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WCB CASE NO. 75-2006 MARCH 19, 1976

GEORGE E. SELLS, CLAIMANT
MC ARTHUR AND HORNER, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DENIAL OF CLAIMANT'S CLAIM BY THE STATE ACCIDENT INSURANCE FUND.

ON AUGUST 22, 1972 CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS LOWER BACK. HE RECEIVED CHIROPRACTIC TREATMENT AND WAS ALLOWED TO RETURN TO WORK ON SEPTEMBER 25, 1972. HE ADVISED HIS EMPLOYER THAT HE FEARED FURTHER INJURY AND HIS JOB WAS TERMINATED AND HE SOUGHT OTHER EMPLOYMENT. ON OCTOBER 25, 1972 THE CLAIM WAS CLOSED WITH NO AWARD FOR PERMANENT PARTIAL DISABILITY.

AFTER CLAIMANT LEFT HIS FORMER JOB HE WORKED FOR A HEATING AND SHEET METAL COMPANY, INSTALLING AIR DUCTS AND FURNACES IN NEW HOMES. HE ENGAGED IN THIS ON-THE-JOB TRAINING FOR APPROXIMATELY SIX MONTHS UNDER A WIN PROGRAM. THE BENDING, LIFTING AND RUNNING THE JACKHAMMER ON THIS JOB IRRITATED CLAIMANT'S BACK AND HE COMPLAINED TO HIS VOCATIONAL COUNSELORS THAT HIS BACK WAS BECOMING WORSE ON THE JOB, HOWEVER, THEY ASKED HIM TO CONTINUE AS LONG AS HE COULD. SINCE HE FINISHED THE PROGRAM, CLAIMANT, EXCEPT FOR A FEW DAYS WORKING IN A CANNERY, HAS NOT WORKED FOR WAGES.

ON JUNE 23, 1975 DR. PASQUESI EXAMINED CLAIMANT WHO WAS COMPLAINING OF PAIN IN THE LOWER BACK, PREDOMINANTLY ON THE RIGHT SIDE WITH RADIATING PAIN DOWN TO THE HEEL. DR. PASQUESI INDICATED CLAIMANT APPEARED TO HAVE A CHRONIC LUMBOSACRAL DISCOMFORT PROBABLY ON THE BASIS OF INSTABILITY. CLAIMANT'S COMPLAINTS WERE SUBJECTIVE RATHER THAN OBJECTIVE AND DR. PASQUESI WAS OF THE OPINION THAT CLAIMANT'S PROBLEMS WERE DUE TO HIS RETRAINING IN SHEET METAL WORK RATHER THAN TO THE ORIGINAL INJURY.

THE REFEREE FOUND THAT CLAIMANT HAD HAD SOME BACK IRRITATION PRIOR TO WORKING AT THE SHEET METAL COMPANY BUT AFTER SUCH WORK HE COULD NOT LIFT, BEND OR SIT FOR LONG PERIODS NOR COULD HE RIDE IN A CAR. THE REFEREE CONCLUDED, BASED ON THIS EVIDENCE AND DR. PASQUESI'S REPORT, THAT CLAIMANT'S CONDITION HAD WORSENED WHILE TRAINING AS A SHEET METAL WORKER AND HAD NO DIRECT RELATIONSHIP TO HIS INDUSTRIAL INJURY OF AUGUST 22, 1972, THAT CLAIMANT HAD SUFFERED A NEW INJURY AND HAD NOT AGGRAVATED THE AUGUST 1972 INJURY. HE AFFIRMED THE DENIAL BY THE FUND.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 10, 1975 IS AFFIRMED.

WILLARD D. MURPHY, CLAIMANT
CLAUSSEN, BILLMAN, COLEMAN AND STEWART,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED AUGUST 29, 1968 WHEREBY CLAIMANT WAS AWARDED 10 PER CENT LOSS OF THE LEFT FOOT EQUAL TO 13.5 DEGREES.

CLAIMANT WAS A 51 YEAR OLD CRUSHER PLANT FOREMAN WHEN, ON SEPTEMBER 23, 1967, HE SUFFERED A FRACTURED LEFT LEG. AFTER BEING DISCHARGED FROM THE HOSPITAL CLAIMANT RETURNED TO WORK AND HIS CLAIM WAS CLOSED ON AUGUST 29, 1968 WITH THE AWARD OF 10 PER CENT.

