claimant and his wife were given legal custody of the grandchildren by order of the juvenile court. An auxiliary issue is whether this hiatus in custody precludes establishment of the three grandchildren as children by virtue of loco parentis. It seems clear that if the children were not in loco parentis on May 11, 1967, they would not qualify for the additional benefits even if they were in loco parentis at all times since May 12, 1967.

The parties have been unable to provide the Board with substantial case citation on the issue of what constitutes loco parentis. It is apparently another of the "accordian" terms which is subject to substantial expansion and contraction. Under the circumstances the more liberal construction should be afforded. The Board concurs with the Hearing Officer and concludes and finds that the claimant qualifies as in loco parentis to the three children and that the hiatus in the relationship does not destroy the right to re-establishment of the right to the compensation.

The order of the Hearing Officer is affirmed.

The Board notes certain definitions and changes in the law. At the time of this injury a claimant who was permanently and totally injured receives additional benefits for "children." The term "dependent" is defined to include grandchildren supported in whole or in part. "Dependent" however, is defined only with reference to members of a family of a workman who is fatally injured. If the claimant had been killed, there is a likelihood that their definition as dependents would preclude being accepted as children. The provisions of ORS 656.206 as to permanent total disability were amended in 1969 to eliminate family members as such and to base additional compensation for "dependents." The definition of "dependent" remaining in the law cannot be applied since it is restricted to fatal claims. The present state of the permanent total disability statute would appear to allow additional compensation upon a general interpretation of the term "dependent" without regard to family association of loco parentis. This cannot be applied retroactively but is noted to show that a current injury would no longer involve the issue here joined.

WCB #70-1720 October 20, 1970

JOSEPH SMALL, Claimant.
Request for Review by Claimant.

The above entitled matter involves the procedural question of whether the claimant may obtain a hearing or appeal with respect to a determination awarding disability pursuant to ORS 656.268 after the claimant has applied for, obtained Workmen's Compensation Board approval of and received advanced paymen of the award of compensation.

ORS 656.230(2) permits the claimant to obtain an amount of not to exceed one half of the outstanding value of the award. ORS 656.304 provides that any such lump sum obtained upon the claimant's application constitutes a waiver of the right to appeal.

The Hearing Officer dismissed the request for hearing and claimant has sought Board review. Inquiry directed to claimant's counsel on September 21, 1970 has brought no response with respect to a request for the legal theory upon which claimant might contend the statute does not apply.

It appears to the Board that under the plain words of the statute, the claimant had an award, that he applied for and received an advanced lump sum payment on that award and he is now precluded by waiver from a hearing on the adequacy of that award with respect to his condition as of the time of making the determination of disability.

WCB #70-591 October 20, 1970

FRANKLIN D. INGLES, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the claimant has sustained a compensable permanent disability as the result of a fracture to the septum incurred by a 36 year old foundry worker on March 19, 1969.

Pursuant to ORS 656.268, a determination issued finding the claimant to have no residual permanent disability. This determination was affirmed by the Hearing Officer.

There does appear to be some deficiency in the attempt to surgically regain the full structure of the septum. The evidence strongly supports a conclusion that the claimant had a long-standing chronic problem with a deviated septum. The surgery performed was to correct the long-standing chronic problem which included inflammatory processes in the sinuses. The issue is not whether the claimant lacks something of complete physical restoration. The issue is whether the claimant has sustained a permanent injury due to the accident which affects his earning capacity.

The claimant asserts that in the past year headaches have precluded work for four days. There is no medical substantiation that the claimant's headaches are causally related to the accident or, if so, that they are of sufficient severity to preclude work nor, if this be true, that they represent a permanent condition related to the accident. The claimant also asserts some annoyance with his breathing, but again there is neither proof of an interference with work capabilities or of permanence from conditions related to the injury.

The Board concurs with the Hearing Officer and concludes and finds that the claimant has sustained no permanent disabling injury as the result of the accident.

The order of the Hearing Officer is affirmed.

WCB #70-13 October 21, 1970

JENE CULVER, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of whether the claimant should have further restorative medical care or in the alternative whether he is partially or totally disabled as the result of a low back problem stemming from bending over to pick up some discarded paper. The incident occurred April 25, 1967. The claimant was employed as a maintenance and custodial worker though he is otherwise identified as a journeyman plasterer.

Pursuant to ORS 656.268, a determination issued finding the claimant's condition to be medically stationary with a residual disability of 38 degrees against the applicable maximum of 192 degrees. This determination was affirmed by the Hearing Officer.

It appears from the record that the medical evidence negates any indication for further medical care. The medical evidence also strongly supports a conclusion that there is a very minimal physical residual from the incident. The question then becomes one of whether the claimant's psychopathology is compensably related to the accident at issue.

There is no question concerning the existence of psychopathology. The evidence, however, strongly supports the conclusion that the claimant's problems in this area are a chronic longstanding situation. The effect of the relatively insignificant trauma upon which this claim is based plays a small part in the total picture of the psychopathology. The claimant's motivation towards re-establishing himself as a useful member of society is poor and somewhat contigent upon the maintenance of litigious controversy following a minor accident. The claimant is possessed of both physical and mental resources which offer little impediment to a return to employment in many areas. The issue is whether his strong desire to be compensated for the accident and to urge a substantial disability in itself constitutes a substantial compensable permanent disability.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's disability attributable to the accident at issue is medically stationary and is only partially disabling to an extent not to exceed the 38 degrees heretofore allowed in proceedings on this claim. The order of the Hearing Officer is affirmed.

File No. 24-66-044-2 October 21, 1970

GLEN A. BAKER, Claimant.

The above entitled matter involves a claim of a sprained back filed in connection with dumping sacks of flour in a glue machine in a plywood plant on June 15, 1966. No loss of time was involved until March 14, 1968. The employer reopened the claim and paid temporary total disability benefits at least through May 28, 1970.

The parties have now submitted a petition pursuant to ORS 656.289(4) requesting approval of the Workmen's Compensation Board to a proposed settlement of the claim on the basis that there is a bona fide dispute over compensability of the claim. A copy of the petition is attached and by reference made a part of this order. The parties have supplemented the record by medical reports reflecting and the Board concludes that a bona fide issue exists as to the compensability of the claim.

The proposed settlement and compromise is hereby approved and consummation thereof shall act as a full and final settlement of all claims and rights the claimant may have against the employer Georgia Pacific Corporation, precluding any further claim for aggravation pursuant to ORS 656.271 or for own motion jurisdiction by the Workmen's Compensation Board pursuant to ORS 656.278.

WCB #69-2238 October 23, 1970

FRANK R. EDERRA, 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 incurred by a 35 year old truck driver as the result of falling from his truck on October 3, 1968.

Pursuant to ORS 656.268, a determination issued finding the claimant to have no residual permanent partial disability. Upon hearing, the Hearing Officer found the claimant to have unscheduled disabilities evaluated at 137.6 degrees out of the maximum allowable of 320 degrees. Of this 137.6 degrees the Hearing Officer found physical impairment of 32 degrees and awarded the remaining 105.6 degrees for a permanent loss of earning capacity. The latter factor was based on principles enunciated by Ryf v. Hoffman in which the majority of the Supreme Court ruled that loss of earning capacity was a factor in evaluating disability. It also appears that it is a plus factor. If there is no loss of earning capacity, the physical loss is compensated none the less. A loss of earning capacity becomes an additive factor. Just as uniformity requires physical losses be assessed upon a scale from zero to 100%, the loss of earning capacity factor, to be equitably applied, must follow some scale which awards greater compensation for the greater apparent loss of earning capacity.

The Board has made it clear that earnings factors are not determinable solely by hourly rates of pay on a before and after basis. There must be an indication that on a relative basis the prognosis for future earnings reflects a lowered earning capacity due to the injuries. In this case it is clear that the claimant can no longer drive trucks. It also appears that the work which is within the claimant's reduced physical capacities is definitely less remunerative and will remain so.

The employer's brief assails the Board's approach to the problem as arbitrary and unconstitutional. Any fixed system of compensation by being fixed becomes the object of being classified as arbitrary. Nothing historically could be more arbitrary than the example of limiting the violinist to the fixed sum allowed for a finger. The Board policy, as noted, is one of implementing the principles of the Ryf decision to recognize that the greater the loss of earning capacity, the greater the award of disability. The employer is in error in asserting that the policy does not consider the factor of permanence. The evidence in this case warrants the conclusion of permanence in the loss of earning capacity.

The Board concurs with the Hearing Officer and concludes and finds that the disability was properly evaluated as noted at 137.6 degrees.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.382, counsel for claimant is allowed the fee of $250 payable by the employer for services rendered claimant on review.

WCB #69-2112 October 23, 1970

FRED H. FREY, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues with respect to alleged permanent disability of the left arm, left shoulder, right leg and low back from an accidental injury incurred by the 64 year old journeyman (foreman) plumber when he fell from a scaffold on December 20, 1968. He landed on his heels and thence backwards onto his right buttock and back.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent disability for a partial loss of function of the left arm of 19 degrees. Upon hearing the award with respect to the arm was affirmed. The Hearing Officer, however, found that the claimant also had residual unscheduled permanent partial disability in the low back and right leg which he evaluated at and awarded 20 degrees out of the maximum of 320 degrees for the low back and 15 degrees for the right leg.

Upon review the claimant asserts the various awards are too low and that an award should have been made with respect to the left shoulder, citing Audas v. Galaxie. The Hearing Officer concluded there was no injury to the shoulder proper and the Board concurs in this finding. There is mention of the shoulder but an analysis of the evidence reflects that the injury is to tendons not part of the shoulder structure. Any injury to an extremity adversely affects the utility of the greater portions of the extremity. Here the injury was restricted to anatomical portions of the arm. Even if the shoulder is injured, there remains a 320 degree maximum applicable to the functioning of a workman as a whole man. The function of a shoulder is basically limited to the extremity it serves. Some correlation should be retained with respect to function of the affected area. Loss of an arm by separation entitles one to 192 degrees. The shoulder normally serving that arm retains little function in absence of the arm, but this does not warrant adding a portion of the 320 degrees allocable to unscheduled injuries. As noted, the Board concurs with the Hearing Officer and concludes and finds that the arm disability does not exceed the 19 degrees awarded.

The Board also concludes that there is a firm basis for the award by the Hearing Officer with respect to the right leg and concludes that the claimant was properly awarded 15 degrees for the leg injury.

The Board does have a problem, however, with respect to the award of unscheduled injury for the low back. Though the claimant initiated the review, the Board deems it the duty of the Board to evaluate disability on a de novo basis. The Board has continuing jurisdiction over all claims. If an employer requests review asserting an evaluation is too high, the Board is not powerless to increase the award if it finds the evaluation to be too low. The same applies to claimants' appeals if one seeking an increase has already been the beneficiary of an excessive award. In this claim the Board concludes and finds that the evidence does not justify finding that the claimant has a permanent low back injury attributable to this accident. The claimant had a long-standing degenerative condition but the evidence fails to reflect that this was permanently worsened by the accident.

The order of the Hearing Officer is affirmed as to awards of 19 degrees for the left arm and 15 degrees for the right leg. The order of the Hearing Officer is modified, however, by setting aside the award for unscheduled disability with respect to the low back.

WCB #69-846 October 23, 1970

JAMES F. STUDER, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 48 year old heavy equipment operator who sustained a low back injury on August 14, 1968 which precludes further employment as a heavy equipment operator.

Pursuant to ORS 656.268, a determination issued finding the claimant to have no permanent disability relatable to this injury. The claimant, with respect to one of previous incidents to his back, had heretofore been awarded 15% of the maximum allowable for unscheduled injuries. Upon hearing, an award was made in this claim finding the claimant to have additional low back disability and an award was made of a further 15% of the maximum allowable for unscheduled disabilities.

