VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

Robert VanNatta, Editor

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VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

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PRICE FORTY DOLLARS

CLAIM NO. C 604-8759 REG MAY 8, 1975

DARRELL D. FULTON, CLAIMANT
Own Motion Determination

Pursuant to an Own Motion Order dated October 10, 1974, the Workmen's Compensation Board required Liberty Mutual Insurance Company, the workmen's compensation carrier for the employer, to reopen this claimant's claim and provide further medical care and compensation for his condition causally related to an industrial injury sustained in 1968.

Claimant was hospitalized April 10, 1974, for a myelogram. A laminectomy at L-3 was performed May 13, 1974. It appears that claimant has now returned to full time work.

ORDER

The Board ORDERS Temporary Total Disability be paid from April 10, 1974 through November 17, 1974, less time worked and Temporary Partial Disability from November 18, 1974 through December 6, 1974.

The Board further ORDERS the named insurance company to pay claimant an award of compensation equal to 48° for 15% unscheduled disability resulting from injury to the low back.

WCB CASE NO. 67-1576 MAY 8, 1975

GEORGE W. RICHARDS, CLAIMANT
Paul Rask, Claimant's Atty.
McMenamin, Jones, Joseph and Lang, Defense Attys.
Own Motion Order

From a Petition for Own Motion Relief filed with the Board on April 16, 1975, it appears that on March 20, 1975 a Referee of the Workmen's Compensation Board issued an Opinion & Order ordering claimant's employer at the time of the March 3, 1973 right ankle injury, to pay one half the expense of certain medical treatment. In addition, the Referee recommended that claimant petition the Workmen's Compensation Board for an "own motion" order requiring payment of the half of the expense by another employer who employed claimant at the time he suffered a right knee injury in November, 1966. The petition filed on April 16, 1975 resulted from that recommendation. Presumably the Referee found the treatment in question was provided to relieve complaints attributable to both injuries and on that basis split the cost.

The claimant's employer at the time of the 1966 injury objects to the request for own motion relief contending that as a matter of both fact and law, the Referee erred in attempting to apportion

liability for the medical expense in question. He contends claimant's remedy was to request Board review of the Referee's order.

Our records do not, however, reveal a request for review having been made by claimant within the time provided by law.

In view of the cases of Keefer V. SIAC, 171 Or 405 (1943), Cutright V. American Ship Dismantlers, 6 Or App 62 (1971) and Berry V. Weyerhaeuser, 7 Or App 343 (1971), and in the absence of evidence showing a particular factual basis for an order, we conclude that entry of an Own Motion Order requiring Arrow Transportation to extend claimant further benefits on account of claimant's November 1, 1966 injury is not justified.

ORDER

Claimant's petition for own motion relief is hereby denied.

Pursuant to ORS 656.278(3), no notice of appeal is deemed applicable.

WCB CASE NO. 74-2248 MAY 8, 1975

EUGENE PUSCHEL, CLAIMANT
Keith Burns, Claimant's Atty.
Department of Justice, Defense Atty.
Request for Review by Claimant

This matter involves a denied back claim. The Referee affirmed the denial.

Claimant, a 50 year old carpenter, noticed back pain in his lower back while at work on February 25, 1974. He filed his claim on May 8, 1974. Claimant had received benefits as an off-the-job condition from Blue Cross and Banker's Life Company. The initial treating doctor reports the employee did not know how or when injury was caused except severe pain started in his lower back on February 25, 1974.

An orthopedist, to whom claimant was referred, made no mention of this being an industrial injury in his report to the attending doctor. Claimant himself admits he does not really know what caused his problem.

On de novo review the Board concurs with the finding of the Referee that claimant has failed to carry his burden of proof and that the denial must be affirmed.

ORDER

The order of the Referee dated September 25, 1974 is affirmed.

WCB CASE NO. 74-1222 MAY 8, 1975

CLARENCE GILTNER, CLAIMANT
Pozzi, Wilson and Atchison, Claimant's Attys.
Keith Skelton, Defense Atty.
Request for Review by Claimant

This matter involves the extent of permanent disability. The Determination Order awarded claimant 20% (64°) unscheduled low back disability. The Referee awarded claimant a total of 60% (192°). Claimant requests Board review contending he is permanently totally disabled.

Claimant, now 37 years of age, received a back injury July 20, 1970, while working as a truck driver. He also received some shoulder and neck injury, but this has subsided. Claimant had a previous back injury in 1967 resulting in a fusion in 1968. After the July 20, 1970 injury, claimant has undergone two attempts to repair the fusion.

The Back Evaluation Clinic rates loss of function due to this injury as mildly moderate and recommends retraining under the Vocational Rehabilitation Division.

The Referee found the claimant not highly motivated to return to work as he has other income and does not have to work. The record reflects that claimant has not pushed for or facilitated any retraining.

On de novo review, the Board concurs with the opinion and findings of the Referee and adopts his opinion as its own.

ORDER

The order of the Referee dated October 8, 1974 is affirmed.

WCB CASE NO. 74-1654 MAY 8, 1975

MUSETTA LEISURE, CLAIMANT
Richard P. Noble, Claimant's Atty.
Department of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The State Accident Insurance Fund has requested Board review of a Referee's order finding claimant was the widow of decedent and entitled to workmen's compensation benefits on account of the decedent's death during a period of permanent total disability. The relevant facts are set forth in the Referee's opinion.

The Referee founded his opinion that a valid marriage existed between decedent, Jack Leisure and Musetta Ter Best Leisure at the time of his death, on a finding that the 1957 marriage of Jack Leisure and Alma Pauline Bell Leisure had not been proved valid.

While we agree there is some question in that regard, the ultimate and crucial question is whether the decedent's last marriage = to Musetta = was valid.

On review the Fund asks that decedent's former but not his latter marriage be presumed lawful.

It is the public policy of Oregon to presume the last marriage of a person valid. In furtherance of the beneficial purposes which the presumption is designed to foster, the law imposes on the one seeking to overcome the presumption a heavy burden of proof to show that the last marriage was invalid. Although as a general rule ordinary domestic relations law is applied in establishing a statutory marital relationship to the deceased, in Section 62.21 of 2 Larson's Workmen's Compensation Law, the author observes:

> "Probably the most that can be said about the application of domestic relations law to compensation claims is that, because of the beneficent character of the legislation, established definitions and rules will usually be stretched as far as precedents will allow, to take care of meritorious cases of dependence.
>
> "Although presumption of validity of the most recent marriage is part of the general law in many states, the burden of rebutting the presumption in compensation cases may be made so heavy that the net result is virtually a conclusive presumption."

The cases cited in support of the above observations particularly Dawson V. Hatfield Wire & Cable Co. (N.J.), 280 A.2d 173 (1971), illustrate the application of these general rules.

We note the record establishes that at the time of decedent's injury Musetta Leisure held the good faith belief that she and decedent were validly married.

Given these circumstances we are faced with deciding whether the State Accident Insurance Fund has presented sufficient evidence to overcome the presumption of validity of the marriage in question. Keeping in mind the quantum of proof required by other jurisdictions in like matters, and comparing it to the quantum of proof adduced by the Fund, we hold that the presumption has not been overcome. Claimant is thus the widow of decedent, Jack Leisure and entitled to the workmen's compensation benefits provided for one in such status.

The Referee's order should be affirmed.

ORDER

The order of the Referee dated September 20, 1974 is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $350, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 74-859 MAY 9, 1975

HAROLD MORTON, CLAIMANT
Nicholas D. Zafiratos, Claimant's Atty.
Mac Donald, Dean, McAllister & Snow, Defense Attys.
Request for Review by Employer

This matter involves whether or not claimant is permanently totally disabled. The Determination Orders have awarded claimant 10% permanent partial disability to the neck. The Referee awarded claimant permanent total disability.

Claimant, a 29 year old fish cannery worker, slipped and fell June 3, 1971, hitting the back of his head and suffered a strain injury to his neck and back. The claimant has functionally illiterate before the industrial injury and had substantial psychopathology.

The examining psychologist and examining psychiatrist both related the industrial accident to the aggravation of the claimant's chronic psychopathology. The psychiatrist testified that the industrial accident triggered a rather precarious balance and was the straw that broke the psychological camel's back. His diagnosis was organic brain syndrome of unknown cause and severe conversion reaction. Both the psychologist and psychiatrist stated that the prognosis for the patient to return to gainful employment through training was very poor. A very sheltered workshop situation would be the only possiblity.

The Board concurs with the findings of the Referee that claimant is permanently totally disabled.

ORDER

The order of the Referee, dated September 12, 1974 is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $400, payable by the employer, for services in connection with Board review.

WCB CASE NO. 74-2236 MAY 9, 1975

MYRON C. McGUCKIN, CLAIMANT
Richardson & Murphy, Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by Claimant

This matter involves a denied claim. The State Accident Insurance Fund denied the claimant's claim on the grounds that claimant did not sustain an accidental injury nor did his work activity cause or aggravate his low back condition. The Referee affirmed the denial.

Claimant, a 57 year old electrician, developed low back pain in July, 1973. He completed an 801 report April 10, 1974, stating he had a compression fracture of vertebra and that his doctor tells him that his work over the years has aggravated his back condition.

The record reflects that the claimant has a poor memory and does not recall or relate a coherent history even to his attending physician. If, in fact, the claimant received an industrial injury or if his work did aggravate a preexisting condition, the claimant could have and should have produced other evidence and testimony to substantiate this.

Based on the record, the Board concurs with the finding of the Referee that there is no satisfactory evidence on which the denial of claimant's claim either as an occupational injury or aggravation of a preexisting condition or occupational disease can be reversed.

ORDER

The order of the Referee dated October 24, 1974 is affirmed.

WCB CASE NO. 74-1669 MAY 9, 1975

NORMAN KOHLER, CLAIMANT
Smith & Lee, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe,
Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The issue is the extent of permanent disability. The Referee affirmed the Determination Order which awarded the claimant 10% (32°) unscheduled low back disability.

Claimant, a 22 year old lumbermill worker, sustained a back injury

March 6, 1973. The medical reports reflect that claimant is essentially pain free with no back spasm or tenderness and gives the opinion that there is minimal disability of the low back. The record also reflects an intervening incident which is unrelated to his work but aggravated his back condition.

The Board concurs with the opinion and findings of the Referee that the award of 10% (32°) unscheduled low back disability adequately compensates the claimant.

ORDER

The order of the Referee, dated November 8, 1974, is affirmed.

WCB CASE NO. 74-673 MAY 9, 1975

ALBERT DENZER, CLAIMANT
Charles Paulson, Claimant's Atty.
Department of Justice, Defense Atty.
Request for Review by Claimant

The issue is the extent of permanent disability. The Determination Order awarded claimant 5% unscheduled disability for the low back and right shoulder, and 5% scheduled loss of right foot. The Referee affirmed the award as to loss of right foot and increased the award for unscheduled disability to claimant's back, neck, shoulder, head and hips to a total of 30% (96°).

The Board concurs with the opinion and findings of the Referee and adopts his Opinion and Order as its own.

ORDER

The order of the Referee dated October 7, 1974 is affirmed.

WCB CASE NO. 73-4186 MAY 9, 1975

HAL G. BROWN, CLAIMANT
Babcock & Ackerman, Claimant's Attys.
Thwing, Atherly & Butler, Defense Attys.
Request for Review by Employer

This matter involves a 25 year old logger who was injured when hit on the back of his head by the haul-back cable. He received no award for permanent partial disability by Determination, but at hearing, the Referee awarded permanent partial disability equal to

64° for unscheduled disability. The employer has requested Board review of the Referee's order contending that claimant does not have a permanent disability because his physicians have all predicted that his post concussion syndrome would eventually disappear.

It appears the claim was closed in accordance with the guidelines discussed in Dimitroff V. SIAC, 209 Or 316 (1957). The Referee properly observed that claimant is therefore entitled to have his permanent disability evaluated now. Keeping in mind that permanent partial disability awards are payable for a limited period of time and that one of the purposes of a permanent disability award is to aid a claimant during the period of readjustment following an industrial injury, we conclude that claimant is entitled to an award of permanent disability compensation.

The Board concurs with the Referee that claimant is entitled to a permanent partial disability award equal to 64° unscheduled disability and conclude his order should be affirmed.

ORDER

The order of the Referee dated October 3, 1974 is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the employer, for services in connection with Board review.

WCB CASE NO. 74-2180 MAY 9, 1975

BONNIE WILSON, CLAIMANT
Harold W. Adams, Claimant's Atty.
Department of Justice, Defense Atty.
Request for Review by Claimant
Cross appeal by SAIF

Reviewed by Commissioners Wilson and Moore.

At issue in this matter is the extent of permanent disability claimant has sustained as a result of a compensable low back injury April 28, 1969, while employed in a nursing home. A first Determination Order made no award for permanent disability. A second Determination Order awarded 10% of the maximum for unscheduled back disability and 5% loss of the left leg. Upon hearing, the Referee increased the unscheduled disability to 60% of the maximum and affirmed the award for the left leg.

Claimant requests Board review contending she is permanently and totally disabled. The State Accident Insurance Fund has cross appealed contending the increased award made by the Referee is excessive and urging reinstatement of the Determination Order.

The record indicates claimant is now precluded from any employment other than very light, according to Dr. Burr. The medical maintenance treatment claimant has been afforded has assisted her in recommended weight reduction and in living with her pain without medication.

Absent from the record before the Board is an indication that claimant is motivated to seek to be reemployed, or to acquire assistance in any type of retraining program. At age 48, claimant should certainly have many productive years ahead.

The Board, on de novo review, is not convinced that claimant is permanently and totally disabled, nor that her permanent disability is equal to 60% of the maximum as allowed by the Referee. The Board concludes that claimant's permanent disability is equal to 30% of the maximum allowable for unscheduled disability.

ORDER

The order of the Referee is modified to reflect that claimant has sustained permanent partial disability equal to a maximum of 30% unscheduled disability and 5% loss of the left leg. In all other respects his order is affirmed.

WCB CASE NO. 74-2487 MAY 9, 1975

ROBERT WHITE, CLAIMANT
David Vinson, Claimant's Atty.
Department of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The issue is the extent of permanent disability. The Determination Order awarded claimant 60% (192°) unscheduled pulmonary disability arising out of the accepted occupational disease claim. The Referee awarded claimant permanent total disability.

Claimant, a 53 year old furnace operator, has chronic pulmonary emphysema and generalized pulmonary fibrosis. The medical evidence in the record, which is unrefuted, along with factors such as claimant's age and limited work background, supports the finding of the Referee that claimant is permanently totally disabled.

The Board adopts the Opinion and Order of the Referee as its own.

ORDER

The order of the Referee dated November 8, 1974 is affirmed.

Counsel for claimant is allowed a reasonable attorney's fee in the sum of $300, payable by SAIF, for services in connection with Board review.

WCB CASE NO. 68-923 MAY 9, 1975

RAFAEL RUIZ, CLAIMANT
Pozzi, Wilson & Atchison, Claimant's Attys.
Philip Mongrain, Defense Atty.
Own Motion Order

On December 24, 1974, the Workmen's Compensation Board requested a Referee of its Hearings Division to convene a hearing, develop a record and render an advisory opinion on whether claimant should be granted additional benefits, pursuant to ORS 656.278, for an injury of February 5, 1966.

The evidence gathered led the Referee to recommend that additional benefits not be granted.

Our review of the evidence causes us to concur with the observations made by the Referee in his advisory opinion and we conclude that claimant's request for additional compensation should be denied.

IT IS SO ORDERED.

Pursuant to ORS 656.278(3), no notice of appeal is deemed applicable.

WCB CASE NO. 73-2426 MAY 9, 1975

JOSEPH ROUSKE, CLAIMANT
Green, Griswold & Pippin, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe,
Defense Attys.
Request for Review by Claimant

This matter involves whether or not the claimant made a timely report of his industrial injury to his employer and whether or not claimant has proved that he has sustained a compensable injury arising out of the employemnt.

The Referee dismissed the claimant's claim without prejudice on the grounds that the true employer, Mitsubishi International Corporation, MGA Division, was not a party to the hearing.

The Board finds, as did the Referee, that the claimant was

employed by MGA Division, Mitsubishi International Corporation. The attorney for the employer and its insurance carrier, in his brief for Board review, states that the true employer is MGA Division, Mitsubishi International Corporation, and that from the outset, the insurance carrier and MGA Division have treated this action as a claim against MGA. The employer further states in his brief that when the insurance carrier and its counsel appeared at the hearing it was doing so in behalf of MGA Division.

Claimant, a 49 year old sales representative, formally filed a claim by and through his attorney by way of a letter of April 26, 1973 alleging injuries to his back which occurred in June, 1972 at Sea-Tac Airport and August, 1972 at Expo '72 while he was engaged in heavy lifting and assenbling sales displays. This letter was addressed to Mitsubishi International Corporation with a carbon copy to MGA Division, Mitsubishi International Corporation.

The record reflects that Mitsubishi International Corporation and MGA Division of Mitsubishi International Corporation have intermixed their business as it applies to this claimant. A paycheck was issued by the MGA Division, yet an expense account was issued by the International Corporation. A MGA warranty card has a return address to the International Corporation. The intermixing of the business affairs of the MGA Division and the International Corporation as it applies to this workman is apparent in the record.

Claimant's direct supervisor was notified immediately by the claimant of his back injury after a lifting incident in setting up a display of merchandise. This supervisor was an employee of MGA Division. Also, the letter addressed to the International Corporation with a carbon copy to the MGA Division was notice to the employer, MGA Division, under the facts of this case considering the intermixing of the business affairs of MGA Division and International Corporation. The Board therefore finds that the claimant has made a timely report and notice of the industrial injury to the employer, MGA Division, Mitsubishi International Corporation.

The medical reports and the other evidence in the file, although sometimes conflicting, show that the claimant has proved by a preponderance of the evidence, that he suffered a compensable injury. The Board finds that claimant is entitled to the benefits as provided by the Workmen's Compensation Law from MGA Division, Mitsubishi International Corporation.

ORDER

Mitsubishi International Corporation, MGA Division, is ordered to accept claimant's claim and pay to claimant all benefits due him under the Workmen's Compensation Law.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $1,000, payable by the employer, for services in connection with the hearing and Board review.

WCB CASE NO. 74-1583 MAY 13, 1975

GORDON H. RICKERT, CLAIMANT
Noreen K. Saltveit, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe,
Defense Attys.
Request for Review by Claimant

This matter involves a denied claim of aggravation. The Referee dismissed claimant's request for a hearing on the grounds that the request for hearing was not filed within five years after the first Determination Order as required by ORS 656.319(2) (c).

Claimant's back injury claim of January 5, 1968 was first closed by the first Determination Order issued December 10, 1968. Claimant did not request a hearing on the denial of the aggravation claim until April 26, 1974.

ORS 656.319 (2) (c) specifically states:

> "With respect to any dispute on increased compensation by reason of aggravation under ORS 656.273, a hearing on such disputes shall not be granted unless a request for hearing is filed within five years after the first Determination Order made under subsection (3) of ORS 656.368."

A request for hearing on this aggravation claim was not made within five years after the first Determination Order was issued and the Referee was correct in dismissing the request for hearing inasmuch as he had no jurisdiction in the matter.

Claimant argues that since he filed an aggravation claim with the employer prior to five years from the date of the first Determination Order and the employer did not deny the claim of aggravation until April 19, 1974, the claimant should have sixty days from the date of denial to request a hearing.

ORS 656.319 (2) (c) is unambiguous in stating that a hearing shall not be granted unless a request for hearing is filed within five years after the first Determination Order.

The medical evidence in the record also shows that claimant's claim of aggravation would have failed on the merits in that claimant's condition resulting from his compensable injury had not worsened.

ORDER

The order of the Referee dated October 11, 1974 is affirmed.

WCB CASE NO. 74-727 MAY 13, 1975

EVELYN M. MINES, CLAIMANT
Burns and Edwards, Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The State Accident Insurance Fund requests Board review of a Referee's Order finding claimant had suffered unscheduled disability equal to 25% of the maximum allowable as the result of complications of a ventral hernia.

On January 23, 1973, while working as a nurses aide, claimant suffered a reherniation of a previously repaired ventral hernia. Because claimant had experienced a terrifying breathing problem after the surgical repair of her first hernia, she refused to submit to another surgery to repair the recurrence.

The State Accddent Insurance Fund contends this is not a "complication" and further, that since claimant's physician has not deemed an operation inadvisable, claimant is not even entitled to the 10° allowable by ORS 656.220, let alone the 80° allowed by the Referee.

We have reviewed the record de novo and considered the briefs submitted on review. Having done so, we concur with the Referee's order and would adopt it as our own and award to claimant's attorney $250, payable by the State Accident Insurance Fund, for his services on this review.

IT IS SO ORDERED.

WCB CASE NO. 74-1847 MAY 13, 1975

MILDRED MARTENS, CLAIMANT
Annala & Lockwood, Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by Claimant

This is a denied aggravation claim. The State Accident Insurance Fund denied the claim and the Referee affirmed the denial.

Claimant, a 56 year old housekeeper at a hospital, received an injury to her left shoulder and clavicle, her right thumb and her right foot in March, 1971. This was handled as a medical only claim.

Claimant has attempted since February, 1972, to get the State Accident Insurance Fund to reopen the claim or to establish a claim of aggravation.

The medical reports of Dr. Stanley Wells, the attending physician, of March 11, 1974, and Dr. Schneider's report of May 29, 1974, established the jurisdictional requirements for an aggravation claim. The subsequent medical reports of October 16, 1974 and November 7, 1974, from Dr. Robert E. Rinehart and Stanley E. Wells, which should have been admitted, speak to the merits of the aggravation claim.

The Board finds that claimant has proved her claim of aggravation to her left shoulder and clavicle, her right foot and right thumb and that her present conditions, including the aggravation to rheumatoid arthritis are causally related to the March, 1971, industrial injury.

ORDER

The order of the Referee, dated November 22, 1974, is reversed.

The State Accident Insurance Fund is ordered to accept claimant's claim of aggravation to left clavicle and left shoulder, right foot and right thumb and aggravation to her rheumatoid arthritis.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $1,000, payable by the State Accident Insurance Fund, for services in connection with hearing and on Board review.

WCB CASE NO. 73-2217 MAY 13, 1975

JEROME K. BYRD, CLAIMANT
Galton & Popick, Claimant's Attys.
McMenamin, Jones, Joseph & Lang, Defense Attys.
Request for Review by Claimant

Claimant has requested Board review of a Referee's order finding that claimant was not entitled to reopening on aggravation with further temporary total disability, penalties and attorney's fees; or to payment of certain medical expenses but allowing an additional 15° of permanent disability compensation for a total of 30° or 20% loss of the right leg.

On review claimant seeks:

1. Temporary total disability from July 4, 1973, to September 5, 1974 plus a 25% penalty thereon;

2. Payment of Dr. Puziss' medical bills plus a 25% penalty;

3. An order requiring acceptance of claimant's claim for re-opening;

4. Permanent partial disability compensation equal to 40% loss of the right leg;

5. An attorney's fee payable by the employer.

We have examined the record and find all claimant's contentions, with the exception of the issue of permanent disability, without merit.

We conclude claimant was been essentially medically stationary since the closure of his claim on May 30, 1973 and that the treatment he received for the injury thereafter would not have prevented his return to regualr employment. He is thus not entitled to reopening, time loss or penalties and attorney's fees payable by the employer.

We do concur with the claimant's contention that the residual disability in the right leg exceeds that heretofore compensated. We oonclude claimant's right leg disability equals 40% of the right leg.

ORDER

The Referee's order dated October 10, 1974 is hereby modified to grant claimant an additional 30° making a total of 60° or 40% loss of the right leg.

Claimant's attorneys are awarded 25% of the additional compensation made payable hereby, but in no event shall the total fee, when combined with fees attributable to the order of the Referee, exceed $2,000.

In all other respects the Order of hhe Referee is affirmed.

WCB CASE NO. 74-2051 MAY 13, 1975

PAUL D. BOWEN, CLAIMANT
Jack D. Howe, Claimant's Atty.
McMenamin, Jones, Joseph & Lang, Defense Attys.
Request for Review by Employer

The employer has requested Board review of a Referee's order finding that claimant's claim for benefits had been timely filed and that claimant had proved his condition constituted a compensable occupational disease.

We have examined the record de novo and considered the briefs of the parties submitted on review. Having done so we conclude the Referee's order should be affirmed in its entirety and that claimant's

attorneys should receive a reasonable attorney's fee of $600, payable by the employer, for their services on this review.

IT IS SO ORDERED.

WCB CASE NO. 74-2227 MAY 13, 1975

WILLIAM J. SMITH, CLAIMANT
John R. Sidman, Claimant's Atty.
Department of Justice, Defense Atty.
Request for Review by Claimant

This matter involves a prodedural problem arising out of a medical only closure. There was a request for hearing for temporary total disability payments only which was dismissed after a stipulated settlement of the temporary total disability problem. A subsequent request for hearing to determine the extent of permanent disability was dismissed by the Referee on the grounds that the medical only closure and the stipulation were res judicata to this issue.

Claimant received an accepted back injury claim January 17, 1973, which was handled and closed as a medical only matter by the State Accident Insurance Fund. The first request for hearing regarding temporary total disability only was settled by stipulation dated July 3, 1973, in which the State Accident Insurance Fund agreed to pay four days of temporary total disability. Nothing further happened until about February 20, 1974, when the claimant asked that his claim be reopened.

By its letter of June 11, 1974, the State Accident Insurance Fund denied the claimant on the basis that the medical reports submitted did not support his claim for aggravation. The claimant requested a hearing contesting the denial letter and to determine the nature and extent of permanent disability.

The Referee dismissed the request for hearing on the grounds that the administrative closure and stipulation were res judicata.

The stipulation, dated July 3, 1974, merely settled the issue of four days temporary total disability. The legal effect of the stipulation was to change this claim from a nondisabling compensable injury to a disabling compensable injury. At that point, if the claimant was medically stationary, the State Accident Insurance Fund should have submitted the matter to Evaluation for a Determination Order pursuant to ORS 656.268(2).

The request for hearing and the Referee's Opinion and Order were premature since there had never been a Determination Order issued.

The Board remands this claim to Evaluation for issuance of a Determination Order.

ORDER

The order of the Referee, dated October 18, 1974, is reversed.

The claim is remanded to Evaluation Division, Workmen's Compensation Board, for appropriate handling pursuant to ORS 656.268(2).

WCB CASE NO. 72-3589 MAY 14, 1975

LESTER M. FLINN, DECEASED
William E. Taylor, Claimant's Atty.
Department of Justice, Defense Atty.
Request for Review by SAIF

The State Accident Insurance Fund has requested Board review of a Referee's order finding decedent's death compensable.

Decedent, a log truck driver, suffered a heart attack while working in an area remote from medical care. During the long journey from the site of the attack to the hospital, he died from the effects of the attack and from aspiration of vomitus. The Referee, although concluding that a medical causal connection between the work activity and heart attack had not been shown, nevertheless found decedent's death compensably related to his employment on the same principle as injuries are considered compensable under the so called "bunkhouse rule".

While we consider the Referee's rationale sound, we believe the beneficiaries have carried their burden of adequately proving a medical causal connection between the decedent's work and his heart attack.

The Oregon Supreme Court, in Clayton V. SCD, 253 Or 397 (1969), relied heavily on Chief Justice Weintraubs' opinion concerning the adequacy of medical proof expressed in the New Jersey case on Dwyer V. Ford Motor Company, 36 N.J. 487, 178 A.2d 161 (1962). Subsequent to the Dwyer case, the New Jersey Supreme Court, in Aladits V. Simmons Company, 47 N.J. 115, 219 A.2d 517 (1966) commented further that although the standard to be met for compensability remains the same, where a workman's collapse is unwitnessed and his lips are sealed by death, that courts will show an understandable readiness to find the necessary reasonably probable connection on a less formidable quantum of proof. Measured by such a standard, we find the evidence of a probable medical causal connection sufficient.

For this reason, as well as upon the rationale expressed in the Referee's well written opinion, the claim of the beneficiaries should be allowed.

The beneficiaries' attorneys have requested an extraordinary fee for their services in establishing the compensability of this claim. The affidavits supplied support the request.

ORDER

The order of the Referee, dated November 13, 1974, is affirmed.

The beneficiaries attorneys, William E. Taylor, Evohl F. Malagon and D.R. Dimick, are hereby awarded additional attorney's fees of $2,000, payable by the State Accident Insurance Fund, for their services in this matter.

WCB CASE NO. 74-3534 MAY 15, 1975

TERRY PETTIT, CLAIMANT
Galton & Popick, Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Order of Dismissal

A request for review, having been duly filed with the Workmen's Compensation Board in the above entitled matter by the claimant, and said request for review now having been withdrawn,

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 72-967 MAY 15, 1975

MELVIN O. McGINNIS, CLAIMANT
Charles Paulson, Claimant's Atty.
Merlin Miller, Defense Atty.
Request for Review by Employer

The employer has requested Board review of a Referee's order finding claimant permanently totally disabled.

At a prior hearing on the extent of claimant's permanent disability, the Referee awarded claimant permanent total disability although claimant had only requested permanent partial disability compensation in his request for hearing.

On review the Board found claimant only partially disabled and reduced claimant's award to 60% of the maximum allowable for unscheduled permanent partial disability.

Claimant appealed to the Circuit Court whereupon the Court remanded the matter to the Referee for receipt of additional testimony to determine the extent of claimant's permanent disability.

The Referee, after receiving further evidence over the objection of the employer, again found the claimant permanently and totally disabled and the employer has again requested Board review.

We previously concluded claimant was not permanently totally disabled because the medical opinion established that claimant's physical disability is only moderate and his memory loss is only mild. The additional evidence submitted does not, in our opinion, justify an award of permanent total disability.

The Referee's order of Setpember 10, 1974 should be reversed and in lieu thereof claimant should receive an additional 64° of permanent partial disability compensation for a total of 192° or 60% of the maximum allowable.

Claimant's attorney should receive 25% of the additional permanent partial disability compensation allowed hereby but in no event shall the fee, when combined with fees received pursuant to the Referee's order, exceed $2,000.

The employer should be permitted to apply any permanent disability payments previously made to claimant in this claim, towards payment of the award hereby granted.

IT IS SO ORDERED.

WCB CASE NO. 74-1826 MAY 15, 1975

JACK P. YOES, CLAIMANT
Merten & Saltveit, Claimant's Attys.
Dept. of Justice, Defense Atty.
Order on Remand

Claimant requests Board review of a Referee's order dismissing his request for hearing on the ground that his aggravation rights had expired.

The Referee ruled that a "medical only" closure of the claimant's claim on August 5, 1968 constituted the first determination from which the five year aggravation period runs.

We have formerly concluded that such administrative closures do not qualify as the "first determination made under subsection (3) of ORS 656.268". Thus, not only have claimant's aggravation rights not expired, they will not begin to run until such a determination is issued. The considerations which led to the use of medical only closures and their relationship to aggravation rights were discussed

in Elizabeth Simmons, Order on Review, WCB 73-1070, (May 22, 1974).

Since claimant's aggravation rights have not expired this matter should be remanded to the Referee for a hearing on the merits of his claim.

IT IS SO ORDERED.

WCB CASE NO. 73-2792 MAY 16, 1975

FIDUL YAKIS, CLAIMANT
Robert McConville, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workmen's Compensation Board in the above entitled matter by the State Accident Insurance Fund, and said request for review now having been withdrawn,

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

IT IS HEREBY FURTHER ORDERED that claimant's attorney receive a fee of $125, payable by the State Accident Insurance Fund, for services reasonably required in connection with the Fund's request for review.

WCB CASE NO. 74-2123 MAY 21, 1975

VERA CROSS, CLAIMANT
Franklin, Bennett, Ofelt & Jolles, Claimant's Attys.
Dept. of Justice, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workmen's Compensation Board in the above-entitled matter by the claimant, and said request for review now having been withdrawn,

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the Order of the Referee is final by operation of law.

WCB CASE NO. 74-1531 MAY 22, 1975

RAYMOND BENEFIELD, CLAIMANT
Liberty & O'Leary, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Order of Dismissal

The employer has moved to dismiss claimant's request for Board review of an Opinion and Order of a Referee dated March 27, 1975.

The grounds for the Motion are that the claimant failed to perfect the appeal in accordance with ORS 656.295 which requires that copies of the request for review be mailed to all other parties to the proceeding.

It appears that claimant has not perfected his appeal in accordance with the requirements of the statute and thus the Board has no jurisdiction to proceed with a review.

Claimant's request for review should be dismissed and the Referee's Opinion and Order dated March 27, 1975 declared final by operation of law.

IT IS SO ORDERED.

WCB CASE NO. 74-306 MAY 22, 1975

EDWARD BICE, CLAIMANT
Babcock & Ackerman, Claimant's Attys.
Jaqua & Wheatley, Defense Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The employer requests Board review of a Referee's order which increased claimant's award for permanent disability from 15% (48°) to 40% (128°) of the maximum allowable for unscheduled disability for loss of earning capacity due to psychiatric residuals of his injury.

On May 27, 1968, while bucking logs, this claimant was struck in the face by a vine maple causing various facial fractures and lacerations and a mild cerebral concussion. Claimant continued to have problems and psychiatric consultation was suggested. Throughout extensive medical examinations and evaluations, no orthopedic abnormalities were found and there was no evidence of organic disease in the nervous system. Psychological evaluations indicated that, as a result of the injury, claimant was experiencing anxiety, depression, a general sense of ill being, a phobia regarding machinery in the belief he would again be injured,--all of which presented a psychiatric problem of serious proportions.

Under the Division of Vocational Rehabilitation, claimant successfully completed more than two years of courses at Lane Community College in forestry. The record indicates claimant has now returned to full time employment with a helicopter company but his earnings are substantially reduced. It also appears that his earning capacity has been permanently impaired.

The Referee found claimant to be entitled to a total of 40% of the maximum for unscheduled disability. The Board, on review, concurs with the findings made by the Referee.

ORDER

The order of the Referee, dated December 6, 1974, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the employer, for services in connection with Board review.

WCB CASE NO. 74-1749-IF MAY 22, 1975

DONALD R. JOHNSON, CLAIMANT
Pozzi, Wilson and Atchison, Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

This matter involves the extent of permanent disability. This claim is to the Inmate Injury Fund. By appropriate procedure, the State Accident Insurance Fund made the determination of 5% (16°) unscheduled disability. The Referee affirmed this award. Claimant requests Board review contending he is entitled to substantial additional permanent partial unscheduled disability.

Claimant received a low back injury June 19, 1969. Claimant has had a laminectomy at L5-S1 level and a herniated disc was removed. The medical reports in the record reflect claimant has made a substantially good recovery but does have residuals from the back surgery. The medical reports, of course, rate the medical loss of function whereas unscheduled disability is rated on loss of earning capacity in the general labor market.

The evidence in the record reflects that the claimant has been working full time at strenuous physical labor on a regular basis. One doctor reports that the claimant has had trouble with his back and it has pained him but he has not taken time off from his work in spite of this.

On de novo review, the Board finds that claimant's earning

capacity has been impaired greater than that awarded by the Determination Order which was affirmed by the Referee. The Board finds that claimant is entitled to an award of a total of 15% (48°) unscheduled low back disability.

ORDER

The order of the Referee is modified to the extent that claimant is awarded a total of 15% (48°) unscheduled low back permanent partial disability. This is an increase of 10% (32°) over that previously awarded.

In all other respects the Determination Order and the Order of the Referee are affirmed.

Counsel for claimant is to receive as a fee, 25% of the increase in compensation associated with this award, which shall not exceed $1,500.

WCB CASE NO. 73-3869-E MAY 22, 1975

GEORGE F. CLARK, CLAIMANT
Moore, Wurtz & Logan, Claimant's Attys.
Gearin, Cheney, Landis, Aebi & Kelley, Defense Atty.
Order Approving Stipulation

On December 23, 1974 the employer requested Board review of a Referee's order dated December 6, 1974.

Pending review by the Board the parties agreed that claimant's unscheduled permanent disability equalled 165° and that the award should be paid to the claimant in a lump sum after deducting a fee for claimant's attorney.

The stipulation is attached hereto as Exhibit "A". The "Request For Approval Advance Payment of Award" is attached as Exhibit "B".

We conclude the stipulation should be approved and executed according to its terms, that the stipulated award should be paid in a lump sum as provided in Exhibit "B", and that the employer's request for Board review should be dismissed.

IT IS SO ORDERED.

STIPULATED ORDER OF DISMISSAL AND DETERMINATION

This matter came on before the Honorable Gordon Sloan, Commissioner of the Workmen's Compensation Board upon the stipulation of the parties. Claimant appeared by and through his attorney, Lynn Moore. Employer-carrier appeared by and through its attorney, Fred M. Aebi

(Gearin, Cheney, Landis, Aebi & Kelley). It appears that the matter has been fully compromised between the parties and that this order may be entered.

IT IS THEREFORE ORDERED AND ADJUDGED that:

(1) Claimant's condition is found to be medically stationary and that he should be awarded a permanent disability rating equal to 165 degrees for unscheduled disability or the sum of $11,550;

(2) Claimant's attorney is hereby awarded attorney's fees in the amount of $1,500. Said attorney's fees are to be paid out of the amount made payable by this order and not in addition thereto; and

(3) Employer-carrier's request for review is hereby dismissed.

SAIF CLAIM NO. C 40082 MAY 22, 1975

BILLY McCUTCHEN, CLAIMANT
Order of Amendment

On the 12th day of March, 1975, the Workmen's Compensation Board issued its Own Motion Determination in the above-entitled matter. The order erroneously recited the date of April 17, 1972 as the date the State Accident Insurance Fund voluntarily reopened claimant's claim for surgery. The sole purpose of this order is to correct the third paragraph of the order to read as follows:

> "The State Accident Insurance Fund, on April 17, 1974, voluntarily reopened claimant's claim to permit Dr. Corrigan to perform surgery***".

SAIF CLAIM NO. A 579585 MAY 22, 1975

JAMES E. NATIONS, CLAIMANT
Allen G. Owen, Claimant's Atty.
Own Motion Order

This matter is before the Workmen's Compensation Board upon request of claimant that the Board exercise its continuing jurisdiction under Own Motion power granted by ORS 656.278.

Claimant suffered a compensable injury on October 17, 1956. The first final order was issued February 4, 1957. A lumbar myelogram was performed on April 23, 1973, then a lumbar laminectomy and L4, 5 disc excision was subsequently performed. The claimant asks that we order the Fund, as the successor to the injuring function of the State Accident Insurance Commission, to provide him with additional benefits as this condition is a result of his October 17, 1956 injury.

The question is whether there is a material causal connection between claimant's October 17, 1956 injury and the 1973 surgery. The evidence on the subject is insufficient to make an informed judgement.

The Board therefore concludes the matter should be remanded to the Hearings Division to conduct a hearing and render an advisory opinion to the Board on the question presented above.

IT IS SO ORDERED.

WCB CASE NO. 74-1742 MAY 22, 1975

WILLIAM LAWSON, CLAIMANT
Marsh, Marsh, Dashney & Cushing, Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

This matter involves a denied claim of aggravation. The Referee dismissed the request for hearing on the grounds that the medical reports submitted did not meet the jurisdictional prerequisites for the hearing on an aggravation claim pursuant to ORS 656.273.

The Board concurs with the finding of the Referee that the medical reports in the record are insufficient to support a claim for aggravation. A claimant's statement that his physical condition has deteriorated or a doctor's statement repeating claimant's assertions are insufficient and a psysician's statement only that claimant has experienced more pain since his injury, is likewise insufficient.

Claimant's new attorney, in his brief, requests the Board to consider additional medical reports on Board review which were not submitted at the time of the hearing. The Board, in its de novo review, reviews the record made at the hearing. Since the medical report in the record was insufficient to give the Referee jurisdiction to hear the claim on its merits, the Board will not accept additional medical reports at Board review level. This is especially true in this case where the additional medical reports could have been obtained and submitted at the time of the hearing.

ORDER

The order of the Referee dated October 15, 1974, is affirmed.

WCB CASE NO. 74-1962 MAY 23, 1975

EDNA C. JORDAL, CLAIMANT
Becker & Sipprell, Claimant's Attys.
Department of Justice, Defense Atty.
Order

On May 9, 1975, the Fund moved the Board for an order setting aside and cancelling a Determination Order dated April 2, 1974, which the parties previously stipulated had been prematurely issued. The Fund also sought permission to convert all payments made under the Determination Order to temporary total disability and to authorize recapture of double payments of compensation already made pursuant to ORS 656.268(3), when the claim is properly determined.

We conclude that the relief requested by the Fund should be granted.

ORDER

IT IS HEREBY ORDERED that the Determination Order issued in the above-referenced claim be, and it is hereby, cancelled, set aside and held for naught.

IT IS HEREBY FURTHER ORDERED that the State Accident Insurance Fund be, and it is hereby, authorized to convert and consider all payments of permanent partial disability made pursuant to said order as payments of temporary total disability due under the Stipulation & Order dated February 26, 1975.

IT IS HEREBY FURTHER ORDERED that the Evaluation Division of the Workmen's Compensation Board make the necessary adjustments in compensation contemplated by ORS 656.268(3)when the claim is again evaluated.

IT IS HEREBY FINALLY ORDERED that the Determination Order dated April 2, 1974 shall not qualify as a first determination under subsection (3) of ORS 656.268 for the purpose of measuring the time limit referred to in ORS 656.273(3)(a).

SIAC (SAIF) CLAIM NO. A756944 MAY 23, 1975

LOUIS L. HARON, CLAIMANT
A. C. Roll, Claimant's Atty.
Own Motion Order

On May 7, 1975, the claimant petitioned the Board for exercise of its own motion jurisdiction over his claim for an injury to his right knee occurring August 28, 1959.

In the course of processing the claim the Board submitted the

Petition to the State Accident Insurance Fund for its response to the Petition.

On May 20, 1975, the Claims Director of the Fund voluntarily agreed to accept responsibility for the aggravation of claimant's right knee condition and to provide the further compensation and medical care requested.

Based on the voluntary acceptance of liability by the Fund we conclude that claimant's claim should be reopened effective December 17, 1974, time loss compensation to begin on said date, and that when claimant's treatment and convalescence is completed, the matter should be referred to the Workmen's Compensation Board for its own motion reevaluation of the claim.

Claimant's attorney, A.C. Roll, should receive 25% of the temporary total disability benefits made payable by virtue of this Order to a maximum of $150, payable from said award, as a reasonable fee for his services in this matter.

IT IS SO ORDERED.

WCB CASE NO. 74-2437 MAY 23, 1975

ROBERT PAGAN, CLAIMANT
Peterson, Susak & Peterson, Claimant's Attys.
McMenamin, Jones, Joseph & Lang, Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order awarding additional temporary total disability together with penalties and attorney's fees but awarding no permanent partial disability.

No briefs were filed on review so the issues to be resolved are not clear. We conclude that the Referee's prior order is not subject to review.

Reviewing the record as a whole, it appears the only viable issue is the extent of permanent partial disability claimant may have suffered as the result of a presently accepted claim of injury to his back. There is no evidence to justify any change in the Determination Order entered on January 11, 1974 and the Referee's order dated January 23, 1975, as amended February 5, 1975, should be affirmed.

IT IS SO ORDERED.

CHARLES E. ROSENCRANS, CLAIMANT
Alan Holmes, Claimant's Atty.
Daryl Nelson, Defense Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

This matter involves the extent of permanent disability. The Determination Order awarded claimant 50% (160°) unscheduled low back disability. The Referee awarded claimant permanent total disability.

Claimant, then a 43 year old cable splicer, received a back injury August 20, 1968, when he slipped from a ladder. Claimant has had two back fusions and three myelograms. Claimant has marked instability above the spinal fusion site. Further surgery to correct this is not recommended.

The medical reports in the record, especially from the attending and examining orthopedists establish that claimant is permanently totally disabled.

An examining psychiatrist reports that the industrial injury may well have served to fixate the claimant into his present pattern. The aggravation of the psychopathology further establishes permanent total disability.

The Board concurs with the findings and opinion of the Referee that claimant is prima facie permanently totally disabled.

ORDER

The order of the Referee, dated December 23, 1974, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $400, payable by the employer, for services in connection with Board review.

WCB CASE NO. 74-1333 MAY 23, 1975

DELMER CLEVENGER, CLAIMANT
Moore, Wurtz & Logan, Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The issues in this review are the compensability of a herniated cervical disc problem and the extent of disability attributable to a compensable low back injury occurring October 1, 1971.

The Referee affirmed the Fund's denial of the cervical condition and affirmed the Determination Order which awarded claimant 15% of the maximum for unscheduled disability for the low back injury. Claimant has requested Board review of the Referee's order.

The compensable low back injury of October 1, 1971, was diagnosed as an acute lumbosacral strain. Claimant returned to work in February, 1972, and there was no award made for permanent partial disability. He was terminated by his employer in October, 1972. Shortly thereafter, when symptoms recurred, claimant was referred to the Board's Disability Prevention Division where he received physical therapy and counseling. His claim was closed a second time with an award of 15% unscheduled low back disability.

In December, 1973, claimant was hospitalized with neck complaints allegedly resulting from prescribed exercises. A cervical laminectomy at C5-6 was performed. The doctors could not relate the cervical problem to any industrial injury or exercises and stated there were no physical reasons why claimant could not return to full activity.

Since May, 1974, claimant has been regularly employed driving a chip truck. The slight decrease in claimant's earnings does not convince the Board that claimant is entitled to a greater award for permanent partial disability than that already awarded. With unknown etiology of the cervical condition, the denial of benefits for this condition must also be affirmed.

ORDER

The order of the Referee, dated December 30, 1974, is affirmed.

WCB CASE NO. 73-1666 MAY 27, 1975

DONALD L. KNIPPEL, CLAIMANT
Sanford Kowitt, Claimant's Atty.
Department of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The State Accident Insurance Fund has requested Board review of a Referee's order which found claimant's claim to be compensable and ordered the Fund to accept the claim and pay benefits.

In a comprehensive, analytical order, the Referee found that claimant's emotional breakdown, which occurred on or about January 5, 1973, was triggered by factors surrounding his employment and thus compensable.

The Board, on review, would affirm and adopt the order of the Referee as the order of the Board.

ORDER

The order of the Referee dated October 4, 1974 is affirmed.

Counsel for claimant is awarded a reasonable attorney fee in the sum of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 74-1616 MAY 27, 1975

JOHN YOUNG, CLAIMANT
Pozzi, Wilson & Atchison, Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The issue is the extent of unscheduled permanent disability. The Determination Orders, the last of which was affirmed by the Referee, awarded claimant a total of 50% unscheduled permanent partial disability. Claimant requests Board review contending he is permanently totally disabled.

Claimant, then age 37, received a back injury September 15, 1970. Immediately following a lumbar laminectomy, claimant experienced bowel and bladder problems. Paralysis of the anal and urinary control and sexual dysfunction resulted. Claimant continues to have problems from this along with some psychopathology.

Claimant's adjustment to his bowel and urinary problem has been difficult. Claimant is encouraged to continue his efforts to adjust to his problems. Any criticism of claimant along these lines seems unjustified.

The Board, on de novo review, finds that claimant is not permanently totally disabled. The Board further finds that claimant should be awarded a total of 70% (224°) which is an increase of 64° over that previously awarded.

ORDER

Claimant is awarded a total of 70% (224°) unscheduled permanent partial disability which is an increase of 20% (64°) over that previously awarded.

Counsel for claimant is to receive as a fee 25% of the increase in compensation associated with this award which shall not exceed $1,500.

WCB CASE NO. 74-1993 MAY 27, 1975

DONALD SHANNON, CLAIMANT
Johnson, Johnson & Harrang, Claimant's Attys.
Jaqua & Wheatley, Defense Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

This matter involves the extent of scheduled permanent partial disability of claimant's left leg. The Determination Order awarded claimant 20% (30°) scheduled permanent partial disability for loss of left leg. The Referee increased this award to a total of 35% (53°) loss of left leg.

Claimant, a 28 year old bucker, twisted his left knee November 10, 1972. Ligament damage was surgically repaired. Claimant returned to his regular job as a bucker in June or July, 1973 and has worked continuously since then.

The medical reports give the opinion that claimant has a moderate physical impairment. A follow-up medical report reflects claimant's knee is bothering him to a mild degree and that the knee is stable with good motion.

On de novo review, the Board finds that scheduled loss of function of the left leg is 20% (30°).

ORDER

The order of the Referee dated December 26, 1974 is reversed.

The Determination Order dated February 12, 1974 awarding claimant 30° for 20% loss of left leg is reinstated.

WCB CASE NO. 74-2640 MAY 27, 1975

BARBARA J. McELROY, CLAIMANT
Stager & Vick, Claimant's Attys.
G. Howard Cliff, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

This matter involves the extent of permanent disability. The Determination Order, which was affirmed by the Referee, awarded claimant no permanent disability.

Claimant, a 30 year old cannery worker, slipped on a wet concrete floor and grabbed for support, twisting her back. She has received conservative care. There are no objective findings.

Marked emotional tension and overlay with severe functional interference with examination was noted. The psychologist stated the patient may be embellishing her symptoms for purposes of compensation and further gave the opinion there is no permanent psychological disability resulting from the industrial injury.

On de novo review, the Board concurs with the findings of the Referee that claimant has sustained no permanent disability arising out of the industrial injury. The Board adopts the Opinion and Order of the Referee as its own.

ORDER

The order of the Referee, dated November 12, 1974, is affirmed.

LEVELL H. HARRISON, CLAIMANT
John D. Ryan, Claimant's Atty.
Department of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant in this matter had received a permanent partial disability award of 48° by a Determination Order. At hearing, the Referee awarded an additional 32°, making a total award of 80° for unscheduled left shoulder disability.

The claimant has requested Board review contending he is entitled to an award of permanent total disability.

Claimant was injured October 19, 1972, while employed as a concrete finisher. At the time of injury he was working underneath a bridge when he slipped from the scaffolding but caught himself from falling by wrapping one arm and one leg around a beam. There was immediate pain and swelling in the left arm, involuntary twitching, followed by stiffness of the arm.

Claimant voluntarily quit work October 12, 1973, after working 40 years as a cement finisher. The numerous treating and examining doctors have found no objective findings but have found a mildly moderate functional overlay. Now nearing his 63rd birthday, the prognosis for a return to the labor market appears remote due to poor motivation to remain in the labor force.

With the medical evidence available, the Board, on review, finds the permanent partial disability award of 25% equal to 80° for unscheduled left shoulder disability adequately compensates claimant for disability attributable to his industrial accident.

ORDER

The order of the Referee, dated November 29, 1974, is affirmed.

WCB CASE NO. 73-3472 MAY 28, 1975

THOMAS YEGGE, CLAIMANT
Harold W. Adams, Claimant's Atty.
Souther, Spaulding, et. al, Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The issue before the Board on review is the extent of permanent disability claimant has sustained as a result of a compensable injury incurred January 9, 1973, while employed in a lumber mill.

The claim was closed by Determination Order awarding claimant 10% of the maximum for unscheduled disability equal to 32°. At hearing, the Referee affirmed the determination and claimant has requested Board review.

On review, counsel for claimant argues that the Referee had decided claimant's case on prejudice against claimant's life style. We disagree. The Board concurs with the Referee's conclusions which are supported by the evidence. There is no medical evidence from some ten examining and treating doctors that claimant has sustained permanent disability greater than that for which he has been compensated.

ORDER

The order of the Referee, dated September 27, 1974, is affirmed.

WCB CASE NO. 74-2993 MAY 28, 1975

GLEN E. KUSKIE, CLAIMANT
J.W. McCracken, Jr., Claimant's Atty.
Department of Justice, Defense Atty.
Request for Review By SAIF

Reviewed by Commissioners Wilson and Sloan.

The issue in this matter is the extent of permanent disability claimant has sustained as the result of a compensable industrial injury he suffered November 23, 1971. Pursuant to a Determination Order, a permanent partial disability award of 60% unscheduled low back disability was made. At hearing, the Referee found claimant to be permanently and totally disabled. The State Accident Insurance Fund has requested Board review urging reinstatement of the Determination Order.

Claimant has undergone two laminectomies, one fusion, and medical reports indicate a pseudoarthrosis which might require another fusion. This surgery has been refused.

The Board has made its own independent de novo review of the record and concludes that claimant has sustained substantial disability, but cannot concur this disability reaches the level of permanent total disability.

This claimant has many assets in his favor. He is only 51 years of age. Although working as a carpenter at the time of injury, claimant is not one of those whose opportunities in life are restricted to heavy manual labor or nothing at all. He has a high school education, a 22 year service record, and has had supervisory positions. He has disposed of his interest in a marina, but not because of his industrial injury. One could question whether claimant was unable to ever again engage rugularly in gainful and suitable work in light of the Referee's recitation that:

> "It is possible that he could handle a light part-time job."

Since claimant receives an Air Force retirement pay and has applied for Social Security, the factor of motivation must also be considered.

Having considered the record as a whole, the Board finds that claimant is not permanently and totally disabled and concludes that the Determination Order should be reinstated.

ORDER

The order of the Referee dated January 6, 1975, is reversed and the Determination Order dated May 14, 1974, granting claimant a permanent partial disability award of 60% of the maximum for unscheduled low back disability equal to 192° is hereby reinstated and affirmed.

WCB CASE NO. 74-3373 MAY 28, 1975

ALFRED SEXTON, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Roger R. Warren, Defense Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

This matter involves the extent of unscheduled permanent disability. The Determination Order awarded claimant 10% (32°) unscheduled low back disability. The Referee increased this award to a total of 75% (240°) permanent partial unscheduled disability.

Claimant, a 39 year old sawmill worker, reported a sore back

from turning boards at the sawmill. The date of injury is listed as June 23, 1972. Claimant has had conservative care only, consisting of chiropractic treatments. The Back Evaluation Clinic concluded claimant could return to the same occupation but should discontinue heavy lifting and twisting above the waist level. They reported the disability to be mild.

An examining orthopedist reports no objective diagnosis can be made and that the claimant does not have any loss of motion. The examining psychologist reports prognosis for restoration and rehabilitation is fairly good but that his training programs should not be of an academic nature. Further, that the patient probably will not suffer permanent psychological disability as a result of the accident if he is rehabilitated. The medical reports reflect claimant's loss of function as minimal or at the most, mild.

Claimant is a sawmill worker with a sixth grade education. The psychological testing indicated that he was performing approximately at this level. Claimant was retrained by the Vocational Rehabilitation Division in body and fender work. Claimant was offered a night watchman job by his employer which he refused even to try because he could not adjust to sleeping in the daytime. Claimant stated he would probably try a day watchman job if it became available.

Unscheduled disability is rated on loss of earning capacity in the general labor market. The medical evidence reflects minimal to mild physical disability. The claimant's limited intellectual and academic capabilities affect this problem. Claimant's experience has been in the laboring field which he states he cannot do any longer. Claimant refused to try a night watchman job. Interpreting the Workmen's Compensation Law liberally, in behalf of the injured workman, the Board finds claimant's unscheduled permanent partial disability to be a total of 40% (128°).

ORDER

The order of the Referee dated December 20, 1974 is reversed.

Claimant is awarded a total of 40% (128°) unscheduled low back permanent partial disability. This is an increase of 30% (96°) over that awarded by the Determination Order.

Counsel for claimant is to receive as a fee 25% of the increase in compensation associated with this award which shall not exceed $2,000.

WCB CASE NO. 74-2489 MAY 28, 1975

ED SHAFER, CLAIMANT
Ringo, Walton & Eves, Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

This matter involves a denied claim for injury to claimant's knee. The Referee affirmed the State Accident Insurance Fund's denial.

Claimant was a welder working side by side with this employer from May 7, 1973 to May 6, 1974. The alleged injury to claimant's knee of March 15, 1973 is first mentioned in the medical evidence in the record when claimant saw a doctor May 6, 1974. That medical record reflects a knee injury of March, 1974.

Claimant had been hospitalized twice for unrelated nonindustrial matters in the interim and the medical records from both of those hospitalizations reflect no knee injury or knee problems.

The Referee had the advantage of hearing and seeing the witnesses. The Board concurs with the finding of the Referee that claimant has failed to prove his claim by the preponderance of the evidence.

ORDER

The order of the Referee dated December 24, 1974 is affirmed.

WCB CASE NO. 74-2377 MAY 28, 1975

BETTY RIVERA, CLAIMANT
McKinney, Churchill & McKinney, Claimant's Attys.
Samuel R. Blair, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant seeks Board review contending that the medical bills should be paid pursuant to the previous Referee's order that the employer accept the claim for payment of compensation. The Referee ordered the employer to pay temporary total disability but denied claimant's request for payment of the medical bills because the matter was on appeal.

ORS 656.313(1) provides:

"Filing by an employer or the State Accident Insurance Fund of a request for review or court appeal shall not stay payment of compensation to a claimant."

ORS 656.002(8) provides:

"Compensation includes all benefits, including medical services * * * "

The Board held, In the Matter of the Compensation of William R. Wood, Claimant, WCB Case No. 69-319, as follows:

"The Board does not deem medical services payable under all circumstances under threat of penalty of failure to do so. Medical services are defined as compensation but the Board does not deem such services to be within the compensation as used in ORS 656.313. If medical services are to be so considered, there could never be a Board review or Court appeal of a Hearing Officer order affecting medical."

The Board adheres to this rationale and affirms the Opinion and Order of the Referee.

ORDER

The order of the Referee, dated November 20, 1974, is affirmed.

WCB CASE NO. 74-1095 MAY 28, 1975

ALBERT A. FREEMAN, CLAIMANT
Franklyn N. Brown, Claimant's Atty.
McMenamin, Jones, Joseph & Lang, Defense Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The employer has requested Board review of a Referee's Opinion and Order which found claimant to be permanently and totally disabled as a result of a compensable injury he sustained May 14, 1973.

The Board on review concludes claimant is, in fact, permanently and totally disabled and affirms and adopts the order of the Referee as the order of the Board.

ORDER

The order of the Referee, dated October 31, 1974, is hereby affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the employer, for services in connection with Board review.

WCB CASE NO. 74-2581 MAY 28, 1975

FRED M. MILES, CLAIMANT
Richardson & Murphy, Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

This is a denied claim of aggravation. The Referee affirmed the denial.