IN 1968, DURING HIS SIX MONTHS' CONVALESCENCE FOLLOWING HIS INDUSTRIAL INJURY, CLAIMANT EXPERIENCED THE FIRST OF THREE PULMONARY EMBOLI. WHEN CLAIMANT HAD RETURNED TO WORK HE HAD BEEN ASSIGNED TO DRIVING A BIG EARTH MOVING MACHINE, HOWEVER, AFTER A MONTH, THE CONSTANT LEG MOVEMENT REQUIRED WAS TOO PAINFUL AND CLAIMANT TOOK A SUPERVISORY POSITION. CLAIMANT SUFFERED ANOTHER PULMONARY EMBOLISM IN APRIL 1970 AND AGAIN ON JUNE 22, 1973 HE WAS HOSPITALIZED BECAUSE OF CHEST PAINS AND A PULMONARY EMBOLISM WAS DIAGNOSED. THE PULMONARY EMBOLISM OF 1973 WAS RELATED MEDICALLY TO THE 1967 INDUSTRIAL INJURY AND THE CLAIM WAS REOPENED ON AN AGGRAVATION BASIS.

CLAIMANT WAS PLACED ON AN ANTI-COAGULANT THERAPY AND, AFTER HOSPITALIZATION IN AUGUST 1970, HIS CLAIM WAS CLOSED IN MARCH 1974 WITH NO ADDITIONAL AWARD OF PERMANENT DISABILITY. BECAUSE OF CLAIMANT'S HISTORY OF EMBOLI AND THE POSSIBILITY OF A FATALITY THEREFROM IT WAS DECIDED TO INSERT A VENA CAVA CLIP. THIS WOULD KEEP LARGE BLOOD CLOTS FROM REACHING THE LUNGS BUT ALSO MIGHT CAUSE EDEMA AND SWELLING OF THE LEGS.

TWO MONTHS PRIOR TO THE SURGERY, WHICH WAS PERFORMED IN SEPTEMBER 1971, CLAIMANT HAD BEEN INVOLVED IN AN AUTOMOBILE ACCIDENT AND HAD SUFFERED A CERVICAL FRACTURE WHICH REQUIRED HIM TO BE OFF WORK FOR ABOUT 3 AND ONE HALF MONTHS. THE FIRST PART OF 1975 CLAIMANT WAS SEEN BY DR. PETERSON COMPLAINING OF HEADACHES AND NECK PAIN RELATED TO THE CERVICAL INJURY.

WITH THE EXCEPTION OF ONE MONTH DRIVING A BIG EARTH MOVING MACHINE CLAIMANT'S WORK SINCE HIS 1967 INJURY WAS PRIMARILY THAT OF A CRUSHER SUPERINTENDENT. AFTER HIS PULMONARY EMBOLISM ATTACK IN JUNE 1973 CLAIMANT NOTED CONTINUED FATIGUE AND LOSS OF STRENGTH AND THESE PROBLEMS CONTINUED, ACCORDING TO CLAIMANT, FOLLOWING THE VENA CLIP SURGERY IN SEPTEMBER 1974. IN APRIL 1975 CLAIMANT ACQUIRED ONE-HALF INTEREST IN A SMALL CRUSHING PLANT AND HE HAS BEEN OPERATING IT AS AN ON-THE-JOB SUPERINTENDENT, WORKING TEN HOURS A DAY IN THIS CAPACITY. CLAIMANT TESTIFIED THAT HIS FATIGUE PROBLEM IS ABOUT THE SAME TODAY AS IT WAS FOLLOWING THE 1973 EMBOLISM, HOWEVER, HE IS NO LONGER RECEIVING ANY MEDICAL TREATMENT FOR HIS LEFT LEG OR FOR THE EMBOLISM CONDITION.

CLAIMANT CONTENDS THAT THE EFFECTS OF THE PULMONARY EMBOLI HAVE CAUSED LOSS OF STRENGTH AND DURABILITY AND A FATIGUE PROBLEM RESULTING IN A SEVERE LOSS OF HIS EARNING CAPACITY.