The claimant was given training in automotive tune up work, but has yet to obtain employment in that field. His location at an area such as Alsea does not offer the range of opportunity for employment he could find elsewhere.

The claimant has at least average intellectual resources. He is not crippled by any connotation of the term. He is precluded from the heavier forms of manual labor. As reported in psychological evaluations, the claimant stresses generalized aches and pains. Certainly there are countless workmen whose disability is far greater who are applying their remaining physical resources to regular suitable work. There appears to be some element of poor motivation in this connection.

The Board concurs with the Hearing Officer and concludes and finds that some permanent disability is attributable to the accident of August 14, 1968 but the permanent residuals of that accident do not exceed the additional award of 48 degrees made for that accident.

The order of the Hearing Officer is affirmed.

WCB #70-198 October 23, 1970

ROYAL P. MacDONALD, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the 42 year old taxi driver sustained any permanent compensable disability as the result of a low back strain incurred April 25, 1968 when he was lifting a package from the trunk of the taxi.

The determination issued pursuant to ORS 656.268 found there to be no residual permanent disability attributable to that incident. That determination was affirmed by the Hearing Officer.

The record reflects that the claimant, prior to the April 25, 1968 incident, was suffering from a severe rheumatoid spondylitis. It appears from the medical evidence that the trunk incident exacerbated the underlying condition. However, taken in its entirety, the medical evidence supports a conclusion that the aggravation was slight. The medical evidence also supports a conclusion that the claimant had a long-standing progressive disease process which was worsening and the prognosis was for continued deterioration. There is no indication that the effect of the trunk incident was more than temporary. Many low back injuries involve trauma which requires the specialized services of an orthopedist. In this instance there were merely some soft tissue injuries, but the claimant's basic problem was and is a disease process in the field of medicine of primary concern to the internist. The claimant argues with the expert medical opinion of Dr. Rosenbaum that the effects of the accident were temporary. That argument does not supply any medical expertise to counter the conclusions of the able doctor in the case at hand. A trauma could compensably permanently aggravate underlying disease processes. If the condition had been quiescent at the time, a more difficult problem might have been posed. The underlying disease process, however, was active and being treated when the trunk incident occurred. The medical expert best qualified with respect to the problem at hand is authority for finding the accident to have been only a temporary factor.

The Board concurs with the Hearing Officer and concludes and finds that the claimant sustained no permanent disability as a result of the strain experienced in lifting the box from the taxi trunk.

The order of the Hearing Officer is affirmed.

WCB #70-2 October 26, 1970

GEORGE COSTA, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 42 year old logger as the result of an injury to the left knee incurred March 7, 1968. The claimant had a prior compensable injury to the same knee for which he had been awarded compensation of 5.5 degrees.

The determination issued pursuant to ORS 656.268 on this claim found the claimant to have an additional 30 degrees of disability. The Hearing Officer increased the award to 60 degrees. Giving effect to ORS 656.222, the claimant has received awards of 65.5 degrees for the combined effect of compensable injuries. The employer sought this review urging that the award is excessive.

The initial determination in the administration of this claim was made prior to the decisions by the Court of Appeals in the Audas and Trent cases, which adopted the concept of loss of earnings as an important factor in evaluating disabilities. The award must be limited to the member of the body involved (in this instance the leg). Within the maximum allowable for the leg, the Appeals Court decisions require consideration of loss of earnings as well as simple physical impairment in arriving at disability.

The claimant was formerly a faller and bucker. From a medical standpoint, it would be advisable for the claimant to give up logging. With a fifth grade educational background, he has returned to the only occupation for which he is basically trained. He is thus still logging, but no longer bucks the downed logs which he is still able to fall. The evidence indicates that his productivity at the restricted level has reduced his earning capacity a fraction in excess of 25%. The initial evaluation pursuant to ORS 656.268 is accepted by the Workmen's Compensation Board as a fair evaluation of the additional physical impairment attributable to this accident. The Board, however, concludes that the apparent loss of 25% of earning capacity as applied to the member affected warrants an award, in addition to the 30 degrees for physical impairment, of an additional 38 degrees.

The Board concludes and finds that the combined effect of the two injuries warrants an award of 73.5 degrees of which 68 degrees is attributable to the injury at issue.

Pursuant to ORS 656.382 counsel for claimant is allowed the fee of $250 for services on review payable by the employer. Counsel for claimant also is to receive 25% of the increase in compensation awarded claimant and payable therefrom as paid.

WCB #69-2286 October 26, 1970

WARREN R. POPE, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether the surgical removal of a tumor from the claimant's right arm was compensably related to an incident of March 27, 1969 when the claimant bumped his right elbow on a door frame.

A claim for the bump to the elbow was allowed. The claimant entered the hospital and had the tumor excised on April 10, 1969. The tumor was a slow growing capsulated type which was necessarily pre-existent to the bump on the elbow. The tumor was located two or three inches below the elbow. The growth of the tumor was such that it had produced a depression in the ulnar nerve.

There was no external evidence of any trauma to the site such as a bruising or contusion of the skin or subcutaneous tissues. The issue is thus whether the blow to the elbow was a material factor in the need for surgery to remove the pre-existing tumor.

The treating surgeon who removed the tumor and thus had the advantage of both external and internal observation of the pathology involved is of the opinion that there was no causal relationship between the bump on the elbow and the need to excise the tumor. The treating surgeon is positive in ruling out relationship of the need for surgery to the trauma described.

There is less positive evidence to the contrary from another doctor. The Board concurs with the Hearing Officer who concluded that Dr. Smith was in better position to resolve the medical problem than Dr. Swank. The medical report of Dr. Swank hypothesizes, for instance, that there might have been slight hemorrhages which disappeared in the short interval but somehow had a relationship. The reports of Dr. Smith, on the other hand, were supported by testimony which stood up well under the cross examination of able counsel.

The Board concludes and finds that there was no material causal relationship between the bump to the elbow and the operation a few days later to remove a slow growing tumor into which the ulnar nerve was embedded.

The order of the Hearing Officer is affirmed.

WCB #70-1074 October 26, 1970

SILAS MATTHEW, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of disability sustained by a 23 year old workman as the result of a lifting injury to his back incurred September 19, 1967. The claimant also tripped and fell on November 16, 1967.

Pursuant to ORS 656.268, the claimant was first determined on January 14, 1969 to have a residual permanent unscheduled disability of 19.2 degrees out of the applicable maximum of 192 degrees. The claim was reopened and the last determination again closing the claim issued May 22, 1970 finding no additional permanent partial disability to that awarded.

Upon hearing the Hearing Officer affirmed the determination. The Hearing Officer notes that the medical evidence is unanimous to a proposition that there is in fact no residual permanent disability attributable to the incidents on which the claim is based.

The claimant, through counsel, has now asked that his request for review be withdrawn and the matter be dismissed.

WCB #70-719E October 26, 1970

EVA DOWNING, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue with respect to the period of time to which the 62 year old food processer was entitled to compensation for temporary total disability as the result of a right shoulder injury incurred April 15, 1967. The symptoms apparently were relatively minor and no medical attention was sought until July 18, 1967. At that time a diagnosis was made of a deltoid bursitis due to trauma. After a period of conservative therapy, surgery was performed August 14, 1968 for resection of the acromion process, excision of the subacromio bursa and arthrotomy of the shoulder joint for exploration.

Pursuant to ORS 656.268, a determination issued finding temporary total disability payable to February 20, 1970. An award of 29 degrees was made for partial loss function of the right arm against the applicable maximum of 145 degrees. Upon hearing requested by the employer, the Hearing Officer found that the temporary total disability should have been terminated February 1, 1969.

The claimant did not return to work. The medical reports from several doctors recite a history from the claimant that she had retired. The claimant denies having related this to the doctors but the Hearing Officer, observing the witness, places no credibility in her denial.

The termination of temporary total disability essentially coincides with the termination of medical care. It is not precise. The claimant may be able to return to regular employment though still receiving some medical attention. The converse is also true that there may be a period of time following the latest medical care in which nature is completing the healing process. The latter will not ordinarily involve total disability. The claimant urges that since the doctor on releasing her to work contemplated some future improvement, she was entitled to temporary total disability compensation even though clearly classified as able to work. The claimant had a permanent disability. This disability precluded certain types of heavy labor. It was the permanent disability, not temporary total disability, that precluded certain types of work following February 1, 1969.

The Board concurs with the Hearing Officer and concludes and finds that the period of temporary total disability was terminable on February 1, 1969. The fact that claimant failed to return to work was not due to inability to work.

The order of the Hearing Officer is in all respects affirmed.

WCB #70-800 October 26, 1970

ELIZABETH M. LEDING, Claimant.

The above entitled matter involves the claim of a now 54 year old woman who sustained an accidental injury on August 5, 1965, the first day on which she had been employed after not working for at least eight years. Despite rather minimal objective symptoms, the claimant's claim was last closed by order of the Hearing Officer finding an unscheduled disability of 55% of the maximum allowable.

The claimant now seeks a hearing on a claim of aggravation. It was accompanied by a medical report from a Dr. Steinman under date of February 20, 1970. In light of the previous history, it was to be expected that if the claimant had permanent disabilities in 1968, she would still have complaints two years later. The real issue is not whether the claimant has complaints but whether there has been an exacerbation of the residuals of her industrial injury and more particularly whether the medical reports submitted reflect sufficient facts to warrant a conclusion that there are reasonable grounds to support a claim of aggravation. The medical reports strongly indicate that if there is a current problem it stems from difficulties arising from her family relationships.

The Board concurs with the Hearing Officer who dismissed the request for hearing that the request for hearing is not properly supported by medical evidence as required by ORS 656.271 and as that section of law has been interpreted by Larson v. SCD, 251 Or 478.

The order of the Hearing Officer is affirmed.

WCB #69-278 October 27, 1970

ESTELLE SMITH, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of the extent of permanent disability sustained by a 49 year old cook who sustained a low back strain when she slipped on March 16, 1968. Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 32 degrees out of the applicable maximum of 320 degrees for unscheduled disabilities. Upon hearing, the award was doubled to 64 degrees and the employer sought this review urging the award to be excessive.

One of the principle problems in evaluating disability is the fact that the claimant has a multitude of problems involving aches and pains throughout her body. Expert medical opinion reflects that most of these aches and pains are unrelated to the accidental injury at issue. Among the contributory problems claimant faces is an excessive weight of nearly 200 pounds.

The record reflects that the claimant's subjective complaints are substantially greater than the minimal objective findings of disability made by the examining doctors. The claimant's employment of some years was terminated, but the circumstances lead to a conclusion that physical complaints unrelated to the work injury were instrumental in this circumstance.

The record reflects that the claimant's subjective complaints are substantially greater than the minimal objective findings of disability made by the examining doctors. The claimant's employment of some years was terminated, but the circumstances lead to a conclusion that physical complaints unrelated to the work injury were instrumental in this circumstance.

The Board concludes and finds that it is difficult to disassociate non-compensable factors and that it is impossible to apply any factor of loss of earnings under the circumstances.

There is evidence of some residual low back difficulties which we now presume to be permanent with some impairment upon the claimant's work capacities.

Though the evidence would not warrant a greater award, the Board concludes and finds that the award by the Hearing Officer should be and is hereby affirmed.

Pursuant to ORS 656.283, counsel for claimant is allowed the further fee of $250 payable by the employer, the award of compensation not being reduced.

WCB #69-1670 October 27, 1970

LOUIS D. CUMMINGS, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 55 year old logger who injured his low back when struck by a swinging log on June 4, 1968.