Claimant, a 28 year old workman, received an industrial injury February 29, 1972, while assembling box springs at a mattress factory. The attending doctor found a simple sprain of ligaments and muscles and released the claimant for regular work less than one month after the injury, stating claimant had made an excellent recovery.

Claimant worked approximately six more months at the mattress factory. He then worked about one year as a real estate salesman and in November, 1973, took on a second job working in a wrecking yard. Shortly thereafter, pain developed in his back and fusion for repair of a spondylolisthesis was performed.

On de novo review, the Board concurs with the opinion and finding of the Referee that the back symptomatology which claimant experienced in November, 1973, is not causally related to the industrial injury of February 29, 1972. The Board adopts the Referee's Opinion and Order as its own.

ORDER

The order of the Referee, dated October 30, 1974, is affirmed.

The Beneficiaries of
EARL E. MILLER, Deceased,
Bodie & Minturn, Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

This matter involves a claim by the beneficiaries of a deceased workman. The State Accident Insurance Fund denied the beneficiaries' claims contending that decedent's death did arise out of his employment. The Referee ordered the State Accident Insurance Fund to accept the claims of the beneficiaries.

Decedent, a then 56 year old sawmill worker, received a head injury April 5, 1974, when a two-by-four fell several feet, hitting his head. Decedent went down to one knee for a minute or so and then rested in the office for a few minutes. A few days thereafter, decedent complained of headaches and he was noted to be sleepy and quiet most of the time. Decedent had had no previous complaints or symptoms along these lines.

Decedent went to a doctor approximately six days after the head injury, at which time the malignant brain tumor was discovered and surgically removed. Decedent died from the brain cancer June 26, 1974.

The issue involved is whether or not the blow to the head aggravated, lighted up and made the tumor symptomatic, or accelerated its growth and hastened the death. The only medical opinion in the file is from the attending neurologist who testified there was a reasonable medical probability that the blow on the head was a material contributing cause in hastening the claimant's death. The other evidence indicates that claimant had no prior symptoms but immediately after the accident, had headaches, drowsiness and lethargy.

The Board concurs with the findings and Opinion of the Referee and adopts his Opinion and Order as its own.

ORDER

The order of the Referee, dated January 6, 1975, is affirmed.

Counsel for claimant is awarded a reasonable attorney's fee in the sum of $350, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 74-1335 MAY 28, 1975

JOHN LAIS, CLAIMANT
Coons, Cole & Anderson, Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

This matter involves a denied claim. The Referee affirmed the denial.

Claimant, a 59 year old pondman, alleges a back injury occurring Saturday, January 19, 1974, while he was attempting to remove a sunken log in the log pond. Claimant reported to the initial doctor on January 22, 1974, giving a history that he was working on the mill pond and he pulled too hard and hurt his back. Claimant gave a consistent history to other doctors to whom he was referred.

Claimant did not report the incident to his employer until February 19, 1974. Claimant states he did not initially report this to the employer because he thought it was a temporary flare-up of his old back condition. The incident occurred on Saturday; claimant rested on Sunday; worked two hours on Monday; and by Tuesday morning, he said that he could not get out of bed without help and went to the doctor.

On de novo review, the Board finds the claimant has proved that he sustained a compensable injury to his back on January 19, 1974.

ORDER

The order of the Referee, dated December 23, 1974, is reversed.

The State Accident Insurance Fund is ordered to accept the claim.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $800, payable by the State Accident Insurance Fund, for services in connection with Board review and the hearing.

WCB CASE NO. 74-3075 MAY 29, 1975

DELORES I. HOISINGTON, CLAIMANT
Panner, Johnson, Marceau & Karnopp, Claimant's Attys.
Department of Justice, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workmen's Compensation Board in the above-entitled matter, and said request for review now having been withdrawn by claimant's counsel; and cross request for review now having been withdrawn by the State Accident Insurance Fund,

IT IS THEREFORE ORDERED that the review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 74-1624 MAY 29, 1975

In the Matter of the Compensation of
CHARLES R. WARE, CLAIMANT
And In the Complying Status of
CHARLES SPECHT & DAN PHILLIPS
Murley M. Larimer, Claimant's Atty.
Brown, Burt & Swanson, Attorneys.
Department of Justice, Defense Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

This is a noncomplying employer case. The Referee found that Charles Specht and Dan Phillips were subject, noncomplying employers and that the claimant sustained a compensable injury arising out of and in the course of his employment. The employer had requested the hearing but did not appear at the hearing. The Referee denied the employer's motion to reopen the case. The employer now requests Board review to reopen the hearing.

The affidavits submitted by the employer requesting the hearing be reopened admit that the employer received actual notice of the hearing and further, that they were misled by the claimant and therefore did not appear at the hearing. The claimant's affidavit denies that it any way misled the employers.

On de novo review the Board concurs with the Opinion and Order of the Referee and the Order Denying Motion For Reconsideration.

ORDER

The Order of the Referee dated August 19, 1974 is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $250, payable by the employer, for services in connection with Board review.

WCB CASE NO. 74-595 MAY 29, 1975
AND 73-1088

CLARA O. JOHNSON, CLAIMANT
Babcock & Ackerman, Claimant's Attys.
Don Swink, Defense Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

This matter involves the extent of unscheduled permanent disability. The Determination Order awarded claimant 5% (16°) unscheduled neck and low back disability. The Referee awarded claimant permanent total disability.

Claimant, then a 45 year old nurses aide, while pushing a laundry cart, stated she slipped on some ice and fell against the laundry cart, twisting her back on December 9, 1972. There were no witnesses to this incident.

Claimant had a previous industrial injury to her right knee and ankle while working for the same employer April 20, 1972. The knee surgery had healed and claimant had returned to her duties and worked for approximately one month when the back injury occurred.

In the consolidated hearing, the 5% (7.5°) scheduled loss of function of the leg was affirmed by the Referee and that award had not been appealed. The only matter under consideration in this Board review is the extent of unscheduled disability arising out of the back injury of December 9, 1972.

Claimant was unhappy with her employer at that time because when she returned to work after recovery from her knee problems, she was placed on a different shift at a different job than she had had prior to the knee injury.

Claimant did not receive medical care for the back injury until nearly a month after the incident occurred. The attending orthopedist and the neurologist, after myelogram, found no bone or nerve involvement. The Back Evaluation Clinic found mild to moderate lumbosacral sprain residuals and mild cervical strain and that her complaints seemed quite out of proportion to the objective physical findings.

The examining psychologist found that neurotic type defenses had been present for years and that the industrial injury influenced a change in personality makeup only to a very minor degree.

The record clearly discloses that from the medical evidence alone and based only on the loss of physical function and the minor degree of aggravation of her psychopathology, claimant is far from being permanently totally disabled.

Of course, loss of physical function and aggravation of psychopathology is not the test in considering an award of unscheduled disability. The test to be applied is the loss of earning capacity resulting from the industrial injury. A brief review of claimant's personal life and work history appear appropriate in arriving at the appropriate award for unscheduled disability.

Claimant was born April 25, 1927, and worked for her father on the farm doing heavy manual farm labor and woods and sawmill labor till she was 33 years old. She then met her husband, moved from Oklahoma to Oregon, and has had three children whose current ages are about 13, 10 and 9. Her husband was hurt in an industrial accident in 1967 and is drawing full Social Security for permanent total disability. Her husband's workmen's compensation claim is not active, at least at this time.

Claimant commenced working out of the home in about 1970. Claimant has worked at three nursing homes from December 9, 1970, to January 2, 1973, as a cook, aide, janitor and in the laundry. During this period of time, she had a gall bladder operation and an industrial knee injury and the back injury. Claimant has very limited academic education and limited intellectual capabilities. Her work experience has been in heavy manual labor.

Claimant received from attending doctor a slip stating that claimant was able to return to work on December 3, 1973, with no prolonged standing and no heavy lifting. Approximately eight months after she received this slip from the attending doctor and within approximately two weeks prior to the hearing, claimant went to numerous nursing homes completing applications and displaying the slip from the doctor. She was obviously not hired.

Claimant's testimony was strenuously objected to as hearsay. The Referee overruled the objection commenting that testimony would be given the weight it is entitled to. In the Opinion and Order, the Referee found that claimant in making the series of applications just before the hearing was engaging in a ploy to strengthen the impression she was motivated to work and concluded that this arose out of claimant's naivete. The Board does not concur in this conclusion that the claimant was naive in this regard.

Since the claimant's testimony regarding the numerous job applications is viewed by the Board as unfavorable to the claimant under the circumstances of this case, the employer is not prejudiced by its admission.

The Board finds the claimant is not prima facie permanently totally disabled. The Board further finds that claimant's motivation

to return to work is poor. Therefore, the claimant is clearly not permanently totally disabled as a result of the industrial injury.

In view of claimant's mild to moderate loss of physical function combined with aggravation of her psychopathology which was only to a very minor degree influenced by the industrial injury, plus claimant's poor prospect of retraining, the Board finds claimant to be entitled to an award of a total of 65% (208°) unscheduled permanent partial disability.

ORDER

The order of the Referee, dated October 2, 1974, is reversed.

Claimant is to receive an award of a total of 65% (208°) unscheduled permanent partial disability which is an increase of 55% (176°) over that awarded by the Determination Order.

Counsel for claimant is to receive as a fee 25% of the increase in compensation associated with this award which shall not exceed $2,000.

WCB CASE NO. 73-2757 June 2, 1975

JUNE UTTI, CLAIMANT
MacDonald, Dean, McCallister & Snow,
Claimant's Attys.
Merlin Miller, Defense Atty.
Request for Review by Claimant
Cross-Appeal by Employer

Reviewed by Commissioners Wilson and Sloan.

This matter involves a denied occupational disease claim. The Referee affirmed the denial on the grounds that the claim was not timely filed pursuant to ORS 656.807(1). The Referee made further findings that if the claim had been timely filed, claimant's claim would have been compensable. Claimant requests Board review contending that the claim was timely filed. The employer cross-appeals contending that the Referee's finding that the claim was compensable was inappropriate and not correct on the merits.

On de novo review, the Board concurs with the opinion and findings of the Referee and adopts his Opinion and Order as its own.

ORDER

The order of the Referee, dated December 5, 1974, is affirmed.

WCB CASE NOS. 74-595 JUNE 3, 1975
AND 73-1088

CLARA O. JOHNSON, CLAIMANT
Babcock & Ackerman, Claimant's Attys.
Don Swink, Defense Atty.
Corrected Order on Review
Nunc Pro Tunc

The Order on Review, issued May 29, 1975, contained an error on page 3, second paragraph of the Order, which stated:

> "Claimant is to receive an award of a total of 65% (208°) unscheduled permanent partial disability which is an increase of 55% (176°) over that awarded by the Determination Order."

The second paragraph of the Order is deleted and is hereby corrected to read as follows:

> "Claimant is to receive an award of a total of 65% (208°) unscheduled permanent partial disability which is an increase of 60% (192°) over that awarded by the Determination Order."

The Order on Review is otherwise ratified and affirmed.

The address of the claimant is also corrected to read: Clara O. Johnson, Pine Circle, No. 5, Woodburn, Oregon 97071. This corrected Order on Review, having no effect on the substantive rights of the parties, no notice of appeal is granted.

WCB CASE NO. 74-2292 June 3, 1975

WILLIAM O. HOCKEN, CLAIMANT
Robert J. Morgan, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant
Cross-appeal by SAIF

Reviewed by Commissioners Wilson and Sloan.

This is an aggravation claim and the issue is the extent of disability. The last award or arrangement of compensation on April 18, 1972, awarded the claimant a total of 50% (160°) unscheduled permanent partial disability. Claimant has taken a lump sum payment on this previous award.

Claimant has filed another claim of aggravation which was denied by the State Accident Insurance Fund. The Referee ordered the State Accident Insurance Fund to accept the claim of aggravation and since there was no evidence that claimant is presently in need of medical care and treatment, the Referee evaluated the extent of unscheduled low back disability to a total of 70% (224°) which was an increase of 64°. The claimant requests Board review contending he is permanently totally disabled.

The State Accident Insurance Fund cross-appeals contending that the medical reports in the record and submitted at the hearing were insufficient to give the Workmen's Compensation Board jurisdiction in this claim of aggravation and further that claimant has not shown on the merits a worsening of his condition as a result of the industrial injury.

Claimant, a then 55 year old carpenter, received a back injury January 12, 1971. Claimant has had a fusion and had preexisting psychopathology which was aggravated by the accident. Claimant has become overdependent on narcotic medication.

The Board concurs with the findings and opinion of the Referee that the medical reports support his claim of aggravation thus giving the jurisdictional requirement of this aggravation claim. The Board finds, as did the Referee, that claimant is not prima facie permanently totally disabled and that claimant is not motivated to return to work. Thus, claimant is not permanently totally disabled. The Board also finds that the award of a total of 70% (224°) for unscheduled low back disability adequately compensates the claimant.

ORDER

The Order of the Referee, dated November 6, 1974, is affirmed.

WCB CASE NO. 74-2637 June 3, 1975

MARY SCOTT, CLAIMANT
Pozzi, Wilson & Atchison, Claimant's Attys.
Ray Mize, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

This matter involved the extent of unscheduled permanent disability. The Determination Orders awarded claimant a total of 50% (160°) unscheduled permanent partial disability. The Referee affirmed this award. Claimant requests Board review, contending she is permanently totally disabled.

Claimant, a 47 year old nurse's aide, received an industrial injury November 13, 1968, while trying to lift a patient. Her initial complaints were pain in the left leg. Her subsequent complaints were diagnosed as a strain to the lumbar sacral area of the spine. Claimant has been treated or examined by some 20 specialists, including internal medicine specialists, orthopedists, neurologists and psychiatrists. She has been hospitalized 10 times. The medical reports indicate no significant objective findings at the present time. One psychiatrist states that claimant's psychopathology is not a result of the industrial injury. The Referee found the claimant uncooperative and unmotivated.

The Board finds claimant is not prima facie permanently totally disabled as a result of the industrial injury. The record reflects claimant is not motivated to return to work. Thus, the claimant is not permanently totally disabled.

Claimant has a poor prospect for retraining. Because of claimant's severity of retraining handicaps, the Board finds claimant should be awarded a total of 75% (240°) which is an increase of 25% (80°) over that for which she was previously awarded.

ORDER

The order of the Referee dated December 31, 1974, is reversed.

Claimant is awarded a total of 75% (240°) unscheduled permanent partial disability which is an increase of 25% (80°) over that awarded by the last Determination Order.

Counsel of claimant is to receive as a fee 25% of the increase in compensation associated with this award which shall not exceed $2,000.

WCB CASE NO. 74-2556 June 3, 1975

FRIEDA WILCOX, CLAIMANT
Coons & Cole, Claimant's Attys.
Jaqua & Wheatley, Defense Attys.
Request for Review by Employer

Reviewed by Commissioners Moore and Sloan.

This matter involves the extent of unscheduled permanent partial disability. The Determination Order awarded claimant 20% (30°) permanent partial loss of the left hand. The Referee increased this award to a total of 28% (42°) permanent partial loss of the left hand.

Claimant, while working at a plywood plant, had her third and

fourth fingers amputated between the first and second joints of the left hand. Both the Determination Order and the Referee correctly rated this as loss to the left hand.

The medical reports reflect a loss of grip in the left hand. The Referee had the advantage of the testimony of the claimant describing the loss of function of the left hand. The evidence in the record supports the increase in the award.

ORDER

The order of the Referee dated December 9, 1974, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the employer, for services in connection with Board review.

WCB CASE NO. 74-3822 June 3, 1975

KENNETH SLOAN, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Jaqua & Wheatley, Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

This matter involves the extent of scheduled permanent partial disability to claimant's right leg. The Determination Order which was affirmed by the Referee, awarded claimant 20% (30°) scheduled loss of the right leg.

Claimant, a 40 year old logger, has had two surgeries to correct the industrial knee injury. Claimant has returned to work as a logger and has worked steadily.

Claimant's testimony was mainly in the nature of loss of earning capacity, but since this is a scheduled disability, the loss of function is the test. The record reflects no additional medical evidence to support a higher award of scheduled disability. The Board therefore affirms the Opinion and findings of the Referee.

ORDER

The order of the Referee, dated January 28, 1975, is affirmed.

WCB CASE NO. 74-3555 June 3, 1975

WILLIAM R. TRANSUE, CLAIMANT
Pozzi, Wilson & Atchison, Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

This matter involves a denied claim. The Referee ordered the employer to accept the claim.

Claimant, a 24 year old welder, reported a back injury on January 17, 1974, resulting from carrying a ladder, when he stumbled over some welding lines. Although claimant had trouble with his back off and on, he continued to work.

The large bulging intervertebral disc was surgically removed July 17, 1974. The employer denied responsibility for the surgery.

Although there are some minor discrepancies in the record, the Board concurs with the finding of the Referee that the back surgery is job-related. The medical evidence relates the back surgery to the industrial injury. The employer did not rebut this medical evidence either with other medical evidence or cross-examination or deposition of the attending doctors.

ORDER

The order of the Referee dated February 13, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $350, payable by the employer, for services in connection with Board review.

WCB CASE NO. 74-2566 June 4, 1975

PHYLLIS J. NESS, CLAIMANT
Pozzi, Wilson & Atchison, Claimant's Attys.
Collins, Ferris & Velure, Defense Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

This matter involves the extent of scheduled disability to claimant's arms and whether or not claimant is entitled to an award

of unscheduled permanent partial disability. The Determination Order awarded claimant 5% (9.6°) loss of the right arm and 5% (9.6°) loss of the left arm. The Referee increased this scheduled disability to a total of 20% (38.4°) loss of the right arm and 20% (38.4°) loss of the left arm. The Referee also awarded claimant 10% (32°) unscheduled neck, shoulder and upper back disability.

Claimant, a 31 year old floor lady at a frozen foods and vegetables processor, filed an industrial claim of April 13, 1973, for sore forearms. This condition was diagnosed and treated as tendonitis-bilateral tennis elbows related to her repetitive-type employment. As to the scheduled disability to both arms, on de novo review, the Board concurs with the findings of the Referee and affirms the scheduled award of a total of 20% (38.4°) scheduled permanent partial disability each, of the right arm and the left arm.

The Board reverses the award of 10% (32°) unscheduled neck, shoulder and upper back disability. The medical evidence in the record is insufficient to support an award of unscheduled disability or to relate it to her job.

ORDER

The order of the Referee dated November 14, 1974, is modified to the extent that the award of 10% (32°) unscheduled neck, shoulder and upper back disability is reversed.

In all other respects the Order of the Referee is affirmed.

WCB CASE NO. 73-1528 June 4, 1975

FRED SCHMUNK, CLAIMANT
Charles Paulson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

This is a heart attack case and the issue is the extent of unscheduled permanent disability. The Determination Order, which was affirmed by the Referee, awarded claimant 65% (208°) unscheduled heart disability. The claimant requests Board review contending he is permanently totally disabled.

Claimant, then a 59 year old salesman, suffered a myocardial infarction December 10, 1971. Claimant has had two prior heart attacks, one in 1968 and one in 1960.

The medical evidence rates functional impairment at a Class II to III which is a 50 to 70 percent impairment. Thus, the claimant is not

prima facie permanently totally disabled.

Claimant has an extensive background and many skills which can be used by him in gainful occupation if he were so motivated to obtain gainful employment. The Board therefore finds that the award of 65% (208°) adequately compensates the claimant for his loss of earning capacity arising out of the industrial heart attack.

ORDER

The order of the Referee dated December 16, 1974, is affirmed.

WCB CASE NO. 74-3001 June 6, 1975

LUTHER ANDERSON, CLAIMANT
Galton & Popick, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

This matter involves a denied claim. The Referee ordered the State Accident Insurance Fund to accept the claim and pay a 25% penalty on the unpaid compensation due on August 1, 1974, because of unreasonably delaying denial of the claim until after 60 days had expired.

Claimant, a 40 year old long haul truck driver, after repairing marker lights, fell off the dolly landing onto his back and hitting his head on November 20, 1973. This incident is verified by remarks on the driver's trip sheet turned in when the trip was completed to the employer.

Neither the claimant nor the employer treated this as an industrial injury at that time. The driver's dispatcher verified that claimant had related to him immediately upon return of the trip that he had taken a dirty spill the preceding day. Claimant received the first medical care for his back on May 7, 1974, at which time he related substantially the same history to the doctor.

Although there is some contradictory evidence regarding the possibility of an off-the-job injury, the Board concurs with the opinion and finding of the Referee that the claimant has proved by the preponderance of evidence that his claim arose out of and in the course of his employment.

The employer had knowledge of the incident the day after it occurred. No formal industrial claim form was requested by the claimant or offered by the employer at that time. After the back condition deteriorated, claimant requested from the employer an industrial claim form which was not supplied to him for about 30 days.

The employer received the claim form on June 5, 1974. The claimant received one check in the amount of $25.04 temporary total disability payment only and the claim was not denied until August 1, 1974. The Board concurs with the findings and order of the Referee that this was an unreasonable delay in denying the claim and affirms the award of a 25% penalty of the amount due up to August 1, 1974.

ORDER

The order of the Referee, dated November 26, 1974, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $600, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 74-2988 June 6, 1975

CHARLES K. PEDERSEN, CLAIMANT
Pozzi, Wilson & Atchison, Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Request for review by Employer

Reviewed by Commissioners Wilson and Sloan.

Pursuant to a Determination Order, claimant, in this matter received a permanent partial disability award of 25% of the maximum for unscheduled disability. After requesting a hearing on this determination, this award was increased to 50% unscheduled disability by the Referee. The employer has requested Board review.

Claimant was employed by Sears as a delivery man and sustained compensable injuries November 11, 1969, when involved in an on-the-job auto accident. He suffered numerous burns and abrasions on the face, arms, legs and back. A preexisting condition of "psoriasis", which pre-accident was limited primarily to this scalp, then spread to most parts of claimant's body. He eventually was referred to the University of California Hospital in San Francisco for an extensive four week treatment. Since his release from this hospital, claimant has developed new areas of psoriasis and his increased sensitivity is aggravated by any contact he may have with chemicals, oils and grease.

The record indicates this condition is relieved with exposure to ultra violet rays, and a unit for dispensing this therapy has been provided by the employer for claimant's use in his home.

Dr. Russell indicates there is no occupational restriction because of claimant's psoriasis. The Referee felt claimant's condition had deteriorated since the determination had been made, that claimant would live with this problem the rest of his life, and that he was

tied to the machine. He measured claimant's permanent partial disability, based upon loss of wage earning capacity, to be 160° equal to 50% of the maximum for unscheduled disability.

The Board, on review, concludes the increase made by the Referee is excessive and finds claimant's permanent partial disability to be 112° equal to 35% of the maximum allowable for unscheduled disability.

ORDER

The order of the Referee is modified to reflect claimant's permanent partial disability to be 112° equal to 35% of the maximum for unscheduled disability. In all other respects, the order is affirmed.

WCB CASE NO. 74-2162 June 6, 1975

EZRA CASTOE, CLAIMANT
Keith Tichenor, Claimant's Atty.
John Foss, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The claimant in this matter requests Board review of a Referee's order which affirmed a Determination Order awarding compensation equal to 124.3° for 65% loss function of the left arm.

Claimant sustained a compensable injury to his arm July 16, 1971, which has necessitated four surgeries including two ulnar nerve transplants. Claimant has lost substantial use of his left arm.

The Board, on review, notes that claimant appeared personally before the Board's Evaluation Division for an interview and discussion of his problems. The Referee, at hearing, also personally saw and observed claimant's arm and affirmed Evaluation's determination of 65% loss function of the left arm.

Relying on the above, the Board concurs with the finding of the Referee.

ORDER

The order of the Referee, dated January 14, 1975, is affirmed.

WCB CASE NO. 74-1709 June 6, 1975

ESTHER L. BISHOP, CLAIMANT
Ringo, Walton, McClain & Eves
Claimant's Attys.
Luvaas, Cobb, Richards & Fraser
Defense Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The issue in this review is the extent of permanent disability claimant has sustained as the result of a compensable injury on October 29, 1973. There was no award for permanent disability made by a Determination Order. At hearing, the Referee awarded claimant 40% loss of use of the right leg and 60% of the maximum for permanent low back disability. The employer has requested Board review of the Referee's order.

Claimant, who is 5' 2" and weighs 280 pounds, fell, injuring the right ankle and knee. She also complained of low back pain. Most of the treating and examining doctors are experts in musculoskeletal injuries. None have found low back disease, no evidence of nerve root compression, and x-rays revealed no definite tear of the menisci. It was indicated the knee pain was directly related to the excess obesity and weight loss would probably alleviate her problem.

Based on the lack of expert medical testimony, the Board, on review, cannot concur with the Referee's finding of claimant's permanent disability. The Board concludes causal medical connection between claimant's condition and the injury has not been established, and the Determination Order making no award for permanent disability should be reinstated.

ORDER

The order of the Referee dated December 4, 1974, is reversed.

The Determination Order awarding no permanent disability is hereby reinstated.

WCB CASE NO. 74-1375 June 9, 1975

LONNIE DALE JOHNSON, CLAIMANT
Paul C. Paulson, Claimant's Atty.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

The claimant in this matter has requested Board review of a Referee's order which affirmed the employer's denial of claimant's claim for compensation.

Claimant was employed in a mill and while working on a planer chain, experienced his arm locking on November 27, 1973. It was Dr. Mueller's opinion claimant's condition was degenerative arthritis of the lateral condyle right humerus. There had been no definite injury and claimant had complained of stiffness and soreness of the right elbow for the previous four years.

On January 28, 1974, Dr. Mueller performed surgery, excising the radial head. In the course of this surgery, Dr. Mueller removed a joint mouse from the right elbow, which was the result of the degenerative arthritis of the elbow and had caused the locking episode in claimant's elbow.

Dr. Mueller's letter of June 27, 1974, indicated he felt claimant's employment was not necessarily a contributing factor to the locking episode. Without medical causation being established, the Board must concur with the Referee's order denying benefits to the claimant.

ORDER

The order of the Referee, dated October 9, 1974, is affirmed.

WCB CASE NO. 72-3589 June 9, 1975

LESTER FLINN, DECEASED
William E. Taylor, Beneficiary's Atty.
Dept. of Justice, Defense Atty.
Order on Reconsideration

On May 14, 1975, the Board issued an Order on Review in this case granting, among other things, an extraordinary attorney's fee to the beneficiaries' attorneys for their services in establishing the compensability of the claim.

The Fund thereupon moved for reconsideration of the Order pointing out that the extraordinary fee granted to the beneficiaries' attorneys by the Board had already, pursuant to ORS 656.388, been sought from and denied by the Circuit Court of Curry County.

The beneficiaries' attorneys have confirmed that allegation in their response but do point out that although no briefs were filed on review, they thoroughly reviewed and researched the case in anticipation of responding to an appellant's brief.

Being now fully advised, we conclude that our award of an extraordinary fee of $2,000 to the beneficiaries' attorneys contained in the Order on Review, dated May 14, 1975, should be cancelled and set aside and in lieu thereof the beneficiaries' attorneys should be awarded a reasonable attorney's fee of $300, payable by the Fund, for their services in connection with the Fund's request for Board review.

IT IS SO ORDERED.

WCB CASE NO. 74-1703 June 9, 1975

JAMES A. POELWIJK, CLAIMANT
Hedrick, Fellows & McCarthy, Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Order Approving Attorney's Fee

Claimant's attorney was successful at the hearing in having a Determination Order terminating temporary total disability as of December 26, 1973, set aside and having claimant returned to temporary total disability from December 26, 1973, until closure pursuant to ORS 656.268. The Order of the Referee was dated February 7, 1975, and made no provision for attorney's fees.

Because the employer has requested Board review, an attorney's fee agreement between the claimant and his attorney has been submitted to the Board for approval. The agreement is approved. The Board hereby approves the agreement and concludes it should be executed according to its terms.

IT IS SO ORDERED.

WCB CASE NO. 73-3228 June 9, 1975

MARY D. CARLSON, CLAIMANT
Emmons, Kyle, Kropp & Kryger
Claimant's Attys.
Dept. of Justice, Defense Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The State Accident Insurance Fund has requested Board review of a Referee's order which found claimant to be permanently and totally disabled. The Fund does not dispute the Referee's finding that claiment is permanently and totally disabled, but argues that claimant is not psychiatrically stationary and that her claim should be left open for psychiatric care prior to a determination of permanent disability.

A statement of the facts and issues involved in this case is clearly presented in the record before the Board and need not be reiterated. Because of the very remote possibility that the treatment indicated would be successful, the Board finds that claimant is permanently and totally disabled. The Board notes that medical care and treatment can be provided by ORS 656.245, and should there be an improvement in claimant's condition, the matter of permanent disability can be reconsidered pursuant to ORS 656.325.

The Board adopts the Opinion and Order of the Referee as the order of the Board.

ORDER

The order of the Referee, dated November 22, 1974, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $350, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 74-4238 June 9, 1975

DON MICHAELS, CLAIMANT
Franklin, Bennett, Ofelt & Jolles
Claimant's Attys.
Ford & Cowling, Defense Attys.
Order of Dismissal

A request for review, having been duly filed with the Workmen's Compensation Board in the above-entitled matter by the employer, and said request for review now having been withdrawn,

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 74-393 June 9, 1975

BETTY NELSON, CLAIMANT
Donald M. Pinnock, Claimant's Atty.
Dept. of Justice, Defense Atty
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

This is a denied claim. The Referee affirmed the denial.

Claimant, a 37 year old fry cook, alleged a back injury on November 10 or 13, 1973. Claimant did not report this as a job injury to her employer and the medical reports from her doctors initially reflect that claimant gave no history of an industrial accident.

The Referee had the advantage of hearing and seeing the witnesses and great weight is given to his findings, especially in this type of a case where credibility of the witnesses is crucial.

The Board concurs with the findings and opinion of the Referee and adopts the Referee's Opinion and Order as its own.

ORDER

The order of the Referee, dated November 29, 1974, is affirmed.

WCB CASE NO. 74-3107 June 9, 1975

KATHLEEN HUGHEY, CLAIMANT
Coons, Cole & Anderson, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

This matter involves the extent of unscheduled permanent disability. Claimant was injured March 22, 1971. The first Determination Order, issued March 2, 1973, awarded claimant 20% (64°) unscheduled neck disability. Three subsequent Determination Orders awarded claimant no further permanent partial disability. The Referee awarded claimant permanent total disability.

Claimant, a then 50 year old fish filleter, received a cervical strain and left shoulder sprain March 22, 1971. She has received conservative care only. A myelogram was negative. The medical reports reflect that she is obese and should lose weight. She had a low back fusion approximately 15 years ago. Her low back was asymptomatic for quite some time after this industrial injury but after the myelogram, claimant states her low back is painful.

The Back Evaluation Clinic reflects total loss of function of the back as moderate and loss of function of the back due to this injury as mild; and further, that total loss of function of the neck is mild.

The psychologist's report reflects that this industrial injury has not significantly affected her personality makeup and that claimant is not motivated to return to work.

On the basis of the medical evidence, claimant is not prima facie permanently totally disabled.

Claimant is not motivated to return to work. Her husband is retired, having retired early on a total disability basis. Since the claimant is not motivated to return to gainful occupation, claimant is not permanently totally disabled under the odd-lot category.

The Board finds that claimant is entitled to a total of 75% (240°) unscheduled permanent partial disability as a result of the industrial injury of March 22, 1971.

ORDER

The order of the Referee, dated January 27, 1975, is reversed.

Claimant is to receive an award of a total of 75% (240°) unscheduled permanent partial disability. This is an increase of 55% (176°) over that awarded by the Determination Orders.

Counsel for claimant is to receive as a fee 25% of the increase in compensation associated with this award which shall not exceed $2,000.

WCB CASE NO. 74-906 June 9, 1975

DARLENE A. FALK, CLAIMANT
Thomas Reeder, Claimant's Atty.
Collins, Ferris & Velure, Defense Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

As a result of a compensable injury sustained January 19, 1973, claimant received a permanent partial disability award of 10% unscheduled disability to the low back. At hearing, the Referee increased the award for unscheduled disability to 25% and awarded 15° equal to 10% partial loss of the right leg. The employer has requested Board review of the Referee's order.

Claimant was injured when she slipped and fell off a pallet and injured her lower back. She testified at the hearing to numbness in her legs, painful muscle spasms in the hip, thigh and calf. Claimant demonstrated a limp which did not appear exaggerated to the Referee.

Dr. Mason of the Disability Prevention Division diagnosed a lumbosacral strain with subjective bilateral radiculitis, possible disc degeneration at L5-S1 and recommended change of occupation. Psychological evaluation rated prognosis for employment as poor due to lack of motivation and poor vocational aptitudes.

The Referee did not find a lack of motivation in claimant's failure to return to work, but was of the opinion she was in need of rehabilitation efforts.

The Board, on review, affirms the finding of permanent disability made by the Referee.

ORDER

The order of the Referee, dated October 30, 1974, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the employer, for services in connection with Board review.

WCB CASE NO. 74-1935 June 11, 1975

VIOLET WILLCUT, CLAIMANT
Buss, Leichner, Lindstedt,
Barker & Beono, Claimant's Attys.
McMenamin, Jones, Joseph & Lang,
Defense Attys.
Request for Review by Claimant
Cross-Appeal by Employer

Reviewed by Commissioners Moore and Sloan.

This matter involves a claimant who sustained a compensable back injury and received a permanent partial disability award of 15% for unscheduled disability. At hearing on this determination, the permanent partial disability award was increased to 60% by the Referee. Claimant has requested this Board review contending she is permanently

and totally disabled, and the employer has filed a cross-request arguing the Referee's award is excessive.

Claimant sustained a compensable back injury July 13, 1972, while employed as an assembler at National Appliance Company. She made several attempts to return to work,but only aggravated her back condition to the point that she was unable to continue and was therefore terminated by her employer in January, 1974. She has not returned to work since.

The record reveals claimant to be 58 years old, having a G.E.D. equivalency, and having worked as a waitress, retail clerk, and in food processing and factories. After having reared a family of nine children, she was divorced in 1971. She is now vocationally limited by a back injury superimposed on a degenerative disc disease. She has had an emotional problem coping with her present predicament but the Board is of the opinion that claimant is not permanently and totally disabled. Efforts at vocational placement or rehabilitation so far have been completely ineffective. In our opinion, claimant has not received adequate assistance in her attempt to return to the labor market.

It appears to the Board that claimant has the potential to return to some type of employment and with a more definitive approach toward placement, this could be accomplished. In the meantime, the award of permanent disability allowed by the Referee appears adequate.

By a copy of this Order, the Board is therefore directing a Service Coordinator of the Disability Prevention Division to contact claimant as soon as possible to advise and assist her regarding plans for reemployment or retraining.

Claimant is also advised that should her condition change, she is protected by the provisions of ORS 656.273 and 656.278.

ORDER

The Order of the Referee, dated October 25, 1974, is affirmed.

WCB CASE NO. 74-1826 June 11, 1975

JACK P. YOES, CLAIMANT
Merten & Saltveit, Claimant's Attys.
Dept. of Justice, Defense Atty.
Order on Motion for Reconsideration

The Fund has moved for reconsideration of our Order, dated May 15, 1975, wherein the matter was remanded to the Referee for a hearing on the merits of the claim.

The Fund argues that the matter should have been remanded to the Fund for submission of the claim to the Board's Evaluation Division for issuance of a Determination Order rather than to the Referee for a hearing.

Claimant's attorney objects contending that to follow the Fund's suggestion would result in claimant having to pay his attorney's fee out of his own compensation for a case which is essentially a denied aggravation claim.

We think both parties have misconceived the case. Our Order perhaps implies that the case is being remanded for a hearing on whether or not claimant has suffered an "aggravation" of his condition. The actual posture of this case is one of a hearing pending on the Fund's denial of certain medical treatment and compensation on a claim that has never been closed. Thus, referral for closure is not appropriate.

No supporting medical opinion is needed as a condition precedent to the hearing. The matter should simply be heard on the merits of whether claimant is entitled to the medical care and compensation which he seeks.

The Board concludes the order on reconsideration should therefore be denied.

IT IS SO ORDERED.

WCB CASE NO. 74-3117 June 13, 1975

CHARLES PAYNE, CLAIMANT
Coons, Cole & Anderson, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The State Accident Insurance Fund has requested Board review of a Referee's opinion and order which awarded claimant a total of 64° equal to 20% unscheduled chest disability. A Determination Order dated August 13, 1974, had awarded claimant 32° equal to 20% for unscheduled chest disability.

Claimant, a 51 year old logger, suffered a compensable injury on June 13, 1972, when he was struck in the chest by a choker. Initially, x-rays showed fractures of the 7th, 8th and 9th ribs laterally on the left; also anterior fractures of the left 8th and 9th ribs. The claim was closed November 14, 1972, with no award of permanent disability. Slightly more than a year later, the claim was reopened as claimant complained of pain in his left chest and shortness of breath.

Claimant was hospitalized and at the time it was discovered that there had been a non-union of the ribs and surgery was performed by Dr. Lorenz W. Gugel, on June 5, 1973.

On October 19, 1973, claimant was referred to the Disability Prevention Division as his chest symptoms and shortness of breath had continued post surgery. Dr. Trommald's report indicated claimant was suffering chest pain, chronic hypertension and chronic bronchitis. Dr. Trommald felt claimant had a permanent disability and suggested a change of occupation.

At the time of the hearing, claimant had taken a job as a watchman which required very little activity; his complaints with respect to chest pain and shortness of breath while working at his previous job were corroborated by his son and a co-worker.

The primary purpose of the Fund's brief apparently was to point out two minor errors made by the Referee, to misinterpret Dr. Trommald's report and to attack claimant's life style, education and credibility of claimant, his son and the witnesses who testified in his behalf.

The Board, on review de novo, finds little merit in this type of a brief and based on the totality of medical evidence and testimony of the witnesses, the Board concurs with the finding of the Referee that claimant is entitled to an additional award for his unscheduled chest disability equal to 32° for a total award of 64° of a maximum of 320° allowable by statute for such unscheduled disability.

ORDER

The order of the Referee dated December 26, 1974, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 74-2092 June 13, 1975

MARGARET R. LARSON, CLAIMANT
Pozzi, Wilson & Atchison, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The issues are the right of claimant to receive temporary total disability from October 8, 1971, through March 14, 1974, rather than temporary partial disability for that period and the extent of scheduled permanent partial disability.

The Determination Order dated May 30, 1974, awarded claimant temporary total disability from February 4, 1971, through October 7, 1971, less time worked and temporary partial disability from October 8, 1971, through March 14, 1974, and permanent partial disability of 27° for 20% loss of right foot and 20.25° for 15% loss of left foot. The Referee awarded claimant an increase of 40.5° for permanent partial disability of the right foot and in all other respects affirmed the Determination Order.

Claimant requested Board review contending she is entitled to temporary total disability from October 8, 1971, through March 14, 1974, and to a substantial increase of scheduled permanent partial disability to both her feet.

Claimant, at the present time age 63, was employed by Multnomah County Hospital as a hospital worker and sustained an occupational disease to both of her feet arising out of an aggravation of a congenital foot condition as a result of her work activities in walking on concrete surfaces.

The Board, on de novo review, finds that claimant's condition was basically the same following October 7, 1971, and until March 15, 1974, as it had been prior thereto. The Board further finds that the criteria for unilaterally terminating temporary total disability or reducing it to temporary partial disability as set forth in Jackson v. SAIF, 7 Or App 109, 115-116, have not been met in this case by the Fund. Claimant had not on October 8, 1971, returned to regular work nor been released by her doctor to do so. Neither had a determination that her condition was medically stationary been made under ORS 656.268.

The Board concludes that claimant was entitled to receive compensation for temporary total disability from October 8, 1971, through March 14, 1974, less time worked rather than for temporary partial disability for said period of time.

The Board concurs in the Referee's award of permanent partial scheduled disability.

ORDER

The order of the Referee dated October 14, 1974, is modified by awarding claimant temporary total disability from October 8, 1971, through March 14, 1974, less time worked. In all other respects the Referee's order is affirmed.

Counsel for claimant is to receive a fee of 25% of the increase in compensation associated with this award which shall not exceed $2,000.

WCB CASE NO. 74-3391 June 13, 1975

DENNIS CHAMBERLIN, CLAIMANT
Babcock, Ackerman & Hanlon,
Claimant's Attys.
Keith Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant has requested Board review of a Referee's order which dismissed his request for hearing concerning his claim for aggravation.

On June 9, 1967, claimant suffered a compensable injury; and the first Determination Order was issued on September 24, 1969. The statutory period within which claimant could seek to enforce a claim for aggravation benefits expired on September 25, 1974.

On September 10, 1974, claimant submitted to the carrier "an application for increased compensation on the grounds of aggravation." No medical report was submitted with that application. On September 12, 1974, the Workmen's Compensation Board, Hearings Division, received claimant's request for hearing on grounds of aggravation; on November 12, 1974, the Hearings Division received claimant's amended request for hearing. Neither request was accompanied by a medical report.

Before September 25, 1974, a report from Dr. John Serbu, dated September 16, 1974, was received by the employer-carrier and offered by the claimant in support of his claim for aggravation pursuant to ORS 656.273(4). In the opinion of the Referee, this report did not set forth Dr. Serbu's conclusion that there was an aggravation nor that there was a reasonable basis for believing the claimant's condition had worsened subsequent to the last award of compensation. Nor did the report mention aggravation or state in any way that claimant's condition had worsened since the last award. Bowser v. Evans Products Co., 99 Ad Sh 361; Dinnocenzo v. SAIF, 99 Ad Sh 648, et seq. Therefore, the Referee concluded that the report of September 16, 1974, from Dr. Serbu failed to meet the requirements of the statute.

Subsequently, two other medical reports were received from Dr. Serbu, one dated October 7, 1974; the other November 1, 1974, and the Referee concluded that, if said reports could be considered as timely filed, they would be sufficient to confer jurisdiction upon him to hear the claimant's claim for aggravation.

The Referee, relying on the Board's opinion expressed In the Matter of the Compensation of Jewell Moorer, Claimant, WCB Case No. 74-239 Order on Review dated November 15, 1974, concluded that because the reports were received after the expiration of the five-year period, they could not be considered as timely filed and would not be sufficient to confer jurisdiction upon him to hear the matter.

In the Moorer case, the Board stated in part:

"We believe the rationale expressed by the Court in Larson v. SCD, 251 Or 478, (1968) justifying the presentation of the supporting medical report after the request for hearing is made, is applicable now to the new claim filing provisions of the law.

"However, we are of the opinion the statute does not permit perfection of an aggravation claim by filing the bare claim within five years with a submission of the supporting medical opinion occurring after the five year period has expired . . ."

ORS 656.273(5) provides:

"A request for hearing on any issue involving a claim for aggravation must be made to the board in accordance with ORS 656.283."

ORS 656.283(1) provides:

"Subject to ORS 656.319, any party or the board may at any time request a hearing on any question concerning a claim."

ORS 656.319(2)(c) states:

"With respect to any dispute on increased compensation by reason of aggravation under ORS 656.273, a hearing on such dispute shall not be granted unless a request for hearing is filed within five years after the first determination made under subsection (3) of ORS 656.268."
(Emphasis supplied)

The distinction between this case and the Moorer case is that in the latter, neither the claim accompanied by supporting medical opinion nor a request for hearing had been made prior to the expiration of the five year period. In the present case, claimant had not only filed a claim, he had filed a request for hearing prior to the expiration date of September 25, 1974.

The Board has held that if nearly five years have transpired since the first determination of the claim, a request for hearing should be forthwith made to the Workmen's Compensation Board in lieu of first processing the claim to the State Accident Insurance Fund or the direct responsibility employer. This would toll the statutes of limitation on the five year period. It does not mean that the claim or supporting medical reports should not be submitted to the Fund or the employer. In the Matter of the Compensation of Milton E. Carson, WCB Cases No. 70-1992, 70-1993 Order on Review dated August 29, 1972. This order was written under the old statute (ORS 656.271) however, the wording of ORS 656.271(1) and the superseding statute ORS 656.273(4) are identical.

There is no indication in any of the recent Court opinions which indicate that the 1973 legislation which substituted ORS 656.273 for ORS 656.271 affected in any manner the ruling of the Court in Larson v. SCD, which states:

> "The statute does not require that upon filing the claim it must be accompanied by, or have attached to it, the written opinion."
> (Emphasis supplied)

The Court stated further:

> "The written opinion is a condition precedent to the right to have a hearing on the claim."

For the foregoing reasons, the order of the Referee entered March 7, 1975, must be reversed. However, the Referee found that the testimony of Dr. Serbu taken by deposition established a relationship between claimant's current disc problem and the industrial injury of June 9, 1967, and that his testimony established sufficiently that claimant's condition has deteriorated subsequent to his last award or arrangement of compensation. Having reviewed the record de novo and concurring in the Referee's analysis of the merits, therefore, it will not be necessary, jurisdiction having been established, to reconsider the merits of the claim.

ORDER

The order of the Referee, dated March 7, 1975, is hereby reversed.

The claim is remanded to the employer, U. S. Plywood, for payment of compensation as provided by law and until closure is authorized under the provisions of ORS 656.268.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $750, payable by the employer, for services in connection with Board review.

WCB CASE NO. 74-2792 June 17, 1975

JESSE HURST, CLAIMANT
Galbreath & Pope, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant
Cross-Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The claimant requests a review of the order of the Referee dated January 9, 1975, which granted claimant an award of compensation for permanent partial disability equal to 35° for loss of claimant's left foot. Initially, a Determination Order dated March 6, 1974, and subsequent amendments thereto, had granted claimant an award equal to 13°. Claimant contends he is entitled to a greater award.

The Fund, which filed a cross-request, contends claimant is entitled to only the 13°.

Claimant sustained a compensable injury to his left foot on August 15, 1973, while working for the Umatilla County Road Department; he had previously injured the same leg during March, 1973, and had returned to his job about a month prior to this last incident. Claiment has not worked since August 15, 1973.

Claimant was seen by Dr. Feves whose diagnosis was a sprain and hematoma, left foot. Although there was a tremendous amount of swelling about the left ankle, the x-rays revealed no bone injury or disease. By September, 1973, the swelling had moved to the left knee; there was fluid present in the left knee joint. Dr. Feves suspected a rheumatic type of arthritis and felt another evaluation of claimant's disability and the medical causation thereof should be made.

On January 8, 1974,claimant was examined by Dr. Pasquesi whose opinion was that claimant had a chronic problem present in both ankles. Dr. Pasquesi recommended further medical investigation towards treatment either from a gout, kidney or cardiac approach rather than trauma.

Claimant asserts that the industrial accident hastened and materially contributed to the onset of his swelling problems; the Fund counters that claimant's condition was a preexisting chronic condition and claimant had failed to present sufficient medical expertise to define the progression of the condition and the relationship of that process to the sprained ankle.

The Board, on de novo review, finds that there is not adequate expert medical testimony to either prove or disprove medical causation and, pursuant to ORS 656.295(5), concludes that the matter was incompletely heard and remands it to the Referee for the purpose of referring claimant to the Disability Prevention Division of the Workmen's Compensation Board for a complete workup. The report based upon the aforesaid workup shall be submitted to the Referee and to the parties for possible cross examination and, ultimately, for a reconsideration of the Referee's previous order and issuance of a new appealable opinion and order.

IT IS SO ORDERED.

WCB CASE NO. 74-1553 June 17, 1975

SAMUEL D. DURAND, JR., CLAIMANT
Bailey, Doblie and Bruun, Claimant's Attys
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which affirmed a Determination Order awarding 64° for unscheduled low back disability. The issue on review is the extent of permanent partial disability sustained by claimant as a result of his industrial injury.

The injury occurred when claimant, a truck driver, was bounced around in the cab of his truck when a log fell from the loader onto the truck. Dr. Storino suspected the claimant sustained a mild concussion and mild to moderate cervico-dorsal sprain. The Back Evaluation Clinic found total loss of function to be mild.

Claimant is relatively young, above average intellectually and has a varied work record. He was viewed as a good candidate for vocational rehabilitation; however, the counselor found him uncooperative. Claimant has now moved to a small coastal town with a limited job market.

The Referee was not impressed with claimant's credibility; he gave little weight to medical opinions as they were based on history given the doctors by claimant. Claimant told Dr. Trommald he did not drink at all, yet the next day he was seeking outpatient care at the hospital for severe headaches caused by dehydration, secondary to acute alcoholism.

The Board, on de novo review, giving weight to the Referee's evaluation of claimant's credibility based upon personal contact with claimant, concurs with the Referee's order and adopts it as its own.

ORDER

The order of the Referee dated January 21, 1975, is affirmed.

GEORGE BEER, CLAIMANT
Collins, Ferris & Velure
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The State Accident Insurance Fund has requested Board review of a Referee's order which granted claimant an award of permanent total disability. A Determination Order dated February 11, 1975, had awarded claimant permanent partial disability of 25% unscheduled low back disability equal to 80°. Claimant requested a hearing on this award. The extent of disability is the only issue on review.

Claimant, a 60 year old steel fabrication salesman, injured his back March 12, 1973, while unloading a tank. He underwent a hemilaminectomy on July 13, 1973, with less than satisfactory benefits. Claimant has fairly serious residuals, including dull aching in the low back with radiation of pain into the buttocks and down the legs. Lifting, bending or sitting aggravates the symptoms and claimant has not worked since the date of his injury.

The fact that claimant has had two previous back injuries does not preclude a finding of permanent total disability. An employer takes a workman as he finds him and if an industrial injury causes an aggravation or acceleration of a preexisting condition, the result of the disability is chargeable to the accident.

Claimant has an 11th grade education, a limited work background and at age 61, the Division of Vocational Rehabilitation found claimant ineligible for their services because of these factors. Mr. Holley of that division stated that claimant was very cooperative with his office. Claimant showed good motiviation to work, but Mr. Kalm with the State Employment Service felt it would be virtually impossible to place claimant, especially in the Medford area where employment opportunities were limited. The Court in Krugen v. Beall Pipe & Tank Corporation, 99 Ad Sh 3264, pointed out the issue was claimant's ability to gain employment as well as his ability to hold employment.

The Board, on de novo review, concurs with the Referee that claimant is entitled to an award of compensation of permanent and total disability.

ORDER

The order of the Referee dated October 17, 1974, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the State Accident Insurance Fund, for his services on Board review.

WCB CASE NO. 72-2039 June 17, 1975

MERLE JONES, CLAIMANT
Allan H. Coons, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

Based upon correspondence from Allan H. Coons, Attorney at Law, Eugene, Oregon addressed to Commissioner Gordon Sloan under date of May 30, 1975; the letter from the State Accident Insurance Fund to Mr. Coons dated May 23, 1975; and the file in the above-entitled matter, it appears that in 1972 the claimant was represented by Allan H. Coons at a hearing in which the Referee raised claimant's compensation from approximately 25% to 75%.

Upon appeal by the State Accident Insurance Fund to the Board, the Referee's award was affirmed. Within less than a year's time, claimant's condition had worsened and his claim was reopened for further surgery and time loss. Redetermination and closure of the claim under ORS 656.268 resulted in claimant being given an award of compensation for permanent total disability.

At the hearing claimant's attorney was allowed a fee of 25% of the increased compensation up to a maximum of $1,500; approximately half of this sum had been paid out prior to the reopening of the claim. The Fund takes the position that claimant's attorney is not entitled to the balance inasmuch as the award for permanent partial disability had not been paid out at the time the award for compensation for permanent total disability was made, but it agrees to pay the balance out of claimant's permanent total disability award if so directed.

ORS 656.286(2) provides:

> "In all other cases attorney fees shall continue to be paid from the claimant's award of compensation except as otherwise provided in ORS 656.301 and 656.382."

ORS 656.301 provides for the payment of attorney's fees when an appeal is taken by the Fund or the employer from the Circuit Court and the Circuit Court's judgment is affirmed. ORS 656.382 provides for penalties and attorney's fees to be paid by the Fund or employer under certain circumstances set forth herein.

ORS 656.388 provides:

> "(1) No claim for legal services or for any other services rendered before a referee or the board, as the case may be, in respect to any claim or award for compensation, to or on account of any person, shall be valid unless approved by the referee or board, or if proceedings on appeal from the order of the board in respect to such claim or award are had before any court, unless approved by such court.
>
> * * *
>
> "(3) Any claim so approved shall, in the manner and to the extent fixed by the hearing officer, board or such court, be a lien upon such compensation.
>
> * * *"

3 Larson Workmen's Compensation Law, §83.13 at page 354.52 states:

> "When the claimant's attorney's fee is deducted from the compensation award, the fee is a matter between the claimant, his attorney, and the commission and does not concern the employer. * * *
>
> "As a general matter, the claimant's attorney's fee should be based on the facts as to his services in the compensation case as of the time the services were rendered, and should not be at the mercy of subsequent or collateral events over which he has no control."

In a New Jersey case where the lawyer's fee was being paid from the claimant's compensation award and claimant died, terminating the compensation award, the court required the employer to continue and complete paying the lawyer. Dey v. David Kahn, Inc., 92 NJ Super. 250, 223 A. 2nd 33 (1966).

The Supreme Court of Oregon in the recent case of Cavins v. SAIF filed May 30, 1975, indicated that that Court did not approve of hypertechnical constructions of attorney's fee statutes relating to workmen's compensation cases.

ORDER

The State Accident Insurance Fund is hereby ordered to pay to claimant's attorney, Allan H. Coons, the balance of the fee of 25% of the increased compensation secured for claimant in the 1972 hearing on claimant's extent of permanent partial disability. Said fee shall be paid from claimant's award of permanent total disability and in the manner provided by law for such payment until paid in full.

SAIF CLAIM NO. BC 152535 June 18, 1975

DAVID W. CLYDE, CLAIMANT
Sanford Kowitt, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Determination

Pursuant to the Board's Own Motion Order dated March 12, 1975, the Fund was ordered to reopen the above-referenced claim for further medical care and temporary disability. The treatment has now been completed and the claim has been submitted for reevaluation.

The Evaluation Division of the Workmen's Compensation Board, after personally interviewing claimant, has submitted its recommendations.

ORDER

The Board orders Temporary Total Disability be paid from March 28, 1974, through April 17, 1974, and Temporary Partial Disability from April 18, 1974, to May 18, 1974.

The Board further orders the State Accident Insurance Fund to pay claimant an award of compensation equal to 32° for 10% unscheduled disability resulting from injury to claimant's left shoulder.

Counsel for claimant is to receive as a reasonable attorney's fee 25% of the increase in compensation granted hereby, not to exceed $2,000.

WCB CASE NO. 74-2617 June 18, 1975

MARLO W. REDISKE, CLAIMANT
Pozzi, Wilson & Atchison,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund requests Board review of a Referee's order which remanded claimant's "claim for aggravation" to it for acceptance and also for the payment of penalties and attorney's fees.

Claimant's claim originally arose as the result of a left knee injury incurred on August 4, 1970, which required medical care and time loss amounting to two days. After acceptance the claim was administratively closed as a "medical only" claim.

On June 7, 1974, the Fund was asked to reopen the claim because of impending knee surgery to be performed by Dr. Thomas L. Bachhuber. On June 19, 1974, the Fund refused to accept responsibility for treatment of disability to the claimant's left knee. Claimant underwent a medical and lateral meniscectomy on July 6, 1974.

The Referee found claimant to be a credible witness and, although he felt there were factors other than the original accident in 1970 which influenced the condition of the claimant's knee, he did believe that the work activities had sustained a level of symptomatology. The twisted knee which claimant received when he jumped over a fence on April 30, 1973, merely produced a temporary setback. The medical reports support this.

The imposition of penalties and attorney's fee was proper.

The Referee's order will be affirmed; however, not without comment on the Referee's decision that the claim had to be considered as a "claim for aggravation" because more than one year had elapsed since the claim was closed on a "medical only" basis. The Board formally concluded that such administrative closures do not qualify as the "first determination made under subsection (3) of ORS 656.268." Thus, not only have claimant's aggravation rights not expired, they will not begin to run until such a determination is issued. Therefore, when claimant's condition does become medically stationary and his claim submitted for closure under the provisions of ORS 656.268, that closure will be the first determination from which both the one year period and the five year aggravation period will commence to run.

ORDER

The order of the Referee dated December 13, 1974, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300 payable by the State Accident Insurance Fund for services in connection with Board review.

WCB CASE NO. 74-3458 June 18, 1975

LARRY BENNETT, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
J. W. McCracken, Jr., Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which affirmed the employer's denial of claimant's claim for compensation.

After working for two days for this employer, claimant reported to work July 5, 1974, bringing his wife to assist him in trimming mobile homes. He saw his supervisor that morning complaining of a stiff neck from watching fireworks but report of a job injury was not made that day.

Claimant later contended his neck began hurting while standing on a ladder in the afternoon of July 5, 1974. The following Monday morning, July 8, 1974, he saw Dr. Glaede who found no objective signs of injury, only subjective symptoms. Claimant did not work between July 8 and July 26, the day he told Dr. Glaede his neck was well. He worked until July 29, but was unable to continue.

Claimant was also examined by Dr. W. J. McHolick, an orthopedic surgeon and Dr. John Serbu, a neurosurgeon. The totality of medical evidence persuades the Board that claimant's complaints of neck pain at the beginning of the work day which continued thereafter was a condition which could not be causally related to an incident on the ladder.

The issues on review before the Board turn primarily on the credibility of the claimant and the circumstances surrounding the claim. The record indicates claimant had falsified his employment application to his employer as well his statement to the adjuster. It is reasonable to assume the primary reason claimant brought his wife to the job would be to assist him because he was not feeling well. Claimant asserted to Dr. Serbu that raising his arms overhead exacerbated the pain in his neck, but Dr. Serbu (Ex. 8) stated that raising one's arm should alleviate the pain in the neck area.

Reviewing de novo, the Board concurs with the findings and conclusions of the Referee that claimant has not sustained the burden of proving he sustained a compensable industrial injury.

ORDER

The order of the Referee dated February 20, 1975, is affirmed.