THE REFEREE FOUND THE MEDICAL EVIDENCE NOT CONVINCING THAT CLAIMANT'S PRESENT CONDITION WAS RELATED TO THE INDUSTRIAL INJURY. HE INTERPRETED THE DOCTOR'S REPORT AS RAISING A POSSIBILITY OF SUCH RELATIONSHIP BUT NOT A MEDICAL PROBABILITY. DR. PETERSON HAD STATED THAT THERE WERE MECHANISMS BY WHICH ONE COULD POSTULATE THAT CLAIMANT COULD HAVE RESIDUAL EFFECTS FROM THE EMBOLI THAT WERE PHYSICAL IN NATURE - DR. TUHY IN HIS REPORT STATED THAT SUCH A MEDICAL RELATIONSHIP IS A POSSIBILITY BUT THAT A 'GREAT MANY THINGS CAN CAUSE FATIGUE...'

THE REFEREE CONCLUDED THAT THIS TESTIMONY WAS TOO SPECULATIVE TO BE ACCEPTED AS CONCLUSIVE EVIDENCE OF A MEDICAL RELATIONSHIP AND THAT ALTHOUGH CLAIMANT DOES HAVE A FATIGUE PROBLEM AND A LOSS OF DURABILITY, NEITHER ARE RELATED TO HIS INDUSTRIAL INJURY.

THE BOARD, ON DE NOVO REVIEW, DISAGREES WITH THE REFEREE. BOTH DR. PETERSON AND DR. MUSA REPORTED THAT THE PULMONARY EMBOLI WERE THE DIRECT RESULT OF HIS BROKEN LEG. DESPITE THE RECURRING EMBOLISM CLAIMANT HAS CONTINUED IN THE CONSTRUCTION FIELD IN A SUPERVISORY CAPACITY, HOWEVER, HE HAS BEEN SUBJECTED TO INCREASINGLY DIMINISHED ENERGY AND STAMINA WITH EACH PULMONARY EMBOLISM AND, ADDITIONALLY, HE HAS EXPERIENCED SWELLING OF HIS LEGS SINCE THE INSERTION OF THE VENA CAVA CLIP. THE BOARD FINDS THAT IT WAS AS MUCH THE RESULT OF THIS INCREASING FATIGUE FOLLOWING THE 1973 EMBOLISM AS IT WAS FROM THE PRESSURE BROUGHT BY THE EMPLOYER WHICH CAUSED CLAIMANT TO RESIGN HIS POSITION. CLAIMANT IS NOW OPERATING A PARTNERSHIP WITH ANOTHER INDIVIDUAL IN A SMALL ROCK CRUSHING BUSINESS AND ALTHOUGH HE IS PRESENTLY FREE OF PRESSURE FROM AN EMPLOYER, HE MUST COPE WITH THE INCIDENTS OF ANY BEGINNING BUSINESS, I.E. LONG HOURS AND UNCERTAIN FINANCIAL FUTURE.

THE BOARD CONCLUDES THAT BECAUSE OF CLAIMANT'S FATIGUE, HIS NEED FOR REST DURING THE DAY, AND HIS GENERAL OVERALL LOSS OF DURABILITY, HE WAS FORCED TO LEAVE HIS JOB WITH THE EMPLOYER AND VERY PROBABLY HE WOULD AT THE PRESENT TIME BE UNEMPLOYED HAD HE NOT HAD MONEY OF HIS OWN TO INVEST IN A PARTNERSHIP. DR. TUHY'S REPORT SAID THERE WERE A GREAT MANY THINGS WHICH COULD CAUSE FATIGUE - THIS IS TRUE, HOWEVER, EXAMINATIONS OF CLAIMANT FAILED TO REVEAL ANY OTHER CAUSES THAN THE FRACTURED LEG AND THE ENSUING PULMONARY EMBOLI. THE CLAIMANT IS ENTITLED TO BE COMPENSATED FOR HIS LOSS OF EARNING CAPACITY RESULTING FROM THE FATIGUE AND LACK OF VITALITY AND THE BOARD CONCLUDES CLAIMANT WOULD BE ADEQUATELY COMPENSATED WITH AN AWARD OF 30 PER CENT OF THE MAXIMUM ALLOWABLE FOR UNSCHEDULED DISABILITY. THIS AWARD SHOULD BE IN ADDITION TO THE SCHEDULED LEFT FOOT AWARD.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 7, 1975 IS REVERSED.