Pursuant to ORS 656.268, a determination issued finding the claimant to have an additional residual unscheduled permanent disability attributable to this accident of 32 degrees out of the applicable maximum of 320 degrees. The claimant, with respect to a 1956 back injury, had previously been awarded 50% of the then applicable maximum unscheduled disability.

The Hearing Officer in the instant case increased the award to 30% for this claim which, combined with the former award, represents a combined factor of 80% of the maximum.

One of the major problems in evaluating disability in this claim is the fact that the claimant stands at five feet eleven and carries an excess of 260 pounds upon this frame. The claimant, from medical reports of record, values the excess weight he is carrying more than the reduction in disability he could achieve by a substantial reduction in weight. He has failed and refused to cooperate with medical recommendations in this respect. This failure becomes quite material in light of the fact that the excess weight imposes a 24 hour a day insult to his long-standing low back problem and makes any medical effort to improve the situation an exercise in futility. Dr. Seres, a neurologist, states that the claimant is frankly unwilling to accept either a weight loss or conditioning exercises. At this point, a substantial part of the disability is the sole responsibility of the claimant.

ORS 656.325(2) and (3) point out the obligation of a claimant to reduce his liability and the interim loss of compensation which may be assessed. Even without statutory authority, logic and reason require that the claimant not be compensated for disability attributable to his own conduct. The refusal to undergo major surgery may be reasonable. The refusal to undertake non-surgical removal of the disabling weight is clearly unreasonable.

Though this matter comes before the Board at the request of the claimant, the Board deems this a proper time to exercise its authority under ORS 656.325 (3) and 656.278. The Board concludes that the initial determination pursuant to ORS 656.268 was proper and that the additional disability attributable to the accident at issue does not exceed 32 degrees. The order of the Hearing Officer awarding an additional 64 degrees is set aside.

The Board remains concerned with the restoration of this claimant to the greatest extent possible as a self-sustaining individual. If and when the Board receives confirmation that this claimant has attained the major weight reduction recommended by the doctors, the Board will re-examine the issue of the extent of permanent disability. The Board, at the time the claimant has removed the self-imposed hindrance to re-employment, will extend every effort toward vocational rehabilitation from resources available to the Workmen's Compensation Board for that purpose.

The order of the Hearing Officer is modified to reduce the award from 96 to 32 degrees.

WCB #69-1388 October 27, 1970

LEWIS W. ROMANS, Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue of whether a spastic torticollis condition was compensably related to an incident of December 8, 1966 when the claimant was assisting in moving a table filled with clothes and experienced a "pop" in his neck on turning his head suddenly to the left. A claim was made on January 4, 1967 and was first closed pursuant to ORS 656.268 on April 5, 1967 without award of permanent partial disability and allowing temporary total disability to January 3, 1967.

The claim was subsequently reopened and in March of 1969 the claimant was enrolled at the Physical Rehabilitation Center facility of the Workmen's Compensation Board. The claimant had undergone surgery in May of 1968 known as a rhizotomy of the first, second and third cervical vertebrae and rhizetomy and sectioning of the spinal nerve to the sternocleidomastoid on the left. On June 11, 1969 a further determination issued finding the claimant to have unscheduled disability equal to 20% loss of an arm by separation and 10% loss of use of the left arm.

The request for hearing in this matter was made by the claimant on July 28, 1969, apparently addressed to the determination of June 11, 1969. On August 24, 1969, the State Accident Insurance Fund received a medical report from a Dr. Paxton with an opinion that the accident did not cause or accentuate the spastic torticollis. The State Accident Insurance Fund thereupon denied

responsibility for that condition. The State Accident Insurance Fund made only two payments on the determination order but took no steps to legally controvert the order.

Apparently spastic torticollis is one of the problem areas in medicine which is of questionable origin. Apparently only a small proportion of those suffer from the condition as the result of trauma. In this case the treating doctor, Dr. Buck, is a general practitioner whose opinion is that in this instance the condition arose from the incident alleged. Dr. Paxton, as noted, is of the opinion the incident neither caused nor accentuated his present difficulty. Dr. Paxton's qualifications as a professor and Chairman of the Division of Neurosurgery of the University of Oregon Medical School are impressive.

The Board, on review, concludes that the issue in a case involving such a large factor of etiology unknown to the medical experts cannot be resolved simply be weighing the expertise of the various doctors whose opinions are of record. The Hearing Officer placed reliance on the long-standing association of Dr. Buck in treatment of this claimant before and after the incident. Dr. Buck also made a special study of the literature available with respect to the problem at hand.

Taking the record in its entirety, the Board also concludes and finds that the claimant's spastic torticollis was triggered or precipitated by the accident as alleged.

The Board also concurs with the Hearing Officer finding that the State Accident Insurance Fund ureasonably failed to pay compensation pursuant to an order of determination and should pay additional compensation equal to 25% of the compensation unpaid pursuant to the order in keeping with ORS 656.262, together with attorney fees.

The order of the Hearing Officer is affirmed in all respects.

Pursuant to ORS 656.382, counsel for claimant is allowed the further fee of $250 payable by the State Accident Insurance Fund for services in connection with the review.

WCB #70-1046 October 27, 1970

EUAL WHITEMAN, Claimant.

The above entitled matter involves the claim of a 46 year old barn man who sustained a puncture wound of the left lower leg inflicted by a pitchfork on September 17, 1969.

The claim was administratively closed as a medical only claim. Upon hearing, the Hearing Officer also found that the claimant had no loss of time or permanent partial disability associated with the injury.

The Hearing Officer order was issued and mailed on August 14, 1970. On August 19, 1970, the claimant addressed a letter to and received by the Workmen's Compensation Board on August 21, 1970. Claimant stated, "I want to appeal my hearing. My attorneys withdrew there service." No copies of the request for review were served on the other party as required by ORS 656.295 and as set forth in the notice of appeal rights appended to the order sought to be reviewed.

The employer has duly moved that the matter be dismissed. On September 22, 1970 the Board advised the claimant of the legal problem based upon the alleged failure to notify the employer. The claimant obtained new counsel but the time within which proper service could have been made has long expired.

It appears to the Board that the motion to dismiss is well taken based upon the claimant's failure to timely serve the employer with copy of the request for review. The order of the Hearing Officer is declared final by operation of law.

The matter is therefore hereby dismissed.

WCB #70-309 October 27, 1970

The Beneficiaries of
CARL S. PETERS, Deceased.
Request for Review by Employer.

The above entitled matter involves the legal issue of whether a voidable marriage is void ab initio or only void from the date of the decree dissolving the marriage. The claimant in this case was widowed October 11, 1968 as the result of a fatal industrial injury to her former husband. Pursuant to ORS 656.204 she was entitled to certain monthly payments until remarriage. On September 21, 1969 the claimant was remarried at Winnemucca, Nevada. Only nine days later she filed suit in Douglas County seeking to have the marriage declared to be null and void. On December 5, 1969 a decree was entered by the Circuit Court of Douglas County declaring the marriage "to be null and void and shall terminate immediately." On May 5, 1970, on the day prior to hearing on the issue in this claim before the Workmen's Compensation Board Hearing Officer, an amended decree was obtained which differed from the first decree simply by deleting the words "and shall terminate immediately." The proceedings before the Hearing Officer and before this Board have urged that when the decree was so changed the effect of the decree was to make the decree retroactive to the date of the remarriage.

There is no indication from the limited record in the annulment suit whether the law of the State of Nevada was ever considered with respect to the validity of the marriage. The law of Nevada has not been briefed in the proceedings before the Hearing Officer or the Workmen's Compensation Board.

For the record, the Board notes that the applicable Nevada law is Section 125.340 of Nevada Revised Statutes. The Nevada law has demarcations similar to those of Oregon with respect to void and voidable marriages. Fraud makes the marriage voidable. The statute provides the "marriage shall be void from the time its nullity shall be declared by a court of competent authority."

Unfortunately, there are no Nevada decisions interpreting the meaning of "from the time." There are three decisions from California Courts on the Nevada law which are split with reference to whether the Court's authority to declare "void" carries with it the authority to declare void ab initio. See Matter of the Estate of Karan, 80 P2d 108; Matter of the Estate of Gosnell, 146 P2d 42, and Santwell v. Folsom, 165 F Supp 224. The latter decision takes the novel approach that the remarriage should be void ab initio or at the time of the decree depending upon the social purpose to be served. Upon that basis, the claimant herein should definitely be restored to her rights to compensation. The Karan decision cites several other decisions interpreting the words void "from the time its nullity shall be declared" to constitute a valid marriage until the annulment decree is entered.

The only Oregon case is that of Dibble v. Meyer, 203 Or 541. There is an unequivocal discussion in that decision with respect to the legal distinction between void and voidable marriages. In a case in the U. S. District Court for Oregon the Dibble decision was discounted as dictum and the Hearing Officer in these proceedings likewise discounts whether the Oregon Supreme Court was correctly setting forth the state of the law.

There is some discussion in briefs herein of the effect of ORS 656.080 with reference to suits to declare a marriage valid. The section deals with both void and voidable marriages so the reference to declaring a marriage void from the beginning does not necessarily apply to voidable marriages.

Neither party discusses the effect of ORS 107.110 on the problem at hand. ORS 107.110(5) requires the decree to "specify the date on which the decree becomes finally effective to terminate the marriage relationship." The amended decree involved in this case specifies no such date. ORS 107.110(6) distinguishes the void marriages enumerated in ORS 107.010. No such provision extends to voidable marriages. Section (4) of 107.110 provides termination of the marriage at the expiration of 60 days from the date of the decree.

This Board is in complete sympathy with this claimant. The unfortunate marriage into which she entered will have been a costly mistake if it cannot be undone. On a philosophical basis many of the ills of the world could be cured if mistakes could be erased.

In this case the Workmen's Compensation Board does not believe that it should depart from the clear words of the Oregon Supreme Court when it states there is little difference between a divorce and annulment of a voidable marriage. The voidable marriage is valid for all purposes until dissolved at the suit of only the party laboring under one of the grounds. Neither should the Board read into the Circuit Judge's order something the Court omitted. The amended decree was executed the day before the hearing in this matter. It was obtained by able counsel who knew the heart of the issue to be decided before the Workmen's Compensation Board. Counsel now relies upon an implication to be read into the order which makes no provision for any date. By ORS 656.110 the first decree terminated the marriage 60 days after December 5, 1969. The amended decree did nothing to alter the effect of the prior decree. The decree of the Court does not recite, as the Hearing Officer relates, that the marriage was "void as though it never existed."

The Board reluctantly concludes that the claimant entered a valid marriage. A void marriage does not require annulment for other than technical reasons, since it does not exist as a marriage. The claimant herein was validly remarried. She remained so until the marriage relation was terminated. If the purposes of social welfare legislation are better served by permitting benefits to be reinstated following annulment of a voidable marriage, that should be accomplished by legislative amendment to either the affected social legislation or the annulment statutes. As it stands, the claimant was validly remarried and the compensation law provides that here benefits are terminable with a lump sum payment of $2,500 upon remarriage.

The order of the Hearing Officer is reversed. The liability of the employer following the remarriage is limited to the $2,500 remarriage settlement. The employer is entitled to credit against the $2,500 for compensation paid pursuant to the Hearing Officer order subject to the limitations of ORS 656.313 to preclude any repayment.

Counsel for claimant is authorized to collect a fee of not to exceed $125 from the claimant for services in connection with this review instituted by the employer.

WCB #70-5 October 27, 1970

CECIL HINES, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of disability arising from a low back injury incurred by a then 47 year old plumbing helper who slipped and fell on August 31, 1966 while lifting a pump.