WCB CASE NO. 72-2337 June 18, 1975

PETE PETITE, CLAIMANT
Emmons, Kyle, Kropp & Kryger
Claimant's Attys.
Dept. of Justice, Defense Atty.
Own Motion Order of Remand

Claimant sustained a compensable injury on or about January 6, 1967. The employer's carrier, Employers of Wausaw, accepted the claim and on March 18, 1970, an award of 15% unscheduled permanent partial disability was granted claimant pursuant to ORS 656.268. A request for hearing was filed by claimant and, after hearing, the Referee affirmed the Determination Order.

In January 1972, claimant again suffered an injury while working for another employer. A claim was filed with and accepted by the State Accident Insurance Fund, that employer's carrier. A Determination Order, dated August 22, 1972, gave claimant no award for permanent disability.

Claimant has requested a hearing on the August 22, 1972, Determination Order which is presently pending. Claimant has also petitioned the Workmen's Compensation Board, pursuant to own motion jurisdiction granted the Board under ORS 656.278, to consider any benefits to which he may be entitled.

The issues involve two claims and the Board is unable to make a decision on the petition filed under ORS 656.278 without first being apprised of the merits of the 1972 claim. The matter is, therefore, remanded to the Hearings Division for the purpose of taking evidence on the merits of both claims. After the Referee has ruled on the 1972 claim, the proceedings should be transcribed and the complete record, including the Referee's recommendations concerning the 1967 claim, should be forwarded to the Board for their consideration.

IT IS SO ORDERED.

DOLLY BREWER, CLAIMANT
Bodie, Minturn, Van Voorhees
& Larson, Claimant's Attys.
Dept. of Justice, Defense Atty.
Order Approving Stipulated Settlement

A Referee's order, dated April 2, 1975, in the above-entitled matter, held that claimant has sustained an aggravation of a compensable injury and ordered institution of time loss among other things; but, based on the stipulation of the parties, did not purport to rate the permanent disability.

Rather than seeking Board review of the Referee's order, the parties have presented a stipulation to the Board amicably disposing of the issues in dispute and also settling the extent of claimant's permanent disability following the aggravation of her condition. The stipulation is attached hereto as Exhibit "A".

The Board, being now fully advised, finds the stipulation fair and equitable to both parties and concludes that the agreement should be executed according to its terms.

IT IS SO ORDERED.

STIPULATED ORDER

Claimant was compensably injured on January 19, 1970, when employed as a potato grader for defendant-employer. The claim was closed on January 18, 1971, with a permanent disability award equal to 29° for partial loss of the left arm. By Opinion and Order of December 20, 1971, a permanent disability award of 192° for unscheduled disability was ordered in lieu of the previous award. A claim for aggravation was filed and a substantiating medical report was provided based on an examination by Dr. Faulkner Short on July 10, 1974. A hearing was held on the question of aggravation on March 5, 1975, and by order of April 2, 1975, the Referee held that there was aggravation. The Referee, based on the stipulation of the parties, did not purport to rate the permanent disability. The parties hereto now stipulate and agree as follows:

1. That the claimant has sustained aggravation, her condition has worsened since December 20, 1971.

2. The claimant's condition is now medically stationary.

3. That the claimant is entitled to temporary, total disability from July 10, 1974, through May 28, 1975.

4. That the claimant is entitled to a permanent, partial award of 80% for unscheduled disability, being 256° out of a possible 320° for loss of the workman (being an increase of 64°

or 20% over that awarded by the hearing officer by Opinion and Order of December 20, 1971).

5. That pursuant to ORS 656.286(1) the Fund is to pay claimant's attorney over and above any compensation paid to claimant the sum of $650 as a reasonable attorney's fee. This is the fee which was authorized by the Referee by order of April 2, 1975, and the claimant's attorney is entitled to no additional attorney's fee at this time except or any attorney's fee that might be remaining unpaid from previous awards to the claimant.

WCB CASE NO. 74-2625 June 20, 1975

RAY VAUGHN, CLAIMANT
Taggart & Walter, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The claimant appeals from an order of the Referee dated November 7, 1974, wherein claimant's claim was remanded to the State Accident Insurance Fund to be accepted for the payment of further compensation in the form of psychological or psychiatric examination, care, treatment and counseling, but not for the payment of temporary total disability benefits from the date of the order until closure authorized pursuant to ORS 656.268. Claimant has appealed a Determination Order, dated July 1, 1974, which did not award any permanent partial disability for an unscheduled neck injury which claimant suffered in January 1970.

Since the date of injury claimant has complained of intermittent back, neck, chest and arm pain which intensifies with activity. His recovery period was rather protracted and claimant has worked only sporadically since his injury. Claimant has been examined and treated by a number of physicians, none of whom were able to find any significant amount of objective pathology. Neither Dr. Thrasher, Dr. Baranco, Dr. O'Brien nor Dr. Daniels found any indication of an organic problem of significance which would prevent claimant from carrying on a mormal work program.

Irvine R. Smith, a psychiatric social worker, was of the opinion that claimant had an immature personality syndrome bordering on schizophrenia which probably pre-dated the accident of January 25, 1970. Mr. Smith felt, however, that claimant's fear of his own inadequacies which pre-dated the accident were made symptomatic as a hysterical conversion reaction at the point of the industrial injury. It would appear that every time claimant attempts to return to work he experiences anxiety and severe pain in his neck, shoulders and both extremities.

The Referee found that the only disability claimant had was caused by this psychological condition, but he was not of the opinion that a proper determination of the extent of such disability at that time could be determined. The Referee further felt that while there was nothing which could be done for claimant on a neurological or orthopedic basis, the evidence indicated that the degree and perhaps the permanency of this psychological condition would be affected by proper treatment. For that reason, he remanded the matter for such treatment. The Referee further found that claimant was not unable to work and therefore would not be entitled to temporary total disability benefits; that while he was not completely rehabilitated, he could work during the period of rehabilitation. When claimant's medical condition is declared stationary his permanent disability, if any, can be determined.

Upon review de novo, the Board concurs with the findings of the Referee and directs the Evaluation Division of the Workmen's Compensation Board, when the claimant is found to be medically stationary and his claim is closed under the provisions of ORS 656.268, to determine what compensation, if any, should be awarded to claimant.

ORDER

The order of the Referee dated November 7, 1974, is affirmed and the Evaluation Division of the Workmen's Compensation Board is directed, when claimant's claim is closed under the provisions of ORS 656.268, to determine what, if any, compensation shall be awarded to claimant.

WCB CASE NOS. 74-2172 AND 75-31 — June 20, 1975

CESSNA E. SMITH, CLAIMANT
Galton & Popick, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
Order On Motions

On May 8, 1975, the Workmen's Compensation Board received a request from the employer for review of the Referee's order entered April 30, 1975, in the above-entitled matter. The employer alleged that the Referee was in error in finding claimant had suffered a new injury when, in fact, claimant's condition was primarily related to an injury suffered while the employer was covered by Industrial Indemnity; therefore, Industrial Indemnity should be responsible for claimant's present condition.

This request for review was served upon the Board and upon claimant and claimant's attorney. The employer being the appealing party and obviously had notice; however, service was not made upon either Industrial Indemnity or its attorneys.

On June 9, 1975, Industrial Indemnity made a special appearance to quash the request for review on the grounds that it had not been served as required by ORS 656.295(2).

On June 12, 1975, claimant made a special appearance and moved to dismiss the appeal for the reason that it was not properly requested within 30 days from the mailing of the copies of the Referee's opinion and order in that the request for review did not reflect service upon Industrial Indemnity or its attorneys.

On June 18, 1975, Employee Benefits Insurance Company, the carrier for the employer, whom the Referee found to be responsible for claimant's condition, responded to both motions citing ORS 656.295(2) which states:

> "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 referee.' (Emphasis supplied)

ORS 656.002(17) provides:

> "'Party' means a claimant for compensation, the employer of the injured workman at the time of the injury or the State Accident Insurance Fund."

The facts as set forth in the opinion and order referred to above indicate that the employer had been represented by two insurance carriers and that when claimant was injured on December 27, 1972, coverage was being provided by Industrial Indemnity and when claimant suffered an accident on January 26, 1974, the coverage was being provided by Employee Benefits Insurance Company. The issue before the Referee was whether the incident of January 26, 1974, constituted an aggravation of the earlier injury or was a new injury. The Referee held that it was a new injury and the employer, through Employee Benefits Insurance Company, appealed.

The statutes above cited require that both motions be denied. The Board has jurisdiction to review the order of the Referee.

The issue before the Referee was whether claimant had aggravated an earlier injury or suffered a new injury; obviously, both Employee Benefits Insurance Company and Industrial Indemnity were vitally concerned with the Referee's conclusion. There is no reason to assume that each would not be equally concerned with the order on review which would be based upon the same issues. Therefore, in the light of complete justice to all parties concerned, Industrial Indemnity, if it so desires, may file its brief in this matter. The transcript of the hearings proceedings has been

ordered. When it is received, the appellant employer and its carrier, Employee Benefits Insurance Company, and the respondent claimant and the carrier, Industrial Indemnity Insurance Company, will be notified of the time each has within which to file its brief.

SAIF CLAIM NO. PB 120262 June 20, 1975

ALICE A. QUINN, CLAIMANT

Own Motion Determination

This claimant sustained a compensable injury April 21, 1965, when she fell down a flight of stairs. A long period of treatment ensued including a fusion and laminectomy performed by Doctors James Luce and Anthony J. Smith. Claimant received a permanent partial disability award of 50% loss function of an arm for unscheduled disability. Subsequently, by stipulation an additional award of 30% loss function of the left leg was made.

Claimant continued to have chronic pain and on May 24, 1972, she was again examined by Dr. Luce. In November 1972, claimant was referred to the University of California Hospital where a re-fusion was performed.

On May 19, 1975, claimant was examined by Orthopaedic Consultants, Portland, who recommended that her claim be closed, finding moderate loss function due to the injury.

ORDER

IT IS THEREFORE ORDERED that claimant be paid temporary total disability from May 24, 1972, through August 27, 1974, as paid, plus one day, May 19, 1975, for medical examination; and no permanent partial disability in excess of that already granted.

SAIF CLAIM NO. HC 3297 June 20, 1975

WAYNE E. FLUES, CLAIMANT

Own Motion Determination

Claimant, then a 32 year old carpenter, strained his back on January 3, 1966, while attempting to move some timber. Claimant had suffered a previous back injury in 1965 which required a laminectomy and for which claim was filed and closed with an award of permanent partial disability equal to 30% loss of an arm by separation for unscheduled disability. As a result of the

January 3, 1966, injury, claimant required another laminectomy performed on March 8, 1966, by Dr. Hiestand. On August 8, 1966, Dr. Nathan Shlim said claimant's condition was stationary and that inasmuch as he had previously been awarded 30% loss of an arm by separation and his disability did not appear to be that great at that time, no additional award was warranted. The claim was closed on August 16, 1966, with no award for permanent disability.

On August 27, 1966, claimant's claim was reopened for aggravation and another laminectomy and fusion from L4-S1 was performed on September 20, 1966. The claim was closed in August 1967 with an award for permanent partial disability equal to 30% loss of an arm by separation for unscheduled disability in addition to the previous award of 30% loss of an arm by separation for unscheduled disability which he received as a result of his earlier back injury.

On May 2, 1969, claimant fell 20 feet injuring his left ankle which required surgery. This injury has no relationship to the back injury.

On March 11, 1974, claimant sought further treatment for his back from Dr. Cook, who on May 6, 1974, performed a laminectomy for a pseudoarthrosis. Claimant was released from the hospital on May 12, 1974, and returned to work on June 17, 1974. He has continued to work since that time.

On March 24, 1975, Dr. Cook made a final evaluation of claimant's back condition and stated that claimant had full range of motion with minimal tenderness and he felt that the claim could be closed.

Based on the medical evaluation and recommendation of the Evaluation Division, it is determined that no additional award for permanent partial disability should be granted.

ORDER

IT IS THEREFORE ORDERED that claimant be paid temporary total disability from March 11, 1974, through June 16, 1974, and that no additional permanent partial disability award be made.

WCB CASE NO. 74-2870 June 23, 1975

EARLINE E. WILLIAMS, CLAIMANT
Charles Paulson, Claimant's Atty.
James D. Huegli, Defense Atty.
Request for Review by Claimant
Cross-Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested a review by the Board of that portion of an amended order of the Referee dated February 12, 1974, which affirmed a partial denial by the employer for the medical condition of porphyria as being unrelated to the industrial accident of November 13, 1972, and for treatment incurred for the porphyria condition or for treatment caused by the symptomatology of porphyria. The employer cross appealed from the portion of the amended order which set aside the second Determination Order dated August 27, 1974, whereby claimant was awarded compensation for a permanent partial disability equal to 10% loss of the right arm and held that the claim should be continued as an open claim until the symptoms resulting from her compensable injury were both orthopedically and psychiatrically medically stationary.

Claimant, a 43 year old registered nurse, suffered compensable injury to her right elbow while employed at Providence Hospital. Dr. Robert A. Berselli diagnosed a right lateral humeral epicondylitis and, on July 3, 1973, performed a right epicondylar stripping operation. Claimant returned to work on August 20, 1973, and worked until October 5, 1973, when she quit because of her inability to use her right arm. Claimant has not returned to work since that date.

In December 1973, claimant was hospitalized with neurological, abdominal and hallucinatory symptoms which Dr. John R. Flanery diagnosed as acute intermittent porphyria, the condition for which the employer denies responsibility. Dr. William W. Thompson who has been claimant's treating psychiatrist since 1960 was of the opinion that the industrial injury precipitated her present illness.

Dr. Thompson points out that claimant has two separate illnesses: (1) acute intermittent porphyria, which is a hereditary defect, and (2) the emotional illness attributable to her injury. Claimant concedes that her porphyria condition was not caused nor aggravated by her industrial injury but that she is, at the present time, temporarily totally disabled due to her emotional illness which the Referee found attributable to her industrial injury.

The Board, on de novo review, finds that claimant's emotional illness is attributable to her emotional response to her industrial injury and not to the porphyria. Although the injury suffered by claimant to her right elbow was minor from an orthopedic standpoint, the claimant's emotional illness resulted in a complete inability of claimant to use her right arm and claimant is entitled to receive compensation for time loss due to this condition until she is found to be psychiatrically medically stationary. The employer shall furnish to claimant all medical treatment necessitated by such medical condition. The Board is aware, as was the Referee, of the difficulty in identifying the cost of the treatment required by claimant's mental problems, not all of which are the result of her industrial injury. The responsibility of making this distinction will rest upon the doctors involved in furnishing the treatment.

The Board further finds that the claimant was not psychiatrically medically stationary on August 27, 1974, therefore, the Referee's order vacating and setting aside the second Determination Order and ordering compensation due claimant be paid was proper.

ORDER

The amended order of the Referee dated February 12, 1975, is affirmed.

WCB CASE NO. 74-169 June 23, 1975

RUTH BIGELOW, CLAIMANT
Richard R. Frazier, Claimant's Atty.
Marmaduke, Merten & Saltveit,
Defense Attys.
Order Authorizing Recovery of an
Extraordinary Attorney's Fee

Claimant's counsel, with consent of claimant, seeks Board authorization of the recovery of an extraordinary attorney's fee in connection with his successful efforts to secure additional compensation for his client.

Based on the circumstances revealed by the record on Board review and the letter of June 17, 1975, the Board concludes the request for an extraordinary fee of $104.85 should be approved.

IT IS SO ORDERED.

SAIF CLAIM NO. BB 73993 June 25, 1975

K. W. LANGE, CLAIMANT
Charles Paulson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury on July 29, 1964. His claim was first closed on July 15, 1968, and claimant chose to appeal the order to the Circuit Court, thereby precluding himself from a right to request a hearing before the Workmen's Compensation Board. Claimant's appeal to the Circuit Court was not timely filed due to the alleged negligence of his attorney, now deceased. The dismissal of claimant's request for hearing by the Hearing Officer was affirmed by the Board in review and claimant now requests relief under the provisions of ORS 656.278.

Claimant contends that he is permanently and totally disabled as a result of the 1964 injury. Claimant has previously been awarded 95% loss function of his left leg; 15% loss function of his left arm, and 40% loss use of an arm for unscheduled disability.

By its Own Motion Order dated April 10, 1975, the Board referred the matter 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.

As a result of the hearing held at Portland, Oregon on May 6, 1975, the Referee recommended that the Board find in claimant's favor.

Each time claimant endeavored to return to work, he would suffer a flareup of his osteomyelitis. Claimant has twice been hospitalized since last closure of his claim on June 21, 1971. Claimant has one year of high school education. Prior to his injury he was employed as a logger, powder monkey, truck driver and also as a rough carpenter. He is no longer able to work because his "back and legs won't take it."

The Referee observed the claimant was of the opinion he was totally honest and forthright during his testimony.

The Board, on de novo review of the transcript of the proceedings of the hearing, concurs with the recommendation of the Referee and adopts his order as its own.

ORDER

IT IS HEREBY ORDERED that claimant is permanently and totally disabled as defined by ORS 656.206 and shall be considered as permanently and totally disabled from the date of this order, onward.

Claimant's attorney is awarded as a reasonable attorney's fee 25% of the increase awarded by this order, payable as paid, not to exceed $2,000.

SAIF CLAIM NO. A 849946 June 25, 1975

CHARLES A. WILLIAMS, CLAIMANT
John Bassett, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On February 22, 1961, claimant suffered an injury to his right leg, hip and low and middle back, for which he ultimately received an aggregate award in the amount of 60% loss function of an arm for unscheduled disability.

In 1973, claimant developed additional back problems which were acknowledged to be legal aggravation of his original injury by the Board's Own Motion Order dated January 15, 1975. Said order ordered the State Accident Insurance Fund to furnish claimant medical care and the compensation benefits provided by law for the aggravation of the 1961 injury from May 30, 1973, onward. When the Fund believed claimant's condition again had become medically stationary, it was to submit the claim to the Workmen's Compensation Board for an Own Motion evaluation of permanent disability.

Medical care has been furnished, benefits paid and the claim submitted to the Evaluation Division of the Workmen's Compensation Board for its recommendation. The Evaluation Division recommended no additional permanent partial disability, but did recommend awards of compensation for temporary total disability from May 30, 1973, through October 6, 1974, and from October 7, 1974, through May 27, 1975, less time worked.

IT IS SO ORDERED.

SAIF CLAIM NO. DC 148488 June 25, 1975

HARRY A. STRONG, CLAIMANT
Noreen A. Saltveit, Claimant's Atty.
Own Motion Order

This matter was previously before the Workmen's Compensation Board for consideration under the Own Motion jurisdiction granted the Board pursuant to ORS 656.278.

It was indicated to the Board that claimant was in need of further medical care for a shoulder condition resulting from an industrial injury which he sustained September 17, 1968. By Own Motion Order dated November 21, 1974, the State Accident Insurance Fund was ordered to reopen said claim for this further care and/or treatment.

A report from Dr. Edwin G. Robinson dated April 24, 1975, has been received by the Board which indicates claimant's shoulder and arm condition is approximately the same as was noted in previous reports, and any increased disability has resulted from an unrelated arterial disease.

The Evaluation Division of the Board also reports that claimant's condition has not changed in over a five year period; that his condition is medically stationary and he is entitled to no compensation for temporary total disability or permanent partial disability in excess of that already granted.

ORDER

IT IS THEREFORE ORDERED that claimant's claim be closed with no further award of compensation.

WCB CASE NO. 74-4295 June 26, 1975

The Beneficiaries of
OLLIE LEWIS, DECEASED
Babcock, Ackerman & Hanlon,
Beneficiaries' Attys.
Dept. of Justice, Defense Atty.
Order on Motion

On June 6, 1975, the Workmen's Compensation Board received a motion from the State Accident Insurance Fund for an order staying the effect of the Referee's order in the above-entitled matter dated May 14, 1975, at least until such time as the Board has had an opportunity to review the case subject to the request for review by the State Accident Insurance Fund which was received by the Board on June 6, 1975.

The Referee ordered the reinstatement of the widow's benefits for the period subsequent to the annulment of July 1, 1975, and also ordered reinstatement of the widow's benefits retroactively to the date of termination thereof, less the $1,500 remarriage allowance. The Fund contends that, under the provisions of ORS 656.313, it would not be able to recoup the monies paid and would therefore sustain irreparable harm and damage in the event there was a subsequent ruling that the compensation should not have been allowed or should have been allowed in a lesser amount.

ORS 656.313 provides:

"(1) Filing by an employer or the State Accident Insurance Fund of a request for review or court appeal shall not stay payment of compensation to a claimant.

"(2) If the board or court subsequently orders that compensation to the claimant should not have been allowed or should have been awarded in a lesser amount than awarded, the claimant shall not be obligated to repay any such compensation which was paid pending the review or appeal."

The above-cited statute is clear and unambiguous. The legislature obviously intended, in promulgating ORS 656.313, that a claimant was to receive benefits pending appeal, not just a "paper judgment" for penalties to be filed with the original Referee's order for possible future reference, following the ultimate appellate outcome of the case. In the Matter of the Compensation of Vivian Johnson, Claimant, WCB Case No. 73-2578 Order on Review dated June 11, 1974.

The Fund in its motion parenthetically states that the constitutionality of ORS 656.313 has not been passed upon directly. A statute is presumed to be constitutional until found otherwise by the courts.

ORDER

The motion of the State Accident Insurance Fund to stay the effect of the Referee's order of May 14, 1975, is hereby denied.

SAIF CLAIM NO. B 101901 June 26, 1975

WILLIAM H. ZUNCK, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Own Motion Order

On October 17, 1974, claimant filed a petition requesting the Workmen's Compensation Board to exercise its "own motion" jurisdiction granted to it by ORS 656.278. Claimant had sustained a compensable injury on January 9, 1965, for which he ultimately received compensation equal to 75% loss function of the right arm. Since 1967, claimant has undergone further medical care and treatment, namely a cervical laminectomy and fusion.

On January 30, 1975, the matter was referred to the Hearings Division with instructions to hold a hearing, take evidence and submit a recommendation on the issue of whether the surgery was required as a result of the 1965 industrial injury.

On May 13, 1975, a hearing was held. The Referee found claimant a credible witness. Although he tended to over-dramatize, there was no question that claimant remained severely disabled. Subsequent to the 1965 injury claimant was treated at least twice surgically for problems with his right arm and he also continued to have trouble with his head and neck. When he told Dr. Edwards, a Salem orthopedic surgeon, about his head and neck he was advised that the symptoms were related to the arm injury.

In January 1966, claimant returned to work and held several types of jobs until October 1970. During all of this time claimant claims his head and neck continued to bother him. Since October 1970, claimant has not been employed.

In 1970 claimant saw Dr. Mayo who took x-rays of claimant's neck; she diagnosed the crushed vertebrae in the neck. Due to financial conditions it was not until 1974 that claimant did anything more about his condition. He was seen by Dr. Buza, a neurosurgeon, and Dr. Burr, an orthopedist. A myelogram revealed a crushed vertebra C-5 and on June 11, 1974, a laminectomy and fusion were performed.

Prior to surgery, Dr. Buza was of the opinion it was more reasonable to relate the condition to the 1965 incident than to some other case and Dr. Burr, who assisted Dr. Buza in the surgery, was of the opinion that claimant suffered a cervical fracture in the 1965 injury which eventually led to the surgery.

The Referee recommended, based upon all the evidence, both lay and medical, that the cervical laminectomy and fusion were necessary because of the industrial injury of January 9, 1975. He further recommended that the claimant's condition be a continuing responsibility of the State Accident Insurance Fund, successor to the employer's carrier at the time of the accident, until his condition is medically stationary and his claim is closed.

The Board, upon de novo review, concurs with the recommendations made by the Referee and adopts them as its own.

ORDER

The claim is remanded to the State Accident Insurance Fund for payment of compensation, as provided by law, commencing June 6, 1974, and until closure is authorized under the provision of ORS 656.268.

Claimant's attorney is awarded a reasonable attorney's fee of 25% of any increase awarded claimant by the Board, payable as paid, to a maximum of $2,000.

WCB CASE NO. 73-1291 June 26, 1975

DONALD B. DOPFER, CLAIMANT
Frohnmayer & Deatherage, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant has requested Board review of a Referee's order which found claimant had not sustained a compensable injury to his left knee and that the permanent disability attributable to his right knee as a result of a compensable injury of September 22, 1971, was no greater than that for which he had been compensated.

Claimant sustained one-the-job injury at Mountain Fir Lumber Company. Dr. Tonn referred claimant to an orthopedic surgeon, Dr. Andrew Lynch, who treated claimant and ultimately performed surgery on his right knee. No history of any left knee injury was given to Dr. Lynch by claimant until February 13, 1973, 16 months after he had first been examined by him. No treatment was given by Dr. Lynch to claimant's left knee. The State Accident Insurance Fund accepted claimant's claim for the right knee injury and claimant was granted permanent partial disability of 25% loss of the right leg equal to 37.5°.

Following Dr. Lynch's reports of claimant's left knee complaints, the State Accident Insurance Fund denied responsibility for any left knee injury.

Dr. Renaud, who examined claimant in February 1974, stated it was most difficult to establish a relationship between the complaints in the left knee, which he attributed to degenerative arthritis, and the industrial injury of 1971. It was his opinion much of claimant's problem was related to obesity.

The Referee could not accept as reliable the claimant's testimony relating to his injury of his left leg and concluded claimant had not sustained his burden of proof that he had incurred a compensable injury to the left knee. The Referee also found claimant's permanent partial disability sustained in the right knee did not exceed that which had previously been awarded.

The Board, on de novo review, concurs with the findings and opinions made by the Referee and adopted them as its own.

ORDER

The order of the Referee dated October 11, 1974, is affirmed.

WCB CASE NO. 74-3563 June 26, 1975

DONALD WITHROW, CLAIMANT
Fred P. Eason, Claimant's Atty.
Jaqua & Wheatley, Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant first injured his left leg on July 16, 1969, when a piece of pipe struck his knee. The Determination Order awarding 8° for partial loss of leg was appealed by claimant. After a hearing that award was increased to 30° partial loss of the left leg. Claimant has requested Board review.

On November 15, 1973, while claimant was pushing a wheelbarrow, he reinjured his left knee. He was examined by Dr. Smith on December 13, 1973, complaining of pain, swelling and weakness. X-rays of the knee revealed no changes when compared with films taken two years previously.

Claimant had intermittent periods of work and layoffs. The record is void of definitive medical information to support a finding that claimant has sustained additional disability and the Referee concluded that claimant's scheduled disability of his knee as a result of both injuries was not equal to more than 20% loss of the leg or 30°.

The Board, on de novo review, concurs with the findings of the Referee and affirms and adopts his order as its own.

ORDER

The order of the Referee dated December 31, 1974, is affirmed.

WCB CASE NO. 74-2548 June 26, 1975

JERRY HOLLON, CLAIMANT
Ringo, Walton & Eves, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

Claimant had received an award of permanent partial disabilty of 30% unscheduled low back disability equal to 96°. He requested a hearing and the Referee increased the award to 50% unscheduled low back disability equal to 160°. The State Accident Insurance Fund has requested Board review of the Referee's order.

Claimant, a 38 year old truck driver, injured his back November 9, 1972. He had sustained a previous back injury April 8, 1972. Dr. Tiley who treated claimant, because of a negative myelogram performed on January 30, 1973, did not recommend further exploration of claimant's spine.

In July 1973, the Back Evaluation Clinic examined claimant and diagnosed a probable herniated disc. Dr. Melgard also recommended an exploration to determine existence of a disc, but claimant was reluctant to proceed surgically and his claim was closed with an award of 15% unscheduled low back disability.

Claimant did not show significant improvement and on November 12, 1973, claimant was admitted for a lumbar laminectomy. This surgery did not benefit claimant physically, but Dr. Melgard felt everything had been done for him that could be done; that claimant was overreacting to his physical problems. Claimant was examined by the Back Evaluation Clinic on April 9, 1974; his condition was then stationary but he was advised he should not return to work requiring lifting or repetitive bending and would be somewhat limited physically. Claimant thereafter received an additional award of 15% unscheduled disability.

Claimant has a limited education and a sporadic work history. The achievement tests given by the Division of Vocational Rehabilitation in October 1974 indicated low scores. The Referee found that claimant's loss of earning capacity was substantial and he granted claimant an additional award of 20% unscheduled disability, making a total award for permanent partial disability of 50% unscheduled disability equal to 160°. The Fund has submitted no brief in contention of the award, only a letter faulting the Referee's conclusions.

On de novo review by the Board, based on the above findings, the Board concurs with the Referee's opinion and order.

ORDER

The order of the Referee dated January 13, 1975, is affirmed.

Counsel for claimant is awarded a reasonable attorney's fee in the amount of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 74-2909 June 26, 1975

DELMAR TACKER, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund has requested Board review of a Referee's order which increased claimant's award for permanent partial disability of his left hand from 15% to 40%.

Claimant sustained a crushing injury on May 10, 1973, when he caught his left hand in a sheet metal rolling press degloving the distal phalanges of his third and fourth fingers. The Referee's order outlines the surgical procedures and skin grafts that were undertaken on the injured hand.

The Referee's personally saw claimant's hand and noted it affected claimant's writing, gripping, picking up of small objects, strength and tenderness, and found claimant's loss of physical function to be equal to 40% loss of the left hand.

The Board, on de novo review, relying on the observations and conclusions made by the Referee, concurs with his order.

ORDER

The order of the Referee dated February 11, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney fee in the sum of $250, payable by SAIF for services in connection with Board review.

WCB CASE NO. 74-2730 June 26, 1975

MARGARET M. PARKES, CLAIMANT
Rod Kirkpatrick, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant has requested Board review of a Referee's order which affirmed the employer's denial of claimant's claim for compensation.

This claimant, who was 19 years old at the time of hearing, was hospitalized on or about June 24, 1974, because of left leg pain which manifested itself after heavy lifting at work, although there was no specific incident involved with the onset. There were no witnesses to an injury. Claimant mentioned it to a friend employee, but no report was made to any supervisor.

After conservative treatment, claimant's condition worsened; a diagnosis of a protruded lumbosacral disc was made and claimant underwent surgery for the removal of the protruded disc on July 2, 1974.

Claimant had, prior to her surgery, lost time from work. She told her foreman she had been injured in a car accident. Claimant also had been assaulted by her boyfriend several times. These facts were related by claimant at the time of hospital admission but were not included in the reports of the treating doctors.

The Referee, at hearing, found claimant had not sustained her burden of proof that a compensable injury had been sustained. The Board, on de novo review, concurs.

ORDER

The order of the Referee dated December 17, 1974, is affirmed.

WCB CASE NO. 72-1681 June 26, 1975

OPAL LILLIAN VETTER, CLAIMANT
James D. Fournier, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant seeks Board review of a Referee's order which dismissed claimant's claim for aggravation because a written medical opinion supporting such claim for aggravation was not submitted as required by ORS 656.273(4) and he was without jurisdiction to hear the matter.

A de novo review of the record indicates that no written medical opinion supporting claimant's claim was tendered prior to the hearing and no briefs have been filed by either party, The Board, therefore, affirms and adopts the order of the Referee as its own.

ORDER

The order of the Referee dated April 16, 1974, is affirmed.

SAIF CLAIM NO. AA 483046 June 26, 1975

DAVE R. HIEBERT, CLAIMANT

Own Motion Determination

Claimant sustained a compensable injury to his knee on June 20, 1955. After an initial "medical only" closure, there were three reopenings of his claim, as a result of which claimant has received 50% loss function of his left leg and 30% loss function of his right leg.

Pursuant to the Board's Own Motion order dated April 3, 1974, the State Accident Insurance Fund was ordered to reopen claimant's claim for further medical care and treatment and for payment of associated temporary total disability from the date claimant was hospitalized.

Dr. Becker, on May 8, 1974, performed a total left knee arthroplasty and on June 20, 1974, the same operation was performed on claimant's right knee. Claimant's knee problems have been greatly alleviated and are in better condition than they have been for many years. On June 3, 1975, Dr. Becker recommended that claimant's claim be closed. The Board's Evaluation Division recommended no additional permanent partial disability, but temporary total disability from May 6, 1974 to June 3, 1975, both dates inclusive.

ORDER

IT IS HEREBY ORDERED that claimant be granted temporary total disability from May 6, 1974, to June 3, 1975, both dates inclusive, and no award made for additional permanent partial disability.

WCB CASE NO. 74-3572 June 27, 1975

EVERETT O. REED, CLAIMANT
Goode, Goode, Decker & Hinson,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which affirmed a Determination awarding claimant 35% loss of the right foot. Claimant contends he is entitled to a greater award because, although a scheduled injury, the injury should be treated individually and consideration given to the effect on the "way of living" of the particular workman. Surratt v. Gunderson Bros., 259 Or 65 and Kajundzich v. SIAC, 165 Or 510, refute completely such contention.

Claimant, a 37 year old construction worker, suffered a compensable injury on December 28, 1973, when he fell approximately eight feet from the roof of a building. Dr. Thomas J. Martens reduced the ankle fracture and claimant was in a cast for nine weeks. In Dr. Martens' closing examination, he indicated claimant had some restriction of motion, some pain with use, and some permanent disability. He felt if the pain subsequently became severe, an ankle fusion might be necessary.

The Referee observed claimant's gait as he walked in the hearing room at request of counsel; he also acknowledged that members of the Evaluation Committee of the Workmen's Compensation Board had examined claimant and had before it all the evidence presented at the hearing. The Referee took notice of the fact that the Committee's rating was in accord with the rating contained in the Manual for Orthopaedic Surgeons In Evaluating Permanent Physical Impairment. Claimant's counsel in his brief protested profusely about the reference to the Manual's rating because the Manual had not been introduced and received in the record. The Referee, the Board and the courts often take administrative or judicial notice of a treatise written by persons generally acknowledged to have expertise in their particular fields. The taking notice of and giving consideration to the contents of such treatise or test is perfectly proper.

The Board, upon de novo review, and giving consideration to the fact that both the Evaluation Committee members and the Referee personally observed claimant, and especially his gait, concludes that the findings of the Referee should be affirmed.

ORDER

The Referee's order dated January 31, 1975, is affirmed.

WCB CASE NO. 74-2971 June 27, 1975

DICIE CASE, CLAIMANT
Paulus & Callaghan, Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant was injured in August 1972 when she fell from a chair onto her tailbone resulting in chronic coccydynia. Conservative treatment did not alleviate claimant's symptoms and in November 1973, a coccygectomy was performed.

Initially, claimant received a permanent partial disability award of 16° for unscheduled disability. Following her surgery, an additional award of 48° was made making a total of 64° permanent partial disability. Claimant requested a hearing and the Referee affirmed the Second determination Order. Claimant has requested Board review contending she is entitled to a greater award.

The surgery relieved the discomfort considerably but claimant still is not able to sit for more than 15 or 20 minutes without shifting her position. She also has constant aching and pain in the legs which is related to her industrial injury; however, there is no evidence that claimant has suffered any loss of function of either lower extremity. Claimant has not worked since the injury.

At the time of injury claimant was employed as an interior decorator-salesperson, working six hours a day. This job involved setting up displays, conferring with prospective buyers, showing furniture, visiting homes to discuss and supervise decorating. This type of employment would appear to the Board to be well within claimant's limitations attributable to her industrial injury.

The Board concludes, based on claimant's age, abilities, education, physical limitations and present earning capacity available to her should she choose to use it, that the evidence fails to reflect a greater disability than that found by the Referee, and concludes his order should be affirmed.

ORDER

The order of the Referee dated December 10, 1974, is affirmed.

WCB CASE NO. 73-3460 June 27, 1975

LARRY E. BRUGH, CLAIMANT
Nicholas D. Zafiratos, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review, the only issue being the compensability of claimant's throat condition which he alleges is causally related to the industrial injury of June 11, 1970, when an overhead door came off its track falling onto claimant's head. A Second Determination Order granting claimant 80° unscheduled disability was increased by the Referee after a hearing and claimant now has received a total permanent partial disability award of 128° for unscheduled low back disability.

After a long period of conservative treatment, Dr. Parsons performed a laminectomy and fusion from L5 to S1 on February 20, 1973. Postoperatively, claimant began having difficulty swallowing and a restriction of air flow which was presumed to be related to his having been in a body cast. Both Dr. Thomas C. Honl and Dr. Timothy A. Patrick, who treated claimant for his throat problem, could only

"possibly" relate the throat condition to the industrial injury. Neither felt that claimant's throat condition was permanent.

The Referee found the medical opinion did not support medical causation, the condition was not permanent and that claimant's earning capacity had not been affected by his throat condition.

The Board, on de novo review, concurs with the findings of the Referee.

On May 13, 1975, claimant filed a motion requesting the Board to remand this matter to the Referee for further testimony on his throat condition. It appears that such testimony would be only a repetition of that already in the record of the hearing, therefore, the motion should be denied.

ORDER

The order of the Referee dated December 2, 1974 is affirmed.

Claimant's motion filed May 13, 1975, is denied.

WCB CASE NO. 74-1265 June 27, 1975

VOLA COLLINS, CLAIMANT
John Svoboda, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund requests Board review of a Referee's order which remanded claimant's claim for aggravation to it for acceptance and also for the payment of attorney's fees.

Claimant suffered a compensable injury on September 17, 1970, for which she ultimately received compensation for unscheduled permanent partial low back disability equal to 64°. Claimant requested a hearing and as a result of said hearing, the Referee awarded claimant an additional 96° giving claimant a total award of 160° or 50% of the maximum allowable by law for unscheduled permanent disability. This award was affirmed by the Board, but subsequently reduced to 96° or 30% of the maximum by a judgment order of Judge Allen dated December 2, 1971.

Prior to June 14, 1971, the date of claimant's hearing, none of the doctors in Eugene or surrounding area who had treated and/or examined claimant recommended surgery; each said it would be in her best interest. After June 14, 1971, claimant's back became worse and it was necessary for her to wear a back brace constantly, and she was unable to find work.

In the fall of 1971, claimant was visiting in Ohio; while there her back gave her extreme pain and she was seen by Dr. D. D. Kackley, an orthopedic surgeon in Columbus, whom she advised about her industrial injury and the treatment which she had received from Oregon doctors relating thereto. Claimant also told him about her childhood scoliosis which had required a medical fusion and stabilization of most of her dorsal lumbar spine, but which had been completely asymptomatic until the industrial injury.

On January 30, 1972, Dr. Kackley performed a lumbar laminectomy and spinal fusion which, to a very large degree, alleviated the symptoms of pain claimant had been suffering. Upon claimant's return to Oregon, she was seen and treated by Dr. George Harper who released her to return to light work on January 30, 1973.

On January 15, 1974, Dr. Kackley wrote that claimant's low back and right lower extremity symptoms were the result of her 1970 industrial injury and subsequently necessitated the surgery described. On September 10, 1974, Dr. Kackley submitted an additional report clarifying the previous opinion. Based on the history obtained from claimant, the physical findings and x-ray findings and additional observations of the involved area at surgery, his opinion was that claimant had suffered an injury to her back at work which was followed by progressive low back symptoms which did not respond to any type of symptomatic therapy; her condition had worsened between the date of the injury and the date of the examination in his office and ultimately required the laminectomy and fusion.

The Fund contends the Workmen's Compensation Board lacked jurisdiction because Dr. Kackley's letter of January 15, 1974, did not meet the requirements of ORS 656.273 (4). The Referee found that the two letters taken together were sufficient to entitle claimant to a hearing.

The Fund next contended that the claim for aggravation was not timely filed.

ORS 656.273(3) provides that a request for hearing on an increased compensation for aggravation must be filed with the Board within five years after the first determination made under ORS 656.268(3). The first Determination Order in this instance was mailed March 11, 1971, and claimant filed her claim on March 18, 1974, well within the five year period allowed.

The contentions of the Fund that the medical treatment claimant received was necessitated by her preexisting degenerative disease and not as a result of her industrial injury and that claimant was not entitled to receive, during the same period of time, benefits both for permanent partial disability and temporary total disability are not well taken. The first contention is refuted by medical reports received from Dr. Kackley; the second is not supported by any statute or court ruling. The Referee found that the Fund's contention that claimant being not completely recovered, was not entitled to any award for permanent partial disability was also without merit. Claimant had a laminectomy and fusion, it is reasonable to assume that she

will suffer some residual permanent partial disability, especially with respect to her potential wage earning capacity.

The Board, on de novo review, concurs with the findings and conclusions of the Referee.

ORDER

The order of the Referee dated January 16, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by SAIF for services in connection with Board review.

WCB CASE NO. 74-1056 June 30, 1975

PEGGY LEE GRIFFIN, CLAIMANT
B. J. Matzen, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which affirmed the State Accident Insurance Fund's denial of her claim for compensation.

Claimant was employed as a candle maker and allegedly injured her low back on November 30, 1973. On March 7, 1974, excision of an acute herniated disc of L5-S1, left and neurolysis of the L5 left nerve root was performed.

The record indicates many omissions and inconsistencies. Claimant alleged she was injured on her job November 30, 1973; she did not see a doctor until December 7, 1973; the Form 801 report of injury was not filled out until January 14, 1974. The record does not indicate that anyone in a supervisory capacity at the candle factory was advised of claimant's alleged injury. There were discrepancies in claimant's work activities on the day in question including the weight of the candle boxes being handled, and whether claimant had slipped three times on slippery wax on cardboard and on the floors.

Claimant has a number of physical complaints that cannot be attributed to the alleged industrial injury.

The Board, on de novo review, concurs with the Referee in finding that, on the merits, claimant has failed to prove she sustained a compensable injury.

ORDER

The order of the Referee dated January 13, 1973, is affirmed.

TROY AUDAS, CLAIMANT
Pozzi, Wilson & Atchison,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund requests Board review of a Referee's order affirming that portion of the Determination Order dated July 16, 1973, which awarded claimant compensation of 15% for unscheduled disability equal to 48° but increased the award of compensation for scheduled disability of 20% loss of the right arm equal to 38.4° made by said Order to approximately 21% loss of the right arm equal to 40°.

Claimant, a roofer, suffered a compensable injury on October 18, 1971, when he fell ten feet from a roof to the ground injuring his right shoulder and arm. Claimant had previously suffered a compensable injury in 1967 for which he ultimately was awarded 50% scheduled disability for his left arm and 70% unscheduled disability for his left shoulder injury. Audas v. Galazie Roofing Company, 2 Or App 520 (1970).

As a result of the 1971 fall, claimant suffered injuries to the rotator cuff and a sprain of the bicep tendon. An arthrogram performed by Dr. Robert Zimmerman showed a tear of the rotator cuff and filling of the subacromial bursa. On January 7, 1972, Dr. Zimmerman performed a resection of the distal clavicle and a repair of the torn rotator cuff.

The test for unscheduled disability is loss of earning capacity. Surratt v. Gunderson Bros., 259 Or 65 (1971). Although claimant has already been awarded 70% unscheduled disability to his left shoulder and now has suffered an unscheduled disability to his right shoulder, nevertheless, claimant does not appear well motivated to return to the labor market. Claimant's potential earning capacity is more greatly affected by this lack of motivation than by his 1971 industrial injury. Claimant is rather adamant about the type of work he was willing to do; indicating that he had been earning $15,000 a year as a roofer and he wasn't particularly interested in taking any job which paid substantially less. Claimant has participated in training program but has completed few of them.

The Board, on de novo review, concludes that that portion of the Referee's order which relates to the affirmance of the award of 15% for unscheduled disability equal to 48° is correct and should be affirmed. The Board further concludes that it is reasonable to assume assume the Referee intended to increase the award for partial loss of

claimant's right arm to 40% rather than to 40°. Whether this assumption is correct or not, the Board concludes that claimant is entitled to an award of 40% loss of right arm equal to 76.8°.

The issue of an award of a reasonable attorney fee by the Referee was not before the Board on this request for review.

ORDER

Claimant is granted an award of 76.8° for loss of the right arm of a maximum 192°, in lieu of and not in addition to the scheduled arm award granted in the Determination Order dated July 16, 1973; in all other respects the order of the Referee dated January 22, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 74-2414 June 30, 1975

LEO BURKHARTSMEIER, CLAIMANT
Charles Paulson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The State Accident Insurance Fund has requested Board review of a Referee's order which granted claimant an award of permanent total disability. Claimant had requested a hearing on the Determination Order dated June 18, 1974, which awarded him 65% unscheduled disability equal to 208°

Claimant, who was 62 at the time of hearing, was employed as a lineman by Pacific Power & Light Company. He sustained a low back and right shoulder injury November 20, 1972. Although disability as the result of this industrial injury was termed minimal, when combined with preexisting disability due to previous injuries (itemized in the Referee's order), the Referee concluded the "sum total" of said disabilities substantiated a finding that claimant was permanently and totally disabled.

The State Accident Insurance Fund argues that claimant has other sources of income and this reflects adversely on his motivation. The Referee, to the contrary, found claimant highly motivated and sincere.

The contention of claimant that such income was from collateral sources and not admissible on the question of motivation was not refuted by the Fund.

The Board, on de novo review, concurs with the findings and conclusions made by the Referee and adopts them as its own.

ORDER

The order of the Referee dated December 16, 1974, is affirmed.

WCB CASE NO. 74-1261 June 30, 1975

ROBERT A. COLE, CLAIMANT
Pozzi, Wilson & Atchison,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant has requested Board review contending his disability is greater than that for which he has been awarded. Claimant sustained a compensable injury September 14, 1971. He received, pursuant to Determination Order dated March 4, 1974, compensation equal to 30° for 20% loss of the right leg and 13.5° for 10% loss of the left foot. At hearing requested by claimant, the Referee increased the award for the right leg to 30%, and affirmed the award for the left foot.

Claimant, a truck driver, was injured when he drove into a ditch to avoid a head-on collision. It was a serious and dramatic accident and claimant underwent a long period of hospitalization and treatment with good recovery considering the seriousness of the accident. On January 25, 1974, Dr. Grossenbacher recommended claim closure and in April 1974, claimant was re-employed as a chip truck driver.

The Board, on de novo review and basing its decision on the medical evidence of record and the personal observations made by the Referee at hearing, concludes the permanent partial disability award claimant has received is a fair and equitable award.

ORDER

The order of the Referee dated October 2,, 1974, is affirmed.

WCB CASE NO. 74-865 July 1, 1975

MERTON MENGE, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant has requested Board review of a Referee's order granting claimant an additional award of 13.5°, making a total of 20.25° equal to 15% partial loss of the left foot. The issue on review is the extent of disability.

Claimant suffered a compensable injury June 1, 1973, while employed as a logger. Surgery was performed for left ankle ligament repair and claimant was off work for 5-1/2 months. He has now returned to logging.

Dr. Schachner reported claimant had stretched the ligament repair causing the ankle to turn easily; he prescribed a corset in the boot which provided some stability to the ankle.

The Referee found claimant had sustained some loss of function, e. g., jumping and running, and such loss was in excess of that for which he had been awarded 6.75°.

The Board, on de no review, relies on the observations and findings of the Referee and affirms and adopts his order.

ORDER

The order of the Referee dated November 20, 1974, is affirmed.

WCB CASE NO. 74-2426 July 1, 1975

JOANNE POLASCHEK, CLAIMANT
Anderson, Fulton, Lavis & Van Thiel,
Claimant's Attys.
Fredrickson, Tassock, Weisensee, Barton & Cox,
Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of a Referee's order which sustained the employer's denial of her claim for compensation.

Claimant alleges she sustained injury to her back while lifting pans of shrimp about May 5, 1974. A diagnosis of possible herniated intervertebral disc was made and claimant was hospitalized for traction.

The Referee, at the hearing, was confronted with testimony of the various witnesses, which impeached the credibility of the claiment to the extent that he concluded claimant had not met her burden of proving she had sustained compensable injury at her place of employment.

The Board, on de novo review, concurs with the findings and conclusions of the Referee and affirms his order.

ORDER

The order of the Referee dated January 15, 1975, is affirmed.

WCB CASE NO. 74-3391 July 1, 1975

DENNIS CHAMBERLIN, CLAIMANT
Babcock, Ackerman & Hanlon,
Claimant's Attys.
Keith Skelton, Defense Atty.
Order on Motion Allowing Attorney's Fee

Claimant has filed a motion with the Board to reconsider its Order on Review of June 13, 1975, and allow claimant's attorney a fee for his services at the hearing level.

The motion is allowed.

Claimant's attorney shall be awarded a fee of 25% of any temporary total disability or temporary partial disability award eventually received by claimant when the claim is closed pursuant to ORS 656.268 not to exceed $1,500.

WCB CASE NO. 74-3333 July 1, 1975

FABIAN M. DAVILA, CLAIMANT
Harold W. Adams, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests Board review of a Referee's order which increased a Determination Order awarding permanent partial disability

equal to 10% loss of left leg to 25%. The only issue on review is the extent of disability.

Claimant sustained fractures of the left tibia and left ankle. Dr. Stanford's final evaluation examination on July 29, 1974, indicated good motion and stability of the knee and ankle, but confirmed the tenderness, pain and the fatigue claimant experienced following several hours of work. Claimant has good motivation and is a person who could learn to live and work with his pain but he does have some disability.

The Board, on de novo review, concludes the award made by the Referee adequately compensates claimant for his 1fft leg disability.

ORDER

The order of the Referee dated December 31, 1974, is affirmed.

WCB CASE NO. 74-3038 July 1, 1975

BRIAN MEALUE, CLAIMANT
Charles Paulson, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant has requested Board review of a Referee's order which approved the denial of claimant's request to reopen his claim and affirmed a Determination Order granting no permanent partial disability award for photophobia resulting from a compensable industrial injury claimant sustained in September 1973.

The medical evidence indicates no change in claimant's photophobia since this claim was closed on March 28, 1974; therefore, no grounds exist to support the request to reopen.

Claimant's eye injury does not involve any scheduled loss of visual acuity; it is an unscheduled disability and any award of permanent disability must be based upon claimant's loss of earning capacity. The record shows claimant has not been precluded from his former work, nor from pursuing work as an auto mechanic for which he completed a course at a community college.

The Board, on de novo review, finds claimant has some sensitivity to light but that sensitivity does not affect his earning capacity, and the order of the Referee affirming the Determination Order should be affirmed. The Board further finds that no changes having occurred with respect to claimant's photophobia since claim closure the Referee's affirmance of the denial was proper.

ORDER

The order of the Referee dated December 12, 1974, is affirmed.

WCB CASE NOS. 73-3390-E July 1, 1975
AND 73-3391-E

WILMA WALTERS CAMPBELL, CLAIMANT
Donald R. Wilson, Claimant's Atty.
Scott M. Kelley, Defense Atty.
Request for Review by Employer

Reviewed by Commissioners Moore and Sloan.

The employer requests Board review of a Referee's order affirming the Determination Order mailed August 14, 1973, and which related to two separate industrial injuries, to-wit: an injury suffered May 25, 1971, to claimant's right ankle for which no permanent disability was awarded; an injury suffered on June 23, 1971, to claimant's right knee and hip for which claimant was awarded permanent total disbility as of July 19, 1973.

On April 1, 1969, claimant was employed on a part time basis by the employer. Claimant was using crutches but was able to do typing, billing, and routine deliveries.

On May 25, 1971, while at work, claimant fell out of a chair and suffered a possible fracture of her right leg. The Referee found that claimant sustained no permanent disability as a result of that injury.

On June 23, 1971, claimant again fell from a chair while at work injuring her right knee and right hip. Released to return to work on a part time basis on September 7, 1972, claimant was unable to find employment. Claimant's right knee would give way; in fact, she fell in February 1973, and again in June 1973.

The employer contends that the fall in June 1973 caused the ultimate disability and such accident constituted an independent, intervening event; claimant contends that the fall was caused by the right knee injury suffered in June 1971 and was a compensable consequence of said industrial injury. Claimant's testimony that she fell because her knee gave way was not contradicted.

The Referee found that the increase in claimant's symptomatology after August 1972 was caused by the June 1973 fall but that there was no evidence offered on behalf of the employer to prove that said fall was an independent, intervening event.

At the time claimant was employed in April 1969, she suffered from various ailments and had submitted to several major surgical operations. The Referee found that claimant could have been considered as permanently and totally disabled within the meaning of the Workmen's Compensation Act at that time but, based on the medical evidence, her condition had worsened at the time of claim closure to the extent that she was unable even to return to part time work in the sheltered employment previously offered to her by the employer. He found that she was permanently and totally disabled as a result of the June 1971 injury to her right knee and right hip.

The Board, on de novo review, concurs in the findings and conclusions of the Referee and adopts them as its own.

ORDER

The order of the Referee dated December 2, 1974, is hereby affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the employer, Lloyd's Furniture, for services in connection with Board review.

WCB CASE NO. 74-1394 July 1, 1975

ROY DANIEL SEARS, CLAIMANT
Erlandson & Reisbick, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant, a 62 year old grocery store checker, alleged that he suffered a compensable injury to his back on Thursday, February 28, 1974. The denial of his claim for compensation was affirmed by the Referee. Claimant has requested Board review of the Referee's order.

Claimant worked Friday, Saturday, was off Sunday, and worked Monday and Tuesday. On his way to work on Tuesday, March 5th, claimant's car was rearended while stopped at a traffic light. On March 6th, he consulted with Dr. Hilbrick, an osteopathic physician. A claim was submitted on March 14 and was denied March 21, 1974.

Dr. Hilbrick x-rayed claimant and discovered moderate osteoporosis of the thoracic spine and minimal degenerative changes. She termed his problem as long-standing and could be attributed to either the alleged injury at work or the vehicular accident.

The credibility of the employer's witnesses was more acceptable to the Referee than that of claimant and his witnesses. Claimant appeared confused at the hearing. Claimant, initially, indicated the injury at the store involved his shoulder and was surprised that a claim had been submitted for workmen's compensation benefits.

The claimant worked between the date of his alleged injury and the date he saw the doctor but no mention of an injury was made to the employer.

The Referee observed the claimant and the witnesses, and, after evaluation of all the evidence, concluded that claimant had not sustained his burden of proof that he had suffered a compensable injury.

The Board, on de novo review, concurs with the finding of the Referee.

ORDER

The order of the Referee dated November 22, 1974, is affirmed.

WCB CASE NO. 74-2766 July 1, 1975

BARBARA OGLESBY, CLAIMANT
Dan O'Leary, Claimant's Atty.
Richard W. Davis, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant has requested Board review of a Referee's order affirming a Determination Order dated July 16, 1974, which gave no award for permanent partial disability.

Claimant, a retail clerk, suffered a compensable injury on April 11, 1973, when she was struck in the right shoulder. Her symptoms were diagnosed as a thoracic outlet syndrome. She did not return to her job but entered a community college where she received her Associate in Science Degree. She has purchased a nursery school which she now operates.

Claimant has received medical care and treatment for a condition which is congenital in nature and had a good recovery. Dr. Rothenberger stated claimant had not suffered any significant permanent disability.

The Board, on de novo review, concurs with the conclusions of the Referee.

ORDER

The order of the Referee dated December 13, 1974, is affirmed.

WCB CASE 74-897 July 1, 1975

ORVILLE E. NELSON, CLAIMANT
Anderson, Fulton, Lavis & Van Thiel,
Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe,
Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests Board review of a Referee's order which sustained the employer's denial of his claim for compensation.

In April 1973, claimant was pinned between two trucks. Claimant denied being hurt when questioned by his employer. He continued working for a couple of months, then went to Alaska to do some commercial fishing.

No claim was made until December 18, 1973. The carrier's denial was issued February 12, 1974. During this period of time, claimant fell overboard, was rescued and hospitalized in Alaska with complaints of severe chest pains; sustained another onset of chest pains in September 1973, and again in November 1973, and was in the Veterans Administration Hospital. No medical reports offered refer to the April 1973 onset of chest or back pain or to the truck incident.

The Referee found the claimant's testimony was not worthy of credit and concluded the lay and medical evidence was insufficient to support the claim of injury.

The Board, on de novo review, finds credibility lacking in claimant's testimony and will rely on the findings and conclusions of the Referee.

ORDER

The order of the Referee dated October 11, 1974, is affirmed.

SAIF CLAIM NO. EC 145950 July 2, 1975

ROBERT D. BIGGS, CLAIMANT

Own Motion Determination

The claimant suffered an injury on September 13, 1968, which was first closed December 12, 1968, with no award of permanent partial disability. On August 30, 1973, claimant was seen by Dr. R. L. Johnsrud complaining of increasing back pain and on February 12, 1974, the State Accident Insurance Fund reopened the claim.

Claimant underwent surgery on April 15, 1974, and on October 30, 1974, claimant's condition was medically stationary. It has been determined that claimant sustained permanent partial disability equal to 15% unscheduled disability for low back.

ORDER

IT IS THEREFORE ORDERED that claimant receive temporary total disability compensation for the period August 31, 1973, to October 30, 1974, inclusive, and an award of permanent partial disability of 15% unscheduled (low back) disability equal to 48°.

SAIF CLAIM NO. EA 977474 July 2, 1975

MICHAEL T. RUGGIERO, CLAIMANT
Willner, Bennett, Riggs & Skarstad,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Own Motion Proceeding Referred For Hearing

Pursuant to the provisions of ORS 656.278, claimant has requested the Board to exercise its own motion jurisdiction and grant to claimant an award of permanent and total disability.

Claimant was originally injured on February 15, 1963, initially involving injury to his right leg only. As a result of litigation, claimant has received a total award of permanent partial disability of 85% loss function of the right leg, 75% loss function of the left leg and 20% loss function of an arm for unscheduled disability to the back.

The evidence before the Board is not sufficient to determine the merits of the issue. The matter is therefore referred to the Hearings Division with instructions to hold a hearing and to take evidence upon the issue of the extent of the claimant's disability attributable to the 1963 injury. Upon conclusion of the hearing, the Referee shall cause

a transcript of the proceedings to be prepared and submitted to the Board, together with his recommendation as to the issues.

No notice of appeal is deemed applicable.

WCB CASE NO. 74-1804 July 2, 1975

GREG WELCH, CLAIMANT
Keith D. Evans, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

This matter involves a partial denial of claimant's claim. The Referee ordered the employer to accept the claim.

Claimant, a 19 year old workman at a steel mill while working on a platform over a "hotbed" where the temperature was well over 100°, fainted and fell to the main floor sustaining abrasions to his elbows. The employer accepted the claim for the abrasions to his elbows but denied the claim as to any cause for the falling or fainting.