CLAIMANT IS AWARDED 96 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED DISABILITY. THIS AWARD IS IN ADDITION TO AND NOT IN LIEU OF THE AWARDS OF AUGUST 29, 1968 AND MARCH 22, 1974.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, 25 PER CENT OF THE COMPENSATION AWARDED CLAIMANT BY THIS ORDER, PAYABLE OUT OF SUCH COMPENSATION, AS PAID, NOT TO EXCEED 2,300 DOLLARS.

JOAN CROFT, CLAIMANT
POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
MCNUTT, GANT AND ORMSBEE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT
CROSS REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 80 DEGREES FOR 25 PER CENT UNSCHEDULED CERVICAL SPINE DISABILITY AND 28.8 DEGREES FOR 15 PER CENT LOSS OF FUNCTION OF THE RIGHT ARM. THE EMPLOYER CROSS REQUESTS BOARD REVIEW.

CLAIMANT IS A 47 YEAR OLD REGISTERED NURSE WHO SUFFERED A COMPENSABLE INJURY ON SEPTEMBER 13, 1972, RETURNED TO PART-TIME WORK ON NOVEMBER 1, 1972 AND COMMENCED WORK ON A FULL-TIME BASIS ON NOVEMBER 13, 1972. CLAIMANT CONTINUED TO WORK FULL-TIME UNTIL FEBRUARY 17, 1973 WHEN SHE TERMINATED HER EMPLOYMENT VOLUNTARILY.

DR. PETERSON, THE INITIAL TREATING DOCTOR, DIAGNOSED CLAIMANT'S CONDITION AS AN ACUTE STRETCH INJURY OF THE RIGHT ELBOW AND SHOULDER JOINTS WITH POSSIBLE INVOLVEMENT OF THE BRACHIAL PLEXUS. DR. HOLBERT DIAGNOSED IT AS A TRACTION INJURY OF HER RIGHT BRACHIAL PLEXUS NERVE ROOTS AS THEY COME OFF THE NEURAL CANAL AND THROUGH THE NARROWED FORAMINA. DR. HOLBERT FOUND SOME LIMITED MOTION AND ROTATION AT THE NECK WHICH WAS ALSO NOTICED BY THE REFEREE AT THE HEARING. CLAIMANT INSTEAD OF TURNING HER HEAD, ROTATED HER BODY KEEPING HER HEAD FIXED. DR. HOLBERT'S FINDING WAS RESTRICTION ON RIGHT BENDING AND TURNING TO 50 PER CENT OF NORMAL, HE ALSO NOTED HYPESTHESIA OF THE RIGHT INDEX FINGER AND A WEAKNESS IN A MILD DEGREE OF THE RIGHT TRICEPS AND THE ABSENCE OF TRICEPS REFLEX AS COMPARED TO THE LEFT SIDE.

CLAIMANT WAS REFERRED TO DR. SERBU, WHO FELT CLAIMANT MIGHT HAVE HAD A HERNIATED DISC AT THE C6-7 LEVEL ON THE RIGHT, HOWEVER, A MYELOGRAM FAILED TO REVEAL THE PRESENCE OF A HERNIATED DISC BUT DID INDICATE A MILD DEFECT OF C6-7 AND C4-5 ON THE RIGHT SIDE.

CLAIMANT CONTENDS THAT SHE HAS LOST SUBSTANTIALLY MORE THAN 25 PER CENT OF HER EARNING CAPACITY AND, THEREFORE, IS ENTITLED TO AN INCREASE IN HER AWARD FOR UNSCHEDULED DISABILITY. SHE ALSO FEELS THE AWARD FOR HER SCHEDULED DISABILITY SHOULD BE INCREASED.