The claimant was initially treated for a number of months with chiropractic care. Orthopedic therapy followed with hospitalization for traction. In December of 1968 surgery for fusion of L-5 vertebra to the sacrum was performed. In the administration of the claim the order now subjected to review was the result of the third hearing. The award now on review was a determination of December 11, 1969 finding the claimant to have unscheduled disability of 58 degrees out of the maximum allowable for such injuries of 192 degrees. Upon hearing, the award was increased by the Hearing Officer to 120 degrees.

The claimant urges on review that he is in fact unable to engage regularly at any gainful and suitable occupation and is therefore entitled to be compensated as permanently and totally disabled.

The Hearing Officer was not persuaded that the claimant is totally disabled and the Board, from its evaluation of the record, concurs with this finding. The claimant is precluded from heavy manual labor. He is not precluded from managing his trailer court and in this endeavor is able to perform such chores as removing the garbage, cleaning up litter and making repairs for tenants.

There was some contention at the hearing over the application of the factor of earnings loss in keeping with Ryf v. Hoffman. Claimant asserted

that income from the trailer court was from a collateral source and should be disregarded. On the other hand, the claimant apparently had income from collateral sources prior to his injury.

At the time of injury the claimant was employed at $425 per month. Neither the pre accident nor post accident earnings pictures were developed sufficiently to apply the factor of earnings loss. The Board recognizes that any additional evidence which is adduced will to some extent reflect earnings from capital both before and after the accident. On the other hand, managing a trailer court in which one has no capital invested would be a suitable gainful occupation, and one capable of performing the necessary work would hardly be totally disabled.

The Board deems the evidence insufficient to resolve the issue. Pursuant to ORS 656.295(5), the matter is remanded to the Hearing Officer for further evidence concerning the claimant's earning capacity before and after the accident. The extent to which invested capital affected those earnings is of course a factor which must be considered.

Upon receipt of such further evidence, the Hearing Officer shall issue such further order in the matter as the Hearing Officer deems appropriate upon the totality of the evidence.

No modifcation is made with respect to the award made by the Hearing Officer, though the award is subject to modification upon the further hearing and any subsequent proceedings thereon.

No notice of appeal is deemed applicable.

WCB #70-27 October 27, 1970

PETRA LARA, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of the compensability of a condition, diagnosed by some doctors, as the rupture of a congenital small anterior aneurysm in the pelvic area of a 47 year old poultry plant worker whose work on the day of the incident involved filling bags with turkey parts.

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

As noted by the Hearing Officer, the claim is one in which medical causation is at issue and therefore one in which the greater weight of the medical expertise determines the compensability of the claim. There is little question but that the symptoms developed during employment. Whether the condition arose out of the employment is the issue.

The medical evidence most favorable to the claimant was the testimony of the claimant's family doctor, Dr. Paul Young, a general practitioner. This testimony was limited to the hypothesis that a rupture of a blood vessel wall at a weakened point could be hastened or precipitated by work activity. Dr. Di Iaconi, the surgeon who performed the hysterectomy also was of the opinion the hematoma arose from an artery rupture precipitated by the industrial exposure.

On the negative side is the testimony of Dr. C. W. Mills, a specialist in obstetrics and gynecology who discounts the possibility of an aneurysm and who is of the opinion that the condition was neither precipitated nor hastened by work activity. A Dr. Scales, also a specialist in obstetrics and gynecology, estimates he has performed 500 hysterectomies and has never seen or heard of a condition such as experienced by the claimant being caused by external stress. Conforming to these specialists' opinions is the opinion of Dr. Parcher, a long time general practitioner, now Medical Director for the State Accident Insurance Fund. Dr. Gaiser, a vascular expert concluded that one would have to resort to speculation with regard to whether the work effort did or did not play a part in the problem.

The Board concurs with the Hearing Officer that the greater weight should be accorded the expert opinions of the specialists in obstetrics and gynecology.

The order of the Hearing Officer is affirmed.

WCB #69-1719 October 28, 1970

JEAN VIOLA FREITAG, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of whether the claimant's condition is medically stationary or, if so, the extent of permanent disability sustained by a 52 year old janitress who bruised her right arm, shoulder and rib cage when she lost control of a power floor buffer on February 16, 1969.

Pursuant to ORS 656.268, a determination issued finding the claimant to have no residual permanent disability. Upon hearing, the Hearing Officer found the claimant to have minimal unscheduled disability of 32 degrees out of the applicable maximum of 320 degrees. The Hearing Officer also ordered the State Accident Insurance Fund to provide certain prescribed medication and braces.

The Hearing Officer notes that the claimant's testimony appears to be somewhat exaggerated in that many complaints voiced at the hearing do not appear to have ever been reported to examining and treating doctors. These same tendencies to a substantial degree impeach her cause urging that she has major disabilities attributable to the accident.

It appears that there has been some minimal impairment chargeable to the accident. However, the primary basis of residual problems is that attributable to a lack of exercise and conditioning. This is neither a medical problem nor a permanent disability.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's condition was properly determined to be medically stationary and that the residual permanent disability does not exceed the 32 degrees awarded by the Hearing Officer. The order of the Hearing Officer is affirmed.

WCB #70-374 October 28, 1970

TED FOREMAN, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a then 47 year old fruit harvest worker who fell from a pile of boxes on October 31, 1966.

The claim has run a litigious course, having first been denied with hearing to determine. The claimant returned to work two weeks following the fall but required ulcer surgery the day following his return to work. He returned to work in January of 1967 and worked until March 22, 1967 when he was discharged for reasons immaterial to this proceeding. The claimant has not worked since.

Pursuant to ORS 656.268, the claimant has been determined to have a permanent disability of 19.2 degrees out of the applicable maximum of 192 degrees for unscheduled injuries.

Much of the argument on hearing and review involves questions about the claimant's motivations and psychological problems. The claimant is described as having had some strain imposed on degenerative changes and superimposed on a fairly marked psychophysiological musculoskeletal overlay. There is strong evidence to support a conclusion that the continuation of litigation and the expectation of gain is in itself a factor. The problem becomes one, in claimant's theory, of appraising this overlay. The Hearing Officer, observing the witnesses, concluded that the claimant had not demonstrated a motivation to return to work.

Despite the question concerning non-availability of work for the claimant in the area in which he chooses to reside, it is difficult to overlook the fact that the claimant did return to his regular job with minimal difficulties shortly after his accident. Employment was terminated for surgery unconnected with the accident. He again returned to work with minimal difficulties and employment was terminated for other reasons.

This background hardly serves as the basis for any finding that any substantial portion of the claimant's problems are due to the accident.

The Board concurs with the Hearing Officer and concludes and finds that the permanent disabilities attributable to the accidental injury of October 31, 1966 do not exceed the 19.2 degrees heretofore allowed.

The order of the Hearing Officer is affirmed.

WCB #69-1150 October 28, 1970

DARRELL C. CARR, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 46 year old diesel mechanic as the result of injuries to his neck and arm when he fell from his truck on November 22, 1967.

The matter was heretofore before the Board on review and by order of May 4, 1970 the matter was remanded to the Hearing Officer for further hearing particularly with reference to a possible loss of earnings factor.

Upon further hearing, the Hearing Officer concluded that the evidence did not justify finding there had in fact been any loss of earning capacity. The Hearing Officer found the testimony of the claimant with respect to his work record to be impeached by the actual work records. Though there were some absences the claimant has a concurrent claim for a knee injury which contributed to these absences and there is no credible evidence of absence from work caused by the injuries in this claim. Simply comparing annual income from year to year is not a reliable basis for arriving at an earning capacity. Availability of work, interruptions due to other injuries and other factors reflect that one would need to resort to conjecture and speculation to say that an earnings impairment had been shown.

In the initial hearing the claimant was found to have an unscheduled disability of 48 degrees for unscheduled disability out of the applicable maximum of 320 degrees for such disability and 40 degrees for partial loss of the left arm against the applicable maximum of 192 degrees.

These awards were affirmed by the Hearing Officer following the further hearing on remand.

The Board concurs with the Hearing Officer and concludes and finds that the claimant's disability does not exceed the 48 degrees of unscheduled disability and 40 degrees for the left arm.

WCB #70-485 October 28, 1970

HURSCHEL L. McCLAIN, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 56 year old mill worker who slipped and incurred a low back sprain and contusion of his buttocks on November 16, 1968.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent injury of the right leg evaluated at 15 degrees out of the applicable maximum of 150 degrees and unscheduled disabilities of 48 degrees out of the applicable maximum of 320 degrees. Upon hearing, the award with respect to the leg was affirmed but the award for unscheduled disability was increased from 48 to 96 degrees. The Hearing Officer in his findings finds the claimant to have a 30% unscheduled disability traceable to the injury of

November, 1967 (sic). This was obviously an error since the only November injury is for 1968 and the award was made for 96 degrees which is the degree factor for a 30% disability.

The claimant does have a record of back problems dating back at least to 1962 with surgery in October of 1967. No surgical intervention has been indicated for any problem arising from the November, 1968 injury. Any evaluation of disability of this claim must be confined to the additional disability attributable to this accident unless it is found that the additional disability renders the claimant permanently and totally disabled. ORS 656.214(4) requires that the evaluation of partial disability be made with respect to comparing the workman to his condition prior to the accident at issue. The Hearing Officer properly acknowledged that segregation of the additional disability was difficult but he did make an evaluation which appears to be quite reasonable under the circumstances. The claimant objects to certain observations concerning anxiety states. The record is not confined to "oral testimony." Reports such as that of Dr. Brook support the Hearing Officer and reflect the claimant to be "tense, apprehensive" with a "rather bizarre cardiac problem." The cardiac problem is not related to the accident at issue.

The Board concludes and finds that the disability attributable to this accident has been properly evaluated.

The order of the Hearing Officer is affirmed.

SAIF Claim # A 708092 October 28, 1970

EVERETT GROGAN, Claimant.

The above entitled matter was taken under consideration by the Workmen's Compensation Board on its own motion with respect to whether the claimant should be provided further benefits for injuries arising from an accidental injury on December 30, 1958. The claimant was struck on the head by a rock and caused to fall over a cliff. The claimant was then 40 years old.

On July 16, 1970 the Board referred the matter to a Hearing Officer for the purpose of taking evidence and making a recommendation to the Board.

The Board has reviewed the record and notes that the claimant has received the maximum allowable for unscheduled injuries. The record reflects that the claimant has adjusted to a life of non-productivity. There are minimal objective symptoms and a poor motivation to ever return to work. The claimant is characterized as a hypochondriac with numerous complaints which have no relation to the accident of 1958.

The Board concludes and finds that the evidence is insufficient to justify exercise of the Board's own motion jurisdiction. No further action will be taken at this time.

No notice of appeal is appended since no change is made in the existing orders affecting compensation payable.

WCB #70-273 October 29, 1970

MARION B. WEBB, Claimant.

An order on the merits was issued heretofore in the above entitled matter affirming the order of the Hearing Officer allowance of compensation benefits. No provision was included for attorney fees. The employer sought Board review. Pursuant to ORS 656.382 counsel for claimant is entitled to an attorney fee payable by the employer.

The sum of $250 is deemed a reasonable fee for the services involved and that sum is ordered paid by the employer to claimant's counsel.

WCB #70-1564 October 29, 1970

JOHN N. KOCH, Claimant.

The above entitled matter involves procedural issues with respect to a claim of alleged accidental injuries incurred on May 9, 1969.

No notice was given to the employer concerning the accident until May 19, 1970. No medical services have been provided or benefits paid. Request for hearing was not filed until July 28, 1970.