The medical evidence in the record is inconclusive as to whether claimant had a seizure from a congenital condition which caused the fainting and fall or did the extremely hot work condition induce or contribute to the fainting.

On de novo review, the Board concurs with the finding of the Referee that the working conditions at the time and place were the direct cause of the fainting and fall.

ORDER

The order of the Referee, dated February 4, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the employer, for services in connection with Board review.

WCB CASE NO. 74-4227 July 3, 1975

ELLEN M. TURNER, CLAIMANT
Ronald M. Somers, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe,
Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant was awarded 25% low back disability equal to 80° and 5% loss of the right leg equal to 7.5°. The Referee affirmed the scheduled award for the right leg but increased the award for unscheduled low back disability to 35% equal to 112°. Claimant has requested Board review on the extent of disability.

Claimant is 45 years old. She is 5 feet, 11 inches tall and weighs approximately 220 pounds. She sustained an acute cervical strain and acute lumbar strain with extension neuralgia to the right knee on December 19, 1970, while working as a nurse's aide in a hospital.

Claimant underwent two laminectomies and a fusion. Claimant's weight problem has been a negative factor in the treatment and surgery claimant has received. Weight loss programs undertaken have caused claimant gastrointestinal problems, but her back problems will not be alleviated until her weight has been reduced.

The Board, on de novo review, concludes claimant will never again be employed unless she receives some vocational retraining, and loses weight. It was indicated in the record that claimant had received some clerical training, but not the extent that she was able to perform satisfactorily at clerical jobs. The Board, therefore, urges claimant to seek and accept the assistance in training and the counseling that can be provided to her by the Division of Vocational Rehabilitation and/or the Board's Disability Prevention Divisions. Each is professionally trained and geared to provide rehabilitation programs to claimants such as this.

The Board also concludes claimant is not permanently and totally disabled, but that her permanent disability does exceed that previously awarded and that claimant is entitled to a total permanent partial disability or 50% for her unscheduled disability. The award made for the right leg is sufficient.

ORDER

The order of the Referee is modified. Claimant is awarded 160° unscheduled low back disability of the maximum of 320° allowable by statute for unscheduled disability. In all other respects the order of the Referee is affirmed.

Claimant's counsel is entitled to receive 25% of the increased compensation awarded by this order on review, but in no event shall the fee allowed on this review, when combined with any attorney fees which may have been received under the Referee's order, exceed a maximum of $2,300.

WCB CASE NO. 74-1488 July 3, 1975

ROBERT M. FLICK, CLAIMANT
Richardson & Murphy, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant was awarded 41% loss of binaural hearing equal to 78.7°; he requested a hearing and the Referee awarded an additional 14% equal to 26.9°, making a total of 105.60° for binaural hearing loss. The claimant has requested Board review contending he is entitled to an award of 100% for industrial purposes.

The Referee found a binaural hearing loss of 55%. The basis of his finding was stated as follows:

> "Dr. Richard A. Hodgson testified at the hearing that claimant, according to his tests, had a binaural hearing loss of 55% and that the probable difference was that he administered his test through actual speech testing rather than pure tones. The explanation at the hearing by the doctor was persuasive as well as the in-hearing experiment conducted with the claimant having his back turned to the questioner. Claimant has met his burden of proof that his hearing loss is 55%."

We read Dr. Hodgson's testimony relative to the 55% binaural hearing loss as being limited to claimant's tonal loss, without consideration of claimant's loss of word discrimination. The doctor's testimony reflects that the 55% estimate was based upon an audiogram taken in April 12, 1973. That audiogram was a tonal test only. Later in his testimony, Dr. Hodgson expressed the opinion that when claimant's loss of word discrimination was combined, claimant had much higher degree of actual hearing loss. The Board has previously determined that loss of word discrimination is a proper test. In the Matter of Edward J. Long, WCB Case No. 7125E.

Accordingly, the Board concludes that when claimant's total hearing loss is measured he has suffered a binaural loss of 90%.

ORDER

The order of the Referee dated February 27, 1975, is modified. Claimant is awarded 90% loss of binaural hearing equal to 172.8°.

Claimant's attorney is entitled to 25% of the increased compensation paid under this order as a reasonable attorney's fee. In no event, however, shall the fee allowed on this review, when combined with any attorney fees which may have been received under the Referee's order, exceed a maximum of $2,300.

WCB CASE NO. 74-3462 July 7, 1975

ELISEO GARCIA, CLAIMANT
Brown, Schlegel, Milbank, Wheeler & Jarman,
Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith
Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

This matter involves the extent of permanent disability and whether or not claimant's claim was prematurely closed.

Claimant, a 25 year old laborer at a cabinet shop, injured his upper back September 12, 1973, while lifting a cabinet. Claimant had previously done field labor work on a seasonal basis. Claimant received conservative treatment and a Determination Order awarded claimant no permanent disability and temporary total disability through January 31, 1974.

The Referee affirmed the employer's denial of further temporary total disability after January 31, 1974, and awarded claimant 10% (32°) unscheduled back disability.

The Board concurs with the Referee that temporary total disability was properly terminated January 31, 1974. Both the medical reports and claimant's full-time employment in February 1974 sustained termination of the temporary disability.

Claimant's pre-existing back condition was aggravated by this industrial injury. Most of the doctors' opinions state claimant should find employment not involving heavy lifting. Claimant's work experience has all been in the manual labor field. The Board finds claimant has sustained a total of 25% (80°) unscheduled back disability resulting from the industrial injury.

Claimant is to be commended for taking adult English courses and vocational rehabilitation and training is urged.

ORDER

Claimant is hereby awarded a total of 25% (80°) unscheduled back disability. This is an increase of 15% (48°) over that awarded by the Referee.

In all other respects, the order of the Referee, dated January 17, 1975, is affirmed.

Counsel for claimant is to receive as a fee 25% of the increase in compensation associated with this award, which when combined with fees attributable to the order of the Referee, shall not exceed $2,000.

WCB CASE NOS. 74-1350 July 7, 1975
AND 74-1139

ROBERT FULLER, CLAIMANT
Gary A. Bisaccio, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

This matter involves two compensable incidents to claimant while working for the same employer. The injury of April 26, 1973, was insured by SAIF. The employer was insured by Employers Benefits Insurance Company on August 8, 1973. The April 26, 1973, back injury was closed by a Determination Order awarding no permanent disability. The August 8, 1973, back complaints were denied by SAIF as being a new injury and were denied by Employers Benefits Insurance Company as being an aggravation of the April 26, 1973, back injury.

The Referee found that the August 8, 1973, incident was an aggravation to the April 26, 1973, back injury and ordered SAIF to accept the claim and reimburse Employers Benefits Insurance Company all payments it had previously made pursuant to an order of the Workmen's Compensation Board issued designating Employers Benefits Insurance Company as the paying agency pending determination of which carrier was responsible pursuant to ORS 656.307.

On de novo review, the Board concurs with the findings and opinion of the Referee. Employers Benefits Insurance Company's contention that

ORDER

The order of the Referee dated November 26, 1974, is affirmed.

WCB CASE NO. 74-998 July 7, 1975

OWEN KUNKEL, CLAIMANT
Van Dyke, DuBay, Robertson & Paulson,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

This matter involves the compensability of claimant's myocardial infarction. The Referee found claimant's heart attack as compensable and ordered the State Accident Insurance Fund to accept claimant's heart claim.

Claimant, a 60 year old home building contractor, fell on November 9, 1973, catching himself on a rafter and sustained a shoulder strain. He continued to have shoulder and chest pains until he was hospitalized November 12 and the myocardial infarction was diagnosed.

Claimant had been under substantial stress because the house he had been building was far behind schedule and having substantial problems.

The attending physician who is an internist testified that claimant was unduly shaken up by the fall which could have seriously disabled him and by the particular project he was working on being held up by a series of misadventures. This doctor testified that the myocardial infarction was precipitated by the emotional trauma connected with the nearly serious accident and the long series of stresses and connected the claimant's myocardial infarction with the claimant's work.

State Accident Insurance Fund's examining internist gave the opinion that claimant's fall was secondary to the infarction and did not relate claimant's myocardial infarction to his work.

On de novo review, the Board concurs with the findings and opinion of the Referee that claimant's heart attack was compensable and adopts his opinion and order as its own.

ORDER

WCB CASE NO. 74-2301 July 7, 1975

JAMES C. HARMANING, CLAIMANT
Pozzi, Wilson & Atchison, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

This matter involves a partial denial by the State Accident Insurance Fund for responsibility for claimant's duodenal ulcer and chronic bronchitis. The Referee ordered State Accident Insurance Fund to accept responsibility for the ulcer and lung condition.

Claimant, on March 3, 1970, fell from a plank and received crushing injuries when a manhole cover fell on top of him resulting in crushed chest, ruptured spleen and kidney. Claimant received an award of 240° by the Determination Order and at a previous hearing, claimant was awarded permanent total disability.

The Opinion and Order from the previous hearing specifically stated:

> "Claimant's emphysema was not caused by the injury but it was aggravated thereby."

The State Accident Insurance Fund denied payment of claimant's lung condition and duodenal ulcer.

On Board review, the State Accident Insurance Fund contests the order of the Referee ordering SAIF to accept claimant's lung treatments. The State Accident Insurance Fund, in its brief for Board review, leans on semantics of medical descriptions of claimant's lung condition. The Board concurs with the finding of the Referee that SAIF's position constitutes a collateral attack upon the previous Opinion and Order.

ORDER

The order of the Referee dated October 30, 1974, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $450, payable by SAIF, for services in connection with Board review.

WCB CASE NO. 74-1631 July 7, 1975

DONALD R. HAMILTON, CLAIMANT
Pozzi, Wilson & Atchison,
Claimant's Attys.
Tooze, Kerr, Peterson, Marshall & Shenker,
Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

This is a denied heart attack case. The Referee affirmed the denial.

Claimant, a 41 year old bus driver on the driver relief board and a part-time dispatcher, had a myocardial infarction February 24, 1974. The claimant's attending physician's opinion is that being on the relief board placed claimant under an emotional stress and tension which aggravated an underlying cardiovascular problem. Also working as a dispatcher part-time and then as a bus driver part-time created tensions in that he observed things regarding fellow drivers while he was a driver that would be in conflict with his duties as a boss while he was a dispatcher.

The attending physician, Dr. A. V. Jackson, D.O., who specialized and taught in vascular diseases and coronary problems found medical causation in that claimant's work was a material contributing factor in producing the heart attack.

Dr. Wayne R. Rogers, M.D., found no probable causative or contributory relationship between the heart attack and claimant's work.

On de novo review, the Board concurs with the finding of the Referee that claimant has failed to prove that the alleged stress was material to his myocardial infarction.

ORDER

The order of the Referee, dated October 18, 1974, is affirmed.

SAIF CLAIM NO. B 101901 July 7, 1975

WILLIAM H. ZUNCK, CLAIMANT

Order of Correction

On June 26, 1975, the Workmen's Compensation Board issued an Own Motion Order in the above-entitled matter.

The sole purpose of this order is to correct a typographical error on page 2, paragraph 3, line 3. The date "January 9, 1975" is incorrect and should be corrected to "January 9, 1965."

WCB CASE NO. 74-2769 July 7, 1975

LAURENCE J. LEHMAN, CLAIMANT
Sanford Kowitt, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe,
Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

This matter involves the extent of permanent disability. The Determination Order awarded claimant 25% (80°) unscheduled left shoulder disability. The Referee increased this award to a total of 40% (128°) unscheduled left shoulder disability.

Claimant, a 52 year old pick-up and delivery truck driver fell September 21, 1972, sustaining a complete tear of a rotator cuff. After surgical repair, the attending doctor stated he could return to work that would not require overhead lifting. Claimant had worked for the same company some 19 years. His education terminated at the tenth grade level but is performing at about the fourth grade level according to psychological tests. His experience has been limited to laboring type jobs.

Claimant has severe degenerative changes in the cervical and lumbar spine. Claimant has high blood pressure and other medical problems.

Claimant's chronic psychopathology was aggravated to a moderate degree by the industrial injury according to the psychologist. The psychiatrist who examined for the insurance carrier does not concur in this opinion.

On de novo review, the Board concurs with the finding of the Referee that claimant is not motivated to return to gainful employment. The claimant received no help from the employer of some 19 years to enable him to find a job which he could perform.

The Board finds claimant has sustained an unscheduled disability of a total of 70% (224°).

ORDER

Claimant is hereby awarded a total of 70% (224°) for unscheduled left shoulder disability which is an increase of 96° over that awarded by the Referee.

Counsel for claimant is to receive as a fee 25% of the increase in compensation associated with this award which, when combined with the fees attributable with the order of the Referee, shall not exceed $2,300.

WCB CASE NO. 74-2190 July 7, 1975

CONSTANCE RANKINS, CLAIMANT
Pozzi, Wilson & Atchison, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant suffered a compensable injury December 10, 1969; her claim was closed with an award of 25% unscheduled permanent partial disability equal to 80°. After a hearing, requested by claimant, the Referee increased the award to 50% unscheduled disability. Claimant has requested Board review contending she is entitled to an award of permanent total disability.

Claimant was a 44 year old secretary for the Portland School District No. 1 when she sustained the compensable injury, i.e., a chair slipped out from under her. She had, at that time, a medical history of a laminectomy and a fusion. The injury necessitated further and extensive surgery which has not essentially changed her physical condition. Dr. Cherry's opinion is that claimant was permanently and totally disabled as early as February 13, 1973.

Claimant had been a very capable, efficient and hard working secretary and had enjoyed her profession. Her attempts to return to part-time work were unsuccessful and, upon the advice of Dr. Cherry, she submitted a request for leave of absence without pay. She has been unable to return to work since July 15, 1974.

Because of the comment of the Referee that claimant's present financial situation is such as to provide minimal motivation to return to work, the Board wishes to make its position clear that it will not give any consideration to collateral income sources in determining extent of permanent disability.

The Board, on de novo review, concludes the medical evidence is sufficient to show that claimant is now precluded from regularly working at a gainful and suitable occupation and she is entitled to an award of permanent total disability.

ORDER

The order of the Referee dated December 2, 1974, is modified. Claimant is permanently and totally disabled as defined by ORS 656.206(1) and shall be considered as so disabled from the date of this Order.

Counsel for claimant is to receive as a fee, 25% of the increase in compensation associated with this award which, when combined with fee made payable by the Referee's order, shall not exceed $2,300.

WCB CASE NO. 74-3598 July 7, 1975

CHARLES F. PAXTON, CLAIMANT
Gooding & Susak, Claimant's Attys.
Dept. of Justice, Defense Attys.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The State Accident Insurance Fund requests Board review of a Referee's order which increased an award given to claimant of 25% low back disability equal to 80° to 50%.

Claimant sustained a compensable injury on October 2, 1972, when he fell from a scaffold. Claimant ultimately had a laminectomy at L5-S1 and two level fusion L4-S1. In his closing evaluation, the treating orthopedic physician recommended claimant be retrained to do other work. Claimant's work background consists of heavy construction labor and some painting; claimant apparently is qualified as a journeyman painter.

Since his claim was closed, claimant has worked off and on as a painter. He attempted to return to work as a construction laborer but was unable to continue because of his physical disability. Claimant is presently employed by his brother-in-law as a painter; however, he has missed on an average of four to six days per month because of his back problems.

Claimant's work history indicates that he has been an industrious worker and that he has been, and continues to be, well motivated. The Referee found claimant, as well as his witness, to be credible. The Referee concluded that it was doubtful claimant would be able to gain or retain employment as a painter for anyone other than his brother-in-law and that he could not return to construction work because of the limitation in heavy lifting. The Referee further concluded that because of the restriction imposed upon claimant as the result of his industrial injury he had suffered a substantial loss in his future earning capacity. Based upon these conclusions, he increased the award.

The Board, on de novo review, concurs in the findings and conclusions of the Referee and concludes that his order should be affirmed.

ORDER

The order of the Referee dated January 17, 1975, is affirmed.

WCB CASE NO. 74-3678 July 7, 1975

PETER BOZIKOVICH, CLAIMANT
Pozzi, Wilson & Atchison, Claimant's Attys.
Fredrickson, Tassock, Weisensee, Barton & Cox,
Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant has requested Board review of a Referee's order which affirmed a Determination Order dated December 12, 1974, awarding claimant no permanent partial disability as a result of an industrial injury September 16, 1972.

Claimant has sustained numerous injuries to his back prior to September 16, 1972, none of which caused claimant to miss much time from work. Medical opinion indicates that claimant will continue to have recurrent episodes of back strain, (a subsequent low back injury was incurred in July 1974), and no medical evidence was offered to show the injury of September 16, 1972, significantly affected claimant's back problems.

Claimant has been a longshoreman most of his life but now at age 61, he does not perform the more strenuous types of dock work.

On de novo review, the Board concludes that claimant has the typical chronic back syndrome with degenerative changes compatible with the inevitable aging processes. Without medical verification from a treating doctor that the injury of September 16, 1972, resulted in permanent disability, the Board must conclude that claimant has suffered no permanent disability from the injury of September 16, 1972.

ORDER

The order of the Referee dated January 16, 1975, is affirmed.

CLAIM NO. 131 CM 35936 July 7, 1975

KENNETH MATHERS, CLAIMANT
Don G. Swink, Claimant's Atty.
McMurry & Nichols, Defense Attys.
Own Motion Determination

In 1965, claimant suffered an injury to his mid-back when a crane boom fell on him; in 1966, his low back was injured when a rock crusher threw him against a wall (in that injury his upper back and neck were also involved). Claimant underwent surgery which consisted of a fusion of the lumbar spine. His claim was first closed on April 30, 1969, and his aggravation rights expired May 1, 1974. Claimant has asked the Board, under the provisions of ORS 656.278, to issue an order requiring the employer to reopen his claim for further medical care and treatment, and for compensation for a worsening of his 1966 injury.

On November 16, 1974, claimant was examined by Dr. E. L. Burnham, an osteopathic physician and surgeon. It was his opinion that claimant's problem, which he diagnosed as a traumatic cervical and dorsal myositis and post-traumatic arthritis of the cervical-dorsal spine, was most likely the result of the 1966 injury suffered by claimant. He placed claimant on a regimen of manipulative therapy and anti-inflammatory medication and requested the claim be reopened for continued medical care.

Although claimant has had continuing trouble with his upper back and neck since the 1966 injury, the reports of Dr. Burnham and his colleague, Dr. J. S. Heatherington, indicate the pain and stiffness in the neck and the resulting headaches have become much worse since mid-1974 and claimant's present condition is the result of an earlier compensable injury suffered by claimant.

The Board concludes claimant is entitled to further benefits and that an order granting them should be entered pursuant to ORS 656.278.

ORDER

The claim is remanded to the employer, Clyde Equipment Company, for payment of compensation as provided by law commencing November 16, 1974, and continuing until claim closure is authorized under the provisions of ORS 656.268.

Claimant's counsel is awarded a reasonable attorney's fee in the amount of 25% of any additional temporary total disability awarded, not to exceed $500; and in addition, 25% of any additional permanent disability awarded claimant as subsequent action by Evaluation; however, the total fees shall not exceed $2,000.

SAIF CLAIM NO. RC 98035 July 7, 1975

ELSON PUTNAM, CLAIMANT

Own Motion Determination

Claimant sustained a back injury on September 29, 1967, which was closed on May 20, 1968, by Determination Order awarding no permanent partial disability. The claim was reopened on February 3, 1972, and, after claimant had had a laminectomy performed on him, a Second Determination Order dated November 29, 1973, granted claimant 20% for unscheduled disability. Claimant's aggravation rights have expired.

The State Accident Insurance Fund voluntarily reopened the claim, based on a report from Dr. James C. Luce, with temporary total disability benefits to commence on the date of recommended surgery. The surgery was performed on June 25, 1974, and claimant returned to work on January 6, 1975. When last examined, claimant's back showed good mobility with no significant atrophy.

Claimant's condition is now stationary and the Evaluation Division of the Workmen's Compensation Board recommends that claimant be awarded temporary total disability from June 24, 1974, through January 5, 1975, both dates inclusive, and an additional award of 20% for unscheduled (low back) disability.

IT IS SO ORDERED

SAIF CLAIM NO. C 195578 July 7, 1975

VERNON JONES, CLAIMANT

Own Motion Determination

Claimant sustained an injury to his right thumb on July 21, 1969. His claim was closed by Determination Order dated January 12, 1970, which awarded no permanent disability.

On February 10, 1975, the State Accident Insurance Fund authorized examination of the claimant's right thumb which was conducted by Dr. T. D. Hayes, an orthopedist, on February 27, 1975. Dr. Hayes reports claimant has excellent results following repair of the lacerated extensor tendon which was done at the time of the injury. He has normal callouses and excellent strength and also normal sensation in the thumb.

There was no claim for temporary total disability and the Evaluation Division of the Workmen's Compensation Board recommends no permanent partial disability be awarded as the result of the July 21, 1969, injury.

IT IS SO ORDERED.

SAIF CLAIM NO. AIBC 89113 July 7, 1975

VERNE J. JENKS, CLAIMANT

Own Motion Determination

Claimant sustained a compensable injury on August 14, 1967. His claim was closed on January 5, 1968, with an award of 15% of the workman for unscheduled low back disability. Subsequently, by stipulation, an aggravation claim was accepted and an additional award of 25% loss of the left leg was given to claimant. The claim was reopened and a total hip replacement was performed by Dr. Dennis Collis on January 27, 1972. Claimant received an additional award equal to 15% loss of the left leg by a second Determination Order dated July 5, 1973. Claimant's aggravation rights have expired.

At the request of Dr. Collis the State Accident Insurance Fund reactivated the claim for further care and medical treatment. Surgery was performed on February 5, 1974, to repair a non union of the greater trochanter. Claimant's condition is now medically stationary.

The Evaluation Division of the Workmen's Compensation Board recommends that claimant be allowed temporary total disability from February 4, 1974, through June 1, 1975, both dates inclusive, and that he be granted an award of 35% of the left leg in addition to the previously granted awards.

IT IS SO ORDERED.

WCB CASE NO. 74-98 July 8, 1975

JOHN J. WHITE, CLAIMANT
Pozzi, Wilson & Atchison,
Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe,
Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The claimant requests Board review of a Referee's order which found that claimant's tinnitis and vertigo and any remaining hearing loss not related to otosclerosis was compensable, but that claimant's emotional problems were not.

Claimant suffered a head injury in 1967 and over the years developed complaints of dizziness, hearing loss and depression. Dr. John Epley, an E.N.T. specialist, performed a left stapedectomy in 1968 and a right stapedectomy in 1972 which resulted in some hearing improvement; however, claimant alleges he continued to suffer a hearing loss. Claimant's claim for compensation of such loss was denied by the employer.

The medical evidence indicated that claimant's tinnitis and vertigo were related both to the noise to which the claimant was exposed while on the job and the 1967 head injury. Otosclerosis is a hereditary condition.

Claimant contends that the mental depression which he suffered was a result of his hearing loss. The only evidence in the record is a report from Dr. Petroff, an E.N.T. specialist, which states that mental depression is a very common accompanying feature of hearing loss which is not corrected by some means. This is the basis for claimant's contention that his emotional problems are related to the industrial injury of 1967 and should be held compensable. The Referee found that claimant's emotional problems, if any, were not compensable without evidence or testimony from a psychiatrist or psychologist.

The Board, upon de novo review, concludes that there is no requirement that the diagnosis of emotional depression and its relationship to physical conditions be made solely by psychiatrists or psychologists; however, in this instance there is no medical evidence that the depression suffered by claimant resulted from his vertigo or tinnitis. Dr. Petroff explicitly refused to give an opinion as to whether there was a casual link between the head injury and claimant's mental depression. The Board further concludes that claimant failed to meet the burden of proving by a preponderance of the evidence that the alleged emotional depression was compensable as a result of his industrial injury of 1967.

On June 25, 1975, the Board received a motion from claimant to supplement the record with a medical report from Dr. Epley dated May 13, 1975. This medical report, obviously, was not a part of the record certified to the Board upon request for review and, therefore, cannot be considered by the Board.

ORDER

The order of the Referee dated November 29, 1974, is affirmed.

The motion received from the claimant on June 25, 1975, to supplement the record with additional medical report is denied.

WCB CASE NO. 74-1334 July 8, 1975

DOYLE SHOULTS, CLAIMANT
Ray Babb, Claimant's Atty.
Gray, Fancher, Holmes and Hurley,
Defense Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The employer has requested Board review of a Referee's order which found claimant to be permanently and totally disabled.

The only issue on review if the extent of permanent disability claimant has sustained as a result of an injury of May 26, 1967. After this accident claimant continued working until May 1973, although he suffered a heart attack in 1969.

Dr. Corrigan stated that claimant has a chronic lumbosacral strain and instability with nerve root irritation exhibiting very significant and severe disability. He felt claimant was a very genuine individual who previously had always returned to work after any injury or illness.

Dr. Jack H. Crosby, who treated claimant for his heart problems, felt the reason claimant could not return to work was because of his disc syndrome not because of his heart disease.

The Board, on review and based on the evidence adduced at the hearing, concurs with the finding of the Referee that claimant is, in fact, permanently and totally disabled.

Should the employer, at some future time, obtain additional medical evidence showing claimant is less than permanently and totally disabled, such evidence with a request for modification of the award may be submitted to the Board for its consideration.

ORDER

The order of the Referee, dated November 20, 1974, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the amount of $300, payable by the employer, for services in connection with Board review.

WCB CASE NO. 74-2414 July 8, 1975

LEO BURKHARTSMEIER, CLAIMANT
Charles Paulson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Amended Order Allowing Attorney Fee

The Board's Order on Review entered June 30, 1975, in the above-entitled matter failed to include an award of a reasonable attorney's fee.

ORDER

IT IS HEREBY ORDERED that claimant's counsel receive a reasonable attorney's fee in the amount of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 75-347 July 8, 1975

VIRGIL WILLIAMSON, CLAIMANT
Charles Paulson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workmen's Compensation Board in the above-entitled matter by the claimant, and said request for review now having been withdrawn,

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 74-1869 July 8, 1975

HELEN CRANE, CLAIMANT
Ail & Luebke, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe,
Defense Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

This matter involves a denied aggravation claim and penalties for unreasonable refusal to pay compensation as a result of the aggravation claim. The Referee ordered the employer, Albertson's. Inc., to accept the claim for aggravation and imposed a penalty of 25% of the amount due and owing the claimant during the period of time which her aggravation claim was in a denied status.

Claimant, a 35 year old bakery supervisor, slipped and sat down heavily jolting her entire spine and neck on August 7, 1971. The claim was administratively closed. Claimant left the employment of Albertson's shortly thereafter for personal reasons and went to work for St. Vincent's Hospital where she worked continuously for a period of about 2-1/2 years. Claimant's headaches and neck and back conditions increased in severity. There was no incident at St. Vincent's Hospital of a traumatic nature.

Claimant filed a claim for aggravation which was denied by Albertson's.

On de novo review of the record, the Board concurs with the opinion and findings of the Referee and adopts his opinion and order as its own.

ORDER

The order of the Referee dated February 7, 1975, is affirmed.

WCB CASE NOS. 74-2111 July 9, 1975
AND 74-2112

HAROLD HARMON, CLAIMANT
Galton & Popick, Claimant's Attys.
Dept. of Justice, Defense Atty..
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

This matter involves a claim which was closed by Determination Order and permanent partial disability payments were made to the claimant. The claim was reopened by stipulation dated April 17, 1974, with agreement that temporary total disability benefits shall be paid from January 17, 1974. The State Accident Insurance Fund deducted the amount of permanent partial disability payments from the temporary total disability payments due on and after January 17, 1974, and credited the original permanent partial disability award to that extent. The Referee ordered SAIF to pay claimant the amount of the permanent partial disability award already paid to claimant as well as the temporary total disability payments due from January 1, 1974.

On de novo review, the Board concurs with the findings and opinion of the Referee and adopts his opinion and order as its own.

ORDER

The order of the Referee dated December 4, 1974, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $250, payable by SAIF, for services in connection with Board review.

WCB CASE 74-3702 AND 74-2845 July 9, 1975

KEAVER POLLARD, CLAIMANT
Harold Adams, Claimant's Atty.
Bob Joseph, Defense Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The issue involved is whether or not the claimant sustained a new injury or an aggravation of a previous injury. The Referee held that this was an aggravation of a previous industrial injury claim and not a new injury.

Claimant, a 27 year old laborer sustained an accepted industrial injury to his low back on August 14, 1973, while working for Stayton Canning Company. The claim was closed with an award of 16° unscheduled low back disability and approximately 7 months temporary total disability. Claimant went to work for Moduline Manufacturing Company doing heavy manual labor and his back pain gradually increased. After about one month of this work he quit his job at Moduline. Claimant first filed his claim as an aggravation claim against Stayton Canning Company. The aggravation claim was denied. Claimant then filed a claim as a new injury against Moduline Manufacturing Company and that claim was denied.

After the consolidated hearing on these two denials, Stayton Canning Company requested the Referee to reopen the hearing because of newly discovered evidence that claimant had had previous back industrial claims. This evidence would not be relevant as to whether or not claimant's claim was a new injury or an aggravation claim. The Board concurs with the Referee's Order on Reconsideration.

The credibility of the claimant is not determinative as to the issues involved in this matter.

ORDER

The Referee's Order on Reconsideration dated January 6, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the employer, Stayton Canning Company, for services in connection with Board review.

WCB CASE NO. 74-3054 July 9, 1975

DONALD R. ACCURADI, CLAIMANT
Galton & Popick, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund requests Board review of a Referee's order which required the Fund to accept claimant's claim for compensation.

Claimant, a serviceman for Northwest Natural Gas, turned to reach for his tool chest as he was alighting from his truck; he sneezed and felt immediate pain in his neck and shoulder.

A claim was filed which the employer denied on the basis the sneeze was not caused by an industrial exposure on the job.

Claimant is 6'6", and weighs 220 pounds, The Referee, in finding claimant had sustained a compensable injury, stated:

> "Claimant testified he was reaching for his tools as he was getting out of his truck. It appears to me that the posture a person would be in under these circumstances would put extra strain on the musculature involved at the time the sneeze occurred. Accordingly, I conclude the resulting injury arose out of this workman's employment during the course of his employment, and is compensable."

Upon de novo review, the Board concurs with the findings of the Referee that claimant sustained a compensable industrial injury.

ORDER

The order of the Referee dated December 23, 1974, is affirmed.

Counsel for claimant is awarded a reasonable attorney's fee in the sum of $300, payable by SAIF, for services in connection with Board review.

WCB CASE NO. 74-3598 July 9, 1975

CHARLES F. PAXTON, CLAIMANT
Gooding & Susak, Claimant's Attys.
Dept. of Justice, Defense Atty.
Supplemental Order Awarding Attorney Fee

The Board's Order on Review issued July 7, 1975, in the above-entitled matter failed to include an award of a reasonable attorney's fee.

ORDER

IT IS HEREBY ORDERED that claimant's counsel receive a reasonable attorney's fee in the amount of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 74-1795 July 9, 1975

TROY AUDAS, CLAIMANT
Pozzi, Wilson & Atchison, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The claimant requests Board review of a Referee's order affirming that portion of the Determination Order dated July 16, 1973, which awarded claimant compensation of 15% for unscheduled disability equal to 48° but increased the award of compensation for scheduled disability of 20% loss of the right arm equal to 38.4° made by said Order to approximately 21% loss of the right arm equal to 40°.

Claimant, a roofer, suffered a compensable injury on October 18, 1971, when he fell ten feet from a roof to the ground injuring his right shoulder and arm. Claimant had previously suffered a compensable injury in 1967 for which he ultimately was awarded 50% scheduled disability for his left arm and 70% unscheduled disability for his left shoulder injury. Audas v. Galaxie Roofing Company, 2 Or App 520 (1970).

As result of the 1971 fall, claimant suffered injuries to the rotator cuff and a sprain of the bicep tendon. An arthrogram performed by Dr. Robert Zimmerman showed a tear of the rotator cuff and filling of the subacromial bursa. On January 7, 1972, Dr. Zimmerman performed a resection of the distal clavicle and a repair of the torn rotator cuff.

The test for unscheduled disability is a loss of earning capacity. Surratt V. Gunderson Bros., 259 Or 65 (1971). Although claimant has already been awarded 70% unscheduled disability to his left shoulder and now has suffered an unscheduled disability to his right shoulder, nevertheless, claimant does not appear well motivated to return to the labor market. Claimant's potential earning capacity is more greatly affected by this lack of motivation than by his 1971 industrial injury. Claimant is rather adamant about the type of work he was willing to do; indicating that he had been earning $15,000 a year as a roofer and he wasn't particularly interested in taking any job which paid substantially less. Claimant has participated in training programs but has completed few of them.

The Board, upon de novo review, concludes that that portion of the Referee's order which relates to the affirmance of the award of 15% for unscheduled disability equal to 48° is correct and should be affirmed. The Board further concludes that it is reasonable to assume the Referee intended to increase the award for partial loss of claimant's right arm to 40% rather than to 40°. Whether this assumption is correct or not, the Board concludes that claimant is entitled to an award of 40% loss of right arm equal to 76.8°.

The issue of an award of a reasonable attorney fee by the Referee was not before the Board on this request for review.

ORDER

Claimant is granted an award of 76.8° for loss of the right arm of a maximum 192°, in lieu of and not in addition to the scheduled arm award granted in the Determination Order dated July 16, 1973; in all other respects the order of the Referee dated January 22, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the amount of 25% of the increase awarded by the Board not to exceed $2,300.

WCB CASE NO. 74-1667 July 10, 1975

FLOYD COOK, CLAIMANT
Coons, Cole & Anderson,
Claimant's Attys.
D. R. Dimick, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of order of Referee affirming an award of permanent partial disability of 30% loss of his right leg.

Claimant, on May 11, 1972, suffered a torn right medial meniscus which was superimposed on a pre-existing knee condition for an old tear of the mediocollateral ligament. Claimant has residual knee problems, e.g., stiffness, limping, tenderness, inability to lift leg very high, etc.

Claimant now has a job where he can move around and change positions frequently, alleviating some of his discomfort. He has continued to be physically active by walking, running, driving, bicycling and other activites.

A future deterioration in claimant's knee is a medical probability, but at the present time, the Referee felt that claimant still maintained 70% (inadvertently stated as 65%) functional use of his leg.

The Board, on de novo review, concurs with the findings of the Referee.

ORDER

The order of the Referee dated January 30, 1975, is affirmed.

WCB CASE NO. 74-603 July 10, 1975

LYLA F. MacAULEY, CLAIMANT
Coons, Cole & Anderson, Claimant's Attys.
Dept. of Justice, Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which granted claimant 22.5° equal to 15% partial loss of the right hand, contending she is entitled to a greater award.

Claimant, a 24 year old beef trimmer, sustained a compensable injury to her right hand approximately December 15, 1972. Claimant trimmed fat from semi-frozen slabs of beef eight hours daily. She consulted Dr. Burr, who performed a release of the flexor tendon sheath of the right long, ring and little fingers. Claimant returned to work in April 1973, ingoring the advice of Dr. Burr that her job was not physically compatible to the slenderness and frailty of her hands. Claimant worked only a month and then concluded she could not handle the work.

Dr. Burr felt claimant's condition was of permanent nature, mild, but which could be aggravated by heavy gripping.

The report of injury filed by claimant referred only to the right hand; any injury to claimant's left hand will not be an issue in this review.

The Board, on de novo review, finds, that, based on the medical and lay testimony before him, the Referee correctly determined claimant's permanent disability.

ORDER

The order of the Referee dated March 7, 1972, is affirmed.

WCB CASE NO. 75-370 July 11, 1975

H. H. BOUTIN, CLAIMANT
Bailey, Doblie & Bruun, Claimant's Attys.
Own Motion Proceeding Referred for Hearing

On July 2, 1975, the claimant requested the Board to exercise its own motion jurisdiction under the provisions of ORS 656. 278 and reopen his claim for an industrial injury suffered on August 4, 1969.

Claimant was originally injured on August 4, 1969, while in the employ of Modoc Lumber-Bly Division as a tallyman. This employer was covered by the State Accident Insurance Fund. A Second Determination Order, dated April 22, 1971, awarded claimant 96° for unscheduled low back disability. A stipulation, approved July 30, 1971, awarded an additional 48°, giving claimant a total of 144°; said stipulation provided that claimant's aggravation rights should run from the original order of determination which was September 9, 1969. Claimant's aggravation rights have expired.

On January 27, 1975, claimant requested a hearing on the denial of an alleged injury suffered June 6, 1974, while employed by Louisiana-Pacific Corporation, a self-insurer.

The evidence before the Board is not sufficient for it to determine the merits of the request to reopen the 1969 claim. There is a question as to whether claimant has suffered a new injury which would be the responsibility of Louisiana-Pacific Corporation or has suffered an aggravation of the 1969 injury which would be the responsibility of the State Accident Insurance Fund.

The matter is, therefore, referred to the Hearings Division with instructions to hold a hearing and take evidence on the issue of whether claimant aggravated his 1969 injury or suffered a new injury as a result of the incident of June 6, 1974. Upon conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation as to this issue.

WCB CASE NO. 74-2459 July 11, 1975

OMA SINGER, CLAIMANT
Charles Paulson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review contending the award of the Referee granting her, after a hearing:

> 9.6° for a 20% intrinsic loss of the left thumb;
> 1.2° for 5% extrinsic loss of the left first finger; and
> 1.1° for a 5% extrinsic loss of the left second finger is not adequate.

Claimant mashed the end of her left thumb at work on October 23, 1973. She received an award of 2.4° for a 5% loss of the left thumb.

Dr. Emerson concluded claimant had a deformed new thumbnail, distal sensitivity, some loss of sensation, and a cold feeling in the thumb.

The Board, on review, relys on the personal observations made by the Referee and his expertise and concurs in his findings.

ORDER

The order of the Referee dated February 28, 1974, is affirmed.

WCB CASE NO. 75-57 July 11, 1975

LOUIS W. ANDERSON, CLAIMANT
Donald R. Wilson of
Pozzi, Wilson & Atchison, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order of Dismissal &
Allowance of Attorney Fee

A request for review, having been duly filed with the Workmen's Compensation Board in the above-entitled matter by the claimant, and said request for review now having been withdrawn,

IT IS THEREFORE ORDERED that claimant's counsel is to receive as a reasonable attorney's fee 25% of the compensation received by claimant to a maximum of $600, to be paid out of the compensation due or to become due claimant as a result of Claim No. ODC 9786.

WCB CASE NO. 73-3274 July 11, 1975

JAMES H. WILSON, CLAIMANT
Harms & Harold, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The issue is extent of permanent disability. The Determination Order awarded claimant 15% (48°) unscheduled low back disability and 25% (37.5°) loss of right leg. The Referee awarded claimant permanent total disability.

Claimant, a 50 year old mill worker, received injury to his back, right leg and left elbow August 3, 1974. Claimant has had back surgery and knee surgery. Claimant's pre-existing psychopathology was aggravated by the industrial injury. Claimant has little or no motivation for rehabilitation or return to gainful employment.

The Board finds claimant's complete lack of motiviation to return to gainful employment as being the fundamental issue in this matter. Claimant's complaints of pain are a major factor in his physical disability. Claimant's lack of motivation also overshadows retraining and the psychopathology.

The Board finds that claimant is not prima facie in the odd-lot category. Thus claimant's complete lack of motivation to return to gainful employment precludes the award of permanent total disability.

The Board finds that claimant is entitled to a total of 50% (160°) unscheduled low back disability and 25% (37.5°) loss of right leg.

ORDER

The order of the Referee dated December 5, 1974, is reversed.

Claimant is awarded a total of 50% (160°) unscheduled low back disability and 25% (37.5°) loss of right leg. This is an increase of 112° unscheduled low back disability over that awarded by the Determination Order.

Counsel for claimant is to receive as a fee 25% of the increase in compensation associated with this award which shall not exceed $2,000.

WCB CASE NO. 75-107 July 11, 1975

GEORGIA REESE, CLAIMANT
Rolf Olson, Claimant's Atty.
James Huegli, Defense Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

This matter involves primarily temporary total disability. The Determination Order awarded claimant temporary total disability from May 20, 1973, through August 13, 1974, less time worked. The carrier in fact had paid claimant temporary total disability to August 13, 1974, and then again commenced temporary total disability from September 3, 1974, to November 21, 1974. The Referee ordered the carrier to reopen the claim and pay temporary total disability from November 21, 1974, until the claim was properly closed.

Claimant had two intervening non-industrial injury incidents. Based on the medical evidence in the file, the Board concurs with the opinion and findings of the Referee and adopts his opinion as its own.

ORDER

The order of the Referee, dated February 25, 1975, is affirmed.

Since claimant's counsel filed no brief, no attorney's fees for the Board review is ordered.

JESSE CRAIG, CLAIMANT
Coons, Cole & Anderson,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The State Accident Insurance Fund requests Board review of the order of the Referee increasing an award of 64° for unscheduled low back disability to 192°.

Claimant was a 58 year old furnace operator, who suffered a compensable injury December 17, 1973. The injury required surgery by Dr. Donahoo which involved "the extrusion of a herniated free-fragment herniated nucleus pulposus at the L5-S1 on the right." The doctor predicted claimant would have intermittent episodes of recurrent pain which probably would preclude work.

Claimant has worked for Hanna Nickel Smelting Company for the past 20 years; he feels he would not be able to continue working there if it were not for an understanding employer and the assistance which fellow-employees give him in performing the heavy work such as shoveling, patching or lifting the heavy bars. Claimant is confident "if he can last that long" he will retire at age 62.

The Board, on de novo review, is not persuaded by the Fund's brief and concludes the diminution of claimant's future wage earning capacity, irrespective of the benevolence of his employer, has been substantial. The Referee's award of 60% of the maximum allowable by statute for unscheduled disability is not an excessive award.

ORDER

The order of the referee dated January 27, 1975, is affirmed.

Counsel for claimant is awarded a reasonable attorney's fee in the sum of $300, payable by SAIF, for services in connection with Board review.

WCB CASE NO. 74-1417 July 11, 1975

JOYCE MC CAMMON, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The State Accident Insurance Fund has requested Board review of a Referee's order which increased, after a hearing requested by claimant, an award of 15% unscheduled disability to 50%.

Claimant suffered a compensable back injury on June 22, 1972, while working in a packing plant. Originally her condition was diagnosed as a contusion and sacral sprain, however, on March 15, 1973, Dr. Davis performed a partial hemilaminectomy at the L5-S1 level. On August 31, 1973, he recommended claim closure stating claimant would have continued restrictions of her back as a result of a persistent herniated nucleus pulposus with radiculitis of the S1 nerve root left. Dr. Davis suggested that claimant be considered for vocational retraining in a lighter occupation. The claim was closed on September 20, 1973, with an award of 15% for low back disability. Claimant has not applied for work since the date of the award.

There was a long lapse of time between claimant's initial referral for vocational rehabilitation and her ultimate recontact with the Division of Vocational Rehabilitation, due, according to claimant, to the health of one of her children. Claimant stated that she had not sought employment because she wanted to receive additional education through the DVR which would enable her to secure employment within her physical limitations. The DVR counselor was of the opinion that claiment was not a good prospect for academic training; her employment would necessarily be confined basically to manual labor. Although claimant, in his opinion, was not employable when he last saw her, he felt, based on his experience with other people similarly impaired, that because of her youth (claimant is 33 years old) her physical condition would improve with the passage of time to the extent she could take typing training and be trained as a receptionist.

The Board, on de novo review, finds that claimant has suffered substantial loss of her future earning capacity as a result of her industrial injury but, based upon a comparison of this award to awards previously made in similar cases, that 50% over compensates claimant for such loss. The Board concludes that claimant has not suffered a loss of future earning capacity in excess of 35% of the maximum allowable by law for unscheduled disability.

ORDER

The order of the Referee dated January 7, 1975, is reversed.

Claimant is awarded 112° of the maximum of 320° allowable by statute for unscheduled disability. This is in lieu of and not in addition to the award made by the Determination Order dated September 20, 1973.

Claimant's counsel shall receive as a reasonable attorney's fee 25% of the compensation awarded by this order, not to exceed $2,300.

WCB CASE NO. 74-1363 July 11, 1975

RICHARD MILLER, CLAIMANT
Grant & Ferguson, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant has requested Board review of a Referee's order which affirmed a Determination Order granting no award for permanent disability.

On October 14, 1972, claimant, a 31 year old chokersetter, suffered a compensable injury. On December 14, 1972, he was released for full time employment and a Determination Order, dated May 4, 1973, stated claimant's permanent disability could not be evaluated because he had failed to provide the Board with any information upon which an evaluation could be made.

Dr. Campagna performed a neurolysis of the left sciatic nerve in September 1973; claimant's progress was excellent. He felt claimant had mildly moderate disability but that there would be no employment restrictions imposed upon claimant as the result of the disability and his condition would continue to improve.

Claimant's work history appears to be sporadic and there is no indication in the record that claimant has sought vocational rehabilitation or made any effort to seek employment. The sole criterion for determining extent of unscheduled disability is loss of future earning capacity; there is no evidence in this record that claimant has suffered any such loss.

The Board, on review, concurs with the findings of the Referee.

ORDER

The order of the Referee dated December 5, 1974, is affirmed.

WCB CASE NOS. 74-2899 July 11, 1975
AND 74-2900

DONALD R. RUSH, CLAIMANT
Del Parks, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe,
Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant has requested Board review of a Referee's order which affirmed the employer's denial of claimant's claim for increased compensation on account of aggravation.

Claimant suffered a compensable low back injury on November 16, 1969, for which he received chiropractic treatments but lost no time from work. Two and one-half years later, claimant received two treatments for mid-thoracic pain. The next onset of back pain occurred early in 1974. In May of 1974, claimant sustained an off-the-job injury to his back.

Claimant was referred to Dr. Balme, an othopedist, who diagnosed a herniated disc. Dr. Klump, also an orthopedist, and Dr. Balme performed a myelogram and laminectomy on June 20, 1974. Claimant filed for and received benefits from off-the-job medical coverage provided by his employer. Later he filed a workmen's compensation claim for aggravation benefits which was denied.

The Referee found the medical evidence insufficient to establish a casual relationship between the 1969 injury and claimant's condition in 1974 requiring surgery. Dr. Klump, who apparently did not have all of the pertinent information in claimant's medical history, could indicate no more than a mere possibility of a casual relationship. Dr. Balme, who testified at the hearing, could not state with any degree of certainty that there was casual relationship.

The Board, on de novo review, concurs with the findings of the Referee.

ORDER

The order of the Referee dated January 8, 1975, is affirmed.

VIVIAN MC MAHON, CLAIMANT
Dwyer & Jensen, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant requests Board review of an order of the Referee affirming a Determination Order which awarded claimant permanent partial disability of 5% for unscheduled neck disability equal to 16°.

Claimant, a 43 year old bookkeeper, injured her neck in an automobile accident and subsequently developed headaches and neck pain. Claimant, initially, was seen by Dr. John E. Tysell who referred her to Dr. Donald J. Schroeder, an orthopedic surgeon from whom she received conservative treatment for a period of time. Dr. Schroeder felt claimant had suffered a chronic cervical strain involving her neck; she was also suffering from a functional overlay.

Claimant was also examined by Dr. K. Clair Anderson and Dr. James R. Degge, both orthopedic surgeons, and by Dr. Arthur A. Hockey, a neurosurgeon. Dr. Degge, on the basis of claimant's subjective claim, complaints and clinical findings, estimated her permanent residual to be mildly-moderate. Dr. Hockey indicated in his report that claimant had evidence of cervical strain.

Claimant contended that she also had problems relating to her right arm which were the result of the automobile accident and for which she should receive some award of disability. The Referee found that only Dr. Degge felt that the right arm problem possibly could be related to the industrial injury and that the evidence in the case, taken as a whole, did not show a causal relationship between claimant's right arm problems and the injury.

The Board, on de novo review, based upon both lay and medical evidence, finds that claimant sustained a much greater degree of disability than 5% as a result of the injury and concludes that she should receive an award of 25% unscheduled neck disability. The Board further concludes that the Referee was correct in his determination that claimant was not entitled to any award of disability relating to her right arm.

ORDER

The order of the Referee dated December 24, 1974, is reversed.

Claimant is awarded 80° of a maximum of 320° allowable by statute for unscheduled neck disability. This is in lieu of and not in addition to the award made by the Determination Order dated September 27, 1973.

Claimant's counsel shall receive as a reasonable attorney's fee, 25% of the increased compensation not to exceed $2,300.

WCB CASE NO. 74-2842 July 11, 1975

LATHEN KINCAID, CLAIMANT
Pozzi, Wilson & Atchison,
Claimant's Atty.
Dept. of Justice, Defense Atty.
Order of Dismissal

A request for Board review of an Order of a Referee, dated October 29, 1974, was filed by the State Accident Insurance Fund on November 6, 1974.

A cross request for Board review was filed by the claimant on November 7, 1974.

The request for review was withdrawn on March 10, 1975, and the cross request for review was withdrawn on July 2, 1975.

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 74-2120 July 11, 1975

KENNETH GUYETTE, CLAIMANT
and
In the Matter of the Complying Status
of
ROBERT W. LENNING
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The employer requests Board review of an order of the Referee which found that the employer on July 15, 1973, was a subject employer, as defined by ORS 656.023, and that claimant was, on the same date, a subject workman, as defined by ORS 656.027; that, on said date, claimant suffered a compensable injury arising out of and in the course of his employment and that the employer was at that time a noncomplying employer.

In 1972, claimant purchased hay from the employer and paid for it with money; in 1973, prior to the haying season claimant again sought to purchase hay, stating he would not be able to pay money for it but

instead would cut and bale the hay he wanted. At that time hay was selling for $25 per ton; claimant wanted to purchase 10 ton. Claimant and the employer decided that the purchase agreement would be worked out on an hourly basis, i.e., 12-1/2 hours of work would be considered as one ton of hay, using $2 per hour as a labor unit. The agreement further provided that claimant could perform work when he had available time and would simply take as much hay as he was entitled to depending upon the hours of work he put in. Claimant was injured while trying to adjust the machine used for haying purposes.

The employer's primary occupation was that of a salesman, his farming enterprise was incidental. Claimant was employed on a full-time basis at Gurden's Industries; however, he was an experienced farmer and did know how to operate equipment. Claimant picked the time and the duration he would work each day. Claimant kept track of his hours but did not report them to the employer. As far as the haying process was concerned, claimant was in complete control at all times of his work and the equipment he used.

Claimant was given a monetary payment of $75 after he was injured because the injury left him unable to remove the remaining 3 ton which he had cut.

The Board, on de novo review, concludes that there was no actual employer-employee relationship in this instance but merely a situation where one neighbor assisted another by allowing him to purchase hay using his labor rather than his money as a purchasing unit. Although claimant did receive some money, the $75 to cover the value of the three tons which claimant had not been able to take to his own farm after he was injured, this would not constitute wages. The controlling measurement was the unit of 12-1/2 hours equal to one ton of hay. The Board further concludes that farming could not be considered as the principal business of the employer, therefore, claimant was not a subject workman because his employment was casual and not in the course of the trade, business or profession of his employer (ORS 656.027 (3) (a)) nor was the employer a subject employer as he did not employ a subject workman (ORS 656.023).

ORDER

The order of the Referee dated February 14, 1975, is reversed.

JEWELL MOORER, CLAIMANT
Galton & Popick, Claimant's Attys.
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable back injury on September 13, 1967. The claim was initially closed by Determination Order dated January 14, 1969, which awarded claimant no permanent partial disability. Subsequently, pursuant to an order dated April 30, 1969, claimant was awarded 5% unscheduled disability for his low back injury. Prior to the expiration of claimant's aggravation rights, a request to reopen his claim was made to the State Accident Insurance Fund which was denied; the denial was upheld by the Hearing Officer, the Workmen's Compensation Board and the Circuit Court.

Pursuant to the jurisdiction granted to it by ORS 656.278, the Board on February 11, 1975, ordered the claim to be reopened with temporary total disability benefits to commence November 5, 1973.

Claimant has been treated by Dr. Howard L. Cherry who on January 7, 1975, evaluated claimant's impairment at 20% unscheduled disability. In April 1973, claimant was at the Disability Prevention Division of the Workmen's Compensation Board for a two week program. The Division reported that claimant, who had an 8th grade education and had done foundry, warehouse and construction work, had definite indications of organic brain damage and was close to being functionally illiterate. Claimant was given a fair prognosis for returning to work and was discharged April 24, 1975.

On May 25, 1975, Dr. Cherry concurred with reports from the Division that claimant's condition was stationary; he also recommended a job change through retraining with the Department of Vocational Rehabilitation.

The Evaluation Division of the Workmen's Compensation Board has recommended that claimant be awarded an additional 30% unscheduled low back disability for an aggregate award of 35% for said disability and temporary total disability from November 5, 1973, to May 29, 1975, both dates inclusive.

Subsequent to the recommendation made by the Evaluation Division, a request was received from claimant's attorney that the claim not be closed until such time as claimant has completed all vocational rehabilitation under the auspices of the Workmen's Compensation Board and, in the meantime, that he continue to receive temporary total disability payments under the Board's Own Motion Order dated February 11, 1975. Claimant's injury occurred in 1967; ORS 656.268 was not amended to preclude claim closure until the workman's condition had become medically stationary and the workman had completed any authorized program of vocational rehabilitation until 1971. The Board, therefore,

has no authority to keep the claim open until claimant has completed his vocational rehabilitation program. Claimant is medically stationary and his claim is closed in accordance with the recommendation of the Evaluation Division.

ORDER

Claimant is granted an additional award of permanent partial disability of 30% unscheduled low back disability. This award is in addition to and not in lieu of the award received by claimant pursuant to the order dated April 30, 1969. Claimant is also awarded temporary total disability benefits from November 5, 1973, through May 29, 1975, both dates inclusive.

Appropriate attorney's fees have been previously awarded by Board's Own Motion dated February 11, 1975.

WCB CASE NO. 75-1419 July 11, 1975

The Beneficiaries of
BILLY BRUNS, DECEASED
McAllister & Egner, Beneficiaries' Attys.
Souther, Spaulding, Kinsey, Williamson &
Schwabe, Defense Attys.
ORDER

On January 7, 1971, claimant (now deceased) suffered a compensable injury while in the employ of Open Road Industries. A Determination Order dated July 27, 1973, found that, as a result of that injury, claimant was permanently and totally disabled as of June 28, 1973.

On or about June 1972, claimant left his employment with Open Road Industries to work for Timberline Trailers, Inc.

On November 6, 1972, a claim was filed on behalf of the claimant for an alleged compensable injury sustained by claimant on November 3, 1972; this claim was denied on November 21, 1972. Claimant did not request a hearing on the denial within either 60 or 180 days, pursuant to the provisions of ORS 656.319 (2)(a), therefore, he failed to establish that the incident of November 3, 1972, was a compensable injury.

On March 10, 1975, claimant was killed in an automobile accident; he was receiving permanent total disability benefits at that time. On April 3, 1975, claimant's widow filed a claim for survivor benefits, pursuant to ORS 656.208, which was denied. The widow requested a hearing, presently set for July 23, 1975. On June 26, 1975, the widow requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, to require the appearance of claimant's former employer,

Timberline Trailers, Inc. and its carrier, Farmers Insurance Group, in order to obtain a complete determination as to the responsibility for the injuries of the claimant.

"Own Motion" authority relates only to matters over which the Board has continuing power and jurisdiction, that is to say: compensable injuries. In the Matter of the Compensation of James C. Conaway, Claimant, SAIF Claim No. KC 404637, Board's Own Motion Order, dated March 7, 1974.

In the instant case the claimant failed to establish that he suffered a compensable injury on November 3, 1972, by not timely requesting a hearing on the denial of his claim therefor, and the Board concludes it has no continuing jurisdiction.

The request for own motion should therefore be denied.

ORDER

The request for Board's own motion relief filed by the widow of the deceased claimant June 26, 1975, is hereby denied.

CLAIM NO. 541 CR 29469 July 11, 1975

IRETHA I. EGAN, CLAIMANT
Burl L. Green, Claimant's Atty.
Own Motion Order

This matter is before the Board under the provisions of ORS 656.278, which invests the Workmen's Compensation Board with continuing jurisdiction over claims on which aggravation rights have expired.

This claim involves an injury sustained September 7, 1967, in which claimant suffered a left trigger thumb injury. After claimant's aggravation rights had expired, the employer's carrier voluntarily reopened the claim to provide further medical care and treatment. By an Own Motion Order closing the claim, temporary total disability was allowed during treatment but there was no award made for permanent disability.

Claimant's counsel, contending claimant did have some permanent disability, then requested the Board to enroll claimant at the Board's Disability Prevention Division for physical examination and workup. This request was honored and the results of this examination have now been tendered to the Board. Based on these reports, the Board finds claimant is entitled to a permanent partial disability award equal to 30° for 20% loss of the left forearm.

ORDER

IT IS HEREBY ORDERED that claimant receive an award of compensation equal to 30° for 20% loss of the left forearm.

Pursuant to OAR 436-82-150, counsel for claimant is awarded as a reasonable attorney's fee, 25% of compensation made payable by this order, not to exceed $300.

WCB CASE NO. 74-3724 July 14, 1975

ARNOLD BARTLEY, CLAIMANT
Coons, Cole & Anderson,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

This matter involves the State Accident Insurance Fund's refusal to pay medical bills for claimant's psychiatric care. In its Order on Review, dated October 9, 1974, the Board ordered the State Accident Insurance Fund to pay for psychiatric counseling under ORS 656.245. This Order on Review was affirmed by the Circuit Court March 10, 1975. The Referee in this present matter ordered that the State Accident Insurance Fund was not responsible for penalties and attorney's fees for failure to pay the psychiatrist, Dr. Moore's, billings.

The Board finds that the State Accident Insurance Fund's continued refusal to pay the psychiatrist's billings under ORS 656.245 is unreasonable resistance and delay in payment of compensation.

ORDER

The order of the Referee dated January 24, 1975, is reversed.

SAIF is hereby ordered to pay past, present and future medical bills including psychiatric care for claimant, pursuant to ORS 656.245.

In addition to paying the $265 to Dr. Moore, SAIF is ordered to pay as a penalty 25% of the $265 to the claimant.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by SAIF.