THE EMPLOYER, ON THE OTHER HAND, CONTENDS THAT CLAIMANT HAD RETURNED TO FULL-TIME WORK WITH HER EMPLOYER, HAD BEEN RELEASED TO RETURN TO SUCH FULL-TIME WORK BY HER DOCTOR AND IN NOVEMBER 1972 DR. HOLBERT REPORTED CLAIMANT STATED HER NECK FELT FINE. CLAIMANT VOLUNTARILY TERMINATED FULL-TIME EMPLOYMENT FOR FINANCIAL NOT PHYSICAL REASONS. THE EMPLOYER CONTENDS THE CLAIMANT, IN EFFECT, IS CLAIMING A WORSENING OF HER CONDITION IN 1974 BUT HAS NOT FILED AN AGGRAVATION CLAIM AND THE ORDER OF THE REFEREE SHOULD BE REVERSED AND THE ORIGINAL DETERMINATION ORDER REINSTATED.

THE REFEREE FOUND THAT CLAIMANT IS PRESENTLY WORKING AS A COUNTY HEALTH NURSE AND THAT THE MOST NOTICEABLE LIMITATIONS THAT SHE HAS ARE LIFTING ANYTHING OVER 20 POUNDS AND DIFFICULTY IN OPERATING AN AUTOMOBILE. NO FURTHER TREATMENT HAS BEEN RECOMMENDED BY HER DOCTORS AND THE REFEREE CONCLUDED CLAIMANT'S CONDITION WAS

STATIONARY, THAT ANY FURTHER TREATMENT THAT SHE MIGHT NEED WOULD BE PALLIATIVE IN NATURE.

CLAIMANT'S CLAIM HAD BEEN CLOSED BY A DETERMINATION ORDER MAILED DECEMBER 5, 1973 WHEREBY SHE WAS GIVEN NO AWARD FOR PERMANENT PARTIAL DISABILITY. THE REFEREE CONCLUDED THAT CLAIMANT DID HAVE RESIDUAL SCHEDULED AND UNSCHEDULED DISABILITY AND AWARDED HER 25 PER CENT FOR HER UNSCHEDULED DISABILITY TO THE CERVICAL SPINE AND 15 PER CENT SCHEDULED DISABILITY FOR LOSS OF FUNCTION OF THE RIGHT ARM.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT CLAIMANT'S BRIEF ON APPEAL DEALS PRIMARILY WITH THE WORSENING OF CLAIMANT'S CONDITION, HOWEVER, THE REQUEST FOR HEARING WAS FILED WITHIN ONE YEAR AFTER THE MAILING DATE OF THE DETERMINATION ORDER, THEREFORE, AGGRAVATION WAS NOT AN ISSUE BEFORE THE REFEREE. THE BOARD AFFIRMS THE AWARD FOR UNSCHEDULED DISABILITY AND THE AWARD FOR SCHEDULED DISABILITY MADE BY THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 11, 1975 IS AFFIRMED.

WCB CASE NO. 75-1727 MARCH 19, 1976

RUSSELL LEWIS, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
MC MURRY AND NICHOLS, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 100 PER CENT LOSS FUNCTION OF HIS LEFT LEG AND 65 PER CENT LOSS FUNCTION OF HIS RIGHT LEG. THE CLAIMANT CONTENDS HE HAS SUFFERED BOTH SCHEDULED AND UNSCHEDULED DISABILITY.

THE EMPLOYER MOVED TO BAR CONSIDERATION OF UNSCHEDULED LOW BACK DISABILITY, ASSERTING THAT THE REFEREE DID NOT HAVE JURISDICTION TO CONSIDER UNSCHEDULED DISABILITY BECAUSE THE AGGRAVATION RIGHTS FROM THE ORIGINAL DETERMINATION ORDER HAD EXPIRED APRIL 16, 1974 AND THE MATTER WAS RES JUDICATA. THE REFEREE CORRECTLY DENIED THE MOTION IN ITS ENTIRETY, STATING A PRIOR AWARD IS NOT RES JUDICATA, AND ONCE A CLAIM IS REOPENED, AFTER DETERMINATION OF DISABILITY, THE CLAIM IS OPEN FOR ALL PURPOSES.