ORS 656.265(4) bars a claim with respect to which the workman has failed to give written notice within one year of the date of the accident. Short of one year, a claimant may establish his claim upon a showing of good cause. ORS 656.319(1) provides that no hearing shall be granted and the claim is unenforceable if no medical services are provided or no benefits paid unless the request for hearing is filed within one year of the date of the accident. The claimant asserts medical services were obtained at some unstated time but this is not equivalent to such services being provided. Though ORS 656.319(2) allows hearing on a denied claim, the Board does not construe the denial by an insurer, after time has run within which to request hearing, to restore the right to hearing.

No representation was made by the claimant and the claimant refused to make any showing with respect to entitlement to a hearing.

The Board, for reasons set forth by the Hearing Officer and for the further limitations prescribed by ORS 656.319, affirms the order of the Hearing Officer dismissing the request for hearing.

WCB #67-1310 November 2, 1970

DONALD D. HOOVER, Claimant.
Request for Review by Employer.

The above entitled matter involves issues of the extent of disability attributable to an accidental injury of May 31, 1967 when the claimant was struck by some falling plywood. The claimant sustained numerous abrasions and contusions.

Pursuant to ORS 656.268, a determination issued May 27, 1968 finding the claimant to have no residual disability. On October 20, 1968 the claimant requested a hearing. He left Oregon and had apparently abandoned these proceedings since even his counsel was not aware of his whereabouts. The matter was reinstated, after being dismissed, and the claimant returned from Missouri for a hearing.

The Hearing Officer found the claimant to have a residual unscheduled disability of 29 degrees out of the then applicable maximum of 145 degrees.

The Hearing Officer does not make any finding with respect to the reliability of the claimant as a witness other than to note a degree of exaggeration in the initial period of time elapsing between injury and being found.

If the problem at hand was one of evaluation of the claimant as a witness, the Board would be at a disadvantage in not having observed the claimant.

There is a pattern in the medical reports not made a part of the opinion of the Hearing Officer. In October of 1967 Dr. Lynch reports, "I was unable to correlate his symptoms with any objective findings." The claimant was unhappy with the negative findings of Dr. Lynch. Dr. Lynch then referred the claimant to Dr. Bush who in turn reported, "I am suspicious that he is grossly exaggerating his symptoms." Dr. Bush further negates any disability for the claimant's usual occupation.

Dr. Post, in one of the lates medical reports, is of the impression the claimant has a mild lumbar sprain with no indication of any major medical problem and a residual ability to carry on demanding physical work.

The Board concludes and finds that the claimant may have some residual discomfort, but that this is not disabling. Non-disabling discomfort is not the basis for award of permanent disability. The Board therefore concludes and finds that the claimant sustained no permanent disability as a result of the accident.

The order of the Hearing Officer is reversed and the award of disability is set aside. Pursuant to ORS 656.313, none of the compensation paid pursuant to order of the Hearing Officer is repayable.

The award having been reduced on review, counsel for claimant is authorized to collect a fee of not to exceed $125 from the claimant for services rendered on review.

WCB #69-2161 November 2, 1970

The Beneficiaries of
IRA JOE McNEALE, Deceased.
Request for Review by Beneficiaries.

The above entitled matter involves the issue of whether the death of the claimant's husband by gunshot was an accidental injury arising out of and in course of employment.

The decedent was a choker setter for a crew building logging roads. The members of the crew took guns with them for hunting and for pleasure. On

October 29, 1969, before staring to work while waiting standby during servicing of some equipment, the claimant had his .22 caliber rifle. The mechanics of the tragedy are now known (sic), but apparently the gun accidentally discharged causing fatal injuries.

The employer knew of the practice of the employees, but there is no evidence that the decedent ever possessed or used any gun for any purpose to the interest of the employer.

The Hearing Officer in his order has carefully detailed the facts and cited authority on the law. The accident did not merely involve an idle time accident. It involved a special risk attributable solely to the impartation by the decedent of a dangerous instrumentality for purely personal purposes. The great weight of authority under compensation laws requiring injuries to both arise out of an in course of employment denies compensation under circumstances such as these.

The Board concurs with the well reasoned opinion of the Hearing Officer and concludes and finds that the decedent did not meet his death by accidental injury arising out of his employment.

The order of the Hearing Officer is affirmed.

WCB #70-216
WCB #70-220 November 2, 1970

ROGER B. HOLIFIELD, Claimant.
Request for Review by Claimant.

The above entitled matter involves two separate accidental injuries combined for purpose of hearing and review with issues raised at hearing on the need for further medical care or, in the alternative, the residual permanent disability attributable to the two incidents. The first injury of May 14, 1968 involved throwing a sheet of 5/8 inch plywood. The claimant's foot slipped in the process and he experienced a "pop" in his neck. He was released to return to work on July 22, following hospitalization and conservative care to treat a condition diagnosed as a "hyperextension cervical spine injury." On January 25, 1969 the claimant slipped on some ice and struck his right elbow. The arm was placed in a cast for some time and some question exists with respect to whether he incurred a fracture.

Pursuant to ORS 656.268, a determination issued finding the claimant to have unscheduled disability of 16 degrees out of the applicable maximum of 320 degrees for the injury of May, 1968. A separate determination found there to be no residual disability from the arm injury of January, 1969.

Upon hearing the Hearing Officer concluded that the claimant's condition was medically stationary and that the only residual disability did not exceed the 16 degrees theretofore awarded. The determinations were both affirmed.

The claimant testified to continuing and worsening problems with his neck and arm but no such history is reflected in the medical examinations. More importantly it appears that there is no more than a minimal effect upon the claimant's work capabilities.

The Board concurs with the Hearing Officer and concludes and finds that despite the complaints, the claimant obviously recovered and improved to the point that only a minimal residual disability may be classified as permanent and that disability, in terms of impairment with work function, does not exceed the 16 degrees awarded.

The order of the Hearing Officer is affirmed.

WCB #69-2272 November 4, 1970

MARY J. GODDARD, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of temporary and permanent disability attributable to an accidental injury of July 2, 1969 when the 33 year old claimant fell backwards onto a fish box incurring bruises to the left buttock and a low back strain.

Pursuant to ORS 656.268, a determination issued finding the claimant's condition to have become medically stationary on October 15, 1969 with a permanent residual unscheduled disability of 32 degrees out of the applicable maximum of 320 degrees. This determination was affirmed upon hearing.

Shortly following the accident the claimant developed neck pains and involvement of the greater occipital nerve diagnosed as an acute myositis of "obscure origin." By October of 1969 the claimant was complaining of symptoms in the left arm and between the shoulder and the neck. At this time there were no low back complaints. The medical reports reflect a strong tendency to exaggerate symptoms and over-reaction to examination.

It appears that the claimant has been given the benefit of the doubt in attributing any permanent disability to the accident at issue. The Board concurs with the Hearing Officer and concludes and finds that the claimant's condition, for any problems compensably related to the accident, became medically stationary on October 15, 1969 with a permanent unscheduled disability of not to exceed 32 degrees.

The order of the Hearing Officer is affirmed.

WCB #70-536 November 4, 1970

EUGENE SHEEHY, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 40 year old ranch hand laborer as the result of catching his left hand in the pulley of a swathing machine on August 28, 1969. The distal phalanx of the left index finger was almost completely amputated by the trauma. There were abrasions to the remaining three fingers.

Pursuant to ORS 656.268, a determination of disability was made which awarded 16 degrees for the index finger (out of an applicable maximum of 24 degrees): 3 degrees for the middle finger (out of an applicable maximum of

of 22 degrees); 3 degrees for the ring finger (out of an applicable maximum of 10 degrees) and 1 degree for the little finger (out of an applicable maximum of 6 degrees). An award was also made of 5 degrees for the uninjured thumb on the basis of a loss of opposition factor.

A request for hearing was filed through counsel but the claimant elected to proceed upon hearing and upon this review without the benefit of counsel. The Hearing Officer and the Board have exercised special caution to preclude any disadvantage the claimant might have incurred by proceeding without counsel.

Upon hearing, the Hearing Officer modified the original determination by awarding an additional 4 degrees for the index finger making the award 20 degrees for that finger. The awards for the other digits were affirmed.

The claimant, upon review, urges that the award should have been made with respect to the hand. It is only natural for a layman to conclude that disability ratings on fingers somehow fall short of compensating for injuries which affect the use of the hand. The law is quite clear in providing that a disability to the metacarpal bones or the adjacent soft tissue is rated as part of the finger. When one observes the skeletal human hand it is obvious that the bones extending from the digits to the wrist are clearly part of the fingers though, in life, surrounded by flesh to form what is commonly called the palm or hand. The award payable with respect to parts of the body are established by law. In this instance there has been no involvement at or above the wrist nor has there been actual injury to all five digits. The awards are properly restricted to the fingers.

The Board concurs with the Hearing Officer and concludes and finds that the compensation payable for the permanent injuries does not exceed 32 degrees upon the basis of the allocation hereinabove set forth.

The order of the Hearing Officer is affirmed.

WCB #69-794 November 4, 1970

LINDA J. BALCOM, Claimant.
Request for Review by Employer.

The above entitled matter involves issues of the compensability of cervical problems following an episode in a nursing home when a patient fell against the claimant on December 21, 1967.

Some procedural problems have clouded the progress of claim adminstration. The claim was first closed administratively without formal determination on the basis the claim involved only medical benefits. On a previous review by the Board, it was ruled that the claim could proceed to join issue on the original closure without complying with the need to support her claim by corroborative medical opinion as on a claim for aggravation. The Board review could not be accomplished in any event since the record made upon hearing had been destroyed by fire.

Upon the last hearing, the Hearing Officer noted that the claimant was plagued by a "plethora of ailments, aggravated by a frail constitution," and

further noted the claimant had a pre-existing "unstable cervical spine." The Hearing Officer further noted the continuity of symptoms and treatments relative to the cervical condition and concluded that the claim had been prematurely closed.

The Board concurs with the Hearing Officer finding that the incident upon which this claim is based caused an exacerbation to the already unstable cervical spine. It is unlikely that a healthy spine would have withstood the impact without precipitating any problems. Upon the well established principle of the employer "taking the workman as he finds him" the pre-existing predisposition to further cervical injury does not relieve the employer of liability.

The employer in this claim accepted responsiblity for medical treatment for a period of time but then unilaterally decided to withdraw approval of further medical care. When the Board decided as a matter of policy to dispense with formal determinations of disability in medical only claims, an essential part of that policy was to guarantee the right to a hearing to any workman whose claim was closed without formal order. The latter part of that policy was properly applied by the Hearing Officer in this case. The employer did not properly fulfill its obligations to properly administer the claim as required by ORS 656.262(1). Any question of continuing liability should have been properly joined by a request for hearing or a denial to the claimant from which issue could be joined. The employer's insurer simply refused to provide further medical upon the basis of the 1962 automobile accident.

The Board concludes and finds that the Hearing Officer properly reopened the claim and that the employer's actions constituted an unreasonable resistance to the employer's obligations of compensation.

The order of the Hearing Officer is affirmed.

Pursuant to ORS 656.386 and 656.382, counsel for claimant is allowed the further fee of $250 for services on review payable by the employer.

WCB #68-1393 November 4, 1970

C. E. STROH, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability sustained by a 51 year old construction equipment operator who injured his left knee when his leg gave way as he was lifting a box of bolts on July 19, 1966. The same knee had been previously injured in 1962 and the claimant had been awarded compensation for a permanent loss of 65% of the leg. In the interval between the 1962 injury and the instant claim in July of 1966, the claimant experienced at least two falls attributed to the injured leg. The claimant required further surgery involving excision of the head and neck of the fibula as the result of the current claim.