WCB CASE NO. 74-3387 July 14, 1975

WALTER MILLER, CLAIMANT
Harold Adams, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The State Accident Insurance Fund has requested Board review of a Referee's order which awarded claimant permanent partial disability of 45% unscheduled low back disability equal to 145°.

Claimant has been a heavy equipment operator most of his working life. On July 14, 1969, he sustained a compensable injury for which he received no award for permanent partial disability. Subsequently, a denied claim for aggravation was ordered to be accepted. Upon closure of this claim, no award for permanent disability was made and claimant requested a hearing which resulted in the Referee's award of 45%.

Although the industrial injury was superimposed upon a preexisting congenital spondylolisthesis, claimant's resultant disability is chargeable to the accident. Dr. Colgan was of the opinion that claimant could not return to heavy equipment work because of his painful back condition.

The Board, on review, concludes the award made by the referee may be somewhat excessive, but will rely on the personal observations made by the Referee, and his comparison of claimant's case with the cases of other workmen cited in his order and concurs with the Referee's findings, conclusions and award of permanent partial disability.

ORDER

The order of the Referee dated January 29, 1975, is affirmed.

Counsel for claimant is awarded a reasonable attorney's fee in the sum of $250, payable by the State Accident Insurance Fund, for his services in connection with Board review.

WCB CASE NO. 74-3261-E July 14, 1975

WILLIAM J. LISH, CLAIMANT
Alan Ruben, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order on Review

Reviewed by Commissioners Wilson and Moore.

Claimant originally sustained an injury to his back on May 14, 1959. Seeking to have his claim reopened after his five year aggravation rights had expired, the Workmen's Compensation Board, under own motion jurisdiction granted by ORS 656.278, on February 7, 1974, remanded the matter to the Hearings Division to conduct a hearing and render an advisory opinion whether or not claimant's present condition was related to the 1959 injury.

The Referee recommended the claim remain closed. The Board, however, giving weight to the medical opinion of Dr. Lawrence Langston that there was a casual connection between claimant's condition and his original injury, by its Own Motion Order, dated August 9, 1974, ordered the State Accident Insurance Fund to reopen the claim for further medical treatment and associated time loss.

The Fund appealed and following a second hearing, the Referee affirmed the Board, stating the Fund presented no evidence which had not been before the Board at the time it issued its Order of September 9, 1974. The Fund has now requested Board review of this affirmance.

On review by the Board, the Fund again presented no evidence that was not previously before the Referee, nor has Dr. Langston's opinion been rebutted. The Fund's parenthetical aside that the Referee was intimidated because of the Board's refusal to follow the advice of a fellow Referee is hardly worthy of comment except to state that the Referee to which reference is made is indeed the most unlikely Referee to be influenced, intimidated or "cowed" by the actions of his colleagues or by the Board.

The Board concurs with the opinion and order of the Referee and adopts his order as the order of the Board.

ORDER

The order of the Referee dated January 25, 1975, is affirmed.

WILLIAM D. WISHERD, CLAIMANT
Gary Kahn, Claimant's Atty.
Thomas Cavanaugh, Defense Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

This matter involves a denied claim for open heart surgery. The Referee ordered the employer to accept the claim.

Claimant, a forty-eight year old used car manager had open heart surgery March 14, 1974. Claimant had been under great stress during the preceding six months because of decreased sales and the chaotic state of the car business during the gas shortage.

The attending doctor, Dr. Richard L. Shepherd gives the opinion that the job stress has contributed significantly to his problem and the stress is undoubtedly a contributing factor. Dr. Herbert E. Griswold is of the opinion that claimant's heart condition was not accelerated or contributed to by his work activity.

The Board concurs with the findings and opinion of the Referee.

In this matter the Referee awarded claimant's attorney's fee to be paid by the employer on a denied case. The employer contends that claimant's attorney's fee allowed by the Referee is too high. The employer is referred to ORS 656.388 (2) which provides that when there is a dispute over attorney fees the matter can be submitted to the presiding judge of the Circuit Court in the county in which the claimant resides for summary determination.

ORDER

The order of the Referee dated March 14, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $150, payable by the employer, for services in connection with the Board review.

WCB CASE NO. 72-1992 July 15, 1975

WILMA A. TEGGE, CLAIMANT
Daniel J. Van Dyle, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

This matter involves the compensability of claimant's injuries arising out of prolonged exposure to the fumes from the toner used in a copying machine. The State Accident Insurance Fund denied the claim and the Referee ordered the Fund to accept the claim.

Claimant, a bookkeeper, shortly after starting use of this particular copy machine involving the toner, developed numerous symptoms involving a strange feeling, head congestion, reduced ability to concentrate, general muscle weakness and skin texture abnormality. Claimant has been examined and treated by numerous doctors. There is evidence in the record that some other workmen had similar problems when exposed to the fumes while some other workmen were not affected by the fumes.

The Board concurs with the Referee's interpretation of the medical reports in the record.

The Referee followed the principle that the employer takes the workmen as he finds him including any unusual susceptibilities.

Based on the entire record, the Board concurs with the findings of the Referee that the claimant's claim is compensable.

ORDER

The order of the Referee dated March 10, 1974, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $500, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 73-2221 and 73-2521 July 15, 1975

OSCAR M. SAULS, CLAIMANT
Franklin, Bennett, Ofelt & Jolles, Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

This matter involves the compensability of injury to claimant's right eye. The compensability of claimant's left eye and extent of permanent disability is not contested. The Referee found claimant's right eye compensable and ordered the State Accident Insurance Fund to accept the claim.

Claimant, while lifting or tilting a 450 pound oil drum received a retinal detachment in the left eye. The Referee found claimant's right eye condition compensable on the basis that the evidence persuaded him that both injuries occurred in the same manner to similar part of the claimant's body while claimant was doing similar work.

On de novo review, the Board concurs with the analysis of the Referee, and affirms his findings and order.

ORDER

The order of the Referee dated November 21, 1974, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 74-661 July 15, 1975

EARL WEEDEMAN, CLAIMANT
Mark Hardin, Legal Aid Service
Claimant's Atty.
Noreen Saltveit, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

This matter involves an aggravation claim. The Referee dismissed the request for hearing on the grounds that the claim had not been properly perfected within the five year period as provided by ORS 656.273.

On de novo review, the Board concurs with the finding and opinion of the Referee and adopts his opinion and order as its own.

ORDER

The order of the Referee dated November 21, 1974, is affirmed.

WCB CASE NO. 73-2686 July 16, 1975

HERBERT LIGGETT, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The State Accident Insurance Fund has requested Board review of a Referee's order on remand which granted claimant an award of permanent total disability.

This matter was first before the Referee as a denied aggravation claim. The Referee dismissed the hearing, finding the medical reports submitted by claimant in support of his claim for aggravation did not satisfy the jurisdictional requirements of ORS 656.271 (now 656.273). The Board, upon review of that matter, reversed and remanded the matter for a hearing on the merits. As a result of the remand hearing, claimant was found to be permanently and totally disabled. The Fund has requested Board review of the order on remand, challenging the claim on jurisdictional grounds, and contesting the propriety of the award and attorney's fees.

The Board, on de novo review, concurs with the findings of the Referee and holds, as it previously did, that the unrebutted medical opinion of Dr. Haevernick successfully establishes claimant's claim of aggravation. The unrebutted medical evidence supports the finding of the Referee that claimant is permanently incapacitated from regularly performing any work and is entitled to an award of permanent total disability.

ORDER

The order of the Referee dated February 18, 1975, is affirmed.

Counsel for claimant is awarded a reasonable attorney's fee in the amount of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 73-3774 July 16, 1975

ROBERT C. DITTRICH, CLAIMANT
Paul J. O'Hollaren, Claimant's Atty.
Alan J. Gardner, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant has requested Board review of a Referee's order which granted a permanent partial disability award of 20% of the maximum for unscheduled upper back disability.

Claimant, who was 46 years old at the time of hearing, had worked for 22 years for Pacific Northwest Bell. He sustained a compensable injury on January 28, 1972, for which he was awarded 5% of the maximum allowable for unscheduled disability equal to 16°.

Claimant suffered a muscle strain of the right shoulder; it was the doctor's opinion that no permanent impairment would result. In December 1972, Dr. Rankin indicated claimant's condition as an upper back fatigue syndrome contributed to by osteoarthritic changes.

Claimant continued to work for his employer, with occasional absences, until August 1973.

The medical reports in the record reflect only minimal objective findings. Dr. Rankin referred claimant to the Board's Disability Prevention Division for a complete workup. Unwillingly, he underwent psychological testing and was found to have excellent aptitudes, but appeared hostile, angry and bitter. Claimant became suspicious of counselors of that agency as well as of his employer and resisted any attempts of assistance.

The Board, on de novo review, cannot find that claimant is so seriously injured that he cannot return to some type of work which his employer might provide, or engage in some type of retraining program which can be offered him through the Disability Prevention Division. The Board, therefore, concludes claimant in not entitled to further temporary total disability or medical expenses, and his disability does not exceed 20% unscheduled disability as awarded by the Referee.

ORDER

The order of the Referee dated December 4, 1974, is affirmed.

WCB CASE NO. 74-2686 July 16, 1975

ALBERT FLOYD, CLAIMANT
Lachman & Henninger, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant has requested Board review of a Referee's order which affirmed a Determination Order awarding claimant no permanent partial disability.

On April 5, 1973, claimant, a 52 year old school teacher, suffered a broken jaw when assaulted by two youths. As a result, claimant sustained a bilateral fracture of the mandible which required surgery. He also sustained dental damage. Dr. Shlim found a numbness in claimant's chin which made it difficult for him to articulate.

Claimant has returned to his same teaching job, and is doing a superior job as a teacher and unit leader.

The injury at issue is to an unscheduled area and the sole criterion for determining disability therefor is loss of future earning capacity. There are no facts which would indicate that claimant will be unable to follow his teaching career.

The Board, on de novo review, concurs that the preponderance of evidence will not support a finding that claimant has suffered any permanent partial disability.

ORDER

The order of the Referee, dated January 7, 1975, is affirmed.

WCB CASE NO. 74-3475 July 16, 1975

ROBERT KEITH WARNOCK, CLAIMANT
Dye & Olson, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which increased the permanent partial disability award for the right arm from 28.8° to 41°, contending he is entitled to a greater award for his scheduled disability.

Claimant, a 28 year old bricklayer, slipped and fell, injuring both arms on August 28, 1973. He sustained a fracture of the right elbow which healed well and Dr. Tiley considered the impairment in the moderate range.

Claimant is precluded from returning to his work as a brick mason because of difficulty in twisting, lifting and performing rotary movements, therefore, he has suffered a substantial loss of earning capacity. However, loss of physical function is the sole criterion for determining scheduled disability.

For this reason, the Board, on de novo review, concurs with the findings and conclusions of the Referee.

ORDER

The order of the Referee dated February 18, 1975, is affirmed.

WCB CASE NO. 74-2402 July 16, 1975

WILLIAM SCHOFIELD, CLAIMANT
Davis, Ainsworth & Pinnock,
Claimant's Attys.
Philip Mongrain, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant was awarded 15% unscheduled disability. After hearing, the Referee increased the award to 25%. Claimant has requested the Board review of the Referee's order. The only issue is the extent of disability.

Claimant sustained an injury in May 1972 which was diagnosed as a lumbar disc and required a two-level laminectomy.

Claimant holds a college degree in Animal Husbandry and, at the time of injury, was in an orchard farming training program. He is now precluded from continuing in this program because of chronic low back pain which radiates into the legs, inability to lift over 20 pounds and to weed, dig or irrigate.

The Referee found no reason to question claimant's credibility or motivation. Claimant's complaints are substantiated by objective medical evidence.

The Board, on de novo review, finds the award of 25% for the unscheduled disability to be a fair award. However, the Board wishes to advise claimant of the availability of the training and counseling

services at both the Disability Prevention Division and the Division of Vocational Rehabilitation which might assist him to secure employment within his now restricted limitations, if he desires to take advantage of such services.

ORDER

The order of the Referee, dated November 29, 1974, is affirmed.

WCB CASE NO. 74-3126 July 16, 1975

WOODROW W. ATWOOD, CLAIMANT
Frohnmayer & Deatherage,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which found claimant, at the time of his injury, to be an independent contractor rather than an employee of employer, Shaw, and therefore not entitled to benefits under the Workmen's Compensation Law.

The parties stipulated that claimant was injured on May 10, 1974, while unloading logs under a hauling contract with employer Shaw. Claimant owned and drove his truck, he sometimes hauled for other parties.

In Bowser v SIAC, 182 Or 42, the claimant was a log hauler who furnished his own truck, hauled at a stated price per 1000 and was subject to the control of the logging company which could terminate relationship at will, but he worked exclusively for the logging company. In Bowser, although on the surface the facts might seem very similar, the employer had less control over the operations of claimant and, more to the point of distinguishing between the two cases, the claimant in Bowser was required to haul exclusively for the company, not so in the present case.

The Board, upon de novo review, concurs in the findings and conclusions of the Referee and adopts them as its own.

ORDER

The order of the Referee dated January 31, 1975, is affirmed.

WCB CASE NO. 74-1297 July 16, 1975

KERRY M. COX, CLAIMANT
John Toran, Claimant's Atty.
G. Howard Cliff, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which sustained a partial denial of claimant's request to reopen his claim for problems related to his knees.

Claimant, employed as a bus boy by Multnomah Athletic Club, received a compensable industrial injury on October 4, 1971, when he slipped and fell sustaining a sprain and laceration of his right wrist and a strained ligament of the right ankle. No award for permanent partial disability was made pursuant to determination.

In 1974, after another job and automobile accident, claimant filed a claim for knee problems alleged to be the result of the 1971 injury. It was denied.

The Board, on de novo review, concludes the facts do not support claimant's contentions. The medical records contain no evidence that claimant's knees were treated at the time of the industrial injury and the mechanics of the accident itself were such that it is highly improbable either knee could have been injured.

For these reasons, the Board concurs with the findings of the Referee.

ORDER

The order of the Referee dated December 23, 1974, is affirmed.

WCB CASE NO. 74-2127 July 16, 1975

SHARON BILYEU, CLAIMANT
Dan O'Leary, Claimant's Atty.
Thomas Cavanaugh, Defense Atty.
Request for Review by Employer
Cross Appeal by Claimant

Reviewed by Commissioners Wilson and Sloan.

The employer requests Board review of a Referee's order which ordered payment of time loss benefits to claimant and also payment of penalties and attorney fees. The claimant filed a cross request for review.

Suffice it to say that the facts of this case are very well known to all interested and/or involved parties because of previous litigation. The Board, on de novo review, having examined the record fully, concludes that the Referee's findings and conclusions were correct.

ORDER

The order of the Referee dated February 10, 1975, as amended by the order of March 3, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $200, payable by the employer, Circle K Corporation, for services in connection with Board review.

WCB CASE NO. 74-3811 July 16, 1975

LARRY ROBERTS, CLAIMANT
Evohl Malagon, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund requests Board review of a Referee's order which remanded claimant's claim for aggravation to it for acceptance and the payment of attorney's fees.

Claimant suffered an industrial injury on June 5, 1972, for which he received conservative treatment from Dr. Stephen J. Schachner. The claim was closed on October 16, 1972, with no award of permanent partial disability.

Claimant continued to work until June 1974. On July 3, 1974, Dr. John T. Redfield, specialist in vocational injuries, after examining claimant, stated he considered claimant disabled until he could secure relief from his pain. Shortly thereafter, claimant was seen again by Dr. Schachner who recommended, after examination, that claimant be given vocational rehabilitation; that he was not able to work as a truck driver, in fact, he was not fit for any work which involved heavy lifting and repetitive bending. Dr. Redfield's medical opinion was that there had been aggravation of the disability resulting from claimant's compensable injury and claimant was entitled to compensation including medical services based on such aggravation. Dr. Schachner expressed his opinion that, based upon claimant's history, aggravation of his problem had taken place and claimant did have complaints and restrictions compatible with a chronic low back strain.

The State Accident Insurance Fund contends that the medical reports submitted to the Referee at the time of hearing were not sufficient to meet the requirements of ORS 656.273.

The Board, on de novo review, concurs in the findings and conclusions of the Referee and adopts his order as its own.

ORDER

The order of the Referee dated January 22, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 73-4034 July 16, 1975

STEPHEN DOKEY, CLAIMANT
Pozzi, Wilson & Atchison,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant, a 24 year old mechanic, sustained a compensable injury to his right shoulder girdle for which he received no award for permanent disability. After a hearing, the Referee awarded 10% of the maximum for unscheduled right shoulder disability. The claimant has requested review of the Referee's order.

Claimant's continuing complaints have led him to numerous doctors, none of whom have been able to unravel the varying causes of his disability or do anything to help him. Claimant has a host of problems, emotional and otherwise, yet evidence indicates he would resist attempts to provide him counseling or psychiatric help.

Claimant's credibility was clearly a factor in this case, both the Referee and Dr. Stanley Young, who made an orthopedic evaluation of claimant, found it questionable.

Reviewing the record de novo, the Board concurs with the Referee and affirms and adopts his order.

ORDER

The order of the Referee dated January 20, 1975, is affirmed.

WCB CASE NO. 74-3854 July 16, 1975

FRED WHITFIELD, CLAIMANT
Pozzi, Wilson & Atchison,
Claimant's Attys.
Thomas Cavanaugh, Defense Atty.
Request for Review by Employer.

Reviewed by Commissioners Wilson and Sloan.

The employer requests Board review of a Referee's order which remanded claimant's claim for aggravation to the employer for acceptance and also for the payment of penalties and attorney's fees.

Claimant sustained a compensable low back injury on July 22, 1971. On November 1, 1972, Dr. F. A. Short, an orthopedist, performed a low back fusion and on July 20, 1973, claimant was awarded permanent partial disability of 25% of the maximum for unscheduled disability equal to 80°.

On July 24, 1974, Dr. Short submitted a medical report to the employer's carrier stating he had examined claimant on July 19, 1974, and found some motion in the fusion area between L4-5 and concluded that claimant had an aggravation of his previous back difficulty. A second report from Dr. Short, dated September 17, 1974, indicated claimant was scheduled for a spinal fusion on September 25, 1974, and a third report, dated September 27, 1974, indicated the fusion had been performed. On October 16, 1974, the employer formally denied the claim for aggravation.

The Referee found that the employer had failed to offer any evidence justifying its denial; that it had knowledge that claimant was disabled and that his condition had worsened based on the reports of Dr. Short received prior to the denial. He concluded that, under those circumstances, the employer had acted arbitrarily, capriciously and unreasonably to the extent that it should be liable for penalties and attorney's fees in addition to accepting the claim for aggravation.

The Board, on de novo review, concludes that Dr. Short's reports should have put the employer on notice that there was reasonable grounds for it to accept the claim and adopts the findings and conclusions of the Referee as its own.

ORDER

The order of the Referee dated January 20, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the employer, Rice Motor Company, for services in connection with Board review.

WCB CASE No. 74-3319 July 16, 1975

RICHARD FIVECOATS, CLAIMANT
Peterson, Susak, & Peterson,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which increased award of 10% for loss of right forearm and 10% for loss of left forearm to 15% loss of right forearm and 20% loss of left forearm.

Claimant, a 19 year old laborer, was injured April 17, 1972, and developed symptoms diagnosed as bilateral carpal tunnel syndrome. Dr. Misko twice performed surgery, releasing the right and then the left transverse carpal ligament.

Reviewing the record de novo, the Board will rely on the personal observations made by the Referee and his evaluation of the medical reports, and concurs with his findings and conclusions.

ORDER

The order of the Referee dated February 11, 1975, is affirmed.

WCB CASE NO. 73-1055 July 17, 1975

The Beneficiaries of
GEORGE O. GRONQUIST, DECEASED
Larry Dawson, Beneficiaries' Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

The State Accident Insurance Fund has requested Board review of a Referee's Opinion and Order finding the beneficiaries' claim was timely filed and that decedent had contracted an occupational disease from which he died thus entitling the beneficiaries to Workmen's Compensation benefits.

For most of his working life, decedent, George O. Gronquist, was an asbestos worker. His last employer was Owens-Corning Fiberglas Corporation in Portland, Oregon, where he was exposed to asbestos in the repair and construction of ships.

In January 1972, he quit work due to health problems and died on June 20, 1972, at the age of 56, leaving a widow and one child under the age of 18.

An autopsy revealed that decedent died from chronic lung disease with asbestosis and cancer. Neither the decedent nor the widow were aware, prior to his death, that he had asbestosis. The widow was not made aware of the cause of death until around the end of 1972 or early 1973 when she secured a copy of the autopsy report.

On January 22, 1973, the widow caused to have mailed to the Owens-Corning Fiberglas Corporation a claim for widow's benefits under the Workmen's Compensation Law. The record does not reveal whether the claim was ever received or acted upon by the employer. We premume it was received [ORS 41.360(24)].

On April 5, 1973, the beneficiaries requested a hearing seeking to establish the compensability of their claim. The Referee found the claim void for lack of timely filing. The Board affirmed that ruling on review but the Circuit Court of Multnomah County reversed and remanded the matter to the Referee to determine whether the claim had been made within 180 days of the time the widow learned decedent had an occupational disease and, if so, to decide the case on its merits.

The Referee found that the beneficiaries filed their claim within the 180 day period and that the decedent's death entitled them to compensation.

On review, the State Accident Insurance Fund contends the beneficiaries' claim was void because ORS 656.807(1) requires the claim to be filed with the Fund and that filing with the contributing employer rendered it void. We disagree.

At the outset, we observe that the Legislature surely did not desire the forfeiture of compensation rights for failing to strictly comply with procedural provisions of the compensation plan. We are reinforced in that opinion by the Legislature's recent enactment of Senate Bill 439 which eliminates some of the former distinctions between the State Accident Insurance Fund and private carriers. Beyond that, however, we note that ORS 656.807(4) provides that the procedure for processing occupational disease claims shall be the same as provided for accidental injuries under ORS 656.001 to 656.794. See also ORS 656.804, 656.002(6) and 656.310(1)(a). ORS 656.262(1) and (3) obligates employers to assist in the processing of claims presented. We conclude that submission of the claim to the employer was adequate. The claim is not void.

The State Accident Insurance Fund, relying on Mathis v SAIF, 10 Or App 139 (1972), next contends the beneficiaries failed to show the decedent's employment situation could have contributed to asbestosis or that the employee was disabled during that exposure and thus have failed their burden of proof. We disagree.

The Court, in Mathis, was dealing with different issues than presented in this case and its ruling is not controlling. It is unnecessary to show that the employee left his employment at Owens-Corning because he was disabled by asbestosis in order to recover death benefits. It is enough to show that decedent was exposed to conditions at Owens-Corning of a kind contributing to the disability from which he eventually died. As pointed out in the respondent's brief on review, the beneficiaries have done that. The Referee's order should therefore be affirmed.

ORDER

The order of the Referee dated January 23, 1975, is affirmed.

Claimant's attorney, Larry Dawson, is hereby awarded $300, payable by the State Accident Insurance Fund, as a reasonable attorney's fee for his services on this review.

WCB CASE NO. 74-1330 July 17, 1975

BRIAN DENNIS McENENY, CLAIMANT
Vernon Cook, Claimant's Atty.
Department of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The State Accident Insurance Fund requests Board review of a Referee's order which remanded claimant's claim for aggravation to it for acceptance, and, because claimant was, at that time, medically stationary, awarded claimant an additional 20% loss of the left leg equal to 30°, and ordered payment of attorney's fees.

Claimant, a professional skier, suffered a torn medial meniscus of the left knee which was surgically repaired on October 6, 1971. His claim was closed with an award of 30% loss of the left leg equal to 45° by Determination Order dated September 11, 1972.

On February 18, 1974, claimant, while employed as a member of the Multipor Ski Patrol, reinjured his knee. The treating physician felt that, although the injury was rather minor, the acute problem brought on by it would not have occurred had claimant had normal knee ligaments.

Claimant's claim for aggravation was denied by the State Accident Insurance Fund, however, claimant continued to have swelling and giving away episodes relating to his left knee and leg.

At the time the claim was initially closed, claimant was able to return to work as a professional skier, however, since then his knee has become progressively worse to the extent that he no longer is able to do any lateral movements while running nor to jump at all. Claimant has given up skiing and all other sport activities. He is now employed as an instructor in construction carpentry at the Job Corps Center in Waldport.

This is a scheduled disability and the sole test is loss of physical function. The Referee found that claimant had sustained a loss of function of his left leg equal to 50% and increased his award for said disability accordingly.

The Board, upon de novo review, finds that claimant has retained more than 50% use of his left leg and, based upon both medical and lay evidence, concludes that claimant has retained 60% use of his left leg.

ORDER

The order of the Referee dated January 7, 1975, as modified by the order dated January 14, 1975, is hereby modified to award claimant 40% loss of the left leg equal to 60°. This is in lieu of and not in addition to the award granted September 11, 1972. In all other respects the order is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 73-1358 July 17, 1975

ROBERT B. LARA, CLAIMANT
George V. Des Brisay, Claimant's Atty.
Jones, Lang,Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant has requested Board review of a Referee's order which awarded him 20% loss of the workman or 64° of a maximum of 320° for unscheduled disability resulting from his industrial injury of December 1, 1971. There had been no award for permanent disability made pursuant to Determination.

The Referee found that claimant was not precluded from engaging in his occupation of carpentry, but believed that he should direct some thought and effort toward rehabilitating himself.

The Board, on de novo review, and basing its decision particularly on the evaluation made at the Disability Prevention Division, concurs with the Referee and affirms and adopts his order as its own.

WCB CASE NO. 73-1630 July 21, 1975

RONALD BUTLER, CLAIMANT
Pozzi, Wilson & Atchison,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of a Referee's order which affirmed the Second Determination Order dated December 5, 1967, awarding claimant 20% loss of an arm by separation for unscheduled disability.

The State Accident Insurance Fund cross requests Board review of that portion of the Referee's order which awarded an attorney fee to be paid by the Fund.

Claimant suffered a compensable injury on June 14, 1966, while employed as a utility man. He was able to return to work after ten days and his claim was closed on September 2, 1966. Subsequently his back worsened and he underwent surgery. His claim was again closed on December 5, 1967.

On September 8, 1971, claimant requested a hearing. Inasmuch as it was more than one year from the date of the first determination, it was treated, together with Dr. Fagan's report, as an aggravation claim and denied by the Fund on December 29, 1971.

On March 31, 1972, it was stipulated that the Fund would accept and process claimant's claim under the provisions of ORS 656.268 and would pay a stated attorney fee.

The Fund did nothing with respect to processing the claim between March 31, 1972, and January 22, 1975, and the Referee found this to be an unreasonable delay in the payment of compensation which would subject the Fund to penalties and attorney's fees as provided by ORS 656.268(8). The Referee further found that, at the time of hearing, claimant was medically stationary and that, based on the evidence, the previous award of 20% appeared to adequately compensate claimant for his disability.

ORDER

The Board, on de novo review, concurs with the findings and conclusions of the Referee and adopts them as its own.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $200, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 74-2809 July 21, 1975

JOHN A. COLE, CLAIMANT
Pozzi, Wilson & Atchison,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which awarded permanent partial disability of 25% loss function of the left leg.

Claimant, 61 at the time of hearing, was employed as a burner when he injured his left leg on December 29, 1972. His claim was closed with no award for permanent disability.

Claimant now operates a wood salvage business, and the equipment requires operating the clutch with his left leg. This causes claimant much pain and it makes him unsure of himself when operating the equipment for fear of reinjuring himself or causing injury to others.

Claimant failed to meet his burden of proof with respect to either the alleged back injury or the psychological injury, according to the Referee.

Claimant appeared to the Referee as a very energetic, aggressive and credible witness. His testimony as to the pain and weakness in the knee, coupled with the medical opinions rendered by the Back Evaluation Clinic and Veterans Administration relating to atrophy in the left extremity and loss of sensation to pin-prick and touch in the left knee, convinced the Referee that claimant had suffered some permanent injury to his left leg.

The Board, on de novo review, concludes the award may be generous, but the State Accident Insurance Fund offered no brief to dispute the award; therefore, it affirms and adopts the Referee's order.

ORDER

The order of the Referee dated March 17, 1975, is affirmed.

WCB CASE NO. 73-4061 July 21, 1975

HAZEL MORSE, CLAIMANT
Rolf Olson, Claimant's Atty.
Philip Mongrain, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

This matter involves claimant's request for additional temporary total disability, payment of certain medical bills, plus penalties and attorney's fees. The Referee, in his amended Opinion and Order, ordered temporary total disability from October 6, 1973, until she becomes medically stationary, payment of two small medical bills, and payment of claimant's attorney's fee of 25% out of the temporary total disability not to exceed $750.

The claimant's request for Board review does not specify the issues for which claimant requests Board review. Claimant did not file a timely brief; thus the reviewing body is somewhat handicapped in not knowing exactly what issues the appellant desires reviewed. This is especially true in cases involving complicated factual situations.

On de novo review, the Board concurs with the findings and opinions of the Referee and adopts his Opinion and Order and the Amended Opinion and Order as its own.

ORDER

The Amended Opinion and Order of the Referee, dated October 23, 1974, is affirmed.

WCB CASE NO. 74-2376 July 21, 1975

JOSEPH LOGSDON, CLAIMANT
Kenneth Bourne, Claimant's Atty.
Richard L. Lang, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The claimant requests Board review of a Referee's order which affirmed the denial of claimant's claim for industrial injury, ordered claimant to be paid temporary total disability in accordance with ORS 656.210(2)(a), and ordered payment of penalties and attorney's fees.

Claimant alleged he suffered an injury on April 5, 1974, his claim was initially accepted on May 13, 1974, and then denied on August 30, 1974.

The first notice the employer received of the alleged incident was on April 15, 1974. No payment was made by its carrier until May 13, 1974. The Referee, after determining the proper rate of payment of temporary total disability benefits, ordered the employer to pay a 15% penalty for time loss benefits due and owing until May 13, 1974, and a 5% penalty of time loss benefits, if any, due from May 13, 1974, until the date of the denial which was August 30, 1974.

Claimant contends that an employer cannot unilaterally terminate compensation benefits without a hearing and cites Jackson v. SAIF, 7 Or App 109 (1971). ORS 656.262(2) provides, in part, that compensation shall be paid periodically, promptly and directly except where the right to compensation is denied. When the claim is denied, the implication arises that compensation benefits are no longer payable.

Claimant also contends that he was regularly employed rather than a casual worker; the evidence is to the contrary. It incidates that claimant worked but one day (the day he was injured), on that day only on a temporary basis.

On the issue of compensability, the claimant's brief contained only a flat statement that the claim had not been effectively denied by the employer. The Referee concluded, based upon the evidence before him, that claimant had failed to meet his burden of proof that he sustained an injury arising out of and in the course of his employment.

The Board, on de novo review, concludes that the findings and conclusions of the Referee were correct and adopts them as its own.

ORDER

The order of the Referee dated December 13, 1974, is affirmed.

WCB CASE NO. 74-4665 July 21, 1975

MICHAEL DELANEY, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Daryll Klein, Defense Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

Pursuant to Determination Order, claimant received an award of 10% (32°) of the maximum allowable for unscheduled permanent partial disability. Following a hearing, the Referee increased the award to 35% equal to 112°. The employer has requested Board review of the Referee's order contending the increased award is excessive.

Claimant sustained a compensable injury to his lower back April 12, 1973, while employed by Pepsi Cola Bottling Company. His job involved bulk sales and required delivering heavy cannisters to his customers.

Claimant was seen by Dr. Burr, an orthopedic surgeon, who recommended conservative treatment and advised claimant not to return to any work requiring bending, lifting, pulling or pushing. Claimant had a congenital defect and a probable early degenerative disc disease.

Based on the advice of his physicians, claimant enrolled at Chemeketa Community College in a two year business marketing course. The outlook for his future employment in wholesale selling appears to be very good.

Claimant is well aware of his physical limitations and has indicated that he has learned to make moves correctly to avoid hurting his back. This precautionary measure will probably stabilize his back problems as much as any medical treatment he might receive.

The Board, on de novo review, concludes that, based on loss of earning capacity, the award granted by the Referee is excessive and that claimant was adequately compensated for his industrial injury by the original award of 10%.

ORDER

The order of the Referee is reversed.

WCB CASE NO. 74-1712 July 21, 1975

PAUL W. BURCH, CLAIMANT
Nikolaus Albrecht, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

This matter involves the extent of permanent disability. The first Determination Order awarded claimant 15% (48°) unscheduled low back disability. The claim was reopened and the second Determination Order awarded the claimant an additional 25% (80°) unscheduled low back disability. The Referee affirmed this second Determination Order.

Claimant, a then 39 year old bus driver, received a back injury January 14, 1971. The claim was first closed with an award of 15% unscheduled disability and the claimant applied for and received a part of this award in lump sum. The claim was reopened.

Conservative care and examinations only were received. Surgery was not recommended primarily because of some personal problems of the claimant not related to the injury.

No briefs were filed in this matter.

On de novo review, the Board affirms the Referee's opinion and findings and adopts his Opinion and Order as its own.

ORDER

The order of the Referee dated March 13, 1975, is affirmed.

WCB CASE NO. 74-3040 July 21, 1975

ROBERT C. McGARRY, CLAIMANT
Nick Chaivoe, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The State Accident Insurance Fund has requested Board review of a Referee's order requiring it to pay for medical services provided to claimant by the Rinehart Clinic from and after June 19, 1974, pursuant to ORS 656.245, and awarding an attorney fee.

Claimant sustained a compensable industrial injury July 10, 1968. The claim was initially closed on February 14, 1969, with no award of permanent partial disability. A Second Determination Order, entered February 3, 1971, awarded 60° for unscheduled neck disability and 19° for partial loss of left arm.

On July 18, 1974, Dr. Robert E. Rinehart wrote to the Department of Veterans Affairs, with a copy to the Fund, stating claimant's present total disability was the result of the injury of July 10, 1968, and that a treatment and rehabilitation program had been instituted.

A request for hearing protesting the "denial of his claim for aggravation" was made by claimant on August 15, 1974. It was stipulated that the statute of limitations had run on aggravation and the only issue at hearing was whether Dr. Rinehart's plan of treatment was reasonable and necessary under ORS 656.245.

The Board has held, in essence, that Dr. Rinehart's views are not accepted by the medical profession generally and the Board does not believe it is in a position to discount the completely opposing prevailing views of the medical profession and accept Dr. Rinehart's plan of treatment. In the Matter of the Compensation of Florence Spargur, WCB Case No. 72-2730.

The Board, upon de novo review, concludes that the specific treatment recommended by Dr. Rinehart was not reasonable and necessary in his continued treatment of claimant for his industrial injury under ORS 656.245.

ORDER

Order of the Referee dated January 8, 1975, is reversed.

WCB CASE NO. 74-3298 July 21, 1975

DANIEL SIMONS, CLAIMANT
Alan B. Holmes, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

This matter involves whether or not the claimant was in the scope of his employment at the time of injury from an automobile accident. The claim for death of a fellow employee, David Rice, WCB Case 74-3225, was heard in the combined hearing. Both claims were denied and the Referee affirmed both denials.

The claimant, a 42 year old manager for plywood operations in Oregon and the deceased, a 41 year old executive vice-president of the corporation, were in the same automobile involved in an automobile accident on June 5, 1974, at 10:50 p.m. between Medford and Grants Pass, Oregon. A regularly scheduled business meeting had been held in Albany, Oregon, and a company plane flew the claimant and the decedent to the Medford airport arriving there at approximately 6:00 p.m.

The claimant and the decedent and two other management personnel spent approximately four hours in the lounge where business and personal conversations took place and drinks were consumed, all of which were paid for by the employer. The claimant and the decedent left the lounge at 10:00 to 10:30 p.m. The automobile accident occurred approximately ten miles noth of Medford towards Grants Pass. The claimant had a motel room in Grants Pass and the decedent lived there.

Whether or not the claimant and the decedent were in the scope of employment during the four hours in the lounge is a very close question. Regardless, the Board finds that at the time of the accident, the claimant and the decedent were in the course and scope of their employment. Fowers v SAIF, 98 Or Adv Sh 1888 (1974).

ORDER

The order of the Referee, dated February 14, 1975, is reversed.

The employer is ordered to accept the claim of Daniel Simons.

Claimant's counsel is awarded a reasonable attorney's fee in the amount of $1,000, payable by the employer for services in connection with Board review.

The Beneficiaries of
DAVID RICE, DECEASED
Dan Wolke, Beneficiaries' Atty.
Keith Skelton, Defense Atty.
Request for Review by Beneficiaries

Reviewed by Commissioners Wilson and Sloan.

This matter involves whether or not the decedent was in the scope of his employment at the time of his death from an automobile accident. The claim for injuries of a fellow employee, Daniel Simons, WCB Case No. 74-3298, was heard in the combined hearing. Both claims were denied and the Referee afiirmed both denials.

The deceased, a 41 year old executive vice-president of a corporation, and Daniel Simons, a general manager for plywood operations in Oregon, were in the same automobile involved in an automobile accident on June 5, 1974, at 10:50 p.m. between Medford and Grants Pass, Oregon. A regularly scheduled business meeting had been held in Albany, Oregon and a company plane flew the decedent and Simons to the Medford airport, arriving there at approximately 6:00 p.m.

The decedent and Simons and two other management personnel spent approximately four hours in the lounge where business and personal conversations took place and drinks were consumed all of which were paid for by the employer. The decedent and Simons left the lounge at 10:00 to 10:30 p.m. The automobile accident occurred approximately ten miles north of Medford towards Grants Pass. The decedent lived in Grants Pass and Simons had a motel room in Grants Pass.

Whether or not the decedent and Simons were in the scope of employment during the four hours in the lounge is a very close question. Regardless, the Board finds that at the time of the accident, the decedent and Simons were in the course and scope of their employment. Fowers v SAIF, 98 Or Adv Sh 1888 (1974).

ORDER

The order of the Referee, dated February 14, 1975, is reversed.

The employer is ordered to accept the claim of the beneficiaries of David Rice, deceased.

Claimant's counsel is awarded a reasonable attorney's fee in the amount of $1,000, payable by the employer for services in connection with Board review.

WCB CASE NO. 74-1223 July 22, 1975

DANIEL MARLOW, CLAIMANT
Richard Kropp, Claimant's Atty.
Lyle Velure, Defense Atty.
Request for Review by Claimant
Cross Appeal by Employer

Reviewed by Commissioners Wilson and Moore.

As a result of a compensable injury sustained September 8, 1971, claimant received an award of 10% unscheduled disability equal to 32°. After a hearing, the Referee increased the award to 50% unscheduled disability equal to 160°. The claimant has requested Board review of this order, contending he is permanently and totally disabled. The employer has cross appealed, contending the award is too generous.

After conservative treatment, claimant underwent a two-level laminectomy in April 1974. Claimant has not returned to work since his surgery, his complaints have become magnified, however, Dr. Shuler found, after examining claimant, that he had made a good recovery. This opinion was shared by Drs. Bartell, Quan and Knox. The doctors at the Back Evaluation Clinic found such an extreme degree of functional overlay that they believed a fully adequate evaluation was not possible.

It is not necessary to reiterate the voluminous medical evidence of record. Suffice it to state that many of claimant's subjective complaints were without substantiation.

The Board, on de novo review, will reply on the finding made by the Referee that medical facts, and other necessary factors such as age, education, mental capacity and training will not support a prima facie case of odd-lot status and that claimant has not sustained permanent partial disability in excess of 50% of the maximum.

ORDER

The order of the Referee dated November 22, 1974, is affirmed.

WCB CASE NO. 74-2021 July 22, 1975

RUBY BOHL, CLAIMANT
Rolf Olson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workmen's Compensation Board in the above-entitled matter by the State Accident Insurance Fund, and said request for review now having been withdrawn,

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 74-3757 July 22, 1975

BETTY NEWTON, CLAIMANT
Donald Richardson, Claimant's Atty.
Stephen Frank, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which dismissed her request for hearing.

Claimant sustained a compensable injury September 6, 1973, and received no award of permanent disability.

On or about March 19, 1974, claimant requested a hearing on the issues of the carrier's denial of temporary total disability benefits and the extent of claimant's permanent disability. At the hearing, claimant withdrew the issue of permanent partial disability.

On October 15, 1974, claimant filed another request for hearing on the issue of extent of permanent disability. The employer filed a motion to dismiss, contending it had been prepared to litigate the permanent disability issue at the first hearing.

The Referee ruled that the issue of extent of permanent partial disability should have been adjudicated at the previous hearing and failure to do so constituted splitting of her causes of action resulting in a proliferation of litigation contrary to Board policy. In the Matter of the Compensation of Chester A. Blisserd, WCB Case No. 70-1396 and In the Matter of the Compensation of Elfreta Puckett, WCB Case No. 71-2035.

The Referee allowed the Motion and dismissed the request for hearing.

The Board concurs with the ruling of the Referee.

ORDER

The order of the Referee dated March 5, 1975, is affirmed.

WCB CASE NO. 74-1121 July 22, 1975

JAMES W. RIGGS, CLAIMANT
Richard Kropp, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Revieeed by Commissioners Wilson and Sloan.

The sole issue in this review is the compensability of claimant's sternum condition as it relates to his compensable industrial injury. The Referee, at hearing, found the condition unrelated to the injury but remanded the claim to the State Accident Insurance Fund for care and treatment in the form of psychological counseling and claimant has requested Board review of his order.

Claimant, a 42 year old truck driver, was injured August 28, 1973, while tightening the load straps on his truck. He fell backwards into a ditch landing on his buttocks and back. Claimant was hospitalized and placed in traction by Dr. Chen Tsai. Complaints with respect to his pain in the sternum were not made until a later date at the Disability Prevention Division.

Dr. Fry examined claimant on July 8, 1974, and found arthritis in the sternum area and started claimant on physical therapy.

It may be that claimant's sternum problem was not immediately known because it was overshadowed by his complaints relating to his entire back, neck, shoulder, right leg and ankle; however, the Board, on de novo review, finds there is not sufficient medical evidence to show that a causal relationship exists between claimant's sternum problem and his industrial injury. The Board concludes that the Referee's findings and conclusions were correct.

ORDER

The order of the Referee dated February 6, 1974, is affirmed.

WCB CASE NO. 73-2314-E July 22, 1975

ELLA MOE, CLAIMANT
Wayne Harris, Claimant's Atty.
Lyle Velure, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which reduced her award of permanent total disability to 50% unscheduled disability equal to 160°.

Claimant, a 49 year old cannery worker, on August 14, 1969, hit her head on a belt at Stayton Canning Company, sustaining a concussion, post traumatic headaches and cervical sprain. On January 23, 1970, her claim was closed with an award of 16° for unscheduled disability. Subsequently, claimant was seen and examined by numerous medical specialists. Ultimately her claim was closed on October 1, 1972, with an award of permanent and total disability.

While claimant has demonstrated subjective complaints, there were no objective findings of disability. Dr. Pasquesi could not state how much of claimant's difficulty was emotional and how much organic. Dr. Quan was of the opinion claimant's psychiatric problems, which preexisted her industrial injury, had not so severely impaired her that she could not engage in some type of gainful work. Dr. Pasquesi felt claimant was not permanently and totally disabled, in fect, he expressed surprise at the award of October 1, 1972.

There is also evidence that claimant is neither motivated to return to work, nor is willing to seek retraining.

At the hearing, the Referee, after personally viewing the claimant and witnesses, and evaluating the medical evidence presented, found claimant's disability was no greater than 50% of the maximum allowable by statute equal to 160°.

The Board, on de novo review, concurs with the findings of the Referee and adopts his order as its own.

ORDER

The order of the Referee dated December 23, 1974, is affirmed.

WCB CASE NO. 74-3230 July 23, 1975

ROBERT A. BROWNING, III, CLAIMANT
Donald Wilson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant in this matter received an award of 15% for unscheduled low back disability. After a hearing, the Referee granted an additional 5% and the claimant has requested Board review, contending his disability is greater than that awarded.

Claimant was injured October 3, 1973, while working as a spray painter. After conservative treatment, claimant underwent a laminectomy and lumbosacral fusion. Dr. Cottrell, who performed the successful surgery, released claimant without qualification, stating that claimant had no complaints of back pain and had a full range of back motion.

Claimant is now completing his college education at Portland State in Business Administration; he is receiving excellent grades. The impact of his physical impairment has certainly been lessened in view of age (he is now 23 years old), education and intelligence. Should there be a worsening in the future of claimant's physical condition, the remedies provided in ORS 656.273 and 656.278 are available to him.

The Board, upon de novo review, finds that claimant's present loss of earning capacity attributable to his industrial injury is no greater than 20%. The Board concurs with the findings and conclusions of the Referee.

ORDER

The order of the Referee dated February 19, 1974, is affirmed.

WCB CASE NO. 74-3294 July 23, 1975

LEWIS J. FRYE, CLAIMANT
John Grove, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Claimant has requested Board review on a Referee's order which sustained the denial of his claim for increased compensation on account of aggravation.

Claimant sustained a compensable injury to his low back October 30, 1968, and has not worked since the third day after this injury. The claim was first closed by a Determination Order issued November 21, 1969, with an award of 48° for unscheduled disability.

The last award or arrangement of compensation occurred by stipulation, dated May 8, 1972, which increased claimant's permanent disability to 160°, based on Dr. Donald Smith's examination of November 15, 1971.

As early as October 28, 1969, Dr. Smith felt claimant could not even perform sedentary type work, and again on November 15, 1971, reported that claimant was obviously permanently and totally disabled.

To successfully perfect his claim for aggravation, it became necessary for claimant to submit medical opinion that his condition had worsened since May 8, 1972, (the date of the last award or arrangement of compensation). Dr. Smith's report, dated September 4, 1973, upon which claimant relied to support his claim for aggravation, referred to claimant's condition becoming worse since the date of his examination of 1971, and does not meet the requirements of ORS 656.273(4).

The Board, on de novo review, concludes claimant's remedy is under the provisions of ORS 656.278, which grants continuing jurisdiction to the Board to, upon its own motion, modify, change or terminate former findings, order or awards if, in its opinion, such action is justified. In the instant case the Board, on its own motion, concludes that the medical evidence is more than adequate to support a finding that claimant is permanently and totally disabled.

ORDER

IT IS HEREBY ORDERED that claimant is permanently and totally disabled as defined by ORS 656.206(1) and shall be considered as permanently and totally disabled from the date of this order onward.

Counsel for claimant may recover as a reasonable attorney's fee, 25% of the increased compensation awarded hereby, payable from said award, to a maximum of $2,000.

ELMER BACKMAN, CLAIMANT
W. R. Thomas, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund has requested Board review of a Referee's order which increased claimant's award from 15% to 80% for unscheduled neck disability. The only issue on review is the extent of permanent partial disability.

Claimant, in March 1973, was employed on a string machine in a plywood mill and, although there was no traumatic incident, he began experiencing pain in the right shoulder and arm. Dr. Ellison, an orthopedic surgeon, diagnosed thoracic outlet syndrome on the right and C5-6 degenerative disease and nerve root irritation. In October 1973, he excised the herniated nucleus pulposus at the C4-5 and C5-6 level.

The claim was closed on July 25, 1974, and claimant returned to work at the mill, initially, at a lighter type job. When he resumed his former job, however, his symptoms became severely exacerbated and he was forced to quit work. Dr. Ellison indicated he had restricted claimant to light duty work with no repetitive overhead work.

It is apparent that claimant's neck and shoulder condition have imposed a serious limitation on this workman, who is now nearing 60 years of age, and who, understandably, is reluctant to move from his farm which is operated by his 19 year old son with the assistance of claimant's wife.

The determination of earning capacity must be made solely by attempting to ascertain what the future holds for the individual claimant. Ferguson v Wohl Shoe Company, 11 Or App 407 (1972).

The Board, on de novo review, finds claimant is not permanently and totally disabled but he is entitled to a more substantial award than 15% for his unscheduled disability as his earning capacity has been greatly impaired. The Board concurs with the Referee's award of 80% of the maximum allowable by statute for unscheduled disability.

ORDER

The order of the Referee dated February 14, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the amount of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

SANDRA BALLEW, CLAIMANT
Sanford Kowitt, Claimant's Atty.
James Huegli, Defense Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The employer has requested Board review of a Referee's order which increased claimant's award from 30% to 70% of the maximum for unscheduled low back disability and affirmed the award of 10% loss of the right leg.

Claimant sustained a compensable injury to her back on October 31, 1969. A laminectomy and two-level fusion was performed by Dr. Rask on August 10, 1970; this procedure was repeated on June 3, 1971. Neither surgeries were successful. Dr. Kiest, on December 26, 1973, performed another fusion with some success. She now has low back pain most of the time and is severely restricted in her activities.

Dr. Kiest, who performed the last surgery, and examined on behalf of the employer, felt claimant had a moderately severe impairment. Such impairment, when combined with claimant's poor education, would certainly diminish her employment opportunities. Claimant was also evaluated at the Disability Prevention Division and found to be a poor candidate for retraining for any work except a low level type.

The Board, upon de novo review, is of the opinion that claimant is now precluded from engaging in many types of suitable and regular employment within her capabilities and that her wage earning capacity has been severely curtailed. It concurs in the Referee's award of 70% of the maximum allowable.

ORDER

The order of the Referee dated March 11, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the amount of $300, payable by the employer, for services in connection with Board review.

WCB CASE NO. 74-2817 July 24, 1975

FAYE DIETER, CLAIMANT
D. S. Denning, Jr., Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF
Cross Appeal by Claimant

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund requests Board review of a Referee's order which awarded claimant permanent total disability compensation beginning as of February 10, 1973, and directed the Fund to pay claimant the temporary total disability benefits previously ordered in the Opinion and Order dated June 19, 1973.

The claimant cross requests for review, contending she is entitled to additional temporary total disability benefits to-wit: from October 19, 1971, to February 9, 1973.

Claimant suffered a compensable injury in 1971. On May 8, 1972, a Determination Order awarded claimant temporary total disability compensation to October 19, 1971, less time worked, but no permanent disability. In January 1973, claimant requested a hearing on the issue of extent of permanent disability and duration of temporary total disability. An Opinion and Order dated June 19, 1973, found claimant to be permanently and totally disabled and entitled to temporary total disability compensation to February 9, 1973.

The State Accident Insurance Fund did not commence payment of permanent total disability benefits until June 19, 1973, and paid temporary total disability benefits from November 17, 1972, through February 9, 1973. The Referee did not feel that the Fund was either unreasonable in making payments or had resisted payment of compensation which would subject it to penalties because the starting dates of compensation were open to different interpretations, but he did consider the matter as a denial of compensation and ordered payment of attorney fees pursuant to ORS 656.386.

The Board, on de novo review, finds that claimant is entitled to temporary total disability benefits from October 19, 1971, to February 9, 1973, less time worked (approximately eight weeks) and that she is permanently and totally disabled and should be considered as such as of February 10, 1973.

ORDER

The order of the Referee dated January 31, 1975, is modified and the State Accident Insurance Fund is ordered to pay claimant temporary total disability compensation from October 19, 1971, through February 9, 1973, (the Fund has paid such benefits from November 17, 1972, through February 9, 1973). In all other respects, the order of the Referee is affirmed.

Counsel for claimant is allowed a reasonable attorney's fee in the sum of $300, payable by the State Accident Insurance Fund, for services rendered in connection with Board review.

WCB CASE NO. 74-2491 July 24, 1975

JOHN REED, CLAIMANT
Richard Butler, Defense Atty.
Request for Review by Claimant
Cross Appeal by Employer

Reviewed by Commissioners Wilson and Sloan.

The claimant requests Board review of an order of the Referee dated February 7, 1975, which granted claimant an additional award of permanent partial disability for unscheduled low back disability of 25% equal to 80° as a result of his industrial injury of March 10, 1970, making a total award to claimant of 50% equal to 160° of a maximum 320°. The Referee further ordered that the Second Determination Order dated June 7, 1974, except as modified by his order, be affirmed.

The employer cross requests Board review, contending that the award of permanent partial disability was excessive and that the Second Determination Order dated June 7, 1974, should not be modified.

Claimant suffered a compensable injury in March 1970. The claim, although accepted, has been the subject of numerous workmen's compensation proceedings.

Claimant's claim was initially closed on March 8, 1973, with an award of 15% for unscheduled low back disability; the claim was later reopened and again closed by a Second Determination Order dated June 7, 1974, whereby claimant was awarded an additional 10% for his unscheduled disability resulting in a total award of permanent partial disability of 25% equal to 80° of the maximum of 320°.

Claimant has been examined by both orthopedic surgeons and neurosurgeons. Dr. Rockey indicated that diagnostic testing by a lumbar myelogram should be pursued with the option of surgical intervention being present if the myelogram were positive. Dr. David Fitchett indicated the possibility of surgery as an option for treatment. Dr. Fitchett also indicated that claimant appeared unwilling to accept the risk of such surgery. At the hearing, claimant testified he had not refused to undergo a myelogram or to have surgery but that he was still considering the option; this testimony is inconsistent with the medical reports which indicate that claimant has a severe physical disability unless his symptoms are relieved by surgery.

The three major issues are very clearly set forth in the Referee's order. The Referee found that claimant's claim was not prematurely closed on June 7, 1974, setting forth with great clarity his reasons for such finding. The Referee also found that claimant was not entitled to continued payments of a 25% penalty awarded in a prior order which was subsequently reversed before payment was made. On the third issue, the extent of permanent disability, the Referee concluded that it was extremely difficult to make a correct evaluation of the effect of claimant's residual disability on his potential future earning capacity, taking into consideration the impact of claimant's failure to undergo suggested medical procedures for potential curative treatment. A workman's right to compensation should not be suspended unless he or she refuses to submit to an operation to which an ordinarily reasonable person would submit, if similarily situated. Grant v SIAC, 102 Or 26, 46 (1921). The Referee found that claimant's fear of surgery and refusal to undergo the suggested diagnostic treatment or surgical procedures appeared to be out of all proportion to the risk from such medical procedure described in the medical evidence.

The Board has read the record verbatim and believes that the Referee did an excellent job of analyzing the issues in reaching his conclusions in a very complex case where claimant represented himself. The Board feels that a workman's refusal to submit to medical treatment may or may not prevent him from right to compensation depending upon the intellect of the workman involved. If the workman knows or should know that the diagnostic treatment and possible surgery is necessary to determine his disability, then his refusal could be found to be unreasonable. In the Matter of the Compensation of Sally K. Waldroup, Claimant, WCB Case No. 71-2600 Order on Review, dated January 12, 1973.

The Board concludes that, in this case, claimant, a very intelligent individual, by refusing to submit to the recommended diagnostic medical procedures and possible surgery which might have helped improve his condition is not entitled to be considered permanently and totally disabled and affirms and adopts the well written opinion of the Referee as its own.

The claimant has asserted that it is his right to appear personally before the Board on the review of this case. ORS 656.295 does not confer such right upon either party, oral appearance may be allowed at the discretion of the Board. It is the policy of the Board to review solely on written briefs without personal appearance by either party.

ORDER

The order of the Referee dated February 7, 1975, is affirmed.

WCB CASE NO. 74-1316 July 24, 1975

RALPH A. MARSH, CLAIMANT
Brian Welch, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The claimant requests Board review of a Referee's order which affirmed the denial of claimant's claim for an occupational disease (hearing loss).

Claimant, a 68 year old edgerman, alleged he suffered an occupational disease (hearing loss) as a result of his exposure to loud noise between August 1972 and November 1972. The employer denied the claim, stating that the condition requiring treatment by claimant was not the result of the employment but rather that claimant was suffering from Meniere's Disease (deafness, tinnitis and vertigo resulting from nonsuppurative disease of the labyrinth).

Dr. Russell Parcher, testifying in behalf of the Fund, specifically stated that noise was not one of the causes or contributing material factors to Meniere's Disease; Dr. Parcher did enumerate possible causes of such disease. The claimant relied upon the medical reports from Dr. Douglas Q. Thompson, an otolaryngologist; however, none of these reports discuss the etiology of claimant's condition in any detail. One of Dr. Thompson's reports states his opinion that the otological findings are due to acoustic trauma over the years, together with presbycusis which is loss of hearing by aging. None of the reports distinguish between the disease itself and exposure to excessive noise.

Dr. Parcher's report is supported by the other medical reports and claimant offered no rebuttal thereto. The Referee concluded that claimant had failed to sustain the burden of proving a compensable occupational disease.

The Board, upon de novo review, concurs in the findings and conclusions of the Referee.

ORDER

The order of the Referee dated February 6, 1975, is affirmed.

WCB CASE NO. 74-459 July 24, 1975

MARIE LYON, CLAIMANT
David Vandenberg, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which sustained the State Accident Insurance Fund's denial of her claim for benefits. The State Accident Insurance Fund denied benefits on the grounds that claimant was not an employee of its contributing employer, Louis Lyon.

Claimant sustained a serious industrial injury on October 9, 1973, while working on land farmed and owned by her and her husband.

The record indicates that claimant's husband, Rodney, and his father, Louis Lyon, had separate parcels of land which they farmed; however, they shared machinery and seasonal farm labor and worked on each other's places as required. No separate accounting of expenses and profits were maintained, but at the end of the year a general sharing was worked out. Although the workmen's compensation insurance was written in the name of Louis Lyon, the cost was likewise shared. The situation denoted a very close knit family relationship, operating what might be termed a loose partnership.

Payroll records were very incomplete but it was apparent that either party would pay the itinerant workers irrespective of which farm they had worked. The only check offered by claimant to prove an employer-employee relationship was one issued by Louis Lyon three weeks after her accident had occurred.

The Board, on de novo review, concurs with the Referee in finding that claimant, Marie Lyon, was, with her husband Rodney, a full-fledged partner in this farming operation and not a subject employee, and the work she performed was to benefit the family partnership and not for her individual gain.

ORDER

The order of the Referee dated February 7, 1975, is affirmed.

WCB CASE NO. 74-2950 July 24, 1975

GERALD C. WILLS, CLAIMANT
Frank Susak, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of an order of the Referee affirming the Second Determination Order dated July 30, 1974, which awarded claimant no permanent partial disability in addition to the 80° unscheduled back disability awarded by the First Determination Order dated January 17, 1973.