CLAIMANT SUFFERED COMPENSABLE INJURIES TO BOTH LEGS ON APRIL 12, 1968 AND ON OR ABOUT JUNE 6, 1969 CLAIMANT SUSTAINED INJURIES TO THE CERVICAL AND LUMBAR AREAS OF HIS BACK WHEN THE MOTOR VEHICLE WHICH HE WAS OPERATING WAS REAR-ENDED.

CLAIMANT HAS HAD ONE OPERATION ON HIS RIGHT KNEE AND THREE OPERATIONS ON HIS LEFT KNEE AND HAS RECEIVED AWARDS OF 80 PER CENT LOSS FUNCTION OF THE LEFT LEG AND 50 PER CENT LOSS FUNCTION OF THE RIGHT LEG. DR. MCKILLOP, CLAIMANT'S TREATING PHYSICIAN, INDICATED THAT CLAIMANT'S LEFT LEG WAS VIRTUALLY INDUSTRIALLY USELESS BECAUSE OF THE INJURY AND SEVERE ARTHRITIS - ALMOST TO THE POINT THAT IT IS EQUIVALENT TO AN AMPUTATION, AND THAT CLAIMANT HAS A SUBSTANTIAL LOSS OF FUNCTION OF THE RIGHT LEG. DR. CHERRY, BASED UPON AN EXAMINATION OF CLAIMANT, THE MEDICAL REPORTS AND EVIDENCE AND THE HISTORY

GIVEN TO HIM BY CLAIMANT, WAS OF THE IMPRESSION THAT CLAIMANT HAD IN ADDITION TO HIS SCHEDULED DISABILITY, CHRONIC LOW BACK STRAIN DUE TO THE INDUSTRIAL ACCIDENT AND AGGRAVATED BY THE AUTOMOBILE ACCIDENT.

THE REFEREE WAS OF THE OPINION THAT DR. CHERRY'S OPINION WOULD PROBABLY HAVE BEEN DETERMINATIVE OF UNSCHEDULED DISABILITY EXCEPT FOR THE LACK OF SUPPORTING EVIDENCE AND HE CONCLUDED THAT THE QUESTION OF THE BACK BEING CONSEQUENTIALLY RELATED WAS PRIMARILY A RECENT AFTERTHOUGHT. THERE IS NO MENTION IN THE MEDICAL RECORDS, NOR CAN THE CLAIMANT RECALL HAVING SPECIFICALLY COMPLAINED OR HAVING TOLD ANYBODY ABOUT A BACK INJURY PRIOR TO HIS AUTOMOBILE ACCIDENT.

THE REFEREE CONCLUDED THAT THE ARTHRITIC AND DISEASED CONDITION CAUSING DIFFICULTIES IN THE BACK WERE DUE PRIMARILY TO THE SUPERSEDING INTERVENING AUTOMOBILE ACCIDENT AND NOT RELATED TO THE INDUSTRIAL INJURY. THEREFORE, CLAIMANT WAS NOT ENTITLED TO AN AWARD FOR AN UNSCHEDULED DISABILITY.

THE REFEREE FOUND, BASED UPON THE REPORTS OF DR. MCKILLOP, THAT CLAIMANT HAS A GREATER SCHEDULED DISABILITY IN BOTH LEGS THAN THAT FOR WHICH HE HAD PREVIOUSLY BEEN AWARDED AND HE, ACCORDINGLY, INCREASED THE AWARDS, 20 PER CENT WITH RESPECT TO THE LEFT LEG AND 15 PER CENT WITH RESPECT TO THE RIGHT LEG.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE CONCLUSION REACHED BY THE REFEREE THAT THE DIFFICULTIES WHICH CLAIMANT IS HAVING IN HIS LOWER BACK ARE DUE PRIMARILY TO THE SUPERSEDING INTERVENING AUTOMOBILE ACCIDENT AND NOT RELATED TO THE INDUSTRIAL INJURY. CLAIMANT HAS NOT SUFFERED AN UNSCHEDULED DISABILITY, THEREFORE, ANY EVIDENCE RELATING TO HIS LOSS OF EARNING CAPACITY AND HIS CONTENTION THAT HE IS PERMANENTLY AND TOTALLY DISABLED UNDER THE PROVISIONS OF ORS 656.206(1) MUST BE DISREGARDED. IN DETERMINING SCHEDULED DISABILITY, WHICH IN THIS CASE CLAIMANT HAS ESTABLISHED WERE RELATED TO HIS INDUSTRIAL INJURY, THE SOLE CRITERION FOR DETERMINING THE AWARD IS THE LOSS OF FUNCTION OF THE SCHEDULED MEMBER. THE BOARD CONCURS WITH THE AWARDS MADE BY THE REFEREE WITH RESPECT TO CLAIMANT'S SCHEDULED DISABILITIES AND AFFIRMS HIS ORDER.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 30, 1975 IS AFFIRMED.