Pursuant to ORS 656.268, a determination issued finding the claimant to have a disability of 15% of the leg due to this injury. ORS 656.222 requires that disability for successive injuries be made with respect to the combined effect of the injuries and the past receipt of compensation. Upon this basis the claimant has been found to have disability totalling 80% of the leg. This was affirmed by the Hearing Officer who also found the claimant to have unscheduled injuries related to the last accident for which award was made of 77 degrees out of the applicable maximum of 192 degrees. The latter award was based upon an exacerbation of a degenerative condition of the spine caused by the injury to the leg. Such an exacerbation, when caused by other injuries, becomes compensable to the extent of disability attributable to that exacerbation.

The claimant is obviously precluded from return to heavy manual labor. His age and intelligence, however, do not preclude re-establishment of the claimant in some other vocation. The Board concurs with the Hearing Officer in finding that the disability, though permanent, is not totally disabling. The Board also concurs with the Hearing Officer's evaluation of the permanent though partial disability of 15% of a leg for this injury and 77 degrees out of the applicable maximum of 192 degrees for unscheduled disabilities.

Some breakdown appears to have occurred in the administrative attempt to obtain and guide this claimant toward the alternative of vocational rehabilitation. The Board, by copy of this order to its Director, Mr. R. J. Chance, directs Mr. Chance to coordinate the administrative efforts of the Workmen's Compensation Board and other public agencies charged with responsibilities in the area of rehabilitation and re-employment within the areas permitted by the claimant's remaining capabilities. There also appears to have been a factor of lack of motivation which interfered with previous rehabilitative efforts. If lack of motivation precludes rehabilitation from this point, the claimant must hold himself basically responsible.

WCB #70-682 November 4, 1970

WARD F. WOODS, Claimant.
Request for Review by Employer.

The above entitled matter involves the issue of the claimant's need for further medical care and treatment and further temporary total disability and the employer's liability for penalties and attorney fees for unreasonably resisting reopening the claim and resuming the payment of compensation.

The claimant, a 47 year old stock handler for the parts department of an automobile manufacturer, sustained a compensable injury on February 13, 1968. The claimant's injury, diagnosed as a cervical strain, was incurred when one of the automobile quarter panels he was placing in an elevator bin fell and struck him in the back.

The determination order of the Closing and Evaluation Division of the Workmen's Compensation Board entered on September 17, 1969, pursuant to the provisions of ORS 656.268, granted the claimant an award of temporary total disability to August 21, 1969, but granted no award of permanent partial disability.

The Hearing Officer, as a result of the hearing held at the claimant's request, reopened the claim and ordered the employer to provide such further medical care and treatment as the nature of the claimant's injury and the process of his recovery requires, and to resume the payment of temporary total disability effective March 23, 1970, until termination thereof is authorized in accordance with the provisions of ORS 656.268(2). The Hearing Officer allowed counsel for the claimant an attorney fee of 25% of the additional temporary total disability, but not to exceed the sum of $650. In an amended and supplemental order the Hearing Officer held that the failure of the employer to reopen the claim and resume the payment of compensation was not unreasonable and that the employer was not liable for penalties and attorney fees for unreasonable resistance to the payment of compensation.

Both the employer and the claimant have requested a review by the Board of the order of the Hearing Officer. The employer appeals from that portion of the order which reopens the claim and requires that the claimant be provided with further medical care and treatment and receive further temporary total disability. The claimant appeals from that portion of the order which held that the employer was not liable for penalties and attorney fees for unreasonable resistance to the payment of compensation.

The claimant indicates that as a result of the injury he experienced severe pain in his back, neck and arms. He received medical attention on the date of the accident with the treatment consisting primarily of medication for the relief of the pain. He was able to return to work the following day and he continued to work regularly for a period of approximately four months. During this period, although his work was restricted to less strenuous activity, his pain became progressively worse until he was required to cease working in June of 1968.

During the 17 month period between June of 1968 and November of 1969, the claimant was examined extensively and received a comprehensive course of conservative treatment, surgery having been ruled out, from a number of medical specialists in the fields of orthopedic surgery, neurology, neurological surgery and psychiatry. The medical reports of these doctors

reflect their basic accord that there is at most only minimal objective medical evidence to substantiate or explain the claimant's continued objective manifestations of pain and discomfort. The medical reports further reflect little unanimity of opinion among the medical experts relative to whether further diagnostic or therapeutic treatment is required by the claimant, and if so, the type of treatment that would result in resolving the claimant's difficulties. The Hearing Officer found and the Board concurs that the determination order of the Closing and Evaluation Division properly evaluated the claimant's condition as disclosed by the medical evidence available at that time.

In November, 1969 following the determination and closure of his claim, the claimant returned to work for his former employer. He was restricted to very light work activity and was unable to work a full five day work week. He continued working until February of 1970, a period of just over three months, at which time he either terminated his employment or was terminated by his employer. He has not worked since that time.

At the time of his resumption of employment in November of 1969, the claimant consulted Dr. Dixon, a psychiatrist. From his examination and treatment of the claimant during the seven month period preceding the hearing of this matter, Dr. Dixon diagnosed the claimant's condition as cervical neuritis resulting from the cervical strain. In his opinion the claimant's cervical neuromusclar disorder was due to organic nerve involvement and was not functional in nature or a result of functional overlay. Dr. Dixon was of the further opinion that the claimant was unable to continue active employment and that he required continued diagnostic and therapeutic medical care and attention.

Dr. Dixon's findings and conclusions are in marked contrast to the views of the other members of the medical profession submitting medical reports and testimony in this matter. The claimant's brief on review, however, documents several areas in which the findings and conclusions of the earlier medical reports may be held to be consistent with Dr. Dixon's views. Faced with medical opinion which is in direct and irreconcilable conflict with respect to both the diagnosis and treatment of the claimant's condition, it is apparent that reasonable minds will disagree as to the proper resolution of the questions in controversy. The briefs of counsel for the claimant and the employer submitted in connection with this review illustrate the strong argument that may be made for the acceptance of each of the opposing positions. Although recognizing that hindsight may ultimately prove any decision made in this matter to be in error, the Board is of the opinion that recognition should be given to the recommendations of Dr. Dixon and that the claimant should be granted the opportunity to avail himself of the course of treatment that may be provided or determined necessary by Dr. Dixon.

The claimant's credibility has been made an issue in this matter. The Hearing Officer who saw and heard the claimant found that the claimant's testimony must be viewed with caution. The Board concurs with the Hearing Officer's finding in this regard based upon the weight which it gives to the Hearing Officer's evaluation of credibility and as a result of its own evaluation of credibility from its review of the record. The claimant's credibility is not decisive of this matter, however, which turns more importantly upon analyzing the medical evidence to resolve the medical questions involved.

The issue of whether the claimant is malingering has also been raised. The strongest support for this view was expressed by Dr. Phillips, a psychiatrist, who indicated that conscious malingering may be contributing to the claimant's basic problem. Several additional indications of the simulation or exaggeration of symptoms appear in the medical reports of other doctors and are documented in the employer's brief. Although the evidence of record in this respect points out the need for the exercise of caution in the review of this matter, the Board does not believe that the evidence is sufficient to establish that the claimant is a malingerer.

The Board finds and concludes from its de novo review of the record and briefs herein that the above entitled claim should be reopened and the claimant provided such further medical care and treatment as the nature of his injury and the process of his recovery may require, and the payment of temporary total disability be resumed effective March 23, 1970. The Board further finds and concludes that the employer did not act unreasonably in its refusal prior to hearing to reopen the claim and resume the payment of compensation and is not liable for penalties or attorney fees under ORS 656.262 and 656.382.

In accordance with the schedule of attorney fees, counsel for the claimant is entitled to receive a reasonable fee for services rendered upon this review by the Board of the order of the Hearing Officer, such review having been initiated by the employer and having resulted in the affirmance of the Hearing Officer's order. The Board has accordingly allowed claimant's counsel an attorney fee in the amount of $250 payable by the employer. This attorney fee should be in addition to the attorney fee allowed by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #69-2083 November 4, 1970

AMA GENE BARNES, Claimant.
Request for Review by SAIF.

The above entitled matter initially involved an issue of whether a 44 year old psychiatric aide who sustained a cervical problem in assisting a patient was entitled to be reimbursed for an eye examination and new glasses obtained as a result thereof. At this point only $46.25 was involved.

The State Accident Insurance Fund had accepted the claim for the cervical injury but denied the aforesaid eye claim of $46.25. At the time of hearing the claim for reimbursement of the glasses was withdrawn and the issue was joined on only the $15 examination by an optometrist. The practice of optometry does not appear to extend to diagnosis of the cause of eye ailments and is defined as follows:

"'Practice of optometry' means the employment of any means other than the use of drugs for the measurement or assistance of the powers or range of human vision or the determination of the accommodative and refractive states of the human eye or the scope of its functions in general or the adaptation of lenses or frames for the aid thereof." ORS 683.010(2).

If only $15 was involved, the matter probably would not be before the Workmen's Compensation Board. The allowance of a denied claim carries with it the allowance of attorney fees. The allowance of the $15 medical bill carried with it an attorney fee of $350.

At best the situation reflects that the treating osteopathic physician thought the claimant had a condition not caused or exacerbated by the neck injury which might be contributing to her problem. Apparently the claimant did need a change in the corrective lens. She had required corrective glasses since age 16. The optometrist, as a matter of course, made no diagnosis of the relationship of the needed correction to the accident.

If there is any course of cause and effect well defined by the case it is that the injury enabled the claimant to become aware of an unrelated problem which was detected and corrected due to the accident. The accident neither caused the eye conditon nor did it precipitate the need for the eye examination. As noted, the accident was more of a fortuitous event to the claimant's advantage rather than a circumstance by which the employer should be required to pay for diagnosis of pre-existing ailments neither caused nor adversely affected by accidental injury.

The Board concludes that the need for the eye examination was neither caused nor materially affected by the accidental injury at issue.

In the field of attorney fees, the State Accident Insurance Fund is relieved of responsibility for payment. Pursuant to Workmen's Compensation Board rule, where compensation is disallowed on appeal by the employer or insurer counsel for claimant is authorized to collect a fee of not to exceed $125 from the claimant.

The order of the Hearing Officer is reversed.

WCB #70-19 November 4, 1970

HAROLD DEAN WARRINGTON, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether a 28 year old mill worker sustained a back injury as the result of shoveling sawdust and mud on November 21, 1969. There was no single incident or sudden onset, the claimant testifying that his back began to burn and hurt some two hours after commencing the work which he claims produced a low back strain.

The claimant has a history of low back trouble since 1962. His employment application with this employer denied previous back difficulties. The claimant first sought medical attention for the instant claim from a Dr. Hogan

on November 24, 1969. Part of the doubt about the validity of the claim is based on the fact that the doctor indicated on a form that the claimant did not state what caused the injury. The claimant's sworn testimony is that he did relate the work incident. The Board would add parenthetically at this point that, if a patient fails to volunteer the details, good medical practice would entail solicitation of a pertinent history. In any event the claimant, when seen by Dr. Stanford December 1st, did relate the onset of pain to the work on November 21st.

The Hearing Officer concluded that there were omissions and inconsistencies in the evidence to question the claimant's veracity. The Board has examined into these "omissions and inconsistencies" in light of the Supreme Court decision of Lucke v. SCD, 89 Or Adv Sh 715. The fact that the workman withheld information from the employer concerning prior back trouble is not commendable from a purely moralistic view but that should not preclude compensation if the back is again injured. Again, the confusion over the exact date of an incident is not important unless the circumstances are such that the confusion impeaches the likelihood of the accident having occurred as claimed. As noted above, if there was a deficiency in the history obtained by Dr. Hogan, the omission should not be debited to the claimant. In weighing inconsistencies it shoud be noted that forms executed by the employer reflect that the employed knew of the injury on the date the claimant asserts he was injured.