Claimant, a 51 year old warehouseman, suffered a compensable injury on June 22, 1971. Dr. A. Gurney Kimberley, who had performed a lumbosacral fusion on claimant in 1960, again performed surgery adding the L4-5 joint to the prior fusion. Dr. Kimberley found claimant to be medically stationary and recommended claim closure on January 17, 1973; the claim was closed with an award of 25% unscheduled low back disability equal to 80°.

In September 1973, claimant commenced treatment with Dr. John W. Thompson, who subsequently repaired a pseudoarthrosis at the L4-5 level. The claim was reopened and closed by the Second Determination Order dated July 30, 1974, which awarded no additional permanent partial disability.

Claimant's formal education is limited to the seventh grade and his work activities were restricted primarily to truck driving which he started at the age of 25. Claimant has undergone three operations for low back pain. Dr. Thompson stated in his report of January 17, 1975, that while claimant has improved since his last surgery and has what appears to be a solid fusion, he is continuing to have back pain which is a result of his multiple back operations. Dr. Thompson felt claimant was medically stationary and permanently disabled as far as returning to the type of work he was qualified to do prior to the injury; as to whether he could be rehabilitated through a course of vocational rehabilitation, Dr. Thompson found it questionable.

Dr. Kimberley in his report of November 21, 1971, stated that claimant's objective medical findings were minimal. The Referee was persuaded by Dr. Kimberley's assessment of claimant's disability and felt that claimant was more motivated to retire than to return to work.

The Board, on de novo review, finds that while Dr. Kimberley's report did assess the objective medical findings as minimal, he also stated that it would be impossible for claimant to do any truck driving. Dr. Thompson twice expressed his opinion that claimant would not be able to do any type of work which he had been capable of doing prior to the injury. The Board also takes into consideration the fact that Dr. Thompson, claimant's treating physician since September 1973, was probably in a better position to assess claimant's condition than Dr. Kimberley, who had not treated nor seen claimant for over two and a half years, and had no knowledge of his condition following the third back operation.

The Board concludes that, while claimant is not permanently and totally disabled as he contends, a 51 year old man with a limited education, who had followed the occupation of truck driving for 26 years, who had no other form of job training and had been advised by his doctors that he could not return to truck driving because of his back injury, has lost 50% of his wage earning capacity, the sole criterion in determining unscheduled disability.

ORDER

The order of the Referee dated February 7, 1975, is reversed.

Claimant is awarded 160° of a maximum 320° for unscheduled low back disability. This is in lieu of and not in addition to the award of permanent partial disability received by claimant by the First Determination Order mailed January 17, 1973.

Claimant's attorney is allowed as a reasonable attorney's fee 25% of the permanent partial disability compensation awarded by this order, payable therefrom as paid, to a maximum of $2,000.

WCB CASE NO. 74-3454 July 24, 1975

JAMES LOVRIEN, CLAIMANT
Dan O'Leary, Claimant's Atty.
Noreen Saltveit, Defense Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Moore.

The claimant requests Board review of the Referee's order which affirmed the employer's denial of claimant's claim for stomach ulcers. Claimant contends he suffered a compensable ulcer condition as a result of tensions and pressures on his job, e.g., there were several incidents and conflicts involving claimant and his relationship with his superior on the job resulting from company policy.

On May 22, 1970, claimant, who had been an employee since 1959, was advised that his job was dissolved, and he was offered a lesser position in the Salem district claims office. In August 1971, claimant was hospitalized with a duodenal ulcer which was hemorrhaging. Initially, the claim was filed under an off-the-job group health plan, but on July 10, 1974, and again on September 16, 1974, after suffering a relapse on

June 11, 1974, claimant filed reports for an occupational disease based upon Dr. Steinfeld's report indicating the duodenal ulcer, which claimant had had for several years, had been aggravated by the job.

The employer accepted the claim for the June 11, 1974, incident but denied any responsibility for the ulcer condition which pre-existed June 11, 1974, on the basis of timeliness and that the said condition did not arise out of and in the course of employment.

The Board, on de novo review, finds that the claimant has failed to meet his burden of showing that the initial ulcer condition arose out of and in the course of his employment and for that reason only concurs with the Referee's order. Because of this finding, the issue of timeliness is moot.

ORDER

The order of the Referee dated February 4, 1975, is affirmed.

WCB CASE NO. 73-1582 and 74-475 July 24, 1975

FLOYD PARAZOO, CLAIMANT
David Vandenberg, Claimant's Atty.
Department of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The State Accident Insurance Fund requests Board review of the order of the Referee remanding to it claimant's claim for aggravation, and assessing penalties and attorney's fees.

This review deals with two cases consolidated for hearing involving a claim for an injury on July 31, 1968, to claimant's left middle finger which was accepted and closed as a "medical only" by the State Accident Insurance Fund and a subsequent injury on March 13, 1973, to the same finger which ultimately required amputation.

The initial injury was a bruised, swollen finger which became malpositioned so that it stuck down from the hand and was more susceptible to injury. On March 13, 1973, claimant smashed his finger rather severly and Dr. Vinyard decided the finger should be amputated to avoid future difficulty. The employer's insurance carrier, who was then Argonaut Insurance Company, accepted the claim for injury, but denied coverage for the amputation.

The dispute centers primarily between the two carriers on the issue of whether the amputation was an aggravation of the 1968 injury and the responsibility of the State Accident Insurance Fund, or whether it should be construed as a new injury, chargeable to Argonaut. The State Accident Insurance Fund never accepted or denied the claim for aggravation.

The Board, on de novo review, relies on the testimony of Dr. Vinyard, who unequivocally stated that the 1973 injury was not sufficient, of itself, to require the amputation, and related the primary cause back to the 1968 injury. The Board, therefore, concurs with the Referee's order.

ORDER

The order of the Referee dated March 12, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

SAIF CLAIM NO. A937200 July 24, 1975

ALFRED KUBE, CLAIMANT
Lawrence B. Rew, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

This matter is before the Workmen's Compensation Board upon request from claimant's counsel that the Board exercise its continuing jurisdiction under own motion provisions of the law granted it by ORS 656.278.

As a result of an injury in July 1962, claimant underwent surgery for a herniated nucleus pulposus on October 12, 1973. Subsequently, the Board, acting under its own motion jurisdiction, ordered the State Accident Insurance Fund to pay medical bills arising out of this surgery.

It now appears that claimant was not paid any time loss while in surgery or while recovering therefrom and the Board finds that claimant is entitled to such compensation as the time loss was a direct result of the compensable injury of July 1962.

ORDER

IT IS THEREFORE ORDERED that the State Accident Insurance Fund pay claimant temporary total disability compensation from September 1, 1973, through April 1, 1974, both dates inclusive.

Claimant's attorney is awarded as a reasonable attorney's fee 25% of the temporary total disability compensation awarded by this order, payable as paid.

WCB CASE NO. 74-4520 July 25, 1975

ALEX AGALZOFF, CLAIMANT
Donald Richardson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order affirming a Determination Order which awarded claimant 45° for 30% loss of the right forearm and 15° for 10% loss of the left forearm, but no award for unscheduled disability.

Claimant contends the award for the right forearm was not adequate and that he is entitled to an award for unscheduled disability for his low back and tinnitus problems.

Claimant, who is a carpenter, received a compensable injury September 5, 1973, when he fell from a 12 foot scaffold to a concrete floor. Claimant responded well to treatment and achieved satisfactory healing of his wrists and hands. At hearing, the primary residual complaints were limitation of motion, pain and discomfort.

The Referee found insufficient medical evidence to substantiate a finding of greater disability to the forearms. Dr. Tiley's reports indicated claimant's condition had not changed appreciably since the date of the closing evaluation.

There was no basis for making an unscheduled award for the back disability since there was no evidence that claimant has suffered a loss of earning capacity. Dr. Richard A. Schwartz found no neurological cause for claimant's tinnitus symptoms, nor was there any evidence to support the contention that such symptom was the result of the industrial injury.

The Board, on de novo review, concurs with the findings of the Referee, but suggests that claimant might be entitled to further medical care and treatment under the provisions of ORS 656.245.

ORDER

The order of the Referee dated April 7, 1975, is affirmed.

WCB CASE NOS. 74,4584, 74-3661
And 74-3468

July 25, 1975

NOAH DAVID BARTLETT, CLAIMANT
Galton & Popick, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of a Referee's order which affirmed the denial of his aggravation claim.

Claimant sustained a compensable injury on October 2, 1968, when he fractured his left foot and ankle. The case was closed by a Determination Order dated February 8, 1971, awarding claimant 74° for partial loss of the left foot and 27° for permanent loss of wage earning capacity. Upon a hearing requested by claimant, this award was increased to 95° for loss of the left foot and 64° for unscheduled low back disability by an order dated November 2, 1971, which was not appealed.

On September 12, 1974, claimant had been examined by Dr. Howard L. Cherry, who concluded, after taking a history from claimant and physically examining him and reviewing all past medical and hospital documentations, that claimant had sustained an aggravation. Based upon this medical documentation, claimant requested a reopening. The claim was denied. Less than a month later, claimant, at that time being medically stationary, filed another claim for aggravation requesting the State Accident Insurance Fund to accept it as a claim for "dry aggravation" and resubmit the claim to Evaluation Division of the Workmen's Compensation Board for closure. Again the State Accident Insurance Fund denied the claim. On December 9, 1974, Dr. Cherry issued an additional medical report which stated:

> "This is submitted as a supplement and part of my report to you dated September 17, 1974. It is my opinion that Mr. Bartlett's condition and disability has naturally worsened since the date of his last award of compensation of November 2, 1971, to such a degree that he has suffered a compensable aggravation."

The Referee compared prior medical reports made in 1971 and relating to the 1968 injury with the claimant's present symptoms and concluded that if there were any changes in claimant's permanent partial disability, such changes were extremely minimal. He was not persuaded by Dr. Cherry's reports and held that claimant had not had a dry aggravation which would entitle him to an increase in his permanent partial disability award and he sustained the denial thereof.

The Board, upon de novo review, finds that the method of comparison used by the Referee to determine whether there had been a worsening of claimant's condition is not always reliable. The Board concludes that the unchallenged Dr. Cherry's reports of September 17, 1974, and December 9, 1974, not only are sufficient to confer jurisdiction under the pre-1975 law, but are sufficient to support a finding of aggravation.

ORDER

The order of the Referee dated March 18, 1975, as amended on March 24, 1975, is reversed. The claim is remanded to the State Accident Insurance Fund for closure under the provisions of ORS 656.268.

Claimant's counsel is allowed as a reasonable attorney's fee the sum of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 74-3813 July 29, 1975

WILLIAM REED, CLAIMANT
Gerald Knapp, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which affirmed a Determination Order awarding 32° for unscheduled low back disability.

Claimant suffered a compensable injury on April 30, 1973. He was discharged from his job after working for two months without complaints, and has not worked since. Medical reports diagnosed a chronic sprain superimposed on an unstable back with arthritic changes. An exercise program prescribed by Dr. Seres seemed to alleviate claimant's symptoms to the extent that he was reluctant to have a myelogram for diagnostic purposes. Dr. Seres found claimant had sustained only a mild disability.

Claimant's testimony was inconsistent and the Referee found him not a credible witness nor well motivated to seek reemployment or retraining.

The Board, on de novo review, concurs with the findings and conclusions of the Referee and affirms and adopts his order.

ORDER

The order of the Referee dated March 20, 1975, is affirmed.

WCB CASE NO. 74-2279 July 29, 1975

RAYMOND STAIGER, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

This matter involves whether or not the claimant's attorney fees should be paid by the State Accident Insurance Fund or from the compensation to be paid to the claimant.

The State Accident Insurance Fund denied claimant's request to reopen his right knee claim and pay for medical care of the right knee. The Referee ordered the State Accident Insurance Fund to accept the claim for payment of compensation and ordered that claimant's attorney fees be paid from the temporary total disability payments. Claimant requests Board review contending that claimant's attorney fees should be paid by the State Accident Insurance Fund.

The Referee, in ordering claimant's attorney fees to be paid from the compensation rather than by the State Accident Insurance Fund, relied on the Court of Appeals decision in the case of Harold Cavins v. SAIF, 75 Or Adv Sh 535. Subsequent to the issuance of the Opinion and Order, the Supreme Court reversed the Court of Appeals ordering the State Accident Insurance Fund to pay claimant's attorney fees rather than to pay claimant's attorney fees from the compensation to be received by the claimant. Harold Cavins v. SAIF, _____ Or _____ (Supreme Court decision filed May 30, 1975).

ORDER

The order of the Referee dated March 12, 1975, to the extent that it ordered claimant's attorney fees not to exceed $500 to be paid from the temporary total disability payments to the claimant, is reversed.

In all other respects, the opinion and order of the Referee dated March 12, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $750, payable by the State Accident Insurance Fund, for services in connection with the hearing and on Board review.

WCB CASE NO. 74-3467 July 29, 1975

ARTHUR ASHENBRENNER, CLAIMANT
Edward Engel, Claimant's Atty.
Douglas Gordon, Defense Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The employer requests Board review of an order of the Referee which increased an award for unscheduled low back disability from 10% of the maximum to 55%, an increase of 144°.

Claimant was a 59 year old skilled cabinet maker at the time he injured his low back. Dr. Harry A. Danielson performed a laminectomy and a foraminotomy at L5-S1 on February 21, 1974. Claimant was first released to return to very restricted work and eventually returned to his regular employment with instructions to limit his lifting to no more than 25 pounds occasionally and 15 pounds on a repetitive basis.

At the present time, claimant is not engaged in cabinet work and therefore has suffered some loss of wage earning capacity; however, the employer claims the reason is because there is a lack of demand for such work not because claimant is physically unable to do it.

Claimant is 60 years old and has an eighth grade education. At the present time, he is able to work a full 8 hour day at activities which require him to spend much of his time on his feet, there are also probably many lighter type jobs which claimant is physically capable of performing although he is limited to a certain extent because of his lack of education.

The Board, on de novo review, feels that although claimant has suffered a substantial loss of his wage earning capacity, there are still many types of jobs which he is physically and educationally capable of doing at his age. The Board concludes that claimant has suffered a loss of wage earning capacity, the sole criterion for determining unscheduled disability, not to exceed 30% of the maximum allowable by statute for unscheduled disability.

ORDER

The order of the Referee dated February 13, 1975, is modified. Claimant is awarded 96° of a maximum 320° for unscheduled low back disability. This is in lieu of and not in addition to the award of 32° given by the Determination Order dated August 30, 1974. In all other respects, the Referee's order is affirmed.

WCB CASE NO. 75-42 July 29, 1975

WALTER ROGERS, CLAIMANT
Rolf Olson, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The employer has appealed the order of the Referee. However, the employer's brief disclosed that after the hearing claimant had been obliged to submit to surgery so that any determination of permanent disability at this time would be premature. The Board agrees.

A further issue on review is an award of penalties and attorney's fee for failure to pay nine days of temporary disability. A review of the documentary evidence, plus statements made to the Referee at the hearing indicates that the employer is correct and that all temporary total disability was paid.

ORDER

IT IS THEREFORE ORDERED that the order of the Referee awarding penalties and attorney's fee is reversed. The request for review is, otherwise, dismissed.

IT IS FURTHER ORDERED that the claim be remanded to the carrier for continued processing of this claim. When the claimant is again medically stationary, the claim shall be submitted pursuant to ORS 656.268.

WCB CASE NO. 74-3459 July 29, 1975

CHARLES EDDINGTON, CLAIMANT
Dan O'Leary, Claimant's Atty.
Richard L. Lang, Defense Atty.
Order Approving Stipulation and
Dismissing Request for Review

On December 19, 1974, a Referee found that claimant had sustained a compensable injury on February 23, 1972, and remanded said claim to the employer, Northwest Marine Iron Works, for payment of benefits. The employer appealed to the Workmen's Compensation Board for a reversal of the Referee's order.

It now appearing that a bona fide dispute exists as to the existence or non-existence of a compensable claim of February 23, 1972, the parties have agreed to fully settle and compromise any and all claims existing between claimant and employer, Northwest Marine Iron Works, and its carrier, Argonaut Insurance Company, for the sum of $8,500 paid to claimant and a reasonable attorney's fee in the sum of $1,000 to be paid to Dan O'Leary, claimant's counsel.

The terms of the disposition of the claim appear to the Board to be a fair and equitable settlement. The stipulation, a copy marked Exhibit "A", attached hereto and made a part hereof, is approved.

The matter pending on review is hereby dismissed.

STIPULATED ORDER:

The claimant, while employed at Northwest Marine Iron Works (Northwest), was injured on October 9, 1970, when he jumped clear of a falling platform and struck his left elbow on an unknown object. He sought treatment, made a claim, and benefits were paid in accordance with the Workmen's Compensation Law. By Determination Order of March 17, 1971, the claimant received temporary total disability benefits.

The claimant now alleges that he was injured at Northwest on February 23, 1972, that injury involving the right shoulder. A claim was made and that claim denied by the direct responsibility insurer, Argonaut Insurance Companies, on behalf of Northwest. A hearing was held on November 22, 1974, in McMinnville before Referee Leady on the denied claim. The claimant testified regarding the injury of February 23, 1972, as did Nurse Ardis Brace of Northwest. She testified that the claimant on February 23, 1972, had complaints of pain in the cervical spine radiating into the right shoulder and, further, that the claimant asked her to make an appointment with Dr. Mickel. She stated that at no time did the claimant tell her or mention to her that he was involved in an on-the-job accident. The claimant subsequently saw Dr. Mickel, and Dr. Mickel rendered treatment and ultimately wrote medical reports which were placed into evidence at the November 22 hearing. There was no mention in the medical reports by Dr. Mickel of any history of injury on February 23, 1972. Dr. Mickel's report of November 29, 1974, stated, "There was no history of injury in regard to the stiffness***". He also saw Dr. Nicholas Fax in May of 1974, and Dr. Fax in his report of July 16, 1974, which was placed into evidence, mentioned only the original accident of October 9, 1970, in that report and not an accident of February 23, 1972.

The Referee, after hearing the evidence and reviewing all the medical reports, issued an Opinion and Order, dated December 19, 1974, that Opinion and Order remanding the claim to the employer for payment of compensation. Subsequent to the Order, the matter was appealed by the employer and direct responsibility carrier to the Workmen's Compensation Board seeking reversal of the Opinion and Order.

Because a dispute has arisen among the parties as to the existence or non-existence of a compensable claim for February 23, 1972, it has been agreed by the parties to fully settle and compromise any and all claims existing between the claimant and Northwest and Argonaut, the direct responsibility carrier, for the sum of $8,500 payment to the claimant on the basis of a bona fide dispute.

It is further agreed that out of the settlement made payable under this stipulation and order, that there be paid to Dan O'Leary as and for a reasonable attorney fee, the sum of $1,000, which is to be paid to Dan O'Leary.

It is further agreed that the appeal presently pending before the Workmen's Compensation Board will be dismissed with prejudice and without costs to the parties.

WCB CASE NO. 75-683 July 29, 1975

GEORGE N. ROTH, CLAIMANT
Ledwidge & Ledwidge, Claimant's Attys.
Dept. of Justice, Defense Atty.
Order Denying Own Motion Consideration

Claimant's counsel has requested Board review of a Referee's order dated June 20, 1975, and simultaneously has requested the Board to exercise own motion jurisdiction in the matter pursuant to ORS 656.278.

Own motion jurisdiction cannot be assumed by the Board until all other remedies have been exhausted, and it now appearing that claimant has filed a timely request for review,

IT IS THEREFORE ORDERED that claimant's petition for own motion jurisdiction be denied, and the matter proceed to Board review in the usual manner.

WCB CASE NO. 74-3261-E July 29, 1975

WILLIAM J. LISH, CLAIMANT
Alan M. Ruben, Claimant's Atty.
Dept. of Justice, Defense Atty.
Supplemental Order Awarding Attorney Fee

The Board's Order on Review issued July 14, 1975, in the above-entitled matter failed to include an award of a reasonable attorney's fee.

ORDER

IT IS HEREBY ORDERED that claimant's counsel receive a reasonable attorney's fee in the amount of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 74-4011 July 29, 1975

ROBERT BABCOCK, CLAIMANT
David R. Vandenberg, Jr., Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which affirmed the State Accident Insurance Fund's denial of his claim for compensation.

Claimant contends he suffered a compensable injury to his knee September 13, 1974, as a result of a scuffle between claimant and a man named Owens who was hauling wood chips under contract to the mill where claimant was employed.

Although both the claimant's employer and Owens' employer had joint supervision and control over the premises where the claimant's injury occurred, their jobs did not require them to come into contact with each other and their dispute was purely personal and did not involve work-related activities.

The Board, on de novo review, concurs with the Referee's finding that although claimant's injury arose "in the course" of employment, it did not "arise out of" such employment and, therefore, was not compensable.

ORDER

The order of the Referee dated March 17, 1975, is affirmed.

WCB CASE NO. 74-1137 July 29, 1975

HAROLD PARTRIDGE, CLAIMANT
Richard Kropp, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant, initially, received an award of 20% low back disability by the First Determination Order. Claimant had had a laminectomy, L4-5, on March 2, 1972. By stipulation dated January 17, 1973, it was increased to 40%. After a second laminectomy and fusion, a Second Determination Order, dated March 5, 1974, awarded no additional permanent disability. Claimant requested a hearing, the Referee affirmed the award, and claimant has now requested Board review. The only issue on review is the extent of claimant's permanent disability.

Claimant was a 36 year old roofer who suffered a back injury on June 11, 1971, which resulted in the two back surgeries. The surgeries were beneficial to some degree, but claimant does have permanent physical impairment and is now precluded from any occupation requiring bending, stooping or lifting.

With assistance from a vocational rehabilitation counselor, claimant has found employment at the Northwest-Jered's Outdoor Store in Albany where he is training to become manager of the sporting goods department. He is young and intelligent with a good potential for re-training.

The Board, on de novo review, concurs with the Referee that claimant's loss of earning capacity is no greater than 40%, and the award affirmed by the Referee adequately compensates claimant for his unscheduled back disability

ORDER

The order of the Referee dated February 19, 1974, is affirmed.

WCB CASE NO. 72-2332 July 30, 1975

FLOYD B. WELCH, CLAIMANT
Gary M. Carlson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of an order of the Referee which affirmed the denial of his claim for aggravation.

Claimant suffered an injury on December 1, 1956. On January 8, 1968, claimant was awarded 28% loss of vision of the right eye. This was the last award or arrangement of compensation received by claimant. At the hearing, the Fund moved to dismiss for lack of jurisdiction, contending that the medical reports submitted did not support the claim for aggravation as required by ORS 656.271(1). The Referee denied the motion, but, after a hearing on the merits, concluded that the medical evidence was not sufficient to support a finding of aggravation of claimant's injury and affirmed the denial.

The Board, on de novo review, concurs with the findings and conclusion of the Referee; however, it suggests that claimant seek any necessary medical care and treatment under the provisions of ORS 656.245.

ORDER

The Opinion and Order of the Referee dated February 14, 1975, is affirmed.

WCB CASE NO. 74-2191 July 30, 1975

HUGH STEWART, CLAIMANT
A. J. Giustina, Claimant's Atty.
James Gidley, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which affirmed the employer's denial of his claim for benefits for a non-fatal myocardial infarction occurring on or about February 20, 1974.

Claimant is 66 years old, he was employed as a funeral coach driver and assisted in all areas of funeral conduction. On February 18, 19 and 20, 1974, claimant began an unusually long and arduous schedule involving several funerals and several trips, one as far as Orland, California. Returning from Orland, claimant became ill, suffered chest pain, unsuccessfully tried to get help from someone on Highway I-5 and finally made it to the Eugene Hospital. An acute myocardial infarction was diagnosed.

Dr. Robert E. Moffitt, who had been claimant's doctor since 1957, testified that the stress and exertion connected with claimant's job was definitely a contributing factor in the heart attack.

Dr. Wysham, a specialist in Internal Medicine and Cardiology, stated he could find no factor such as physical strain or activity which would indicate claimant's employment was a material contributing cause of the heart attack.

The Referee accepted the opinion of Dr. Wysham because of his superior expertise.

The Board, on de novo review, although respecting Dr. Wysham's skill and wisdom, does not agree with this statement that there was no unusual emotional or physical strain or activity in claimant's employment. The Board believes, as did claimant's treating and longtime family physician, that claimant did come under severe strain and pressure during the three day period just prior to the attack, which was a contributing material cause thereof. The Board finds claimant's heart attack to be compensable.

ORDER

The order of the Referee dated February 10, 1975, is reversed. The claim is remanded to the employer, Valley Coach Service, to be accepted for payment of compensation, as provided by law, commencing February 20, 1974, and until closure is authorized pursuant to ORS 656.268.

Claimant's counsel is awarded as a reasonable attorney's fee, payable by the employer, the sum of $300, for services in connection with Board review.

SAIF CLAIM NO. KC 149905 August 1, 1975

EVAN B. RIGGS, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

This claim involves a right shoulder injury sustained by claimant on September 28, 1968. Surgery was carried out in 1969, at which time the distal end of the clavicle was removed.

The claim was first closed June 9, 1969, with an award of 10% loss of the right arm. By stipulation dated December 29, 1969, the award was increased to 40% loss of the right arm.

In February 1975, the State Accident Insurance Fund received a medical report from Dr. Becker of Reno, Nevada, describing further surgery on the injured shoulder. The Fund, at this point, reopened claimant's claim and paid time loss from November 11, 1974, through December 4, 1974. Claimant has excellent function of the right shoulder with no tenderness nor complaints from the workman.

ORDER

IT IS THEREFORE ORDERED that claimant be granted no additional permanent partial disability.

WCB CASE NO. 74-3478 August 1, 1975

OLLIE J. FITZGIBBONS, CLAIMANT
Keith Mobley, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund has requested Board review of a Referee's order which increased claimant's permanent partial disability award from 16° to 128°.

Claimant, a very petite, 52 year old lady, sustained a compensable chronic back strain in May 1972. She had worked as a motel maid and nurse's aide, and has been unable to return to this type of work. Although claimant has had no surgery, there was an opinion from Dr. Swartz that possibly a facet rhizotomy would be of benefit to claimant, if she was willing to undergo such procedure.

The Board, on de novo review, finds there is insufficient medical evidence in the record to make a determination of claimant's permanent disability.

ORDER

The State Accident Insurance Fund is directed to reopen this claim and refer claimant to the Board's Disability Prevention Division for a medical examination and workup. Upon dismissal from the Center, the claim again shall be submitted to the Evaluation Division of the Workmen's Compensation Board for re-determination of the extent of claimant's disability, if any; such re-determination to be subject to hearing, review and appeal.

The State Accident Insurance Fund shall pay claimant temporary total disability from the date she arrives at the Disability Prevention Division until the claim is closed under the provisions of ORS 656.268.

WCB CASE NO. 74-3141 August 1, 1975

ALLEN PETERSON, CLAIMANT
Pozzi, Wilson, & Atchison,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of the Referee's order affirming the Second Determination Order, dated September 7, 1973, which awarded claimant no additional permanent partial disability. The First Determination Order awarded 25% unscheduled disability equal to 80°.

Claimant, a 64 year old workman, received a compensable injury on August 26, 1969, when he fell while standing on a chair. Claimant underwent surgery for the repair of an inguinal hernia on October 8, 1969. Thereafter, claimant began complaining of pain and swelling in the testicles, urinary problems and, by August 1970, of low back problems.

Claimant has received treatment from several doctors; he has been uncooperative. A recommended exploratory surgery procedure was refused. One doctor opined that anatomical areas which were expressed by claimant to be tender or painful did not actually have symptomatology.

The Referee, at hearing, did not find claimant to be a credible witness, and, based on lack of substantial objective medical findings, concluded that claimant was not entitled to a greater award of permanent disability.

The Board, on de novo review, concurs with the findings made by the Referee and affirms his order.

ORDER

The order of the Referee dated March 20, 1975, is affirmed.

WCB CASE NO. 74-3165 August 1, 1975

JOHN WAHLBRINK, CLAIMANT
Richard A. Sly, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The claimant requests Board review of a Referee's order which remanded his claim to the State Accident Insurance Fund for acceptance and payment of benefits as of December 2, 1974, until the claim is closed under the provisions of ORS 656.268, awarded attorney's fees but did not award any penalties for unreasonable delay in the payment of compensation by the Fund.

Claimant suffered a back injury on September 1, 1972, which was diagnosed as an acute lumbar strain with a spina bifida occulta at L5. Claimant was hospitalized September 25, 1972; he returned to work on November 27, 1972, still complaining of back problems. On April 10, 1973, claimant was given a closing examination and subsequently a Determination Order awarded claimant 5% unscheduled low back disability equal to 16°.

On October 28, 1973, claimant was again admitted to the hospital because of recurrent back pain and inability to do any type of work. The doctor felt his condition was related to the 1972 injury and the claim was voluntarily reopened by the Fund as an aggravation claim. The claim was again closed on June 26, 1974, and claimant was awarded an additional 5% unscheduled disability for a total of 10% equal to 32°.

On September 12, 1974, claimant was examined by Dr. Baskin still complaining of low back pain. The doctor requested the Fund to reopen the claim by a letter dated September 26, 1974. Claimant was admitted to the hospital on December 2, 1974, for bed rest and therapy and discharged on December 11, 1974.

The Referee concluded that the claim should have been reopened as of December 2, 1974, and claimant entitled to time loss benefits commencing as of that date. The Referee further found that the letter of September 26, 1974, from Dr. Baskin did not meet the aggravation requirements of ORS 656.273(4) and that the Fund had not denied claimant any treatment under the provisions of ORS 656.245.

The Board, on de novo review, finds that although the September 26, 1974, letter from Dr. Baskin did not meet the requirements of ORS 656.273(4), it was sufficient to put the Fund upon notice that it should either accept or deny the request to reopen. Instead, the Fund did nothing, no compensation was paid to claimant until the Fund was ordered to make such payments by the Referee.

The Board concludes that there was substantial medical information submitted to the Fund upon which it could have made its decision, and that it should be subjected to the penalties provided by ORS 656.262(8) for its unreasonable delay. The Board further concludes that claimant's attorney should be paid a reasonable attorney's fee by the Fund rather than out of the compensation awarded claimant by the Referee.

ORDER

The order of the Referee dated February 21, 1975, is modified. The State Accident Insurance Fund shall pay to claimant, in addition to the benefits ordered by the Referee under date of February 21, 1975, 25% of said compensation so ordered paid, pursuant to the provisions of ORS 656.262(8).

The claimant's counsel shall be paid, as a reasonable attorney's fee for his services at the hearing, the sum of $500 to be paid by the State Accident Insurance Fund.

Claimant's counsel is awarded as a reasonable attorney's fee the sum of $300, to be paid by the State Accident Insurance Fund, for his services in connection with Board review.

WCB CASE NO. 74-2818 August 1, 1975

ROBERT FRANKLIN, CLAIMANT
D. Keith Swanson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of the Referee's order dated April 21, 1975, which affirmed the denial of the State Accident Insurance Fund of claimant's claim for aggravation of a January 2, 1973, injury.

Claimant was seen the day following his injury by Dr. J. F. Schmidt who diagnosed an acute post-traumatic lumbar spinal sprain. Dr. Schmidt continued to treat claimant until March 1973; on April 2, 1973, the claim was closed with no award for permanent partial disability.

In January 1974, claimant experienced left lumbar spine pain radiating down the left leg and he again sought treatment from Dr. Schmidt. On May 24, 1974, Dr. Schmidt indicated claimant's condition appeared to be stabilizing in a chronic state wherein he received relief upon treatment; that claimant's condition was exacerbated primarily because of his overweight condition. In June 1974, the Fund refused further treatment.

Claimant has been treated regularly by Dr. Schmidt since the 1973 injury, first, twice a month and, recently, once a month. His condition appears about the same as it was in April 1973, when his claim was closed.

The Referee found that there was insufficient evidence to support claimant's claim for aggravation. The Referee further concluded that claimant was not entitled to medical care and treatment under the provisions of ORS 656.245(1) because the treatment claimant has been receiving from Dr. Schmidt for over two years, from which he has received temporary relief, was not such treatment as would restore claimant to his prior condition or be instrumental in the process of his recovery.

The Board, upon de novo review, concurs with the conclusion of the Referee regarding the insufficiency of the evidence to support claimant's claim for aggravation; however, it does feel that the medical expenses incurred in the continued treatment received by claimant from Dr. Schmidt were compensable under ORS 656.245(1) as they were necessarily and reasonably incurred in the continued treatment of claimant's industrial injury.

ORDER

The order of the Referee dated April 21, 1975, is modified. The State Accident Insurance Fund is ordered to pay for all medical expenses incurred by claimant as a result of treatment received by him from Dr. J. F. Schmidt from January 3, 1973, until April 10, 1975, the date of the hearing. In all other respects, the Referee's order is affirmed.

WCB CASE NO. 74-4092 August 1, 1975

RANDY W. YACKLEY, CLAIMANT
Hayes P. Lavis, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of a Referee's order which granted an award of 10% unscheduled low back disability equal to 32°.

Claimant sustained a sprain to the muscles of his back and responded well to conservative treatment. He was able to return to work at his same job.

No briefs were submitted to the Board for its de novo review. The evidence supports a finding that the claimant has not sustained permanent disability in excess of 32°. The Board affirms and adopts the Referee's order as its own.

ORDER

The order of the Referee dated February 28, 1975, is affirmed.

WCB CASE NO. 74-3358 August 1, 1975

HAZEL STOUT, CLAIMANT
Ray Brown, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund requests Board review of that portion of the Referee's order which ordered the Fund to pay claimant an amount equal to 25% of the temporary total disability compensation accrued and unpaid between June 3, 1974, and August 19, 1974, for unreasonable delay in the payment of compensation; an additional 25% penalty on the same amount between the same periods for willful and unreasonable refusal to pay compensation, and an additional 25% on the same amount between the same periods for unreasonable delay in the acceptance or denial of claimant's claim. The Fund also protested the amount of the attorney's fee awarded.

The Board, on de novo review, concludes that the imposition of 25% of the temporary total disability compensation accrued and unpaid between June 3, 1974, and August 19, 1974, is a sufficient penalty for the dilatory action of the Fund. The attorney's fee awarded by the Referee was proper.

ORDER

The order of the Referee dated February 10, 1975, is modified. That portion which directs the State Accident Insurance Fund to pay 25% penalty for wilful and unreasonable refusal to pay compensation and an additional 25% penalty for unreasonable delay in the acceptance or denial of claimant's claim is reversed. In all other respects the order of the Referee is affirmed.

WCB CASE NO. 74-4106 August 1, 1975

TROY CHEEK, CLAIMANT
Dan O'Leary, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The claimant requests Board review of a Referee's order which directed the State Accident Insurance Fund to pay claimant temporary total disability benefits for the period of time from February 26, 1974, through June 10, 1974, affirmed the Determination Order of October 31, 1974, in all other particulars and awarded attorney's fees payable from the increased compensation.

Claimant suffered a compensable injury on October 28, 1969. He was given psychological and medical examinations at the Disability Prevention Division and was treated by Dr. Kiest. Dr. Bachhuber, in his closing examination, said he felt the cervical complaints were almost entirely psychophysiological in nature. None of the doctors saw any immediate need for surgery. Claimant's claim was closed with no award of permanent partial disability and some time loss.

On April 14, 1970, claimant was confined to the Oregon State Penitentiary; thereafter he was examined, at various times, by Drs. Becker, Cherry and Tanabe because of chronic neck strain. On February 25, 1974, Dr. Buza examined claimant and recommended myelography and further evaluation. On June 12, 1974, Dr. White performed an anterior cervical fusion at C5-6. His closing examination of claimant indicated good surgical recovery with only mild residual left C-6 neuropathy. Claimant's claim was then closed with additional temporary total disability compensation from June 11, 1974, through September 26, 1974, and an award of 10% unscheduled neck disability equal to 32° and 5% loss of the left arm equal to 9.6°.

After a hearing requested by claimant, the Referee awarded claimant additional time loss for the period from February 26, 1974, through June 10, 1974.

Claimant contends that he is entitled to temporary total disability prior to February 26, 1974, is entitled to a greater award of permanent partial disability, and also entitled to penalties and attorney's fees as a result of the Fund's failure to pay time loss prior to June 11, 1974.

The Board, on de novo review, concludes that the Referee's order sets out with great clarity and unambiguity his findings and conclusions and the Board affirms said findings and conclusions and adopts the Referee's order as its own.

ORDER

The order of the Referee dated March 21, 1975, is affirmed.

SAIF CLAIM NO. NODC 1551 August 4, 1975

AIRLETTA M. SANDERS, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Order

The Board has been requested by claimant to reopen her claim under the own motion provision of ORS 656.278 which grants continuing jurisdiction to the Board.

Based on a letter from Thad C. Stanford, M.D., it appears that the worsening of her arm condition is a result of her industrial injury and claimant is in need of further medical care and treatment.

ORDER

The State Accident Insurance Fund is ordered to reopen claimant's claim for care and treatment as recommended by Dr. Stanford and for payment of such compensation as provided by law commencing April 25, 1975, and until the claim is closed pursuant to ORS 656.268.

IT IS SO ORDERED.

WCB CASE NO. 74-463 August 4, 1975

STERLING PRICE, CLAIMANT
Evohl Malagon, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The State Accident Insurance Fund requests Board review of a Referee's order which granted claimant an award of permanent total disability as a result of a low back injury sustained August 21, 1972.

Claimant, a faller and bucker, sustained a back injury on August 21, 1972, when he bent over to pick up a saw. He was seen on August 28, 1972, by Dr. Glaede. Claimant has had no surgery, no hospitalization, no bracing and has received little in the way of treatment other than medication. On February 6, 1973, Dr. Glaede stated: "This man's back was completely cleared up on November 15, 1972, with no residuals. He is cured." On March 16, 1973, a Determination Order awarded no permanent disability.

Three days later, March 19, claimant returned to Dr. Glaede complaining that his back had never cleared up. Dr. McHolick saw him at that time also and could find no reason why claimant should not be carrying out full time employment. Claimant returned to work as a faller on May 21, 1973. On July 23, 1973, he slipped on a log, cutting his knee; he has not returned to work since that date.

Dr. Van Osdel, after doing a complete workup, found claimant had sustained a chronic strain of the spine superimposed on a moderate dorsal kyphosis of the dorsal spine, a moderate degree of osteoarthritis and some degenerative disc disease. The Back Evaluation Clinic found the same symptoms and regarded loss of function of the back attributable to the accident as mildly moderate.

The Board, on de novo review, finds claimant has not been rendered permanently and totally disabled as a result of what appears to be a minor industrial injury. Although claimant cannot return to the woods, there are many lighter jobs which he can do. His motivation to return to work is questionable. The Board concludes that claimant has not sustained more than 40% loss of his wage earning capacity. An award of permanent disability equal to 40% of the maximum allowable for unscheduled disability adequately compensates claimant.

ORDER

The order of the Referee is reversed. Claimant is awarded 128° of the maximum 320° for unscheduled disability.

WCB CASE NO. 74-3274 August 4, 1975

JUAN MALDONADO, CLAIMANT
Carlotta Sorensen, Claimant's Atty.
James Huegli, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests Board review of a Referee's order which granted him a permanent partial disability award of 10% loss of the left thumb, contending he is entitled to a greater award.

Claimant received an injury on November 20, 1973, when a rivet punctured his thumb. Dr. Peter A. Nathan's report dated December 17, 1974, stated there was only a slight irregularity in the nail and no evidence of impairment. The Referee, who saw claimant's thumb and heard testimony, found minimal impairment.

The Board, on de novo review, concurs with the Referee and affirms and adopts his order.

ORDER

The order of the Referee dated March 10, 1975, is affirmed.

WCB CASE NO. 74-2894 August 4, 1975

ROY A. IVERSON, CLAIMANT
Erlandson & Reisbick, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant has requested Board review of a Referee's order which sustained the denial of claimant's occupational disease claim of aggravation of his rheumatoid spondylitis. The claim was filed on May 31, 1974, for a condition diagnosed as rheumatoid spondylitis. There was no trauma involved, just a gradual increase in symptoms becoming of such severity that claimant ceased work as of June 1973.

The record contains diametrically opposed medical opinions. Dr. Rinehart stated claimant's rheumatoid spondylitis was aggravated by his employment. Dr. Rosenbaum stated he could not relate the illness to claimant's occupation. The Referee stated neither doctor could substantiate by any evidence, studies or statistics his expressed opinion.

The Board, on de novo review, finds that there is not adequate expert medical testimony to either prove or disprove medical causation and, pursuant to ORS 656.295(5), concludes that the matter was incompletely heard and remands it to the Referee for the purpose of referring claimant to the Disability Prevention Division of the WCB for a complete workup. The report based upon the aforesaid workup shall be submitted to the Referee and to the parties for possible cross-examination and, ultimately, for a reconsideration of the Referee's previous order and issuance of a new appealable opinion and order.

IT IS SO ORDERED.

WCB CASE NO. 73-720 August 4, 1975

ROBERT GRANGER, CLAIMANT
John Ryan, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson, Moore and Sloan.

This matter involves the extent of permanent disability. The Referee awarded the claimant a total of 50% (160°) unscheduled low back disability and 15% (22.5°) left leg disability. Claimant requests Board review contending he is permanently totally disabled.

Claimant, a 49 year old truck driver, received a back injury October 15, 1971. Claimant has had two surgeries. Claimant has completed retraining in refrigeration and air-conditioning. Claimant is receiving social security for total disability.

The reports from vocational rehabilitation counselor and the attending orthopedist reflect that claimant's motivation to return to work is good. The Referee found that claimant had failed to present evidence of good motivation to seek and work at gainful employment.

On de novo review, the Board finds that the claimant is permanently totally disabled under the odd-lot category in that claimant has proved by the preponderance of the evidence that his motivation to return to gainful employment is good.

ORDER

The order of the Referee dated November 8, 1974, is reversed.

Claimant is awarded permanent total disability effective the date of this order.

Counsel for claimant is to receive as a fee, 25% of the increase in compensation association with this award which shall not exceed $2,300.

WCB CASE NO. 74-1164 August 4, 1975

WILLIAM E. STAINES, CLAIMANT
Keith Tichenor, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Sloan and Moore.

The State Accident Insurance Fund requests Board review of a Referee's order awarding claimant permanent total disability.

While employed as a groundskeeper at a golf course, claimant sustained a compensable injury March 2, 1973, when he was struck on the head by a golf ball. Claimant was hospitalized where a scalp laceration was sutured. He later experienced numbness and paresthesias in the left hand and forearm, followed by irregular, jerking movements of the hand, arm and head. A Jacksonian epilepsy seizure was diagnosed.

Claimant returned to work to ascertain whether or not he would be able to perform lighter type work; after three days he was again hospitalized, received medication and has not worked since.

The Referee found claimant to be permanently and totally disabled because of a psychological dysfunction attributable to the industrial injury.

The Board, on de novo review, concurs that claimant is permanently and totally disabled, but disagrees with the Referee's statement that claimant has not sustained an organic brain disorder. The Board finds that this disorder, which will require him to take Dilantin for the rest of his life, will preclude him from work involving the operation of power equipment for his own safety and the safety of others.

ORDER

The order of the Referee dated February 5, 1975, is affirmed.

Counsel for claimant is awarded a reasonable attorney's fee in the amount of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 74-2107
AND 74-4010 August 5, 1975

KNOX C. SWANSON, CLAIMANT
Anderson, Fulton, Lavis & Van Thiel,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant requests Board review of a Referee's order which affirmed the State Accident Insurance Fund's denial of his claims for compensation.

Claimant, an employe of Seaside Sanitary Service, alleged he sustained an injury to his right knee on April 24, 1974. The claim was denied and claimant requested a hearing. At the hearing, the claimant alleged he suffered a second separate injury to his right knee on April 29, 1974. This claim also was denied by the Fund and both issues disposed of by the Referee at a continued hearing.

Both injuries were unwitnessed. The testimony before the Board, on de novo review, is so confusing and contradictory that the Board will rely on the findings and conclusions of the Referee, and affirms his denial of both claims.

ORDER

The order of the Referee dated February 27, 1975, is affirmed.

WCB CASE NO. 74-3057 August 5, 1975

SIDNEY CARTER, CLAIMANT
Pozzi, Wilson & Atchison,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The State Accident Insurance Fund requests Board review of an order of the Referee which awarded claimant permanent total disability effective January 24, 1975.

Claimant, a 40 year old truck driver, suffered a compensable injury on December 16, 1971. Released to work on December 27, 1971, he was unable to continue truck driving. On May 2, 1972, a laminectomy was performed. Claimant was released to return to work on July 10, 1972, but because of stiffness and pain, quit three days later.

In 1973, the Back Evaluation Clinic recommended that claimant reduce his weight and that claimant could return to light work. Loss of function was considered mildly moderate. On June 6, 1973, a spinal fusion was done.

Claimant contacted the Division of Vocational Rehabilitation both before and after the surgery. He was considered unable to return to his previous employment as a truck driver. After several attempts at retraining, the counselor was unable to give claimant a favorable prognosis. On August 12, 1974, a Determination Order awarded claimant 75% unscheduled low back disability and 15% scheduled award for right leg disability.

The Referee found that claimant had made a sincere effort to actively find employment but was unsuccessful because of his physical impairment, which coupled with other factors, placed him prima facie in the odd-lot category and that the employer failed to meet its burden of proof to show that some kind of suitable work was regularly and continuously available to claimant.

The Board, on de novo review, concludes that the Referee's findings and conclusions are supported by the evidence and his order should be affirmed.

ORDER

The order of the Referee dated January 24, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 74-3278 August 5, 1975

JANET CRAIGEN, CLAIMANT
Corey, Byler & Rew, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Moore.

The State Accident Insurance Fund requests Board review of a Referee's order which found claimant to be permanently and totally disabled. A Determination Order had awarded claimant 25% unscheduled disability.

Claimant sustained injury to her back during March 1973, while working as a potato grader. She was hospitalized with conservative care for nerve root irritation possibly caused by a ruptured disc. Her condition did not improve, but Dr. Pasquesi felt that a nerve root release and spinal fusion would not benefit claimant. She had had a two level fusion in 1969.

Testimony indicates that claimant is able to perform only minimal tasks at home with increasing pain and symptoms on activity. Dr. Smith, claimant's treating physician, was of the opinion that claimant would not be able to join the working force at all in the future.

The Referee found that claimant's motiviation to return to work was good and that her physical impairment alone placed her in the odd-lot category.

The Board, on de novo review, concurs with the conclusion of the Referee that claimant is permanently and totally disabled. The Board further concludes that claimant should be considered as permanently and totally disabled from the date of the Referee's order.

ORDER

The order of the Referee dated January 10, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

SAIF CLAIM NO. EC 12510 August 5, 1975

LAZARUS L. GARRETT, CLAIMANT

Own Motion Determination

This workman sustained a fractured left ankle and lumbo-sacral strain when injured on April 14, 1966. His claim was closed by Determination Order dated June 9, 1967, which awarded claimant 20% loss of an arm by separation for unscheduled disability and 40% loss function of the left leg.

In May 1975, the State Accident Insurance Fund voluntarily reopened the claim for further treatment and time loss. Time loss has been paid claimant from April 4, 1975, through July 31, 1975.

The matter was submitted to the Board's Evaluation Division which found that claimant has sustained no additional disability to the left leg, but has sustained additional low back disability.

ORDER

IT IS THEREFORE ORDERED that claimant is granted an additional award of 20% of the maximum allowable by statute for unscheduled low back disability equal to 38.4°. This award is in addition to the award granted by the Determination Order dated June 9, 1967.

WCB CASE NO. 74-3485 August 5, 1975

EMMA OVERALL, CLAIMANT
Jerome Bischoff, Claimant's Atty.
Frank Moscato, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests Board review of an order of the Referee which dismissed claimant's request for hearing on the ground that her aggravation claim was not supported by a written opinion by a physician which met the requirements of ORS 656.273.

ORS 656.273, as amended by 1975 c. 497 sec. 1, provides:

> "(7) A request for hearing on any issue involving a claim for aggravation must be made to the Board in accordance with ORS 656.283. Adequacy of the physician's report is not jurisdictional. If the evidence as a whole shows a worsening of the claimant's condition the claim shall be allowed." (Emphasis supplied)

ORS 656.273, as amended by 1975 c. 497 sec. 5, provides that the act applies to all claims for compensable injuries that occurred prior to the effective date of the act; therefore, the Board, on de novo review, concludes that it has no alternative but to remand the claim for aggravation for a hearing on the merits pursuant to the provisions of ORS 656.273, as amended.

ORDER

The Referee's order on motion for dismissal, dated January 7, 1975, is reversed and the matter is remanded to the Hearings Division for a hearing on the merits.

WCB CASE NO. 73-3530 August 5, 1975

The Beneficiaries of
GLENN ADRIAN SLATER, DECEASED
Eldon Rosenthal, Beneficiaries' Atty.
James Huegli, Defense Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The employer, H & L Corporation, seeks Board review of an order of the Referee which remanded to it a claim for widow's benefits which it originally denied.

The workman died on April 8, 1972; the parties stipulated that the workman was permanently and totally disabled at the time of his demise, and further stipulated that the employer knew the workman was permanently and totally disabled at that time. The widow, hereafter called claimant, had had the workman's power of attorney for some time prior to his death and had dealt with the employer's carrier on a number of occasions. Late in June or early July 1972, she telephoned the carrier's representative and inquired concerning widow's benefits under the Workmen's Compensation Act. She was advised to see her attorney.

In May 1973, claimant's attorney filed a written claim for benefits and a letter of denial was sent to claimant's attorney in July 1973; said denial was based on the assertion that the claim had not been timely or properly filed.

The employer argues that notice to its carrier of a claim is not knowledge of a compensable injury to it; also that in order for a proper claim to be filed it must be in writing and must be filed within six months of the death of the workman. The widow contends that since the workman was permanently and totally disabled at the time of his death, a fact which was known to the carrier, and since the carrier also knew that the widow was married to the workman at that time, a claim had been perfected as defined in ORS 656.002(5) and it was not necessary for her to take any further steps until the carrier had either accepted or denied the claim.

The Referee, in a well written opinion, sets forth the appropriate statutes and concludes that the fact that a written claim was not made by the widow within six months of the death of the workman did not bar the claim. The telephone conversation with the representative of the carrier was sufficient notice to establish a claim and thereafter the carrier had a duty to provide a written denial with the reasons therefor.

The Board, on de novo review, concurs with the findings and conclusions of the Referee's order. The Board further notes that this case presents some very unusual circumstances which prevented the widow from following the normal procedure; these circumstances are thoroughly discussed and explained in the Referee's order and it is not necessary to reiterate them.

ORDER

The order of the Referee dated December 13, 1974, is affirmed.

Claimant's counsel is awarded as a reasonable attorney's fee the sum of $300, to be paid by the employer, H & L Corporation, for services in connection with Board review.

CHARLES JACKSON, CLAIMANT
Joseph Gillham, Claimant's Atty.
Rask & Hefferin, Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

This matter involves a dismissal of claimant's request for hearing by the Referee. Claimant requests Board review requesting the Order of Dismissal be reversed and that the matter be remanded for hearing.

A Determination Order awarding claimant 15% (22.5°) loss of the right forearm was issued January 11, 1974. Claimant by and through his attorney requested a hearing which was filed February 1, 1974. A hearing set for May 7, 1974, was postponed at claimant's request. A hearing set for August 13, 1974, was postponed at the request of both parties. The Referee sent a letter dated November 15, 1974, inquiring as to the status of the claim. No response was made to that letter. On December 18, 1974, the Referee issued an order to show cause within 30 days why the request for hearing should not be dismissed as abandoned. No response to the Order to Show Cause was received. On January 20, 1975, the Order of Dismissal was issued.

Claimant's new attorney filed the request for Board review. Claimant's mailing address apparently changed on May 4, 1974, but claimant did not notify the Hearings Division, Workmen's Compensation Board of such change of address. Claimant's attorney received the Order to Show Cause but made no appearance or response.

As the Board stated in the case of In the Matter of the Compensation of Raymond McKeen, WCB Case No. 70-2288, 7 Van Natta's 107:

> "The Board is reluctant to deny any person a day in Court. The administrative process cannot be sustained when a party seeking a hearing failed to respond to communications and directive ... If the claimant has an issue deserving of a hearing, he has a responsibility of cooperating ...
>
> "The question is now whether the Board should now relent and remand the matter for hearing. Such a precedent would only encourage a more widespread disregard of communications on the assumption that a dismissal upon such facts would not be sustained. The Board concludes that the claimant has forfeited his right to a hearing under the circumstances."

The Board denies claimant's request that the Referee's order be reversed and that the matter be remanded for hearing.

ORDER

The Referee's Order of Dismissal dated January 20, 1975, is affirmed.

WCB CASE NO. 74-2624-E August 6, 1975

CARL R. FITCH, CLAIMANT
Mulder, Morro & McCrea,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant seeks Board review of a Referee's order which reduced claimant's award of permanent total disability to 160° for unscheduled neck and left shoulder disability.

Claimant suffered a compensable injury in August 1970 in a lifting incident. On February 27, 1973, and before claimant's condition had become stationary and a determination made, he suffered a second injury when the motorcycle he was riding was involved in an accident with a car. In February 1974, the first Determination Order awarded claimant 80° for neck and left shoulder disability. In March 1974, a second Determination Order issued finding claimant to be permanently and totally disabled. The issue on review is the extent of the Fund's responsibility for this condition.

The Referee, at hearing, found claimant's condition was not wholly related to the industrial injury nor was that injury the material contributing cause of claimant's more severe condition following the motorcycle accident. The Referee found claimant's loss of earning capacity as a result of the industrial injury was equal to 160° of a maximum of 320° for unscheduled neck and left shoulder disability.

The Board, on de novo review, concurs with the findings of the Referee and affirms and adopts his order.

ORDER

The order of the Referee dated March 7, 1975, is affirmed.

WCB CASE NO. 74-3877 August 6, 1975

JIM C. STEARNS, CLAIMANT
Galton & Popick, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The claimant has requested Board review of an order of the Referee which awarded him 15° for a 10% loss of his right leg. Claimant contends that he is entitled to a greater award and also that the Fund should pay for the services of Dr. Howard L. Cherry.

Claimant, a 35 year old elevator service man, suffered a compensable injury on July 27, 1973, which resulted in a severe strain and a torn medial meniscus in his right knee. Surgery was performed on March 28, 1974, and the claim closed on July 23, 1974, on the recommendation of the operating physician who expressed his opinion that claimant had extremely minimal disability that was inherent to a meniscectomy.

On December 2, 1974, claimant saw Dr. Cherry, seeking a second medical opinion as to the condition of his knee. Dr. Cherry found, as a result of his examination, that claimant had full range of motion in the knee but some instability in the AP direction and crepitous without effusion; he was of the opinion that claimant had sustained disability in the range of 20% loss function of the leg.

The Referee concluded that claimant was sincere but was inclined to exaggerate greatly; he also viewed Dr. Cherry's report with caution for the reason that it depended significantly on the history related by the claimant. The Referee also found that the expense of the examination and report by Dr. Cherry was not the responsibility of the Fund inasmuch as both were done, primarily, if not exclusively, to aid claimant at the hearing and were not prepared by a treating doctor.

The Board, on de novo review, concurs with the findings and conclusions of the Referee and affirms and adopts his order as its own.

ORDER

The order of the Referee dated April 9, 1975, is affirmed.

WCB CASE NO. 74-3698 August 6, 1975

DWAIN LEE, CLAIMANT
Burton Fallgren, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund has requested Board review of a Referee's order which increased claimant's award of 20% unscheduled low back disability equal to 64° to 224°, an increase of 50%.

On September 17, 1973, claimant, a faller and bucker, sustained a compensable low back strain. Claimant began working in the woods at age 15 and had no other vocational training. He had an eighth grade education. Because of a severely disabled left arm, problems with both right and left hands, and a worn out back, claimant is now precluded from returning to the only occupation for which he is qualified.

At the Disability Prevention Division, claimant was cooperative, unusually conscientious but it was the concensus evaluation that he would be unable to resume his lifelong work.

The Referee, at hearing, found claimant a credible witness, highly motivated, and concluded claimant had suffered a loss of earning capacity equal to 70%.

The Board, on de novo review, finds the award generous, but not out of line, and affirms and adopts the order of the Referee.

ORDER

The order of the Referee dated March 7, 1975, is affirmed.

Counsel for claimant is awarded a reasonable attorney's fee in the amount of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 74-2530 August 6, 1975

SPENCER D. MILLER, CLAIMANT
George M. Jenks, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Claimant requests Board review of an order of the Referee which dismissed claimant's request for hearing on the ground that his claim for aggravation was not supported by a written opinion of a physician which met the requirements of ORS 656.273(4).

ORS 656.273, amended by Oregon Laws 1975, Ch 497 Sec 1, provides, among other things, that the adequacy of the physician's report is not jurisdictional. Sec 5 provides that the Act shall apply to all claims for compensable injuries that occur prior to the effective date of the Act.

The Board concludes that it has no alternative but to remand the claim for aggravation for a hearing on the merits under the provisions of ORS 656.273, as amended.

ORDER

The order of the Referee dismissing the request for hearing dated March 11, 1975, is reversed and the matter is remanded to the Hearings Division for a hearing on the merits.

WCB CASE NO. 74-1741 August 7, 1975

GEORGE L. ROYLANCE, CLAIMANT
Schouboe, Cavanaugh & Dawson,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund requests Board review of a Referee's order which remanded claimant's claim for aggravation to the employer for payment of benefits provided by law.

Claimant, a 62 year old sheet metal mechanic, suffered a compensable low back injury on November 30, 1972. The initial diagnosis was that of an acute lumbosacral strain and on April 19, 1973, the claim was closed by Determination Order which awarded time loss but no permanent partial disability.

Claimant, after receiving additional treatment from Dr. Logan, an orthopedist, wrote the Fund on April 5, 1974, complaining about his back pain which prevented him from working. Dr. Logan also sent reports to the Fund on September 27, 1973, and on April 16, 1974. These letters were construed by the Fund as an aggravation claim and denied on April 29, 1974. An additional report from Dr. Logan was submitted on July 18, 1974.