WCB CASE NO. 75-837 MARCH 22, 1976

SUSAN CRUMPTON, CLAIMANT

COREY, BYLER AND REW,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT
CROSS REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 320 DEGREES FOR 100 PER CENT UNSCHEDULED DISABILITY, CONTENDING THAT SHE IS PERMANENTLY AND TOTALLY DISABLED. THE STATE ACCIDENT INSURANCE FUND CROSS REQUESTS REVIEW BY THE BOARD.

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HER LOW BACK ON OCTOBER 1, 1969, DIAGNOSED AS A CHRONIC STRAIN OF THE LUMBAR MUSCLES

AND LIGAMENTS, SUPERIMPOSED UPON MODERATELY SEVERE DEGENERATIVE DISC DISEASE AT L2-3 AND MILD DEGENERATIVE DISC DISEASE AT L1-2 AND L5-S1 WITH OSTEOARTHRITIS AT MULTIPLE LEVELS - SPECIFICALLY, AT L2-3 AND LUMBOSACRAL JOINT.

CLAIMANT AT THE TIME OF THE HEARING WAS 52 YEARS OLD, SHE HAS A FORMAL ELEVENTH GRADE EDUCATION BUT NO OTHER EDUCATION OR TRAINING. SHE HAS ATTENDED A COMPREHENSIVE PHYSICAL REHABILITATION PROGRAM AT THE DISABILITY PREVENTION DIVISION AND HER CLAIM WAS INITIALLY CLOSED BY A DETERMINATION ORDER MAILED JULY 3, 1970 WHEREIN SHE WAS AWARDED 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY AND 8 DEGREES FOR PARTIAL LOSS OF THE RIGHT LEG.

THE CLAIM WAS REOPENED AFTER CLAIMANT EXPERIENCED INTERMITTENT FLAREUPS WHICH REQUIRED HER TO BE REHOSPITALIZED, AND AGAIN CLOSED BY A DETERMINATION ORDER MAILED FEBRUARY 19, 1970 WHEREIN CLAIMANT WAS AWARDED 80 DEGREES FOR 25 PER CENT UNSCHEDULED LOW BACK DISABILITY, GIVING CLAIMANT A TOTAL AWARD OF 112 DEGREES FOR 35 PER CENT UNSCHEDULED DISABILITY AND 8 DEGREES FOR PARTIAL LOSS OF THE RIGHT LEG.

CLAIMANT'S WORK BACKGROUND CONSISTED OF JOBS WHICH REQUIRED BENDING AND STOOPING, PROLONGED STANDING AND SITTING AND HEAVY LIFTING. CLAIMANT IS UNABLE TO DO ANY OF THESE THINGS AT THE PRESENT TIME. IN ADDITION TO HER BACK PROBLEM CLAIMANT HAS HIGH BLOOD PRESSURE AND IS OBESE - CLAIMANT HAD BOTH THESE PROBLEMS PRIOR TO HER INDUSTRIAL INJURY. FOLLOWING HER INDUSTRIAL INJURY CLAIMANT WAS FOUND TO HAVE DIABETES MELLITIS.

DR. PERKINS, AFTER PSYCHOLOGICAL EVALUATION, WAS OF THE OPINION THAT CLAIMANT SEEMED MOTIVATED TO RETURN TO WORK THOUGH SHE WAS A RATHER POOR CANDIDATE IN LIGHT OF CURRENT SKILLS, VOCATIONAL APTITUDES AND THE FACT THAT SHE DID NOT HAVE A HIGH SCHOOL DEGREE.