The Board concludes that the workman sustained the injury as alleged. The order of the Hearing Officer is reversed and the employer is ordered to allow the claim.

Counsel for the claimant is allowed the fee of $500 payable by the employer for services including both the hearing and review.

WCB #68-1859 November 5, 1970

ISAAC J. WIRTA, Claimant.

The above entitled matter involves an issue of the extent of permanent disability incurred by the claimant as the result of injury to the left great toe on June 20, 1966. The matter was previously before the Board and remanded by the Circuit Court for evaluation of the disability on the basis of injury to the foot.

Upon further hearing, award was made finding a loss of use of 25% of the foot.

A request for review by the State Accident Insurance Fund has been withdrawn. There being no other issue before the Board the matter is hereby dismissed and the order of the Hearing Officer is declared final as a matter of law.

WCB #70-804 November 5, 1970

RALPH RUNNING, Claimant.
Request for Review by Claimant.

The above entitled matter involves the issue of whether a myocardial infarction sustained by a 43 year old truck driver was compensably related to his work activities.

The inception of symptoms of heart trouble was chest pain at home while in bed on February 3, 1970. There were further symptoms at work on the next afternoon. On February 9th, while at work loading trucks, a myocardial infarction occurred. The actual physical effort was in operating a fork lift truck which was malfunctioning and causing some unusual effort. The circumstance is sufficient to supply legal causation.

On the issue of medical causation, however, the Hearing Officer found the preponderance of the expert medical testimony to be that the work effort was not, in terms of reasonable medical probability, a material contributing factor. The treating physician, Dr. Caron and Dr. Sutherlin, a cardiologist, are of record by deposition and testimony at the hearing that there was no natural contributing factor. Dr. Griswold, also a cardiologist, is of record in a report that there was a material contributing factor. Unfortunately Dr. Griswold's report is based upon an erroneous understanding of the chain of events. The Hearing Officer felt that in all likelihood a correct understanding of the facts would not alter Dr. Griswold's opinion. In the process of weighing the evidence, however, the greater weight was properly accorded the more extensive evidence obtained from Dr. Caron and Sutherlin under examination and cross examination. The medical opinion evidence against the compensability is not based upon a theory that effort can never cause infarction. The medical evidence is that an irreversible chain of events was set in motion at home in bed and the fact that the subsequent infarct occurred at work was coincidental with work but not caused or contributed to by work.

Just as no two individuals are alike, so the problem of compensating one coronary infarction and not the next must depend upon the person, the chain of events and the weight of medical opinion applied to the facts. It is not a matter of weighing past court decisions to say that this is another Benny Olson or "Mayes" or "Clayton."

The Board concurs with the Hearing Officer and concludes and finds that the claimant's work was not a material contributing factor to the development and occurrence of the myocardial infarction.

The order of the Hearing Officer is affirmed.

WCB #70-869 November 6, 1970

CLARENCE T. WEISS, Claimant.
Request for Review by Employer.

The above entitled matter involves an issue of the extent of permanent disability sustained by a then 51 year old lead man in a pipe factory who sustained two separate accidental blows to his head on September 20, 1968. The first blow was to the right side of the neck and jaw followed within a couple of minutes by a blow to the left temple. The claimant also had a subsequent accident on December 3, 1968 in the nature of a fall. This claim was closed without award of permanent partial disability but the claimant contends that fall and others such as one in April, 1970 following hearing herein are attributable to residuals from the injuries to the head. One of the unusual results of the head injuries was a cerebral infarction diagnosed as produced by the dislodgement of an embolus from the left carotid artery which coursed to effect the distribution of the right middle cerebral artery.

The determination issued pursuant to ORS 656.268 found there to be a permanent residual disability of the left arm of 38 degrees. Upon hearing the Hearing Officer increased the award for the left arm to 76 degrees and also made awards of 30 degrees for loss of use of the left leg and of 80 degrees for unscheduled disabilities out of the applicable maximum of 320 degrees.

The employer particularly challenges the awards of unscheduled disability and for the leg as unsupported by medical evidence. The record reflects that it was at first thought that the two blows to the head were of only temporary significance. The subsequent diagnosis of cerebral arterial involvement is not contradicted but the employer urges that symptoms such as alleged mental befuddlement and leg disability required medical substantiation and that the Hearing Officer necessarily resorted to conjecture and speculation to accept those symptoms as existing and being causally related to the accidents.

The Board concludes that the medical opinion evidence is sufficient, taken in light of other evidence, to support a finding that the claimant's orientation, coordination, balance and general efficiency have been permanently and adversely affected.

The Board recognizes the principle that separate accidents must be separately administered and evaluated. Keefer v. SIAC, 171 Or 405. There is sufficient identity in cause and effect as well as employing entity in this matter to accept the claimant's suggestion that the entire problem be evaluated as part of the accidents of September 20, 1968.

Taking the record in its entirety, the Board concurs with the Hearing Officer and concludes that the claimant has sustained permanent injuries to the left arm, left leg and unscheduled areas including the brain. The Board also concurs with the Hearing Officer evaluations of the disabilities in each area.

The order of the Hearing Officer is affirmed.

WCB #70-1128 November 6, 1970

CHARLES W. KELLER, Claimant.
Request for Review by Claimant.

The above entitled matter involves two claims for back injury by a claimant whose first claim arose in September of 1965 at which time the then 53 year old claimant was employed subject to the Workmen's Compensation Law with the State Industrial Accident Commission as the responsible insurer.

In March of 1970 the claimant instituted another claim which recited the 1965 injury. The employer's present insurer, Industrial Indemnity Company, denied the claim as not related to any current employment.

Apparently the only order ever issued by the former State Industrial Accident Commission or its successor in interest the State Compensation Department, now known as the State Accident Insurance Fund, was an order of September 22, 1965. The request for hearing was dismissed. The claimant, on review, asserts that he has five years from September 22, 1965 to request a hearing as a matter of right on aggravation. O L 1965 Ch 285, Sec 43(3) did provide that claimants could elect between pre-1966 and post 1965 remedies when the State Compensation Department issued an order on a pre-1966 claim. No such order has issued nor does the claimant have an election since his procedural rights under the pre-1966 law have long expired.

There is a further reason why the claim of aggravation in this case is not entitled to hearing. The claim is not corroborated by the medical evidence required by ORS 656.271 to be submitted before hearing can be had.

The issue of whether the claimant sustained a new compensable injury is still pending as of this writing with a hearing scheduled for this month of November, 1970.

Following the hearing in this matter, the Workmen's Compensation Board in July of 1970 promulgated Administrative Order WCB 10-1970 pursuant to which issues as to successive employers or insurers may be joined in a single hearing. It would have been preferable to have the alternative issues resolved in a single proceeding. The administrative order noted contains a reservation which would have precluded hearing on the merits of the aggravation claim since the administrative order could not vest a hearing as a matter of right where precluded by statute. Aside from the question of whether the claimant was entitled to hearing as a matter of right is the own motion jurisdiction vested in the Workmen's Compensation Board by ORS 656.278. A joint or concurrent resolution of the two matters might well have developed a situation deemed appropriate for Board own motion jurisdiction.

The Board at this time is limited to the issue of whether the claimant is entitled as a matter of procedural right to hearing on a claim of aggravation from the September, 1965 order by the then State Industrial Accident Commission.

The Board concurs with the Hearing Officer and concludes and finds that the matter was properly dismissed.

WCB #69-2151 November 6, 1970

DALE JENNESS, Claimant.
Request for Review by SAIF.

The above entitled matter involves an issue of the extent of permanent disability sustained by a then 47 year old university custodian when he was lifting a table and twisted his left hip on April 24, 1967. A defect in the intervertebral structure between L-4 and L-5 was diagnosed and subjected to surgery in June of 1967. Subsequent consideration was given with reference to whether there should be further surgery to stabilize vertebrae by fusion.

Pursuant to ORS 656.268 the claimant has received an award of compensation for a permanent unscheduled disability determined to be 25% of the then maximum applicable to unscheduled disability. The claimant had previously received an award of 35% of the applicable maximum for unscheduled injuries and 25% of the maximum for injuries to the right leg. These did not involve the low back or leg. The prime significance would appear to be that the claimant previously obtained awards of permanent disability which in retrospect were not permanent to the extent of the awards.

The Hearing Officer in this case found the claimant to be unable to ever again engage regularly in a gainful and suitable occupation. This finding is not based upon the observation of the claimant as a witness. Rather, the conclusion was upon the evaluation by the Hearing Officer of the medical evidence. There is an opinion from the treating physician in support of such a conclusion. The opinions of Dr. Faulkner Short, orthopedic specialist, and Dr. John Raaf, neurologist, reflect only a moderate disability.

The Hearing Officer argues with the conclusions of Dr. Short. The claimant was placed in a body cast for a month by Dr. Short as a diagnostic test. The Hearing Officer referred to the procedure as "treatment" and then discounted Dr. Short's opinion because the disability did not respond to the "treatment." This failure to properly evaluate Dr. Short's diagnosis and examination of course led to inadequate or no weight being given to the opinion of Dr. Short. The Hearing Officer also gave short shrift to the conclusions of Dr. Raaf, a neurologist of substantial reknown.

Apparently substantial weight was given by the Hearing Officer to a letter from a rehabilitation counsellor. This letter to the claimant referred to a mutual decision that your file be closed. It is quite apparent from reading the document in its entirety that the door was closed by the claimant. The door remains open when claimant "feels able to participate in a work evaluation or training program." This is important to direct the claimant back to work. He is not motivated to return to work. The counsellor's letter is not evidence of inability to work. It is evidence that the claimant is not motivated to return to work.

There is evidence of a functional overlay. There is also evidence that the claimant grossly exaggerates with regard to his complaints and the physical findings.

The Board concludes and finds that the disability attributable to this accident does not exceed the 25% of the unscheduled maximum awarded by the determination under review. The order of the Hearing Officer is reversed and the determination is reinstated.

The Board, by copy of this order to its Director, R. J. Chance, directs that he coordinate the activities and facilities of the Workmen's Compensation Board, the Department of Employment and Department of Vocational Rehabilitation toward an effective re-employment and rehabilitation for this claimant. It is not a question of how the claimant "feels about it." The claimant has the responsibility and duty to make a bona fide effort to resume as a constructive member of society. An award of permanent total disability on this record would be a reward for poor motivation and a determination to justify idleness on what are essentially only minimal to moderate disabilities.

The order of the Hearing Officer is reversed.

The award having been reduced on appeal by the insurer counsel for claimant is authorized to obtain a fee of not to exceed $125 from the claimant for services on review.

WCB #70-52 November 6, 1970

ROBERT W. LANE, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of disability arising from a low back injury incurred on May 14, 1969 when the 37 year old claimant fell forward as a pry bar he was using slipped. The claimant asserts that he is in need of further medical care and that his claim was therefore prematurely closed.

Pursuant to ORS 656.268, the claim was closed on December 8, 1969 finding the claimant's condition to have become medically stationary on June 13, 1969 without residual disability.

The claimant had a previous compensable low back injury to the same area of the back for which he received an award of 10% of the then maximum applicable to unscheduled injuries.

There is evidence by the claimant of symptoms in the right leg and foot. He returned to his former occupation and has worked steadily following the brief period of temporary total disability. He has received no medical attention since the claim closure and there is no evidence either relating the right leg symptoms to the accident or indicating a need for further medical care. The claimant's residual disability does not appear to exceed the disability existing prior to this accident for which a permanent award was previously made as noted.

Pursuant to ORS 656.245, the claim closure does not preclude future employer responsibility for required medical services for conditions resulting from the injury. A special order should not issue in the matter where the evidence does not justify such order. Affirming the Hearing Officer in this particular order does not preclude future consideration if the employer allegedly fails to conform to ORS 656.245.