The Referee concluded that claimant's letter of April 5, 1974, could not be construed as an appeal from the Determination Order as it was addressed directly to the Fund rather than to the Board. The Referee further concluded that claimant had met his burden of proving an aggravation of the compensable injury through Dr. Logan's report dated July 18, 1974.

The Board, on de novo review, concurs with the findings and conclusions of the Referee, noting that the Fund failed to introduce any medical evidence which rebuts that produced in behalf of the claimant.

ORDER

The order of the Referee dated March 12, 1975, is affirmed.

Claimant's counsel is awarded as a reasonable attorney's fee the sum of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 74-3335 August 7, 1975

MINNIE HOLLINGER, CLAIMANT
Dye & Olson, Claimant's Attys.
Frank A. Moscato, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of an order of the Referee which remanded her claim for neck and cervical injury to the employer for payment of compensation from October 17, 1974, the date the claim was denied, until closed pursuant to ORS 656.268. Claimant contends that she is entitled to time loss commencing June 8, 1974, rather than on October 17, 1974.

Claimant suffered a compensable injury on August 2, 1973, when she hit her right hand and forearm. Subsequently, claimant was seen by Dr. Holm, an orthopedist, complaining of right shoulder and arm pain attributable to a muscle strain secondary to her industrial injury.

Claimant was last seen by Dr. Holm on July 3, 1974, still complaining of pain in her right shoulder; at that time she was under treatment with Dr. Tiley for an arthritic condition involving the cervical spine which Dr. Holm did not consider related to her wrist problem. Dr. Holm felt that claimant's condition was stationary insofar as her wrist problem and that she could return to her regular job on June 10, 1974. Dr. Holm felt that there might be an indirect relationship between claimant's present symptoms and her industrial injury. On November 14, 1974, claimant received an award of 5% loss of her right forearm equal to 7.5° and time loss from September 14, 1973, through June 7, 1974.

Claimant was seen by Dr. Melgard, a neurosurgeon, on July 9, 1974. Dr. Melgard found a chronic cervical strain and right shoulder involvement. On September 5, 1974, claimant was seen by Dr. Cohen complaining of pain in the back of her neck and between her shoulder blades and in her right shoulder. Dr. Cohen recommended traction, hot packs and massage to the neck and scapula muscles for a period of two to three months; he admitted her to Holladay Park Hospital on September 10, 1974.

On October 17, 1974, the employer denied responsibility for any medical treatment to claimant's neck and cervical region alleging that there was no relationship between than condition and the industrial injury.

The Referee felt that the medical evidence supported a finding that the cervical and right shoulder involvement originated from a muscular strain from the arm and that the shoulder neck symptoms arose therefrom and were work-related. The Referee chose October 17, 1974, as the commencement date of time loss benefits, stating in his Order on Reconsideration, that "because of the confused medical situation, the employer was not in a position to deny the claim until October 17, 1974. It would be unjust and inappropriate to extend the period of temporary total disability beyond that date."

The Board, on de novo review, concludes that the medical opinions expressed by both Dr. Holm and Dr. Cohen support the Referee's finding that the neck and cervical problems were compensable. The Board, however, finds that the claimant was not medically stationary insofar as her neck and cervical problems were concerned on June 7, 1974; that Dr. Holm's recommendation that her claim be closed related solely to her wrist problem. Dr. Cohen's letter of September 5, 1974, recommended medical treatment for the next two or three months and he hospitalized her on September 10, 1974; therefore, claimant could not have been medically stationary after September 10, 1974.

ORDER

The order of the Referee dated January 27, 1974, is modified to provide that the employer shall pay compensation from September 10, 1974, until termination is authorized pursuant to ORS 656.268. In all other respects the order is affirmed.

Claimant's counsel is awarded as a reasonable attorney's fee 25% of the additional temporary total disability benefits awarded by this order.

WCB CASE NO. 74-2191 August 8, 1975

HUGH STEWART, CLAIMANT
Hoffman, Morris, VanRysselberghe,
& Hargreaves, Claimant's Attys.
Supplemental Order Awarding
Additional Attorney's Fee

The Board's Order on Review entered July 30, 1975, in the above-entitled matter failed to take into consideration the fact that claimant's counsel, although he did not prevail at the hearing level, was ultimately successful upon review of the Referee's order and should, therefore, receive an attorney's fee in addition to the amount usually awarded for services in connection with Board review. The issue involved was rather complex, depositions were taken by claimant's counsel of Dr. Wysham, and Dr. Moffitt testified in behalf of claimant at the hearing.

ORDER

IT IS HEREBY ORDERED that claimant's counsel receive, in addition to the attorney's fee in the amount of $300, payable by the employer, for his services in connection with Board review, a reasonable attorney's fee in the amount of $1,000, payable by the employer.

WCB CASE NO. 74-3106 August 8, 1975

MARIE V. ROSS, CLAIMANT
Colley & Morray, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

A request for Board review was duly filed with the Workmen's Compensation Board in the above-entitled matter by the claimant. Subsequently, a second hearing was held in which the issue presently before the Board on the request for review was favorably ruled upon by the Referee. In the Matter of the Compensation of Marie V. Ross, Claimant, WCB Case No. 75-1569. Therefore, the issue presently before the Board is now moot.

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed.

WCB CASE NO. 74-2470 August 8, 1975

HARLIN J. COCHENOUR, CLAIMANT
Parker, Abraham & Bells,
Claimant's Attys.
Schouboe, Cavanaugh & Dawson,
Defense Attys.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The employer requests Board review of a Referee's order which required the employer to accept claimant's claim for a heart attack and pay benefits accordingly.

Claimant, 49 years old, had worked for Sunset Motors for 17 years in the mechanical and electrical preparation of new cars for sale and delivery. On March 11, 1974, claimant was using an electric buffer on the hood of a car when he experienced chest pains. Claimant was hospitalized and Dr. Wilkinson diagnosed a myocardial infarction. Claimant was released after three weeks with a good recovery.

The Board, on de novo review, concludes that the Referee, in finding the claim compensable, has misinterpreted the two key medical reports made by the treating doctor, Dr. Wilkinson, and the examining doctor, Dr. Wysham, a cardiologist.

Dr. Wysham's letter of December 11, 1974, stated that any connection between claimant's buffing the car on March 11, 1974, and his heart attack was coincidental; it could have occurred at any time. Dr. Wilkinson's opinion merely indicates that the onset of symptoms of an infarction occurred while claimant was at work, but does not causally relate claimant's work to the infarction.

The Board concludes there is no evidence of medical causation and the claim is not compensable.

ORDER

The order of the Referee dated January 8, 1975, is reversed.

WCB CASE NO. 73-3347 August 8, 1975

BENJAMIN G. HAAS, CLAIMANT
Willner, Bennett, Meyers, Riggs,
& Skarstad, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson,
& Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of the Referee's order which sustained the employer's denial of claimant's claim.

On August 1, 1973, claimant had filed his claim for benefits for nervous tension alleging that his emotional problems were the result of his employment. The employer denied the claim on the ground that the emotional condition was not caused by claimant's job. The claimant appealed and the Referee, after considering all of the evidence, affirmed the denial, remarking that any discussion of the evidence would militate to the detriment of at least one of the parties.

The Board, on de novo review, agrees with the opinion expressed by the Referee that a discussion of the evidence, which the Board has carefully and completely read, would serve no beneficial purpose and might, in fact, be detrimental to some of the parties involved. Suffice it to say that the evidence does indicate that the situations in which claimant found himself while off the job were not significantly different than those which he encountered while at work. The evidence does not justify a finding that the alleged pressures of claimant's job were major contributing factors to his medical condition.

The Board affirms and adopts the order of the Referee as its own.

ORDER

The order of the Referee dated June 27, 1974, is affirmed.

WCB CASE NO. 73-3761 August 8, 1975

RALPH J. MARTIN, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF
Cross-request by Claimant

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund requests Board review of the Referee's order which directed it to accept claimant's claim for aggravation. Claimant cross-requests Board review, contending that penalties should have been assessed and that the attorney's fee awarded by the Referee was not sufficient.

Claimant, a 40 year old welder mechanic, suffered a compensable injury on September 21, 1971, for which he was awarded 48° for 15% unscheduled low back disability by Determination Order dated November 10, 1972. Claimant filed a request for hearing. Subsequently, claimant was examined by Dr. Holland, a psychiatrist, who felt that claimant had significant psychiatric disease and that his low back symptoms were emotional in origin. In March 1973, pursuant to stipulation, the psychiatric impairment was recognized and claimant was awarded an additional 50° for unscheduled permanent partial disability.

Claimant, thereafter, continued to have problems with his low back and he was seen by numerous specialists. Dr. Luce, on January 22, 1974, was of the opinion that there was a reasonable basis, medically, for reopening the claim for further evaluation and treatment, if necessary. Dr. Donahoo also examined claimant and, in his report of March 26, 1974, noted a change in claimant's condition since May 4, 1972, when he first evaluated claimant's condition.

Although Dr. Donahoo referred to a high white blood count upon which he had previously commented and which was also noted in Dr. Luce's report, no one ever made an analysis; the Fund completely ignored this aspect of the case.

The Referee found that claimant had proved by preponderance of the evidence that he had suffered an aggravation of disability since March 1973, the date of the last award or arrangement of compensation. The bases for this conclusion are succinctly set forth in his opinion. The Referee awarded an attorney's fee of $1,000 to be paid by the Fund but found that penalties were not applicable.

The Board, on de novo review, concurs with the findings and conclusions of the Referee and affirms and adopts them as its own.

With respect to the adequacy of claimant's counsel's fee, the Board calls his attention to the provisions of ORS 656.388(2).

ORDER

The order of the Referee dated November 12, 1974, is affirmed.

Claimant's counsel is awarded as a reasonable attorney's fee the sum of $300 payable by the State Accident Insurance Fund for his services in connection with Board review.

WCB CASE NO. 74-1996 August 8, 1975

ELOISE HAIR, CLAIMANT
Pozzi, Wilson, & Atchison,
Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson,
& Schwabe, Defense Attys.
Request for Review by Employer
Cross-request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

The employer asks for Board review of the Referee's order that claimant's condition was not medically stationary and remanded her claim to the employer. The Referee also approved payment of attorney's fees out of the additional compensation he awarded and any additional permanent disability award claimant might receive. Claimant filed a cross-request for Board review.

Claimant suffered a compensable injury to her left knee in March 1972. After receiving medical treatment which failed to improve her condition, claimant was referred to Dr. Maks, internist specializing in arthritic conditions; Dr. Maks felt that, at that time, claimant did not have rheumatoid arthritis.

Dr. Geist, who initially treated claimant felt claimant had pre-existing chondromalacia which was symptomatic by her work activities and, in December 1972, performed a left patellectomy. While hospitalized, claimant noted progressive pain, swelling and stiffness in the knee. In March 1973, Dr. Maks, after examining claimant, diagnosed rheumatoid arthritis.

Claimant contends that the rheumatoid arthritis was caused by both physical and emotional factors and was triggered by the industrial injury and the subsequent treatment therefor. Dr. Maks felt that rheumatoid arthritis could be considered a psychosomatic illness; he related the claimant's rheumatoid arthritis to the injury based on reasonable medical probability that stress can cause the disease.

Dr. Rosenbaum, an internist, opined that the rheumatoid arthritis was not causally related to the industrial injury. Both doctors agree that the disease is not a traumatic disease, that its cause is unknown. Both agree claimant's treatment should include physical and emotional rest.

The Referee found that claimant was under stress from the time of her injury through the surgery and subsequent thereto. He also found that Dr. Maks' testimony indicated that claimant's condition was not medically stationary at the time her claim was closed on May 15, 1974, by a Determination Order which awarded claimant 52.5° for partial loss of the left leg.

The Board, on de novo review, concludes, as did the Referee, that the medical opinion expressed by Dr. Maks, when taken into consideration with other evidence, is more convincing than that of Dr. Rosenbaum on the issue of whether claimant's rheumatoid arthritic condition is the result of her industrial injury. The Board also concurs with the Referee's conclusion that the claimant was not medically stationary insofar as her rheumatoid arthritis is concerned at the time that her claim was closed and it should be reopened for treatment of said condition.

However, the Board finds that the employer, in opposing claimant's contention that her arthritic condition was compensable and refusing to reopen her claim for treatment thereof has, in fact, made a partial denial of claimant's claim. Therefore, the Board concludes that claimant's counsel is entitled to be paid a reasonable attorney's fee for his services at the hearing, to be paid by the employer, rather than based on a percentage of the additional compensation claimant receives.

ORDER

The order of the Referee dated March 3, 1975, is modified to the extent that claimant's counsel is awarded as a reasonable attorney's fee the sum of $800 to be paid by the employer, GAF Corporation. In all other respects the Referee's order is affirmed.

Claimant's counsel is awarded as a reasonable attorney's fee the sum of $300, to be paid by the employer, GAF Corporation, for his services in connection with Board review.

WCB CASE NO. 74-1971 August 11, 1975

DAVID A. WORKINGER, CLAIMANT
Howeiler and Richards, Claimant's Attys.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of a Referee's order which sustained the employer's denial of claimant's claim for compensation for a heart attack.

Claimant, a cook at the International Kings Table, alleged that stress at work plus friction between his boss and himself were materially contributing factors in the heart attack he suffered on September 10, 1973.

Dr. Rogers, a cardiologist, said claimant had had no infarction but rather an attack of acute coronary failure; i.e., severe heart pains due to inadequate blood flow to the heart muscle without significant actual permanent loss to the muscle. The cause for the attack occurring when it did, according to Dr. Rogers, was that the anterior descending coronary artery had been narrowing in a progressive fashion over many years and had reached critical proportions at the time of the attack. He felt this could have occurred at any point in time and there was no probable relationship between claimant's stress and activity and the heart attack.

Dr. Giedwoyn, the treating physician, stated that stress could be one of the material factors in a heart attack, but this statement was made in general terms and not specifically related to the attack suffered by claimant.

The Board, on de novo review, concludes the opinion of Dr. Rogers is more persuasive and affirms and adopts the Referee's findings and conclusion.

ORDER

The order of the Referee dated March 14, 1975, is affirmed.

WCB CASE NO. 74-4315 August 11, 1975

ROY IMEL, CLAIMANT
Robert L. Olson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of the Referee's order which affirmed the denial of claimant's claim.

Claimant sustained a compensable injury to his right elbow on August 5, 1974. Claimant was employed as a park attendant and one of his duties was to dump garbage cans into a steel garbage drop box. Claimant finished the work day; however, the pain was so severe that he went to the hospital for emergency care. After a few days, he returned to work and again bumped his arm. The arm got worse and claimant saw Dr. Wells, an orthopedic surgeon, who found a prominent mature bony extosis over the tip of an olecranon which he surgically excised on November 4, 1974.

Dr. Wells testified that such a spur as he had removed would develop over a long period of time and is usually caused from repeated trauma in that area. Claimant testified that he had had prior experiences bumping his elbow in the course of work as a park attendant, usually when he was dumping garbage cans. At first he stated he had never bumped his arm at work prior to August 5, 1974, but later stated that he had bumped it several times but not seriously enough to require him to see a doctor. The Referee concluded that claimant ailed to sustain his burden of proof as the testimony he had given was unreliable and inconsistent and the medical evidence, by itself, was not sufficient to establish the necessary relationship.

The Board, on de novo review, concludes that claimant was more confused than inconsistent; that what claimant was attempting to say, to the best of his ability, was that the first time he required medical treatment after bumping his elbow was on August 5, 1974, although he had bumped it many times prior thereto during the course of his work. The Board concludes that this is an example of repetitive trauma, a conclusion supported by the order of Dr. Wells, and should be held compensable.

ORDER

The order of the Referee dated March 24, 1975, is reversed.

Claimant's counsel is awarded as a reasonable attorney's fee for his services at the hearing level a sum of $850 payable by the State Accident Insurance Fund.

Claimant's counsel is awarded as a reasonable attorney's fee the sum of $300, payable by the State Accident Insurance Fund, for his services in connection with Board review.

WCB CASE NO. 74-4228 August 11, 1975

HAROLD E. TURNER, CLAIMANT
Sahlstrom, Lombard, Starr & Vinson,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Claimant requests Board review of an order of the Referee which dismissed claimant's request for hearing on the ground that his claim for aggravation was not supported by a written opinion of a physician which met the requirements of ORS 656.273(4).

ORS 656.273, amended by Oregon Laws 1975, Ch 497 Sec 1, provides, among other things, that the adequacy of the physician's report is not jurisdictional. Sec 5 provides that the Act shall apply to all claims for compensable injuries that occur prior to the effective date of the Act.

The Board concludes that it has no alternative but to remand the claim for aggravation for a hearing on the merits under the provisions of ORS 656.273, as amended.

ORDER

The order of the Referee dismissing the request for hearing dated April 2, 1975, is reversed and the matter is remanded to the Hearings Division for a hearing on the merits.

SAIF CLAIM NO. FC 75184 August 11, 1975

ROY PHILLIPS, CLAIMANT
Pozzi, Wilson & Atchison,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Own Motion Order

By Own Motion Order of Remand, dated April 24, 1975, this matter was referred to the Hearings Division for receipt of evidence with respect to claimant's claim for increased compensation for his injury of April 28, 1967.

Claimant sustained a compensable injury April 28, 1967, when he stepped on a nail, punctured his right foot and developed infection. Claimant continued to have problems and Dr. Bachhuber performed surgery excising a portion of the bone from the base of the second toe to relieve this joint. The claim was closed by a Second Determination Order dated December 27, 1968, which awarded claimant 50% loss use of the right second toe.

In 1973, Dr. Schuler reported claimant had chronic complaints which were the result of factors such as gout and a congenital anomaly, in addition to the trauma sustained at the time of the injury. Claimant also had returned to his job as a drywall applicator which required him to use his foot as a "kicker."

The Referee recommended the Board give claimant favorable relief under ORS 656.278. The Evaluation Division of the Workmen's Compensation Board recommended 25% loss use of the right foot.

After considering the record made by the Referee and a recommendation from the Evaluation Division, the Board finds that claimant is entitled to a greater award of permanent disability than he previously received.

ORDER

Claimant is hereby awarded 25% loss use of the right foot. This is in lieu of, and not in addition to, the award granted by the Second Determination Order dated April 28, 1968.

Claimant's attorney is awarded as a reasonable attorney's fee 25% of the increase awarded claimant by this order, payable as paid, not to exceed $2,300.

WCB CASE NO. 74-4375 August 11, 1975

JOHN A. TILANDER, CLAIMANT
Pozzi, Wilson & Atchison, Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by Claimant.

Reviewed by Commissioners Moore and Sloan.

Claimant requests Board review of a Referee's order which affirmed a Determination Order, dated November 27, 1974, which awarded claimant 48° for 15% unscheduled low back disability.

Claimant, now 32 years old, was employed as a commercial painter when he sustained an acute back strain on September 20, 1973. Claimant is now precluded from returning to this occupation or any occupation involving heavy lifting or bending.

In an effort to increase his employability, and upon advice of his doctors to change his occupation, claimant took a course in real estate sales, but was unable to pass the examination. Under the auspices of the Division of Vocational Rehabilitation, claimant is now enrolled at a community college, taking a junior accounting course.

There is no question that claimant is well motivated to return to work; however, he cannot return to work as a painter and he was earning much more in that type of work than he probably will be able to earn as a junior accountant. The Board, on de novo review, concludes that claimant's permanent disability, measured by loss of earning capacity, is greater than that for which he has been awarded. The Board concludes that claimant is entitled to 35% unscheduled low back disability, an increase of 20% over the 15% previously awarded claimant.

ORDER

The order of the Referee dated March 21, 1975, is modified. Claimant is awarded 112° of the maximum of 320° allowable for unscheduled low back disability. This is in lieu of, and not in addition to, the award made by the Determination Order dated November 27, 1974.

Claimant's counsel is allowed as a reasonable attorney's fee, 25% of the increased compensation awarded by this order, payable as paid, not to exceed $2,300.

WCB CASE NO. 74-4127 August 13, 1975

BILLY TAIT, CLAIMANT
Richard Kropp, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests Board review of a Referee's order which increased his award of permanent partial disability from 35% to 45% loss of the right foot.

Claimant sustained a compensable injury August 30, 1973, diagnosed as a fracture dislocation of the right ankle. Surgery was performed and a leg brace was prescribed to reduce the pain. After the fractures healed, claimant still had complaints of pain, swelling, discoloration and a burning sensation; however, these symptoms, although limiting, do not deprive claimant of more than 45% loss of use and function of his right foot.

Dr. Burr indicated degenerative changes would be developing, however, if this occurs claimant can seek benefits under either 656.245 or 656.273.

The Board, on de novo review, concurs with the finding of the Referee.

ORDER

The order of the Referee dated March 31, 1975, is affirmed.

WCB CASE NO. 75-1209 August 14, 1975

LOUIS E. ROBINSON, CLAIMANT
Galton & Popick, Claimant's Attys.
Dept. of Justice, Defense Atty.
Order of Dismissal

A request for review having been duly filed with the Workmen's Compensation Board in the above-entitled matter by the State Accident Insurance Fund, and said request for review now having been withdrawn;

And the cross request for review filed by claimant's counsel also having been withdrawn;

IT IS THEREFORE ORDERED that the request for review and cross request for review now pending before the Board are hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 74-1843 August 14, 1975

VERNON MICHAEL, CLAIMANT
Evohl Malagon, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order on Motion

On April 2, 1975, claimant moved to dismiss a request for Board review filed by the D. R. Johnson Lumber Company which is an employer contributing to the State Accident Insurance Fund.

Claimant contends that only the State Accident Insurance Fund and not a contributing employer is given standing by the law to seek Board review. Both the Fund and the employer resist the motion.

ORS 656.289(3) provides that a Referee's order becomes final after 30 days unless "one of the parties requests a review by the Board under ORS 656.295." ORS 656.002(17) defines "party" as "a claimant for compensation, the employer of the injured workman at the time of the injury, or the State Accident Insurance Fund." (Emphasis supplied)

ORS 656.262(1) distinguishes between the responsibility of DRE's and contributing employers regarding the processing of claims. That section makes the Fund responsible for processing claims of contributing employers while DRE's remain personally responsible. It appears these distinctions were consciously and intentionally included in the statute in order to continue under the new law as to the State Accident Insurance Fund, the same relationship created between a contributing employer and the old State Industrial Accident Commission under the pre-1965 Workmen's Compensation Law.

> "Under the old Law, an employer had the right to elect whether or not he would contribute to the State Industrial Accident Fund. If he did contribute, he was immune from actions under the common law and the Employer's Liability Law for injuries to employees; he had turned over to the State his personal responsibility, and his workers obtained the benefits of workmen's compensation from the State Fund." (Emphasis in the original) 45 OLR 40 at 52 The 1965 Workmen's Compensation Law: a New Model for the States. See also Wise v. SIAC, 148 Or 461 (1934)

We think it is clear that only the State Accident Insurance Fund and not the contributing employer has been given the status of a "party" to proceedings brought under ORS 656.283 and 656.289 and 656.295. Thus the request for Board review made by D. R. Johnson Lumber Company did not operate to toll the running of the appeal period on the Referee's order or to invest the Board with jurisdiction to review the order. It follows therefore, that the attempted request for Board review must be dismissed and the Referee's order dated January 28, 1975, declared final by operation of Law.

IT IS SO ORDERED.

WCB CASE NO. 75-772 August 14, 1975

HELEN VAN DOLAH, CLAIMANT
Jay Whipple, Claimant's Atty.
Noreen Saltveit, Defense Atty.
Own Motion Order

Pursuant to the Board's Own Motion Order dated April 21, 1975, this matter was referred to the Hearings Division to take evidence upon the issue of whether claimant needs further medical care and treatment relating to her industrial injury of December 16, 1968, the extent of her permanent partial disability attributable to the 1968 injury and make recommendations to the Board.

Claimant developed traumatic tendonitis of the elbow which required, over a two year period, conservative treatment, long periods of immobilization in a cast and, eventually, surgery. Her condition was complicated by secondary developments of shoulder pericapsulitius. As a result of various awards claimant has now received a total of 30% loss of function of the left arm and 20% unscheduled disability for the left shoulder.

Claimant underwent vocational retraining in accounting and bookkeeping and, in January 1974, she gained employment operating a posting machine which required only use of her right arm. After 19 months, she was terminated because her employer desired a typist as well as a posting clerk.

Claimant then sought additional medical attention. She had constant left arm pain which radiated across the chest and caused severe headaches. She was referred to Dr. Grewe who performed a sympathectomy. In his report of January 14, 1975, Dr. Grewe felt claimant's condition was related to her 1968 injury and required the medical care she had received. On June 9, 1975, he released her for light type work. She has found none.

The Referee accepted the opinion of Dr. Grewe and recommended that the claim be remanded to the employer for acceptance and payment of benefits until her claim can be closed. He did not feel claimant was now medically stationary.

The Board accepts the recommendations of the Referee.

ORDER

Claimant's claim is remanded to the employer, Chase Bag Company, for payment of the treatment received from Dr. Grewe and payment of temporary total disability from November 5, 1974, until closure is made under ORS 656.278.

Counsel for claimant is awarded as a reasonable attorney's fee, 25% of the increased compensation which claimant will receive from this order and 25% of any additional compensation she may receive upon closure of her claim under ORS 656.278.

WCB CASE NO. 74-1687 August 14, 1975

CLYDE SIMMONS, CLAIMANT
Evohl Malagon, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant
Cross Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

Claimant has requested Board review of a Referee's order which found claimant had not sustained an aggravation of his industrial injury, but that he was entitled to medical services under ORS 656.245 and awarded claimant's counsel a fee of 25% of the cost of these medical services to be paid by claimant to his attorney.

The State Accident Insurance Fund has filed a cross request for review of that portion of the Referee's order relating to payment of medical services under ORS 656.245.

Claimant suffered a compensable right shoulder injury on August 4, 1971. Dr. Hanford diagnosed a frozen shoulder, injected cortisone and a nerve block. He felt claimant had minimal impairment The claim was closed August 14, 1972, with an award of 48° unscheduled right shoulder disability. By stipulation on October 27, 1972, an additional award of 16°, making a total award of 64° was made. Claimant returned to mill work but eventually quit in late 1973 and has not worked since.

The Referee found that the medical reports submitted in support of the claim failed to prove an aggravation.

The Referee concluded, and the Board, on de novo review, agrees, that although claimant had failed to establish a claim of aggravation, he was entitled to benefits under ORS 656.245. Bowser v Evans Products Co., 99 Or Adv Sh 3288.

With respect to that portion of the Referee's order which allowed claimant's attorney an amount equal to 25% of the total cost of medical services allowed, to be paid directly from the claimant to counsel, the Board takes notice that since the entry of the Referee's order Cavins v SAIF, 75 Or Adv Sh 535 was reversed by the Supreme Court, Cavins v SAIF, 75 Or Adv Sh 1963, and the Fund is responsible for the payment of the attorney fee if the claimant prevails under ORS 656.245.

ORDER

The Board remands this matter to the Referee to fix the amount of the attorney's fee, said fee to be paid by the State Accident Insurance Fund. In all other respects, the order of the Referee dated March 19, 1975, is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NOS. 73-1582
AND 74-475 August 18, 1975

FLOYD PARAZOO, CLAIMANT
David Vandenberg, Claimant's Atty.
Dept. of Justice, Defense Atty.
Amended Order on Review

The Order on Review entered July 24, 1975, in the above-entitled matter erroneously referred to the injury of July 31, 1968, as an injury to claimant's left middle finger. The medical evidence indicates that it was claimant's right middle finger which was injured and ultimately amputated. The Order on Review, therefore, should be amended by substituting the word "right" for the word "left" in the third line of the second paragraph of said order.

IT IS SO ORDERED.

WCB CASE NOS. 74-4584,
74-3661
AND 74-3468 August 18, 1975

NOAH DAVID BARTLETT, CLAIMANT
Galton & Popick, Claimant's Attys.
Dept. of Justice, Defense Atty.
Supplemental Order Awarding Attorney Fee

The Board's Order on Review issued July 25, 1975, in the above-entitled matter failed to include an award to claimant's attorney of a reasonable attorney's fee for his services at the hearing before the Referee. Claimant's counsel is entitled to such an attorney fee payable by the State Accident Insurance Fund, inasmuch as the order of the Referee was reversed and claimant's claim was remanded to the Fund for closure under the provisions of ORS 656.268 by the aforesaid Order on Review.

ORDER

IT IS HEREBY ORDERED that claimant's counsel receive a reasonable attorney's fee in the amount of $500, payable by the State Accident Insurance Fund, for his services at the hearing before the Referee.

WCB CASE NO. 74-3339 August 18, 1975

DENNIS LEE BIGGS, JR., CLAIMANT
Frank Susak, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant has requested Board review of a Referee's order which affirmed the State Accident Insurance Fund's partial denial of his claim for psychological problems.

This claimant was a 23 year old window washer who fell from a ladder on April 3, 1974, landing on his back. The Fund accepted the claim for the physical injury, but issued a partial denial of responsibility for claimant's emotional problems and subsequent hospitalization for an overdose of drugs.

The Referee found no credibility in claimant's testimony, appearance or attitude and sustained the partial denial. The reports of both Dr. Hickman and Dr. Phillips were based on claimant's statements to them and, as such, little weight is given to them by the Board on their de novo review of the matter.

The Board concurs with the Referee that claimant has failed to present sufficient evidence to sustain his burden of proof.

ORDER

The order of the Referee dated March 6, 1975, is affirmed.

SAIF CLAIM NO. BC 23995 August 18, 1975

WILLIAM PORTER, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Order

By its Own Motion Order dated March 10, 1975, the Board directed the Hearings Division to convene a hearing in the above-entitled matter, take testimony and give claimant an opportunity to present evidence to justify his claim for further benefits.

The hearing was held on March 10, 1975, with claimant appearing and representing himself. A transcript of the proceedings has been prepared and forwarded to the Board for its consideration.

In reviewing the record, the Board notes the original claim was filed for an injury to the distal portion of the right middle finger occurring in 1966, which ultimately resulted in amputation. Medical records reflect that claimant has received proper, authorized treatment for the finger injury.

Claimant urges that his head and neck problems, as well as many other physical complaints, are related to and resulted from the industrial injury involving the right middle finger. The Board, on de novo review, can find no medical evidence to substantiate such causal relationship. Without such medical evidence, the Board is unable to grant further benefits to claimant under its Own Motion jurisdiction, and the matter is hereby dismissed.

WCB CASE NO. 73-527 August 18, 1975

JACK E. BARRATT, CLAIMANT
Don G. Swink, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The Leonetti Furniture Manufacturing Company, (Leonetti) through Employers Insurance of Wausau, (Wausau) has requested Board review of a Referee's order seeking a reversal of his ruling that its November 14, 1972, Board approved disputed claim settlement with claimant was void.

The State Accident Insurance Fund has requested review of that part of the Referee's order finding claimant permanently and totally disabled but not deciding whether the State Accident Insurance Fund or Wausau was obligated to provide the compensation awarded to claimant. The State Accident Insurance Fund seeks an order placing the liability on Leonetti and Wausau.

This case has had a long and involved history. These are the facts:

Prior to the claims in question, claimant had suffered two compensable injuries; the first to his head and neck in 1960 and the second to his low back in 1963. For each of these injuries, he was awarded 20% of the maximum compensation then allowable for unscheduled permanent disability.

In 1967, he secured employment at Leonetti Furniture Manufacturing Company in Portland as a rip sawyer. While so employed on May 5, 1971, claimant, then 60 years old, suffered another compensable injury to his spine. He experienced a sudden lightning-like pain between his shoulders with a gradual onset of low back pain the same day. A claim

was filed with and accepted by the State Accident Insurance Fund which was then liable for the compensation injuries of Leonetti workmen.

Claimant was treated conservatively by orthopedist Dr. Paul Campbell, for an acute lumbosacral and cervical strain and aggravation of extensive degenerative arthritis and was able to return to work on July 22 although he was not yet considered medically stationary.

After two weeks of work, Dr. Campbell reported claimant was working regularly at his regular job and doing well except for some back ache at night and snapping in the cervical spine occasionally. By November 30, 1971, Dr. Campbell reported claimant was not yet medically stationary but that he was sleeping well and his discomfort was mainly in the left shoulder. On January 17, 1972, claimant was examined by Dr. Campbell at a regular check-up appointment. Neck motion at that time was limited and somewhat painful.

On January 18, 1972, claimant was reassigned from the rip-saw job to the job of assembling davenport frames. While working at that task, he experienced the onset of numbness in his right arm while using a staple gun and later in the morning, while turning a frame, he again experienced a lightning-like pain in his back, head, and neck. He became dizzy and left work about 10:00 a.m.

He telephoned Dr. Campbell's office where the office nurse, after learning of his increasing neck and back symptoms and headaches, advised him to use the anti-imflammatory medicine prescribed by Dr. Campbell on the 17th, to rest, and if his symptoms subsided, to return to work on the 19th.

He attempted to work again on January 21, 1972, but again experienced similar symptoms concurring with the work effort.

He returned to Dr. Campbell, who thereupon referred him to Dr. Martin C. Johnson, a neurosurgeon, for consultation. X-rays and myelography revealed cervical spondylosis with cervical nerve root compression at C-6 bilaterally, secondary to osteophyte formation at C5-6, greater on the left than the right.

Dr. Johnson commented:

> "This patient has developed intractable arm shoulder pain with radiation into the thumb, four fingers bilaterally greater on the left than the right over the last three months. He has had several efforts of conservative therapy including a neck bracing and traction without sufficient relief. It is felt that on the basis of these plain x-rays which demonstrated moderately advance degenerative changes at the C4-5, C5-6, C6-7, and C7-T1 interspaces with reverse curvature that myelography was indicated to check on the degree

> of nerve root involvement. It is felt that his symptoms are compatible with nerve root compression at the one level that the patient has significant objective x-ray evidence of disease at. Perhaps this would best be treated by anterior cervical fusion discectomy C5-6. I will discuss it with the patient accordingly."

On February 3, 1972, Dr. Johnson performed an anterior cervical fusion and discectomy at C5-6.

Claimant filed a new workmen's compensation claim with the employer claiming compensation for the January 18, 1972, incident.

Leonetti had changed its workmen's compensation coverage on October 1, 1971, from the State Accident Insurance Fund to Wausau and therefore sent the claim to Wausau for processing. Wausau learned of claimant's May 5, 1971, injury and, on April 24, 1972, denied the claim as not arising out of and in the course of employment during the period they carried Leonetti's coverage. They told claimant they thought his problem was a continuation of the May 5, 1971, injury and suggested that he seek reopening of that claim. (Actually, claimant's State Accident Insurance Fund claim was not then closed.)

The initial hospital reports regarding the May 1971 injury reveal that when claimant first went to the hospital on May 5, 1971, and was examined by Dr. Filmore Carter at the emergency room, he had no low back complaints, but elevation of the arms caused pain in the neck and shoulder, worse on the left, and that his head ached. Dr. Carter ordered x-rays of the cervical and dorsal spine plus therapy.

Other medical reports reveal that he gradually developed low back pain that day for which he was thereafter hospitalized and treated for a period of 10 days. The final diagnosis upon discharge was acute lumbosacral and cervical strain. The State Accident Insurance Fund, however, decided to accept the claim as a low back strain only, although it did not communicate its decision to claimant. It apparently paid all claimant's medical expenses, however.

After receipt of Wausau's denial, claimant apparently made a specific claim for compensation from the State Accident Insurance Fund for the neck problem.

On May 12, 1972, the State Accident Insurance Fund denied it was responsible for claimant's neck condition. It decided that claimant had suffered a new accident on January 18, 1972, and recommended that claimant file a claim with Leonetti and thus Wausau.

Having already done so to no avail, claimant retained an attorney and requested hearings on both denials. Pending the hearing, the Administrator of the Board's Compliance Division suggested that claimant ought to be receiving compensation and suggested that one of the carriers provide it. Wausau agreed to do so with the understanding that it would not be considered an admission of liability or compensability on Wausau's part.

The issue framed at the first hearing was: Which insurance carrier was liable for the compensation due claimant on and after January 18, 1972?

At the hearing, the State Accident Insurance Fund contended that claimant had suffered a superseding and intervening accident while at work on January 18, 1972, while Leonetti was covered by Wausau. Wausau in turn attempted to show that whatever happened to claimant was simply a continuation of the symptomatology produced by the May 5, 1971, injury. It attempted to show that the work effort in which claimant was engaged on January 18, 1972, was not a material cause of the lightning-like pain which he experienced that morning; that it was perhaps a spontaneous development of pain caused by the natural progression of his severe degenerative arthritis, which fortuitiously coincided with his activity on the job.

In his Opinion and Order dated October 10, 1972, Hearing Officer Pattie stated:

> "After a careful review of the testimony and the documentary evidence in this file, the Hearing Officer finds that claimant had degenerative disc disease since 1961, and that there was a possibility that an anterior cervical fusion would be necessary at some undetermined time. The Hearing Officer also finds that claimant sustained both a neck and a back injury on May 5, 1971. The low back symptoms had receded, but from November 15th until January 17th, claimant's neck became progressively worse. This increase in symptoms was caused by the underlying degenerative disc disease, by the aggravation of that disease as a result of the injury of May 5, 1971, and by the strenuous activity of handling heavy lumber at the rip-saw in the course and scope of his employment in November and December of 1971 and January of 1972. The Hearing Officer further finds there was an "incident" on January 18, 1972, which precipitated a sudden sharp shooting pain in claimant's neck as a result of lifting and turning a davenport frame in the course and scope of claimant's employment."

Following the hearing, Wausau's attorney, Roger Warren, presented the Hearing Officer with a four-page brief contending in essence that not every "event in employment" is a new compensable injury. He contended that:

"The 'event in employment' on January 18, 1972, in all probability was not a compensable trauma as we know that term and its application***." (Joint Exhibit A)

Despite Wausau's argument, the Hearing Officer ordered Wausau to accept claimant's claim for the January 18, 1972, incident as a new injury apparently agreeing with Dr. Campbell's analysis of the January 1972 events as an accidental injury connected with the work being done at the time. (Deposition of Dr. Campbell, Page 5, line 6 through Page 7, line 2.) He affirmed the State Accident Insurance Fund's denial.

Leonetti, through Wausau, requested Board review but the Fund was not served with a copy of the request. Before the review occurred claimant and Wausau presented a stipulated settlement for Board approval wherein claimant agreed to recognize Wausau's letter of denial as corrected in consideration of the payment of "a certain sum previously agreed to." After examining the available files and records of the Board concerning the matter under appeal, and after determining the size of the "certain sum previously agreed to", the Board, on November 14, 1972, approved the settlement pursuant to ORS 656.289(4) and dismissed the request for review thus rendering the Hearing Officer's order dated October 10, 1972, final by operation of law. A copy of the Order was mailed to all parties to the hearing.

Meanwhile, the State Accident Insurance Fund had continued to process the claimant's May 5, 1971, injury claim. On December 11, 1972, Dr. Campbell reported that claimant's low back condition was medically stationary with residual limitation of motion and low back pain which necessitated the wearing of a back brace on a fairly regular basis.

On February 7, 1973, the Board's Evaluation Division concluded that claimant's permanent low back disability remaining from the May 5, 1971, injury equalled 60% of the maximum allowable for unscheduled disability and it entered its Determination Order accordingly.

On February 15, 1973, claimant requested a hearing contesting the adequacy of the permanent disability award.

On March 16, 1973, the State Accident Insurance Fund also requested a hearing, alleging:

1. That claimant had suffered no permanent disability as a result of the May 5, 1971, injury.

2. That claimant was permanently totally disabled as a result of the alleged compensable injury of January 18, 1972, while Wausau was insuring Leonetti's workmen's compensation liability.

The Fund moved to join Wausau in the requested hearing, contending that Wausau was a necessary party to the hearing. The State Accident Insurance Fund alleged that it had become aggrieved by the Board's order approving the settlement between claimant and Wausau because:

1. Claimant had requested a hearing on the 1971 injury Determination Order seeking additional permanent disability compensation.

2. The State Accident Insurance Fund intended to prove claimant was rendered permanently totally disabled by the disputed 1972 injury and

3. The State Accident Insurance Fund's permanent disability liability for the 1971 injury would legally be extinguished upon a showing that claimant was rendered permanently totally disabled by the disputed 1972 injury.

The State Accident Insurance Fund further alleged that Wausau could be joined in the requested hearing because the settlement approved by the Board was void as it did not involve a bona fide dispute over the compensability of the January 18, 1972, incident.

A hearing on the motion to join Wausau was held. Wausau contended that claimant did not suffer a new accidental injury within the meaning of the Oregon Workmen's Compensation Law on January 18, 1972, and that its disagreement with claimant thus represented a bona fide dispute under ORS 656.289(4).

The Referee found that the dispute was essentially between the two insurance companies over which of them was liable for the compensation which the employer owed the claimant. He found the Board's order approving the stipulation void for lack of jurisdiction and granted the Fund's motion to join Wausau.

Wausau requested Board review of the Order joining it in the proceeding, but the Board ruled the request for review was premature.

On May 13, 1974, the hearing on extent of disability was held.

Claimant is now 62 years old with a 10th grade education. His work experience has consisted primarily of furniture manufacturing, but it has also included truck driving, motel management and operating a small grocery store before he last became employed in furniture manufacturing again. He has not been gainfully employed since January 21, 1972. Although claimant recognizes the validity of Wausau's denial, he testified that the work he was doing on January 18, 1972, aggravated both his neck and low back.

Claimant continues to wear a low back brace which he first began wearing in 1968 and 1969. With it, he was able to work at Leonetti, even after the May 5, 1971, injury, until he left in January 1972.

Before the May 1971 injury, claimant did his own yard work. Afterwards, he continued to mow his lawn for a time, avoiding, however, tasks involving stooping, such as trimming the grass. Eventually, he left all the yard work for his wife. Since January 1972, he has hired his yard work done.

He has also been unable to life weights, such as a bag of groceries since January 1972, explaining that he experiences painful spasms in the muscles of his arms, shoulders, back and neck. More recently, he has developed essential hypertension, anginal pain due to arteriosclerotic heart disease and a hand tremor. According to the physician treating his cardiovascular problem, he is limited to sedentary activities only by that condition alone. It developed after the claims in question and is not related to his employment.

Dr. Campbell's closing examination and report of December 1972 described claimant's low back pain and limitation of motion as referred to earlier in this order. X-rays were also taken at that time which demonstrated generalized degenerative arthritis in the cervical spine and marked degenerative changes throughout the low back.

Prior to the latest hearing, claimant was also examined by another orthopedist, Dr. Theodore J. Pasquesi. X-ray studies done at that time were compared with films exposed at Emanuel Hospital in May 1963. The comparison revealed that degenerative disc disease was present at L5-S to a degree similar to that currently found, with only a mild increase in marginal spurring from the minimal degree found in 1963.

His examination also revealed limitations of motion and signs of pain which he calculated produced impairments equal to 35% loss of the whole man. Including claimant's mental condition, his tremor and cardiovascular condition, as well as his orthopedic complaints, Dr. Pasquesi thought claimant was permanently and totally disabled, but that he was not permanently and totally disabled based on his orthopedic limitations alone.

Claimant uses a cane and a bed board, but he has used the bed board since before 1971. As a result of his combined physical ailments, claimant has retired from the labor force.

The Referee found that claimant's conditions had rendered him permanently and totally disabled and ordered Leonetti to pay the benefits without deciding which insurer should respond to the order on Leonetti's behalf. He did, however, reinstate the Hearing Officer's order of October 10, 1972, apparently to give Wausau the opportunity to carry on the appeal it had instituted before entering into the stipulated settlement in question.

On review, Wausau first questions the State Accident Insurance Fund's right to collaterally attack the Board's order approving the stipulation and dismissing review. It contends the Board's order was entered in the exercise of its jurisdiction of the parties and subject matter and that it did not act in excess of its jurisdiction in approving the settlement because there was a bona fide dispute over compensability within the meaning of ORS 656.289(4).

Alternatively, it suggests that, assuming the State Accident Insurance Fund was correct when it earlier concluded that it had no standing to attack the Board's order because it was not then aggrieved, that the issuance of the Determination Order awarding permanent partial disability for the May 5, 1971, injury did nothing to aggrieve it so as to give it standing to thereafter attack the Board's order concluding the dispute over the compensability of the January 18, 1972, incident.

Before proceeding to discuss these contentions, we observe that though the Board is not a "judicial" body so that the legal term "jurisdiction" is not strictly applicable to it, the term is used to designate the Board's authority under the compensation act to consider and decide controversies and such jurisdiction is governed by analogy to the rules applicable to courts. Pocahontas Mining Co. v. Industrial Commission, 301 Ill 462; 134 N.E. 160. Thus, what has been said concerning jurisdiction and judgments of courts is also applicable to "judgments" of administrative tribunals.

The Referee correctly observed in his order regarding the motion to join Wausau that the Fund had no standing to question the validity of the order approving the settlement between claimant and Wausau at the time that it issued because it was not then aggrieved. In order to have standing to question a judgment, the judgment must substantially, immediately and directly prejudice a pecuniary interest of the person attacking it. 2 AM JUR Judgments, Section 694.

If, as the State Accident Insurance Fund contends on review, a subsequent permanent total disability award extinguishes all preexisting permanent partial disability liability, (SAIF brief, Page 6, lines 14 et seq), then the issuance of a Determination Order granting any permanent disability compensation rather than claimant's appeal of such an order would render the State Accident Insurance Fund aggrieved by the Board's order. We disagree, however, with the State Accident Insurance Fund's hypothesis that a subsequent injury causing permanent total disability extenguishes liability for a former permanent partial disability award granted for an injury. We are not persuaded, as counsel for the State Accident Insurance Fund apparently is, that the word "or" appearing in the preamble to the Oregon Workmen's Compensation Law establishes the proposition that he advances. The Legislature dealt with the circumstance of successive injuries in ORS 656.222, rather than the preamble. It is not unusual that a worker suffers permanent partial disability in any injury, and while receiving the statutory sum allowed, suffers a new compensable injury which renders him permanently and totally

disabled. In such cases, the claimant has received the balance of the permanent partial disability award contemporaneously with permanent total disability payments. While this, arguably, may not have been the Legislature's intention, we have not been cited to any statutory provision which affirmatively demonstrates such a legislative intent. We conclude therefore that the State Accident Insurance Fund did not become aggrieved by the Board's order approving the settlement upon the issuance of the Determination Order granting claimant permanent partial disability for the May 5, 1971, injury.

Did claimant's request for a hearing on the Determination Order render the State Accident Insurance Fund aggrieved? We think not. We conclude that the State Accident Insurance Fund was not, and could not be aggrieved and therefore would not and could not have any standing to question the Board order approving the settlement until such time if ever, as the claimant was found permanently and totally disabled as a result of the May 5, 1971, injury. Unless that actually occurs, the State Accident Insurance Fund remains "unaggrieved" and thus not entitled to question either the validity or wisdom of the Board's order.

At the time the State Accident Insurance Fund moved to join Wausau that had not, in fact, happened. It was therefore a matter of speculation whether the State Accident Insurance Fund would ever become aggrieved. The State Accident Insurance Fund not having become aggrieved, the motion to join Wausau should have been denied.

For the purposes of the preceding discussion, we assumed as the State Accident Insurance Fund apparently did, that the Board's order approving the settlement was res judicata as to the State Accident Insurance Fund on the issue of whether the events of January 18, 1972, did or did not represent a compensable injury under the Workmen's Compensation Law. We shall now explore the validity of that assumption. It should be carefully noted that the Board order in question related only to the dispute presented for Board review by Wausau. At that stage, only Wausau and claimant were adversaries because Wausau did not allege any right to relief which would adversely affect the State Accident Insurance Fund, nor did claimant cross-request Board review of Hearing Officer Pattie's affirmance of the State Accident Insurance Fund's denial. The rule is well settled that a judgment is binding in favor of or against all parties to the proceedings in which it is rendered and their privies, but does not operate to affect "strangers" to a judgment (AM JUR 2d Judgments, Section 518.) Was the State Accident Insurance Fund a "party" or a "stranger" to Wausau's appeal of Hearing Officer Patties' order?

> "'It is an axiom of the law, that no man shall be affected by the proceedings to which he was a stranger = to which, if he is a party, he must be bound. He must have been directly interested in the subject matter of the proceedings = with right to make defense, to adduce testimony, to cross-examine the witnesses on the opposite side, to

> control, in some degree, the proceedings, and to appeal from the judgment. Persons not having these rights are regarded as strangers to the cause.'" Vanderpool v. Burkitt, 113 Or 656,666 (1925)

Since the State Accident Insurance Fund was not formally made a party to the proceeding before the Board and could not have immediately, substantially and directly been affected by the outcome of the review, we conclude it was a stranger to the proceeding.

While the Board recognizes the desirability of finality and harmony of judgments, it also recognizes that the State Accident Insurance Fund's right to fundamental due process would be thwarted by binding it by the Board's order approving the settlement. We conclude that the Board's order approving the settlement, while having the effect of finally deciding the issue of compensability as between Wausau and the claimant, did not and does not bar the State Accident Insurance Fund from establishing, if it ever becomes necessary, that claimant's 1972 claim was compensable, even though claimant would be estopped from doing so collaterally.

We now turn to the basic issue of this case; that is, the extent of claimant's permanent disability. Claimant contends his disability exceeds that awarded, but in his brief on review specifically disclaims that the injury of May 5, 1971, rendered him permanently and totally disabled. (Claimant's brief on review, Page 3, lines 9 and 10.) The State Accident Insurance Fund contends the May 5, 1971, injury did nothing to permanently worsen claimant's already precarious physical condition. The State Accident Insurance Fund also urges that claimant's successful return to employment following the May 5, 1971, injury demonstrates that he suffered no permanent impairment of earning capacity.

It appears the Referee took into account conditions of disputed compensability and also considered claimant's subsequently developed heart condition which appears unrelated to his injuries in finding claimant permanently and totally disabled. Since the heart condition developed after claimant ceased employment, it obviously should not have been considered even under ORS 656.206, which permits consideration of unrelated preexisting but not subsequently developed disabilities in finding a workman's condition to be permanently and totally disabling.

The evidence establishes that claimant's injury of May 5, 1971, did not operate alone to render the claimant permanently and totally disabled. Claimant was able to adequately perform at his regular job following the May 5, 1971, injury. Claimant is thus limited to an award of permanent partial disability granted in conformance with ORS 656.214(5). Because of claimant's already limited physical abilities and his age, education and work experience, claimant's relatively minor permanent worsening produced by the now chronic residuals of the May 5, 1971, low back strain destroyed an unusually significant portion of claimant's remaining ability to engage in general industrial employment.

We conclude the award of 60% of the maximum compensation allowable. for unscheduled permanent partial disability allowed by the Evaluation Division, appropriately compensates claimant for the results of his May 5, 1971, injury.

The Referee's order dated August 14, 1973, finding the Board's order approving the stipulation and dismissing review dated November 14, 1972, void and joining Wausau should be reversed.

The Board's order approving the disputed claim settlement between claimant and Wausau should be left in esse. The Referee's order granting claimant an award of permanent total disability payable by Leonetti Furniture Company should be reversed and the Determination Order dated February 7, 1973, granting claimant 192° or 60% of the maximum allowable for unscheduled disability payable by the State Accident Insurance Fund should be affirmed.

IT IS SO ORDERED.

WCB CASE NO. 75-2366 August 18, 1975

MRS. ROBERT CARTER, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Order Remanding For Hearing

This matter is before the Workmen's Compensation Board at the request of claimant for consideration of her claim under the own motion jurisdiction granted the Board by ORS 656.278.

The request that her claim be reopened for further medical care and treatment is based on Dr. Aaron Blauer's letter, dated April 20, 1975, to the Fund, stating such care and treatment is necessitated by a recurrence of the symptoms related to the industrial injury which she sustained in June 1966.

The Board does not have sufficient information at this time to determine the propriety of reopening claimant's claim. The matter is therefore referred to the Hearings Division with instructions to hold a hearing and receive evidence on the issue of claimant's condition and the necessity for further hospitalization and treatment. At the conclusion of the hearing, a transcript of the proceedings shall be prepared and submitted to the Board, together with the Referee's recommendations.

IT IS SO ORDERED.

WCB CASE NO. 74-3683 August 19, 1975

DOLLY OLSON, CLAIMANT
Keith Tichenor, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of a Referee's order which sustained the State Accident Insurance Fund's denial of her claim for compensation for cervical problems and headaches.

On September 23, 1973, claimant twice slipped on a waxed floor. She did not fall to the floor, but in preventing the fall, she sustained a lumbosacral strain. Her claim was accepted and closed as a "medical only." On August 30, 1974, claimant's treating physician requested that the claim be reopened for treatment for headaches and cervical pain; the State Accident Insurance Fund denied this request.

Claimant was treated immediately following the incident for complaints essentially related to her lower back. Though she obtained temporary relief after three chiropractic treatments, claimant continued with home treatment. Her back pain became worse and her cervical pain developed to the point that she sought medical treatment in July 1974, and was hospitalized by Dr. Gorman on July 17, 1974. Dr. Gorman stated the accident exacerbated what was already existing in the form of degenerative disc disease, but led to symptomatic problems.

On de novo review, the Board received no brief from the Fund; it failed to refute the medical testimony of Dr. Gorman. The Board concludes that Dr. Gorman's opinion, which was substantiated by the report of Dr. Brown, is sufficient to establish causal connection between claimant's cervical problems and the industrial injury.

ORDER

The order of the Referee dated February 25, 1975, is reversed.

The claim is remanded to the State Accident Insurance Fund to be accepted for payment of compensation, as provided by law, commencing August 30, 1974, and until the claim is again closed pursuant to ORS 656.268.

Claimant's counsel is awarded as a reasonable attorney's fee for his services at the hearing, the sum of $800, payable by the State Accident Insurance Fund.

Claimant's counsel is awarded as a reasonable attorney's fee the sum of $300, payable by the State Accident Insurance Fund, for his services in connection with Board review.

WCB CASE NO. 74-3942 August 19, 1975

WILLIAM PHILLIP, CLAIMANT
J. David Kryger, Claimant's Atty.
Jack Mattison, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant requests Board review of the Referee's order directing the employer to pay claimant temporary total disability from October 24, 1973, through November 29, 1973; temporary partial disability from November 30, 1973, through March 25, 1974; and temporary total disability from March 26, 1974, to July 16, 1974.

The employer was also directed to pay claimant an amount equal to 25% of the rate of temporary total disability payments authorized to claimant for the period November 7, 1974, to January 8, 1975, as a penalty for unreasonable delay in commencing payment of compensation. Claimant's attorney was to be paid a reasonable attorney's fee of 25% of the increase in compensation payable out of the increased compensation.

Claimant suffered a compensable injury on October 24, 1973, and was seen by Dr. Ellison for treatment on that date. Dr. Ellison continued to treat him and had scheduled surgery for November 30, 1973, however, claimant was arrested and confined on November 29, 1973. Dr. Ellison expressed the opinion that, as of November 30, 1973, claimant was capable of returning to some type of work wherein he could utilize his hand in a limited manner. On November 28, 1973, the carrier terminated payment of temporary total disability. On December 4, 1973, the employer notified the carrier it had a light type job for claimant; however, at this time, claimant was incarcerated and not able to accept the employment.

Subsequently, claimant was examined by Dr. Becker and Dr. White. On June 12, 1974, the employer was asked concerning the status of claimant's claim; its carrier replied asking claimant's current condition. A report was submitted to Dr. White which indicated that claimant had recovered from his surgery of March 26, 1974, and that his claim could be closed as of July 16, 1974.

On October 24, 1974, claimant made a demand upon the carrier for time loss payments from November 29, 1973, and the following day requested a hearing. On January 8, 1975, the carrier paid claimant temporary partial disability from November 30, 1973, the date Dr. Ellison expressed his opinion concerning light work, until the March 24, 1974, surgery performed by Dr. White; the carrier also paid temporary total disability from that date through July 16, 1974.

The Referee, in his order, apparently distinguished between the payment of temporary partial disability (ORS 656.212) and the payment of temporary total disability (ORS 656.214) in concluding that the methods of termination of payment of compensation set out in Jackson v. SAIF, 7 Or App 109 (1971) were not applicable. The Referee concluded that the employer had the right to reduce temporary total disability payments to temporary partial disability payments if informed that work is available which the workman is capable of doing even though the workman does not accept said employment.

The Board, on de novo review, disagrees with the Referee's conclusions. Jackson v. SAIF, (supra) is wholly unambiguous; the employer is required to continue payment of disability benefits until the claimant either has returned to his regular work, is released by his doctor to return to his regular work, or there has been a determination that his condition is medically stationary under ORS 656.268. Jackson makes no distinction between temporary total and temporary partial disability benefits. The employer had no right to unilaterally terminate compensation or, in any manner, reduce the compensation except under the circumstances described in Jackson. Upon receipt of Dr. White's letter indicating that claimant was medically stationary as of July 16, 1974, the employer should have requested claim closure and a determination of claimant's disability; it did not do so.

The Board concludes that the mere fact that claimant was offered a job is not sufficient basis for the unilaterial reduction of his compensation by the employer. Temporary partial disability is payable only when the claimant has actually returned to light employment. In this case, claimant never returned to work although Dr. Ellison had expressed his opinion that he might be able to do some light-type work as of November 30, 1973.

The Board further concludes that claimant is entitled to be paid temporary total disability from October 24, 1973, the date of his injury, to July 16, 1974, (although claimant had neither been released to return to regular work, returned to regular work, or a determination made that he was medically stationary on that date, subsequent to the Referee's order the Evaluation Division of the Board did make a determination on April 21, 1975, allowing time loss through July 16, 1974. This determination is currently the subject of a separate request for hearing and will not be dealt with in this review.

The Board further concludes that the unilaterial termination by the employer of compensation to claimant on November 28, 1973, was improper and subjects the employer to payment of penalties and attorney's fees as provided under ORS 656.262(8), even though claimant was paid temporary partial disability on January 8, 1975, for the period November 30, 1973, through March 26, 1974. The employer failed to pay any time loss for 13 months and the Board concludes that this must be construed as unreasonable resistance which justifies the payment by the employer of claimant's attorney's fees under ORS 656.382 and also the imposition of penalty for such failure to make pavments

The employer should be assessed penalties and attorney's fees for its failure to pay compensation during and for March 26, 1974, through July 16, 1975; these payments were ultimately made but not until January 1975. This constitutes unreasonable resistance. The employer was aware of the fact that claimant was being seen by Dr. White during that period of time and it was the employer's obligation, under the provisions of ORS 656.262(1), to process the claim; it did not do so.

ORDER

The order of the Referee, dated February 26, 1975, is reversed.

The claim is remanded to the employer, American Can Company, for payment to claimant of temporary total disability from October 24, 1973, to July 16, 1974, less payments previously made.

In addition, the employer shall pay an amount equal to 25% of the temporary total disability payments awarded claimant for the period from November 28, 1973, to July 16, 1974, pursuant to the provisions of ORS 656.262(8).

Claimant's counsel is awarded as a reasonable attorney's fee the sum of $300, payable by the employer, for services in connection with Board review.

Claimant's counsel is awarded as a reasonable attorney's fee for his services at the hearing before the Referee the sum of $850, payable by the employer.

SAIF CLAIM NO. DC 103538 August 19, 1975

MABEL J. SCHALLBERGER, CLAIMANT
Galton & Popick, Claimant's Attys.
Dept. of Justice, Defense Atty.
Own Motion Order Remanding For Hearing

The Board has been requested by claimant's counsel to exercise its Own Motion jurisdiction under law pursuant to ORS 656.278 in the above-entitled matter.

Counsel's request is supported by a report from Dr. McGregor L. Church, indicating claimant has suffered an exacerbation of her original industrial injury of November 17, 1967, and a copy of the subsequent claim denial by the State Accident Insurance Fund.

Claimant has also filed a Request for Hearing with the Hearings Division of the Board.

The Board concludes that this request for Own Motion consideration should be remanded to the Hearings Division to be heard in consolidation with the Request for Hearing presently pending in that division.

Following the hearing, the Referee is requested to prepare a proposed finding of fact and recommendation to the Board for their resolution and disposition of the matter of the Own Motion request.

IT IS SO ORDERED.

WCB CASE NO. 74-867 August 19, 1975

WAYNE H. SCHEESE, CLAIMANT
Franklin, Bennett, Ofelt, and
Jolles, Claimant's Attys.
Dept. of Justice, Defense Atty.
Order On Review

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund requests Board review of a Referee's order which found claimant to be permanently and totally disabled.

On November 13, 1972, claimant developed severe symptoms of angina pectoris while at work. He was taken to the Permanente Clinic where the diagnosis was of an underlying coronary arteriosclerotic heart disease and angina pectoris due to coronary insufficiency.

Claimant filed a claim which was denied by the Fund. After a hearing, it was remanded to the Fund to be accepted "based upon the symptomatology (angina pectoris coronary insufficiency)". Claimant's claim was closed by Determination Order dated March 1, 1974, which awarded claimant time loss but no permanent partial disability.

Dr. Ritzmann, claimant's treating physician, classified claimant as a functional Class III because he was not able to complete an ordinary Masters "2-step" test without producing symptoms of angina. Dr. Ritzmann was of the opinion that claimant was permanently and totally disabled.

Dr.Griswold testified that the November 13, 1972, occurrence produced symptoms but no change in claimant's EKG (claimant had had a previous attack of angina in August 1972, but which had not prevented him from returning to work) and, therefore, there was no evidence that the work episode aggravated the disease. When

asked to explain why claimant was asymptomatic before the on-the-job occurence but symptomatic afterwards, Dr. Griswold admitted the work caused the symptoms which had not left, but that he was unable to say that the work activity necessarily aggravated the underlying condition.

The Fund contends that the issue is whether claimant's on-the-job episode increased his preexisting disability and, if so, but not before, it would be responsible for this portion of the disability. The claimant never contended thatrhe had suffered an aggravation of his preexisting arteriosclerosis, his only contention was that the work episode produced the symptomatology which caused him now to be permanently and totally disabled.

The Board, on de novo review, concurs with the findings and conclusions of the Referee contained in his well-written opinion and order. The Board feels Dr. Griswold and Dr. Ritzmann actually are in accord; Dr. Ritzmann states unequivocally that claimant is permanently and totally disabled from symptoms due to angina pectoris, Dr. Griswold says claimant's work caused the symptoms but he refused to say that the work aggravated the condition. Claimant's symptoms are the bases for determining the extent of his disability.

The order of the Referee dated November 20, 1974, is affirmed.

Clamant's counsel is awarded as a reasonable attorney's fee the sum of $500, payable by the State Accident Insurance Fund.

SAIF CLAIM NO. FC 75184 August 19, 1975

ROY PHILLIPS, CLAIMANT
Pozzi, Wilson & Atchison,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Amended Order

The above-entitled matter was the subject of an Order on Review dated August 11, 1975.

On Page 1, the last paragraph erroneously recites, "This is in lieu of, and not in addition to, the award granted by the Second Determination Order, dated April 28, 1968."

The sole purpose of this order is to correct the record and confirm the order should recite, "This is in lieu of, and not in addition to, the award granted by the Second Determination Order, dated December 27, 1968."

The order of August 11, 1975, should be, and it is hereby amended to reflect that correction.

SAIF CLAIM NO. BC 41535 August 19, 1975

DEAN ANDERSON, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

This matter involves a claimant who sustained a compensable injury to his left wrist on August 24, 1966. Conservative treatment was given to the left wrist and his claim was closed January 12, 1968, with permanent partial disability equal to 5% loss of use of the left forearm.

On February 3, 1972, Dr. Paluska requested the State Accident Insurance Fund to reopen the claim for further medical care and treatment. On December 4, 1972, a partial radial styloidectomy and removal of two bony ossicles was done. A second closing and determination allowed temporary total disability and an additional permanent partial disability award of 20% loss of the left forearm.

On May 13, 1974, Dr. Paluska reported that claimant's left wrist condition had deteriorated and required further surgery. A wrist fusion was performed September 30, 1974, and a second fusion on June 30, 1975. The doctor's last report indicates a solid bone graft and no cyst formation present.

The matter has now been submitted to the Evaluation Division for its recommendation. Physical findings as reported indicate that claimant's physical impairment following this surgery does not greatly exceed that which was present when the claim was closed in 1973. Claimant is entitled to an additional 5% loss of the left forearm equal to 6.05°.

ORDER

Claimant is hereby granted an additional permanent partial disability award of 5% loss of the left forearm equal to 6.05°, and additional temporary total disability from September 30, 1974, through June 30, 1975.

WCB CASE NO. 74-2475 August 21, 1975

LORENE M. JANZ, CLAIMANT
B. Rupert Koblegarde, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

By the Board's Own Motion Order, dated March 14, 1975, this matter was referred to the Hearings Division to convene a hearing for the purpose of determining if claimant had suffered an aggravation as the result of her industrial injury.

Claimant sustained a compensable chest and back injury on July 25, 1966. The First Determination Order issued August 24, 1967 and awarded 35% loss of an arm by separation for unscheduled disability. A Second Determination Order provided a 5% additional unscheduled disability for a total of 77°. Claimant appealed and received 20% loss of use of the left leg in addition to her previous awards.

Claimant filed an aggravation claim prior to June 13, 1974; it was dismissed based on a stipulation which was made and provided that the matter be referred to the Board for own motion jurisdiction.

Evidence adduced at the hearing on July 9, 1975 indicated that claimant had made up her mind some time after the 1966 injury that she was no longer employable. The Referee opined that claimant was, in fact, unemployable but he believed claimant's own assessment of her complaints were not in keeping with the medical findings and that her course of conduct and outlook had gone on for such a length of time that it appeared doubtful that any medical help or vocational rehabilitation would be of value to the claimant.

The Referee found no evidence of aggravation of claimant's condition; he felt that the disability ratings were on the low side, but since he could not find claimant's condition had worsened, the disability issue was res judicata and outside the scope of his authority to make such finding.

The Board, in reviewing the matter, de novo, concurs with the finding of the Referee that claimant's present condition is a result of her industrial injury, but has not been aggravated and the claim for aggravation should not be accepted.

IT IS SO ORDERED.

SAIF CLAIM NO. C 173619 August 21, 1975

ARMANDO GONZALES, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

This matter involves a claimant who sustained a compensable injury to his left leg March 10, 1969, diagnosed as contusion of the left thigh and internal derangement of the left knee. There was no surgical intervention and no award made for permanent disability.

Claimant continued to have problems with his injured knee through the years and in a report dated August 27, 1974, Dr. Becker recommended surgery. The State Accident Insurance Fund voluntarily reopened the claim and Dr. Becker performed a medial meniscectomy on January 30, 1975.

The claim was submitted to the Evaluation Division of the Board which recommended that claimant is entitled to an award of permanent partial disability of 15° equal to 10% loss of the leg.

ORDER

Claimant is hereby awarded permanent partial disability of 15° equal to 10% loss of left leg.

Claimant is further entitled to additional temporary total disability from January 29, 1975 through May 5, 1975, less time worked.

WCB CASE NO. 74-4300 August 21, 1975

PAUL E. GREEN, SR., CLAIMANT
Brown, Burt & Swanson, Claimant's Attys.
Souther, Spaulding, Kinsey,
Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant requests Board review of a Referee's order affirming a Second Determination Order which awarded claimant no permanent disability. The only issue on review is the extent of disability.

Claimant suffered a compensable injury on October 4, 1973. His claim was accepted and closed with no award for permanent disability. Subsequently he reinjured his back, the claim was reopened by stipulation and closed again with no award of permanent disability. Claimant contends the continuous driving and lifting associated with operating a forklift truck caused a material worsening of a preexisting back disability.

Claimant's condition was described as an acute and chronic lumbosacral strain with a pseudojoint at L-5, S-1 on the right giving the appearance of a compressed disc. Dr. Halfterty's opinion was that claimant's back complaints were real, his symptoms were consistent and precise, and further treatment would simply have to be a matter of avoiding the known aggravating factors that caused the onset of pain.

The Board, on de novo review, finds that claimant, because of his back injury, is now precluded from performing jobs that require heavy lifting and, inasmuch as most of claimant's work background involved heavy lifting, etc., claimant has sustained some loss of wage earning capacity. The Board finds he is entitled to an award of 15% of the maximum allowable by statute for unscheduled disability because of this loss.

ORDER

The order of the Referee is reversed.

Claimant is hereby awarded 48° of the maximum of 320° for unscheduled disability.

Claimant's counsel is awarded as a reasonable attorney's fee, 25% of the increase in compensation made payable by this order not to exceed $2,300.

WCB CASE NO. 74-3789 August 21, 1975

EVANGELINA MENCHACA, CLAIMANT
Henigson, Stunz & Fonda, Claimant's Attys.
Dept. of Justice, Defense Atty.
Order of Remand

Claimant requests Board review of a Referee's order which denied her request for increased compensation on account of aggravation and urges the Board to remand the matter to the Referee to consider newly discovered evidence which will support claimant's claim of aggravation.

Claimant is a 45 year old Mexican-American woman employed all her life in manual farm labor. In October, 1972, claimant was working on a potato harvester when a truck driver backed a truck into the harvester pinning claimant between the back of the truck and the harvester. She sustained a fracture of the left tenth rib. Her claim was closed December 8, 1972, with no award for permanent disability.

For the next two years, claimant was able to work only short periods of time because of excruciating pains in her chest. She was treated medically for a heart condition, later underwent a myelogram and in January, 1975, the pain was so severe she quit work altogether. In February, 1975, claimant was examined by Dr. Brown, a Nampa neurologist, who diagnosed her condition as osteochondritis and commenced a treatment of injections.

At the March 12, 1975 hearing on aggravation, the Referee declined to reopen claimant's claim on the basis of aggravation but advised claimant of medical services under ORS 656.245.

The matter was pending before the Board on review when the Board was advised that claimant had undergone surgery on May 21, 1975, which had afforded her immediate relief, according to Dr. Robert Blome, the operating surgeon.

The Board, on de novo review, concludes the matter should, therefore, be remanded to the Referee to hear this newly discovered medical evidence and, thereafter, submit an Opinion and Order taking into consideration such evidence.

IT IS SO ORDERED.

WCB CASE NO. 74-1753 August 21, 1975

DUARD CONWAY, CLAIMANT
Joel B. Reeder, Claimant's Atty.
Dezendorf, Spears, Lubersky & Campbell,
Defense Attys.
Order of Dismissal

A request for review having been duly filed with the Workman's Compensation Board in the above-entitled matter by the claimant, and said request for review now having been withdrawn.

IT IS THEREFORE ORDERED that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 73-232 August 22, 1975

BETTY JANE STEVENS, CLAIMANT
Nick Chaivoe, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant requests Board review of an order of the Referee which granted her permanent partial disability equal to 208° for unscheduled disability in lieu of and not in addition to previous awards claimant had received by prior Determination Orders.

Claimant contends she is permanently and totally disabled or, in the alternative, if not permanently and totally disabled that she should be awarded 192° for her unscheduled disability and an additional 128° for the scheduled disability in her legs.

Claimant was injured on December 17, 1965. Her claim was accepted and, after undergoing a laminectomy and fusion, the claim closed by the First Determination Order dated September 29, 1967 which awarded claimant 60% loss of an arm for unscheduled disability equal to 115.2°. The claim was subsequently reopened and claimant received additional surgery; her claim was again closed by the Second Determination Order dated January 12, 1973 which granted an additional 15% loss of an arm for unscheduled disability equal to 28.8°, giving claimant a total award of 75% loss of an arm for unscheduled disability equal to 144°.

The Referee found that the extent of claimant's unscheduled disability was greater than that for which she had previously received awards and in lieu of said awards, granted claimant an award of 208° of a maximum 320°. The Referee concluded that the evidence did not support a finding that claimant's leg disability, if any, was a separate disability for which she would be entitled to receive a scheduled disability award.

The Board, on de novo review, concurs with the Referee's conclusion that claimant is entitled to a greater award for her unscheduled disability than she has received; however, at the time of the injury on September 29,1967, the maximum allowable by statute for unscheduled disability was 192°, therefore, an award of 208° is not proper. The Board finds that claimant is entitled to an award of 192° which represents 100% loss of an arm for unscheduled disability and it is the maximum award for such disability. The Board concurs in the conclusion of the Referee that claimant's leg disability, if any, has not been proven as a separate disability which would entitle her to a scheduled disability award.

With respect to the Referee's denial of claimant's motion to dismiss for lack of jurisdiction, the Board concurs in the ruling of the Referee.

ORDER

The order of the Referee, dated February 12, 1975, is modified. Claimant is granted an award of permanent partial disability equal to 192° for unscheduled disability of a maximum 192°. This is in lieu of and not in addition to previous awards granted by Determination Orders dated September 29, 1967 and January 12, 1973. In all other respects, the order of the Referee is affirmed.

SAIF CLAIM NO. BC 191848 August 22, 1975

LUCY FORESTER, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant Atty.
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant received a compensable industrial injury June 1, 1969, when she strained her back. Her claim was closed, initially, August 21, 1969, with no award for permanent disability. After reopening, a Second Determination Order on May 25, 1970, awarded 10% unscheduled disability equal to 32°.

By letter dated September 19, 1974, Dr. Tsai requested authorization from the State Accident Insurance Fund to perform a myelogram to be followed by surgery, if indicated. The myelogram

confirmed the need for surgery and the Fund voluntarily re-opened claimant's claim for further medical care and treatment. Claimant was hospitalized and on January 27, 1975, a right laminectomy was performed at the L4-L5 level with disc removal. The latest report from Dr. Tsai indicates claimant had good surgical results and would be able to do light work involving lifting of no more than 25 pounds.

The Evaluation Division has determined that claimant is entitled to an additional award of 10% unscheduled disability.

ORDER

IT IS THEREFORE ORDERED that claimant receive an additional award of 32° for 10% unscheduled disability and temporary total disability be granted from January 23, 1975, through July 24, 1975.

Claimant's attorney is awarded 25% of the increased permanent partial disability made by this Order, to a maximum of $2,300.

WCB CASE NO. 75-42 August 22, 1975

WALTER ROGERS, CLAIMANT
Rolf Olson, Claimant's Atty.
Roger Warren, Defense Atty.
Supplemental Order Awarding Attorney Fee

The Board's Order on Review entered July 29, 1975, in the above-entitled matter failed to include an award of a reasonable attorney fee.

ORDER

IT IS HEREBY ORDERED that claimant's counsel shall be awarded as a reasonable attorney's fee 25% of any temporary total disability or permanent partial disability award eventually received by claimant when his claim is closed pursuant to ORS 656.268, not to exceed $2,000.

CLAIM NO. C 604 6336 HOD August 25, 1975

RAY F. PLYMALE, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Own Motion Order Remanding for Hearing

Claimant alleges as a result of his compensable industrial injury sustained in 1967 while employed at U. S. Plywood, that his condition has become so aggravated that he is now permanently and totally disabled and seeks relief under the Own Motion jurisdiction granted to the Workmen's Compensation Board under ORS 656.278.

The evidence before the Board is not sufficient to determine the merits of the issue. The matter is, therefore, referred to the Hearings Division with instructions to take evidence upon the issue of the extent of claimant's disability attributable to the 1967 injury. Upon the conclusion of the hearing, the Referee shall cause a transcript to be prepared and submitted to the Board together with a recommendation of the Referee as to the issues.

IT IS SO ORDERED.

CLAIM NO. 20-68-26 August 25, 1975

HARVEY ELLERBROEK, CLAIMANT
Own Motion Order

This matter is before the Workman's Compensation Board under its own motion provisions of ORS 656.278.

Claimant is a long term employe of Georgia Pacific who sustained a compensable injury in 1968. A letter from Dr. Edwin G. Robinson, dated June 18, 1975, indicates claimant's chronic sciatic pain is becoming progressively worse; he believes claimant should contemplate a change in his occupation as a truck driver.

The Board concludes claimant's claim should be reopened and hereby remands this matter to the employer for payment to claimant of all benefits provided by law until the claim is closed pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 74-3942 August 26, 1975

WILLIAM PHILLIP, CLAIMANT
J. David Kryger, Claimant's Atty.
Jack Mattison, Defense Atty.
Amended Order on Review

The Order on Review entered on August 19, 1975, in the above entitled matter should be amended as follows:

On page 2, delete the fourth paragraph and insert in lieu thereof, the following paragraph.

> "The Board concludes that the mere fact that claimant was offered a job is not sufficient basis for the unilateral reduction of his compensation by the employer. However, had the employer sought relief under the provisions of ORS 656.325 and been authorized by the Board to either reduce or terminate the claimant's compensation because of his refusal to accept the offered job, then the reduction or termination of claimant's compensation by the employer would have been proper."

In all other respects the Order on Review entered in the above-entitled matter on August 19, 1975, should be affirmed, ratified and republished.

IT IS SO ORDERED.

SAIF CLAIM NO. AB 35989 August 26, 1975

RUBY MARGIE ROLO, CLAIMANT
Roy Kilpatrick, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Remanding for Hearing

Claimant has requested the Workmen's Compensation Board to consider this claim under its own motion jurisdiction pursuant to ORS 656.278.

Claimant received a compensable injury to her right foot December 22, 1963 and has received a total permanent partial disability award of 100% loss function of the right foot. Due to a shortening of her right leg, claimant is now having problems with her left leg and back and is in constant pain. She cannot stoop, squat or get up and down without assistance and is unable to work.

In order to properly determine the degree of claimant's present disability attributable to her industrial injury, the Board concludes the matter should be remanded to the Hearings Division to take evidence as to the causation of claimant's back and left leg problems and the extent of claimant's present permanent partial disability. The Referee shall submit his findings and proposed recommendations to the Board.

IT IS SO ORDERED.

SAIF CLAIM NO. HB 157718 August 26, 1975

VIRGINIA HINZ, CLAIMANT
Pozzi, Wilson & Atchison,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Own Motion Order Remanding for Hearing

Claimant has petitioned the Workmen's Compensation Board to convene a hearing under its Own Motion jurisdiction pursuant to ORS 656.278, contending she is permanently and totally disabled as a result of her industrial injury of November 5, 1965, sustained while she was employed by School District No. 1 of Multnomah County.

Claimant underwent a total hip replacement in 1970. She returned to teaching in Portland Public Schools until her retirement in February, 1975. Claimant has received permanent partial disability awards of 65% loss of use of the left leg and 30% loss of an arm by separation for unscheduled disability.

To equitably determine the extent of claimant's permanent disability, the Board concludes the matter should be referred to the Hearings Division to convene a hearing, take current medical evidence as to claimant's present condition and, thereafter, submit findings and a recommendation to the Board for its decision.

IT IS SO ORDERED.

WCB CASE NO. 74-4111 August 27, 1975

WILMA MATTHEWS, CLAIMANT
Roger Todd, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Sloan.

The employer has requested Board review of a Referee's order which increased claimant's award from 20% to 60% of the maximum for unscheduled disability.

Claimant, employed at U. S. Plywood, sustained an industrial injury March 7, 1972, while she was pulling a veneer sheet off a roller. This injury necessitated a lumbar fusion for a spondylolisthesis of L5-S1. Claimant convalesced until January, 1974, after she returned to work she only worked until the middle of February.

By claimant's own testimony, she is still hopeful for a complete recovery so she can return to her former job at U. S. Plywood. Medically speaking, this appears to be impossible and claimant is going to have to reorient her thinking in terms of returning to employment compatible with the physical limitations imposed upon her by the industrial injury.

The Board, on de novo review, finds the award granted by the Referee to be generous, but concludes there is evidence that claimant has suffered a substantial loss of wage earning capacity and, therefore, affirms the Referee's order.

ORDER

The order of the Referee dated March 24, 1975 is affirmed.

Claimant's counsel is awarded as a reasonable attorney's fee the sum of $300, payable by the employer.

WCB CASE NO. 73-2218 August 27, 1975

CLYDE WOOD, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund requests Board review of a Referee's order which directed payment of certain medical services; assessed a penalty for unreasonable resistance to payment of compensation and awarded claimant's counsel a fee of $200; increased the award of unscheduled disability from 15% to 50% of the maximum, and allowed claimant's counsel, as a reasonable attorney's fee, 25% of the increase in compensation payable from claimant's compensation as paid, not to exceed $1,500.

On July 21, 1971, claimant suffered a compensable injury to his back and right leg. He was first seen by Dr. F. H. Nickila a chiropractic physician, who diagnosed a lumbosacral sprain and subluxation with right sciatica; Dr. Nickila also was of the opinion that claimant had a herniated disc L-5. Later claimant was examined by Dr. Donald J. Paluska, an orthopedic surgeon, whose impression was that of degenerative osteoarthritis of the lumbosacral joint with chronic lumbosacral strain aggravated by exogenous obesity and tight hamstring muscles. He recommended weight reduction and exercises and felt that if constructive measures were not effective a diagnostic myelogram and a possible spinal fusion should be considered.

Subsequently, claimant was treated by Dr. C. W. Davis, chiropractic physician in Klamath Falls. Dr. Davis' report of June, 1973, advised the Fund that, as of that date, claimant was unable to return to his regular work as a mobile home salesman because he was unable to do any amount of walking, stair climbing or standing incident to this type of employment on a full time basis. Some six months prior to June, 1973, and until April, 1974, claimant and Dr. Davis were engaged in a business enterprise involving the operation of a mobile home sales lot.

At the hearing the Fund urged that the chiropractic treatments claimant received by Dr. Davis were unnecessary and consequently they should not be responsible for their cost. It contends on review that the treatment was another part of a vicious conspiracy invented by claimant in an attempt to escape liability and that claimant could not be considered credible.

The evidence indicates that claimant during the period he was engaged with Dr. Davis in the operation of the mobile home lot actually worked only sporadically and did not receive any pay except for $145 made on one sale. The Referee found that claimant had not been able to return, nor had he returned, to full time employment when he was engaged in this markedly less demanding activity.

The Board, on de novo review, finds it unnecessary to reiterate the history succinctly set forth in the Referee's order of the medical treatment received by claimant and the medical opinions of his condition; however, it does take note of the fact that claimant refused the myelogram suggested by Dr. Paluska to determine whether or not a spinal fusion was necessary and claimant was somewhat less than cooperative with the doctors at the Board's Disability Prevention Division. Claimant's work background includes a variety of jobs, his early work experience was mostly of a heavy type, however since 1963 his work has been principally that of a salesman. It appears that claimant has been reluctant to seek retraining through the Vocational Rehabilitation Division although the prognosis for his ability to be retrained is good. Additionally, there are quite a few areas of sales work which would be within claimant's present physical limitations.

The Board concludes that while claimant has sustained some loss of earning capacity as a result of the industrial injury, he has retained at least 75% of his earning capacity and, therefore, the Referee's award for unscheduled disability should be reduced accordingly. The Board concurs with the remaining portions of the Referee's order.

ORDER

The order of the Referee dated May 9, 1975 is modified.

Claimant is awarded 80° of a maximum of 320° for unscheduled disability, this is in lieu of and not in addtion to the award of unscheduled disability heretofore awarded. In all respects the order of the Referee is affirmed.

WCB CASE NO. 74-3130 August 27, 1975

HENRY J. FREED, CLAIMANT
Pozzi, Wilson & Atchison, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant in this matter had received an award of 160° equal for 50% unscheduled low back disability pursuant to a Determination Order mailed August 8, 1974. The Referee increased the award to 208° (65% unscheduled low back disability) and claimant has requested Board review contending he is permanently and totally disabled.

On May 1, 1973, claimant slipped and fell while installing furnace ducts. The initial diagnosis was an acute lumbar strain and claimant has not worked since the injury. The record indicates claimant had maintained a stable work history. While employed by the City of Portland, he was for 20 years in its maintenance department; more recently he worked as a service station operator and a furnace installer. He had worked as a baker and also a miner.

During the course of employment, perhaps as a baker or as a miner, claimant developed a form of pneumoconiosis, a lung condition, which doctors have indicated has worsened since the compensable injury, but not because of it.

Dr. Halferty did not believe claimant could return to productive employment due to a combination of his industrial injury and his pulmonary condition. If claimant had no pulmonary pathology Dr. Halferty would rate claimant's permanent partial disability as related to the industrial injury as "moderate." Dr. Jerry Becker, one of claimant's treating doctors, agreed.

Although preexisting, the lung condition did not reach its increased proportions until after the industrial injury, and the Referee took this into consideration in concluding that claimant's loss of wage earning capacity, was greater than 50% and increased the award to 65% unscheduled low back disability.

The Board, on de novo review, concurs with the findings of the Referee.

ORDER

The order of the Referee dated March 26, 1975 is affirmed.

WCB CASE NO. 74-3769 August 27, 1975

DAVID KIBBONS, CLAIMANT
Pozzi, Wilson & Atchison,
Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Sloan and Moore.

The claimant requests Board review of the Referee's order which affirmed a partial denial of claimant's claim by the State Accident Insurance Fund.

Claimant, a collator operator, injured his right shoulder while clearing his machine on June 14, 1974. He continued to receive treatment for the shoulder injury throughout June and July of 1974; about mid-June, 1974, claimant began experiencing numbness on the left side of his body, temporary blindness in his left eye and spells of weakness lasting from 15 minutes to 3 hours. These symptoms were reported to the doctors who were treating claimant for his shoulder injury.

Claimant was released to return to work by Dr. Gloekler on July 8, 1974. Claimant attempted to return to work that day but was unable to do so: therefore he sought further medical help and secured an appointment with Dr. Barton, a neurologist, who examined claimant on July 30, 1974. Dr. Barton, while noting that claimant's symptoms could be on a hysterical basis, found that claimant had an equivocal Babinski as well as an abnormal brain scan. Dr. Barton changed claimant's prescription, advised him to come into the clinic daily and wait until he experienced another "spell" so that an electroencephalogram could be done while the symptoms were actually occurring. On August 26, 1974, claimant was able to return to work but acting upon the advise of Dr. Barton, he took a short vacation and then returned to work on September 3, 1974. Since that time his symptoms have subsided.

On October 1, 1974, the Fund accepted responsibility for claimant's shoulder injury but denied responsibility for the numbness of the left side, headache, ear popping and dizziness. This partial denial, after hearing, was upheld by the Referee.

The Board, on de novo review, finds that, although Dr. Gloekler believed claimant to be medically stationary and released him to return to work on July 8, 1974, the evidence is quite clear that claimant attempted to return to work, was unable to, and because he could not, sought further treatment. Dr. Barton, although never unequivocally relating the bizarre set of symptoms which appeared a few days after claimant's industrial injury to that injury, did make certain objective findings which caused him to advise claimant to do certain things which prevented him from returning to work. Claimant followed advice.

Therefore, the Board concludes that because claimant failed to establish a casual relationship the Fund's denial of these bizarre conditions was proper; however, Dr. Barton's advice to claimant and claimant's adherence to such advice precluded claimant from returning to work until August 26, 1974, therefore, he is entitled to receive temporary total disability benefits to that date.

ORDER

The order of the Referee dated March 26, 1975, is modified.

Claimant is awarded temporary total disability benefits from July 8, 1974 to August 26, 1974. This is in addition to the temporary total disability benefits awarded claimant by the Determination Order mailed October 24, 1974.

Claimant's counsel is allowed as a reasonable attorney's fee 25% of the increased compensation awarded by this order, not to exceed $250.

In all other respects the Referee's order is affirmed.

CLAIM NO. 20-68-26 August 27, 1975

HARVEY ELLERBROEK, CLAIMANT
Supplemental Order

The Board's Own Motion Order dated August 25, 1975, in the above-entitled matter failed to include a Notice of Appeal to all parties. The sole purpose of this supplemental order is to advise the parties of this right. The following Notice of Appeal should be, and it is hereby, made a part of the Board's order dated August 25, 1975.

NOTICE OF APPEAL

Pursuant to ORS 656.278:

The claimant has no right to a hearing, review or appeal on this award made by the Board on its own motion.

The employer may request a hearing on this order.

This order is final unless within 30 days from the date hereof the employer appeals this order by requesting a hearing.

WCB CASE NO. 74-3440 August 27, 1975

TRUMAN D. SAMPSON, CLAIMANT
Gary Peterson, Claimant's Atty.
Michael D. Hoffman, Defense Atty.
Request for Review by Employer

Reviewed by Commissioners Wilson and Moore.

The employer has requested Board review of a Referee's order which increased claimant's award from 48° to 160° for unscheduled low back disability.

Claimant testified he had engaged in restaurant management and consultation, however, he was working as a fry cook when he slipped on a wet tile, fell and injured his back on September 17, 1972. After extensive conservative treatment, a laminectomy was performed. In a closing report Dr. Pasquesi reported claimant had no loss of motion, but did have persistent sciatic radiculitis and probably would have to seek retraining.

Claimant's psychological evaluation showed him to be a very intelligent, resourceful and adaptable individual. Claimant testified he had taken numerous executive seminars in schools associated with restaurant and food services, had received a pilot's license from Santa Barbara Aviation College, and had taken a Dale Carnegie course at his employer's expense. In December, 1974, under the Division of Vocational Rehabilitation, claimant was enrolled in a two year electronic technician course at Mt. Hood Community College.

The Board, on de novo review, cannot concur with the Referee's finding that claimant has sustained 50% of the maximum for unscheduled disability based on loss of earning capacity. Claimant tended to exaggerate his previous earning levels; also the prognosis for his success as electronic technician appears favorable. The Board concludes that claimant's loss of earning capacity as a result of his industrial injury does not exceed 30%.

ORDER

The order of the Referee is modified.

Claimant is awarded 96° of the maximum of 320° for unscheduled low back disability. In all other respects the order of the Referee dated March 25, 1975 is affirmed.

WCB CASE NO. 74-3506 August 27, 1975

MICHAEL E. WALKER, CLAIMANT
Lynn Moore, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund requests Board review of a Referee's order finding claimant's claim compensable.

Claimant, a 27 year old dance instructor employed by the Arthur Murray School of Dancing, was, along with other members of his studio and other dancing studios, participating Sunday in a rehearsal for an exhibition to be put on at Memorial Coliseum the following week. After claimant had concluded work at the studio on Saturday, he took the records needed for the rehearsal home with him as he was not certain he could get into the studio on Sunday. After the rehearsal, claimant, not wishing to have responsibility for the records until the following Monday, left the Coliseum with the intention of driving to the studio and returning the records. Enroute he was involved in a car accident and suffered a broken leg and ribs.

The Fund contends that the injury claimant suffered was not compensable as it was not an accidental injury arising out of and in the course of his employment.

The Referee in a well written Opinion and Order enumerated the factors set forth in similar cases and text which must be considered in determining when an accident "arises out of and in the course of employment." The Referee then proceeded to examine each of these factors in relation to the present case and concluded that claimant was, in fact, returning, or attempting to return the records to the studio at the time he suffered the injuries. The Referee commented upon the weakness of some of claimant's evidence, but indicated that it was not fatal to his claim and held that the injury was compensable.

The Board, on de novo review, finds it unnecessary to reiterate the conclusions reached by the Referee as the reasons therefor are set forth in depth and with clarity in the Opinion and Order. The Board concurs in the findings, conclusion and order of the Referee and adopts them as its own.

ORDER

The order of the Referee dated February 14, 1975 is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300, payable by the State Accident Insurance Fund for services in connection with Board review.

WCB CASE NO. 74-950 August 27, 1975

JOHN RISKE, CLAIMANT
Pozzi, Wilson & Atchison,
Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith
Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

Claimant has requested Board review of a Referee's order which granted claimant an additional award of 48° for unscheduled low back and psychological disability, and affirmed an award of 25% loss of the left leg made by a Determination Order dated January 23, 1974.

Claimant sustained a compensable industrial injury on September 15, 1969. A long course of treatment ensued including surgery from a flareup of an osteomyelitis condition. This condition resulted from a serious car accident in which claimant was involved in 1953, and preexisted the industrial injury. The automobile accident also caused psychological problems. Claimant has not worked since the injury, denies any interest in retraining and considers himself permanently and totally disabled.

The Back Evaluation Clinic reports claimant's loss function of the low back is minimal and his disability from this injury to the leg is mild.

On de novo review, the Board agrees that claimant's disability attributable to the industrial injury does not exceed that for which he has been awarded. The Board affirms and adopts the order of the Referee as its own.

ORDER

The order of the Referee dated March 26, 1975 is affirmed.

WCB CASE NO. 73-3468 August 27, 1975

GERALDINE N. FORSYTH, CLAIMANT
Ernest Lundeen, Claimant's Atty.
Merlin Miller, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

Claimant requests Board review of a Referee's order which affirmed a Determination Order awarding her no permanent partial disability. She alleges she is permanently and totally disabled.

Claimant, age 54, was employed as an assembler for Open Road Industries, when she fell amd sustained a compensable low back injury on December 28, 1972. She received physiotherapy, traction and a corset as support. All of the diagnostic procedures, laboratory tests, myelogram and x-rays were negative.

Claimant's previous work experience had been in the secretarial field. She had worked for this employer only two weeks before her injury; she has not worked since. Claimant had severe disabling arthritis long before the industrial injury and she had worked only sporadically, if at all, in the years subsequent to the onset of her disabling arthritis. Along with this condition, claimant had had internal rectal problems and stomach complaints unassociated with her employment.

The only condition related to the industrial accident was claimant's low back strain. Dr. Pasquesi's closing evaluation report states claimant had no measurable impairment as a result of the injury. The treating doctor, F.L. Goodwin, M.D., agreed with this evaluation.

The Referee found that claimant had failed to sustain the burden of proving any permanent disability. The Board, on de novo review, concurs.

ORDER

The order of the Referee dated February 28, 1975 is affirmed.

WCB CASE NO. 73-3525 August 28, 1975

WALTER PFLUGHAUPT, CLAIMANT
Harold Adams, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The issue is compensability of an occupational disease of a fireman.

The claimant contends that under ORS 656.803 (1)(b) and (2) there is a presumption that medical testimony is not admissible in contravention of the presumption. He would have the Board treat the presumption as a conclusive presumption. It is not. ORS 656.802(2) clearly states that it is a disputable presumption. United States National Bank v. Lloyd's, 239 Or 298 is the law in the State of Oregon.

The claimant failed to carry his burden of proof to establish that he had a compensable disease.

The Board affirms the order of the Referee and adopts his Opinion and Order as its own. A copy of the Opinion and Order is attached hereto marked Exhibit "A" and by this reference incorporated herein.

ORDER

The order of the Referee is affirmed.

SAIF CLAIM NO. HB 163064 August 28, 1975

DANNIE L. JONES, CLAIMANT
Bryant, Edmonds & Erickson, Claimant's Attys.
Dept. of Justice, Defense Atty.
Own Motion Order

This matter is before the Workmen's Compensation Board at the request of claimant that the Board exercise its continuing jurisdiction under the provisions of ORS 656.278.

The claimant's claim was closed by the Board's Own Motion Determination entered November 18, 1974. Based upon a report from Dr. Anthony S. Wattleworth, it now appears claimant's condition has worsened to the extent that a L4-L5 laminectomy and L4-S1 spinal fusion is being planned.

IT IS HEREBY ORDERED that the claim of Dannie L. Jones be reopened for the surgery recommended by Dr. Wattleworth and for such further treatment as may be necessary because of claimant's condition which is related to his 1965 industrial injury.

IT IS FURTHER ORDERED that claimant's counsel is entitled to, as a reasonable attorney's fee, 25% of claimant's temporary total disability to a maximum of $150 for his services in securing reopening of claimant's claim.

JEFFERY L. BARRY, CLAIMANT
Burns, Edwards & Kenin, Claimant's Attys.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The claimant requests Board review of the Referee's order which affirmed the employer's denial of claimant's claim for an occupational disease. Claimant alleged his condition of glaucoma and cataracts had been aggravated by his employment which caused tension, sleeplessness and anxiety. He also contended that overwork brought on by excessive periods of overtime, inability to get along with his fellow employees and frustration with his employer for allegedly not fulfilling promises to promote him aggravated his condition.

Claimant is 63 years old; he was employed by the Bank of California in San Francisco in 1960 and continued until 1965 when he was transferred to the Portland Branch doing the same type of work, i.e., running an IBM proof machine for sorting checks.

Dr. Paul J. Robinson, an eye specialist, first examined claimant in 1969. At that time, claimant told him he had glaucoma for ten years prior thereto. Dr. Robinson did not feel that claimant's condition was work related; he did not believe normal stress would cause or aggravate glaucoma. Dr. Robert E. Fischer and Dr. C.A. Christensen, also eye specialists, were of the opinion that glaucoma could be hereditary or could be caused through normal aging processes.

Causation of cataracts and glaucoma and the matter of aggravation of such would certainly fall within the area of expert medical testimony. Complicated medical matters are solved by medical testimony. URIS v. SCD, 247 Or 420. In this case the consensus of medical testimony was that the glaucoma suffered by claimant was not aggravated by tension. Further, there is not sufficient evidence that calimant's occupation at the Bank of California caused or aggravated his glaucoma and cataracts in any manner. The Referee concluded that claimant had failed to sustain the burden of proving an occupational disease against either the Bank of California or the First National Bank of Oregon which, upon motion of the former's attorney, was joined as a necessary party prior to the hearing.

The Board, on de novo review, concurs with the findings and conclusions of the Referee and adopts them as its own.

ORDER

The order of the Referee dated February 24, 1975 is affirmed.

WCB CASE NO. 74-2313 August 28, 1975

WAVA COX, CLAIMANT
Pozzi, Wilson & Atchison, Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which affirmed a partial denial by the State Accident Insurance Fund.

Claimant was employed by Heath Florist when she sustained an injury to her back on December 8, 1973. The fund accepted responsibility for the back complaints but, on May 16, 1974, denied treatment for foot problems, carpal tunnel syndrome, brachial neuritis and intercostal neuralgia.

Dr. Melgard's letter of December 23, 1974 stated claimant had related history of longstanding trouble with her hands and arms. He could in no way relate the carpal tunnel syndrome or other complaints to her flower shop work, but did feel the lifting incident caused a cervical strain. Dr. Parcher, who testified at the hearing, was of the same opinion.

Based on the above, the Referee sustained the partial denial made by the Fund, found penalties and attorney fees were not applicable and because claimant's claim was in an open status, concluded that a finding of permanent disability would be premature.

The Board, on de novo review, affirms and adopts the order of the Referee as its own.

ORDER

The order of the Referee dated March 28, 1975 is affirmed.

WCB CASE NO. 74-2869 August 28, 1975

WILLIAM LOVELACE, CLAIMANT
Banta, Silven, Young & Marlette, Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

Claimant has requested Board review of a Referee's order which affirmed the State Accident Insurance Fund's denial of his claim for workmen's compensation benefits.

Claimant alleges that on April 24, 1974, while recovering from a strained back, he was driving a compact car in the course of his employment when it became necessary to apply the brakes sharply and he felt extreme pain in his back and right side.

Claimant regularly participated in a rather strenuous exercise program which included swimming, bike riding and karate. Claimant testified at the hearing that a six mile bike ride taken just prior to the car incident had bothered his back. No evidence of any causal relationship was offered, and the Referee concluded that claimant's condition requiring medical treatment was not the result of his work activity.

The Board, on de novo review, concurs with the findings and conclusions of the Referee.

ORDER

The order of the Referee dated April 8, 1975 is affirmed.

WCB CASE NO. 74-417 September 3, 1975

DON C. YARNELL, CLAIMANT
Lyle Velure, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Moore and Sloan.

This matter involves the extent of unscheduled permanent disability. The Determination Order awarded claimant 10% (32°) unscheduled low back disability after finding that claimant's total unscheduled disability was equal to 50% (160°) but deducting therefrom a prior award of unscheduled disability of 40% (128°). The Referee awarded claimant permanent total disability.

Claimant now 60 years old had a two level low back fusion in 1958 and cervical spine surgery from an industrial injury in 1971. Claimant has other non-related medical problems from other injuries and arthritis of the lumbar spine and congenital anomalies of the lumbar spine.

On August 11, 1972, he fell on his back on a concrete floor. The medical evidence reflects that the total loss of function as it exists today is moderately severe and that claimant is precluded from returning to his former occupations and only able to return to special light work permitting sitting part of the time and standing part time. Claimant has little education and is a poor candidate for retraining. Claimant has attempted to find lighter work without success. Claimant is remarkably well motivated but couldn't get work even with the best of motivation.

On de novo review, the Board concurs with the finding of the Referee that claimant is permanently and totally disabled.

ORDER

The order of the Referee dated February 18, 1975 is affirmed.

Claimant's counsel is awarded a reasonable attorney's fee in the sum of $300 payable by the State Accident Insurance Fund for services in connection with Board review.

WCB CASE NO. 74-3244 September 3, 1975

ALBERT FORCHT, CLAIMANT
Evohl Malagon, Claimant's Atty.
Robert Fraser, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

This matter involves a denied claim. The claim was denied by letter of December 11, 1973 which the claimant received. Claimant's first request for a hearing was made by his letter of September 3, 1974. The Referee dismissed claimant's request for hearing on the grounds that claimant failed to file a request for hearing within 180 days after he was notified that his claim was denied. ORS 656.319 (2)(a).

On de novo review, the Board affirms and adopts the Referee's Order on Motion for Dismissal.

ORDER

The Referee's Order on Motion for Dismissal dated April 21, 1975 dismissing claimant's request for hearing is affirmed.

WCB CASE NO. 74-1395 September 3, 1975

DAWAYNE F. VOLK, CLAIMANT
Franklin, Bennett, Ofelt & Jolles, Claimant's Attys.
Souther, Spaulding, Williamson, Kinsey &
Schwabe, Defense Attys.
Request for Review by Employer.

Reviewed by Commissioners Wilson and Moore.

This matter involves the extent of scheduled permanent disability of claimant's left hand. The Determination Order awarded claimant 60% (90°). The Reeree increased this award to a total of 95% (145°) loss of his left hand.

Claimant, a 30 year old workman, cut off four fingers on his left hand in a trimsaw. After returning, claimant works full time as a truck driver.

The medical evidence rates claimant's impairment at 49.15% loss of left hand.

The Determination Order was issued after a personal interview with the claimant.

On de novo review, the Board finds that claimant has remaining 40% of the function of the left hand.

ORDER

The order of the Referee dated April 8, 1975 is reversed.

The Determination Order dated March 27, 1974 awarding the claimant 60% (90°) loss of the left hand is reinstated.

WCB CASE NO. 74-2502 September 3, 1975

LESTER L. THOMPSON, CLAIMANT
Ingram & Schmauder, Claimant's Attys.
Gearin, Cheney, Landis, Aebi & Kelley, Defense Attys.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

This matter involves the extent of permanent disability. The Determination Order which was affirmed by the Referee awarded claimant 5% (16°) unscheduled back disability.

Claimant, a 54 year old loader tender at a sawmill, received a back injury December 22, 1972 when he jumped off a truck. The condition was diagnosed as a mild sprain. The referee found the claimant to be credible.

The Board concurs with the finding of the Referee that claimant's condition is no different at this time than it was prior to the industrial injury.

ORDER

The order of the Referee dated March 28, 1975 is affirmed.

WCB CASE NO. 74-3478 September 3, 1975

OLLIE J. FITZGIBBONS, CLAIMANT
Keith Mobley, Claimant's Atty.
Dept. of Justice, Defense Atty.
Supplemental Order Awarding Attorney Fee

The Board's Order on Review issued August 1, 1975, in the above-entitled matter failed to include an award of a reasonable attorney's fee.

ORDER

IT IS HEREBY ORDERED that claimant's counsel shall be awarded a fee of 25% of any temporary total disability awarded claimant not to exceed $150.

WCB CASE NO. 74-3646 and 74-4416 September 3, 1975

ARNOLD ANDERSON, CLAIMANT
Galton & Popick, Claimant's Attys.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Commissioners Wilson and Sloan.

The State Accident Insurance Fund requests Board review of the order of the Referee which remanded to it claimant's claim for aggravation, assessed penalties and attorney's fee payable by the State Accident Insurance Fund and directed the State Accident Insurance Fund to reimburse claimant for payments made by his attorney to Dr. Berselli and to pay the medical and hospital expense incurred by claimant during the treatment of his period of aggravation.

Claimant suffered a compensable injury to his low back on March 22, 1972 for which he was awarded 64°. On June 14, 1973, by stipulation, the award was increased to 101°. On May 11, 1973, claimant had been in an automobile accident and following this accident had severe back pain and pain in his right ankle; claimant stated that he had had severe back pain shortly before the accident as well.

Dr. Berselli treated claimant and advised him that he should be able to return to work in the early part of May, 1974. Dr. Berselli's diagnosis was of a chronic lumbosacral strain, presently in remission; however, he felt claimant might develop occasional episodes of recurrent low back pain. Dr. Berselli did not believe there was any permanent partial disability resulting from the automobile accident.

In June, 1974, claimant had an episode of low back pain and Dr. Berselli recommended hospital confinement and, at the request of claimant, asked the State Accident Insurance Fund to reopen the claim based on his report of July 17, 1974.

Claimant requested a hearing on a claim of aggravation which was dismissed on the grounds that it did not satisfy the requirements of ORS 656.273. A subsequent report from Dr. Berselli was received, but again the Fund's motion for dismissal for lack of jurisdiction was granted. The Workmen's Compensation Board, on de novo review, found the medical reports sufficient to confer jurisdiction and remanded it for hearing on the merits.

The Fund was presented medical reports from Dr. Berselli in support of the claim for aggravation by a letter dated October 2, 1974, however, the Fund did not respond to that claim until its letter of denial on January 21, 1975. The Fund contends that unless it can interpret a medical report as being jurisdictionally sufficient under the statute it has no obligation to do anything. The Referee correctly concluded that the Fund has an obligation to accept or deny when a claim is presented and the Workmen's Compensation Act provides for payment of compensation for temporary total disability to be paid by the fourteenth day after notice or knowledge of the claim with subsequent periodic payments. By Rule 7.02, the Workmen's Compensation Board has given a claim for aggravation the dignity of a claim in the first instance.

The Referee concluded that claimant had met his burden of proof in presenting his aggravation claim and that because the Fund had not commenced payment of temporary total disability within 14 days after receipt of said claim, claimant was entitled to penalties; also because claimant prevailed in his denied aggravation claim, his attorney was entitled to a reasonable attorney's fee to be paid by the Fund. The Referee did not assess penalties against that portion of the compensation due for payment of hospital and medical expenses.

The Board, on de novo review, concurs with the findings and conclusions set forth in the well written Opinion and Order of the Referee and adopts them as its own.

ORDER

The order of the Referee dated April 3, 1975 is affirmed.

Claimant's counsel is awarded as a reasonable attorney's fee the sum of $300, payable by the State Accident Insurance Fund, for his services in connection with Board review.

WCB CASE NO. 74-3906 September 3, 1975

LEOTTA IAZEOLLA, CLAIMANT
Pozzi, Wilson & Atchison, Claimant's Attys.
Frank A. Moscato, Jr., Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Moore and Sloan.

This matter involves the extent of scheduled permanent disability to the claimant's left hand. The Determination Order and the Referee awarded claimant no permanent disability.

Claimant, then a 49 year old seamstress bumped her left hand August 29, 1973. Treatment has been whirlpool therapy only. Claimant refuses diagnostic tests for her subjective complaints.

The Board concurs with the finding of the Referee that the medical evidence shows no objective findings of disability or loss of function.

ORDER

The order of the Referee dated March 24, 1975 is affirmed.

WCB CASE NO. 74-3033 September 3, 1975

F. JOHN COOK, CLAIMANT
Rod Kirkpatrick, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

The issue is the extent of permanent disability. The Determination Order awarded claimant 40% (60°) permanent partial loss of function of the left leg. The Referee increased the scheduled award to 60% (90°) left leg disability and awarded claimant 5% (16°) unscheduled low back disability. The claimant requests Board review contending he is permanently and totally disabled. No briefs have been submitted in the matter.

On de novo review, the Board affirms and adopts the Referee's Opinion and Order as its own.

ORDER

The order of the Referee dated April 29, 1975, is affirmed.

WCB CASE NO. 73-3836 September 3, 1975

CHARLES BOYD, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Moore.

This matter involves the State Accident Insurance Fund's denial of claimant's request to reopen this medical only claim. The Referee affirmed the denial.

Claimant, a 31 year old logger, received a back injury February 19, 1973 when two limbs fell from a tree hitting him in the back. Claimant was treated by a chiropractor and was off work two or three days. The claim was handled as a medical claim only.

Claimant had trouble with his back and was hospitalized for one day on April 16, 1973. The treating doctor, Dr. J.D. Abbott, M.D., stated he did not see any direct relationship with the industrial injury to his present symptomatology. Claimant continued working until September 26, 1973. He was seen by Dr. McHolick on October 9, 1973 and by referral to Dr. Arthur A. Hockey, who performed a lumbar laminectomy with a negative exploration.

The Board concurs with the finding of the Referee that the attending physician's reports and deposition do not establish by the preponderance of evidence the requisite medical-causal relationship of claimant's back problems in October 1973 to the February 1973 industrial injury. Dr. McHolick's report of October 26, 1973 states "it is difficult to state whether this injury or an intervening injury could have been the cause and I feel that since the patient did have an injury of significance that it is probably best to consider this an aggravation of the episode." However, on deposition, Dr. McHolick testified that it was impossible to say whether there was a causal connection between claimant's back condition as he found in October 1973 with the industrial injury of February 1973.

ORDER

The order of the Referee dated April 9, 1975 is affirmed.

WCB CASE NO. 74-4303 September 4, 1975

JESSE R. LaDELLE, CLAIMANT
Coons, Cole & Anderson, Claimant's Attys.
Jaqua & Wheatly, Defense Attys.
Order of Remand

In October, 1968, claimant suffered a compensable low back injury while working for Georgia Pacific Corporation. After surgery, the claim was closed on April 1, 1969, with an award of 15% for unscheduled disability. Claimant's aggravation rights expired April 2, 1974.

Claimant's condition was basically unchanged between the time his claim was closed and July, 1974. In 1973 claimant had obtained a job at Star Wood Products, Inc. After July, 1974, claimant noticed a gradual worsening in his back and leg discomfort; it became so severe that claimant could not continue his work and in October, 1974, claimant was hospitalized by Dr. Serbu.

Claimant then sought to have his 1968 claim reopened; this was denied on the basis that his five year aggravation rights had expired. Claimant then filed a new injury claim with Star Wood Products, Inc.; this was denied by the State Accident Insurance Fund which contended claimant's condition resulted from his 1968 injury.

The claimant requested a hearing on the State Accident Insurance Fund's denial of his November 4, 1974, claim and requested the Board, in the alternative, to order a Referee to take evidence and render an opinion as to whether claimant's 1968 claim should be reopened under the Board's own motion authority pursuant to ORS 656.278. Claimant also requested the Board, pursuant to ORS 656.307, to designate a paying agency to provide him benefits during the pendency of the hearing and decision on these issues.

By order entered January 9, 1975, the Board, pursuant to ORS 656.307 and ORS 656.278, directed Georgia Pacific to commence payment of benefits as of November 4, 1974, to claimant as a result of the October 8, 1968, injury and to continue such payment until determination was made with respect to the responsible party. The Board further remanded the matter to the Hearings Division to take evidence to determine whether claimant's present condition was an aggravation of the 1968 injury or a new injury suffered in November, 1974.

A hearing was held on July 25, 1975. Dr. Serbu was unable to determine whether claimant's condition represented an aggravation or a new injury. An evaluation was made by a team of two orthopedists and a neurosurgeon which concluded, based upon the history related to them by

claimant, that claimant's condition represented an aggravation of the 1968 injury. Subsequently, after these doctors were given a written statement which was a more comprehensive and accurate account of claimant's work history and physical condition subsequent to the 1968 injury, they reversed themselves and concluded that claimant's condition resulted from his work activities at Star Wood Products, Inc. The Referee, applying the "repeated trauma" doctrine and noting the change in claimant's work activity immediately preceding the worsening of his condition, recommended that claimant's condition be considered to be the result of a new injury suffered November 4, 1974.

The Board, having reviewed the Advisory Opinion and Order of the Referee, concurs in his recommendation. The denial of claimant's claim for aggravation of his 1968 industrial injury was proper and said claim will not be reopened under the provisions of ORS 656.278. The Board notes, however, that the Referee had jurisdiction with respect to the claim for the November 4, 1974, injury, therefore, it remands that matter to him for the entry of a final and appealable order.

ORDER

Claimant's request for own motion jurisdiction under the provisions of ORS 656.278 is denied.

The WCB Case No. 74-4303 is remanded to the Referee for the issuance of a final and appealable order thereon.

WCB CASE NO. 74-491 September 4, 1975

AMELIA M. JOY, CLAIMANT
Hawkins, Germundson and Scalf,
Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by Claimant.

Reviewed by Commissioners Wilson and Sloan.

Claimant requests a Board review of the Referee's Order on Remand from the Circuit Court which affirmed, ratified and republished his previous opinion, dated June 5, 1974, which held that claimant had failed to present any persuasive evidence causally relating the symptoms for which she was admitted to the hospital on March 13, 1973, to any condition resulting from her compensable injury of July 21, 1967.

Initially, Referee William J. Foster, after a hearing, held that claimant had suffered a compensable injury and remanded the claim to the Fund to be accepted for payment of benefits as provided by law. In setting aside the denial, Referee Foster stated that the Fund was responsible for all conditions involving claimant's right leg and problems related thereto.

On May 20, 1974, a hearing was held before Page Pferdner to determine why the Fund should not pay certain medical expenses which occurred as a result of claimant's industrial injury, to wit: medical expenses relating to hospitalizations from February 26, 1973 to March 10, 1973, and from March 13, 1973 to March 14, 1973. The holding of the Referee was stated in the first paragraph. The Workmen's Compensation Board affirmed the order of the Referee. It was appealed to the Circuit Court which remanded the matter to the Referee to allow claimant to present further evidence as to what portion of the hospital bill for the two hospitalizations was related to the right leg. Judge Berkeley Lent stated that the Fund was not responsible for any portion not related to the right leg and the burden of proof was on claimant to establish what portion was related.

On April 10, 1975, another hearing on remand was held. The Fund objected to evidence being received on the grounds that the Order of Remand was not based on good cause; the objection properly was overruled by the Referee.

Dr. Franck, claimant's treating physician since December, 1971, had stated in a letter dated February 13, 1974, that he felt it was possible that claimant's leg injury on the right side was a conceivable factor in the development of thrombophlebitis in the left leg. The Referee did not feel this was sufficient supportive evidence to justify imposing responsibility upon the Fund for the hospitalization for the right leg.

In the 1975 hearing, the only additional evidence was the opinion of Dr. Franck that claimant's hospitalization on March 13, 1973, was for dizziness of an unknown etiology and he was unable to state whether or not her bilateral lower extremity thrombophlebitis and tenderness caused the dizziness. Dr. Franck then testified that, based on reasonable medical probability, the hospitalization of March 13, 1973, was probably related to the compensable injury of July 21, 1967. The Referee would not accord any weight to this testimony because of its vagueness. He concluded that neither the testimony of claimant nor Dr. Franck presented any evidence of what portion of the hospital bill was related to the right leg.

The Board, on de novo review, agrees with the Referee that claimant has failed to meet the burden of proof placed on her by Judge Lent's order and, therefore, affirms the order of the Referee. However, the Board does feel that the testimony of Dr. Franck is entitled to some weight even though it, together with the testimony of claimant, was not sufficient to meet the burden of proof required.

ORDER

The Order on Remand of the Referee, dated April 14, 1975, is affirmed.

WCB CASE NO. 74-4122 September 4, 1975

FRANCISCO VELASQUEZ, CLAIMANT
Pozzi, Wilson and Atchison, Claimant's Attys.
Department of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Commissioners Wilson and Sloan.

This matter involves whether or not claimant's condition is medically stationary and if so the extent of claimant's disability. The Determination Order awarded claimant no permanent disability. The Referee affirmed the Determination Order.

Claimant, a 50 year old restaurant owner and cook received sprains when he pulled on a garbage can on April 4, 1974. Claimant was in an automobile accident in July, 1974 and fell at a service station in March, 1975.

The medical evidence clearly sustained the Referee's finding that claimant's present problems are not the result of pulling a garbage can on April 4, 1974.

ORDER

The order of the Referee dated April 30, 1975 is affirmed.

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