The Board concurs with the Hearing Officer and concludes and finds that on the state of the record the claim was properly closed and that no additional permanent disability was incurred in the accident.

The order of the Hearing Officer is affirmed.

WCB #70-429 November 6, 1970

JERRY R. SKANES, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of disability arising from a low back injury incurred on February 4, 1969 when the 31 year old truck driver claimant slipped and fell. The claimant has had a long history of low back injuries and the issue as to the back is the degree of additional permanent disability attributable to this accident.

There was also an issue of alleged hearing loss at the hearing. The State Accident Insurance Fund had issued a denial of any responsibility for that condition and no request for hearing was made within the time provided. The Hearing Officer cited a previous Board order with respect to the administration of partial denials of claims. The decision of Melius v. Boise Cascade 90 Or Adv Sh 731, Or App, involved a Court of Appeals affirmance of a partial denial of a claim allowed for other conditions. The Board concludes and finds the hearing loss issue to have been properly excluded.

Unfortunately the claimant has chosen to file no brief or representation beyond the simple request for a review. Though the law does not require a brief or statement of the issues, a party who simply requests a review without some indication of his basis for dissatisfaction does a disservice to himself as well as creating an imposition upon the reviewing agency and the Courts.

The claimant had some back problems prior to the accident. The order under review recognizes some additional disability. This award has been made despite the fact that this claimant has returned to satisfactorily perform his former job and has been able to engage in strenuous recreational activities. The logical conclusion is that some of the symptoms which allegedly represent a disability at work are not as disabling when the similar activity is involved at play. The claimant has sustained no apparent loss of earning capacity.

The Board concurs with the Hearing Officer and concludes and finds that the disability attributable to this accidental injury does not exceed the 48 degrees heretofore determined pursuant to ORS 656.268 and affirmed by the Hearing Officer.

The order of the Hearing Officer is affirmed.

WCB #70-493 November 6, 1970

DONALD FRANKFOTHER, Claimant.
Request for Review by Claimant.

The above entitled matter involves an issue of the extent of permanent disability sustained by a 37 year old workman who twisted his back while unloading fruit on September 29, 1967.

The claimant received some chiropractic treatment and also conservative therapy including traction under the care of an orthopedic physician. A

mental breakdown in November of 1967 led to hospitalization first at Holladay Park and then the Veterans facility at Roseburg.

Pursuant to ORS 656.268 the claimant has been determined to have a permanent disability of 64 degrees being 20% of the applicable maximum for unscheduled injuries. This determination was affirmed by the Hearing Officer.

There is some contention over the issue of whether a loss of earning capacity factor should be applied to the disability evaluation. The Board concurs with the Hearing Officer that a general comparison of his before and after accident earnings reflects no decrease. Upon a strict comparison to the work when injured the claimant is actually now earning more than before. The claimant did at one time hold a more remunerative job but he has no disability attributable to the accident which would preclude resuming that type of employment.

The Hearing Officer notes that a claim of disability is made based largely on surgery on the assumption that certain surgery warrants a certain factor of disability. The purpose of surgery is to cure or improve conditions. The review of numerous claims and particularly those involving successive injuries with prior awards provides a good demonstration of the fact that back surgery is often successful. It is the residual disability and not the course of treatment which must be evaluated.

The Board has had occasion to be critical of poorly motivated claimants. The Board notes with approval the Hearing Officer's conclusion that the claimant in this case is highly motivated and industrious. The Board, however, concurs with the Hearing Officer evaluation, and concludes and finds that the disability was properly evaluated at 64 degrees.

The Order of the Hearing Officer is affirmed.

WCB #69-2323 November 6, 1970

HOWARD T. MAXWELL, Claimant.
Request for Review by Claimant.

The above entitled matter involves issues of the extent of permanent disability sustained by a 61 year old construction worker who incurred a low back sprain when he fell into a ditch on March 23, 1967.

Pursuant to ORS 656.268, the determination upon which these proceedings are based found the claimant to have a disability of 38 degrees being approximately 20% of the applicable maximum. This determination followed a previous determination, hearing and award, and a reopening of the claim by stipulation of the parties. Upon the current hearing the award was increased to 67 degrees. The claimant, on review, asserts he is either permanently and totally disabled or is entitled to permanent partial disability awards of 192 degrees for unscheduled disabilities and 82.5 degrees for an alleged loss of use of 75% of a leg. The claimant, in addition to the low back strain incurred in the accident, has non-industrially related ailments consisting of a diverticulitis, hemorrhoids and a heart lesion.

The medical evidence clearly indicates the claimant is precluded from harder types of manual labor. The expert medical opinions of a Dr. A. Gurney Kimberley and Dr. John White are that the claimant is able to do light manual work on a steady basis and can do most types of work that would not involve heavy physical labor.

Against the opinions of these able doctors, a personnel employe of the Fish Commission with some experience in employment counselling testified as a paid witness that there is no gainful or suitable occupation which the claimant could perform. This testimony was not elicited with respect to whether the incapacity was related to the injuries involved in this claim. The opinion was admittedly made without consideration to whether the claimant could be trained to do something else. This witness also conceded that he had not read the entire record and thus made his ultimate conclusion on a brief interview, something less than the complete record, a complete disregard of rehabilitative processes and a generalized conclusion without direction to the disabilities from the accident at issue.

The medical reports clearly indicate that the claimant's disabilities related to the accident have been improving since 1968.

The Board concurs with the Hearing Officer and concludes and finds that the disability attributable to the accident at issue does not exceed the 67 degrees awarded by the Hearing Officer for the unscheduled disability. The evidence does not warrant finding a further or separate permanent disability to the leg.

The order of the Hearing Officer is affirmed.

SAIF Claim # BB 28990 November 12, 1970

ALLMAN M. KINION, Claimant.

The above entitled matter was heretofore referred to a Hearing Officer on June 1, 1970 for the purpose of taking evidence with respect to whether the claimant's current cervical problems are compensably related to an accidental injury of October 26, 1963 when the then 52 year old claimant fell and exacerbated a then degenerative condition of the spine.

The medical evidence presented upon hearing includes a report from Dr. Robert Fry who notes that the dorsal spine is now fused anteriorly throughout most of its length. His opinion is that the current symptoms are probably an aggravation of the injury of 1963. There is no record of intervening trauma. A Dr. Riley, under opinion dated April 14, 1970, also relates the current problem to the 1963 injury. The medical advisor to the State Accident Insurance Fund, a Dr. Parcher, concludes that the claimant's current problems are a natural progression of the underlying disease process and are not attributable to the 1963 injury. Dr. Fry has examined and treated the claimant for over six years and Dr. Riley also examined the claimant in 1964. None of the doctors were examined or cross-examined on the vital issue of the relative responsibility of the natural degeneration as opposed to possible long term responsibility of the accident as imposed upon the underlying degenerative problem.

The Board concludes and finds from the weight of the evidence that the claimant's current problems are compensably related to the injury of 1963. The posture of the claim is such that if it were presented within the time within which the claimant could seek benefits under ORS 656.271 for aggravation, the claim would be allowed.

The claimant not being entitled to file a claim for aggravation as a matter of right due to expiration of the time provided by law, the claimant is limited to relief which might be granted by the Workmen's Compensation Board to act upon the Board's own motion as provided under ORS 656.278. It was pursuant to these provisions that the hearing herein was held. No order is made by the Hearing Officer under the applicable procedure.

The Board therefore orders that the State Accident Insurance Fund accept responsiblity for the current cervical problems experienced by the claimant. The State Accident Insurance Fund, in this connection, is to pay for the medical services obtained by the claimant and pay for temporary total disability associated with such medical care.

When the claimant's condition becomes medically stationary, the matter is to be referred to the Closing and Evaluation Division of the Workmen's Compensation Board conforming to ORS 656.268 for an advisory determination by that division of the Workmen's Compensation Board upon which further own motion order may issue with respect to the possible obligations of the State Accident Insurance Fund for temporary total disability and permanent partial disability.

The Workmen's Compensation Board has established policy that attorney fees upon own motion proceedings will follow the schedule applicable on ordinary review, particularly where claimant's counsel has represented the claimant in a full adversary hearing.

The fee schedule provides and the claimant is allowed a fee of 25% of the increased compensation not to exceed $1,500. At this point, if benefits are restricted to medical care, counsel for claimant is authorized to collect a fee in the amount indicated from his client based on the medical bills the claimant has been relieved from paying. The completion of the process may involve compensation per se and attorney fees should only be collected from the claimant if there is in fact no money compensation to which the lien of counsel attaches.

The members of the Board, in executing this order, verify that they have individually reviewed the entire record certified from the Hearing Officer.

The Board assumes that ORS 656.278 grants the State Accident Insurance Fund right of appeal from an order increasing benefits on own motion proceedings. Appeal notice is limited to the State Accident Insurance Fund since no reduction is made in the claimant's previously established right.

WCB #70-396 November 16, 1970

PHILIP EUGENE CONNER, Claimant.

The above entitled matter involves an accidental injury of March 11, 1969, in which the claimant sustained an injury to the left forearm under circumstances constituting a compensable accidental injury with concurrent right to pursue a cause of action against a responsible third party.

The third party cause of action is pending and an offer of settlement has been made with respect to which a proposed distribution of the proceeds has been agreed upon. A copy of the stipulation providing for the proposed distribution is attached and by reference made a part hereof.

The proposed stipulation is hereby approved and made a part of the record in the matter of the compensation of the claimant.

Stipulation:

The above-captioned matter having been closed by determination order of November 18, 1969 and the permanent partial disability having been agreed upon by stipulation of settlement between the parties and approved by the Board on April 6, 1970;

WHEREAS the the (sic) insurer, on behalf of the employer, has paid the total sum of $5,170.10 under their Claim No. 6300-CO-1436 and

WHEREAS a third-party action was instituted by the workman against Fleet Leasing, Incorporated, an Oregon corporation, in the Circuit Court of the State of Oregon for the County of Multnomah under Case No. 358-605 and

WHEREAS an offer of settlement has been made by the defendant Fleet Leasing, Incorporated, for a total sum of $20,000 and

WHEREAS standard Bar fee schedule of attorney's fees and costs combined amount to $6,705.16 and that sum combined with the funds expended by the insurance carrier would, with distribution pursuant to ORS 656.593, provide payment of attorney's fees, costs and repayment to the insurance carrier, leaving a cash payment to the workman of $8.124.74 and

WHEREAS the workman's claim has been fully and finally closed, save and except for possible rights of aggravation and the workman having been advised by his own treating doctor for the third party that the workman has little, if any, likelihood of sustaining an aggravation of the injury and

WHEREAS the workman has requested the insurer and the insurer has agreed to discount its recovery of funds expended by one-third in return for the workman granting credit to the insurer and employer on any aggravation claim the full extent of the cash recovery affected by the workman on the distribution of the third-party funds and

WHEREAS a distribution based upon the above-stated facts would provide as follows:

Attorney's fees and costs	$6,705.16
United States Fidelity & Guaranty Company	3,446.74
Philip Eugene Conner	9,848.10
	$20,000.00

IT IS HEREBY STIPULATED that the Board is requested to approve the distribution of funds as stated above with the further approval that in return for the insurance carrier permitting the employee to retain an additional $1,723.36 in return for the employee's agreement to credit the employer and insurer with the total sum of $9,848.10 toward medical bills and compensation, both temporary and permanent disability, toward any aggravation which he might suffer in the future and

IT IS FURTHER ACKNOWLEDGED that both parties enter this stipulation with the advice and approval of counsel and request the approval of the Board.

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PERMANENT PARTIAL DISABILITY

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