DR. SMITH, CLAIMANT'S TREATING PHYSICIAN, EXPRESSED HIS OPINION THAT CLAIMANT SHOULD CONSULT HER FAMILY PHYSICIAN ABOUT A WEIGHT REDUCTION PROGRAM WHICH SHOULD BE MONITORED IN VIEW OF HER HYPERTENSION AS WELL AS HER EARLY DIABETES - HOWEVER, THE WEIGHT REDUCTION WOULD HAVE A SIGNIFICANT EFFECT ON REDUCING HER BACK DISCOMFORT. DR. SMITH INDICATED FURTHER MEDICAL OR SURGICAL TREATMENT OFFERED CLAIMANT VERY LITTLE AND HE BELIEVED THAT SHE WAS ESSENTIALLY TOTALLY DISABLED. HE DID NOT FEEL THAT CLAIMANT WAS A MALINGERER BUT THAT SHE HAD SIGNIFICANT BACK PATHOLOGY AND A VERY SIGNIFICANT LIMITATION OF HER ABILITY TO WORK. HE COULD SEE NO PARTICULAR HOPE OF HER RETURN TO USEFUL EMPLOYMENT.

THE FUND CONTENDS THAT CLAIMANT HAS BEEN ADEQUATELY COMPENSATED BY THE AWARDS ALREADY RECEIVED BUT ALSO CONTENDS THAT IF, IN FACT, SHE SHOULD BE PERMANENTLY AND TOTALLY DISABLED, THAT SUCH STATUS RESULTED, IN PART, FROM HER NON-WORK CONNECTED DISABILITIES, I.E., DEGENERATIVE DISC DISEASE, DIABETES MELLITIS, HYPERTENSION, OVERWEIGHT, ETC. AND THAT IT IS NOT RESPONSIBLE FOR CLAIMANT'S COMPLETE STATUS.

THE REFEREE FOUND THAT THE CLAIMANT'S DEGENERATIVE DISC DISEASE PREEXISTED THE INDUSTRIAL INJURY AND WAS AGGRAVATED BY THAT INJURY. DR. PARCHER, A MEDICAL CONSULTANT FOR THE FUND, EXPRESSED HIS OPINION THAT CLAIMANT'S PROGRESSIVE DEGENERATIVE DISC DISEASE PROBABLY WAS AGGRAVATED BY THE INDUSTRIAL INJURY. CLAIMANT'S DIABETES MELLITIS, HYPERTENSION CONDITION AND HIGH BLOOD PRESSURE WERE NOT MATERIAL FACTORS REGARDING HER PRESENT PHYSICAL DISABILITIES AND LIMITATIONS.

CLAIMANT HAS HAD AN OVERWEIGHT PROBLEM FOR MANY YEARS. AT PERIODS OF TIME SHE HAS BEEN ABLE TO LOSE WEIGHT BY PLACING HERSELF ON A DIET. SHE CONTENDS THAT NOW SHE IS LIMITED IN HER ABILITY TO EXERCISE AND LOSE WEIGHT BECAUSE OF HER BACK CONDITION. THE REFEREE FOUND HER PRESENT OVERWEIGHT CONDITION IS A NON-PERMANENT FACTOR WHICH IS WITHIN CLAIMANT'S ABILITY TO CONTROL AND SUCH CONDITION DOES CONTRIBUTE TO HER CONTINUED BACK PAIN AND DISCOMFORT EVEN THOUGH THE INDUSTRIAL INJURY AND ITS RESIDUAL EFFECTS ARE THE PRIMARY AND MATERIAL CAUSES OF CLAIMANT'S INABILITY TO RETURN TO GAINFUL EMPLOYMENT. CLAIMANT HAS A DUTY TO LOSE WEIGHT AND MINIMIZE THIS CONTRIBUTORY EFFECT OF OBESITY AS IT RELATES TO HER TOTAL IMPAIRMENT. THE FUND IS NOT RESPONSIBLE FOR CLAIMANT'S VOLUNTARY OVERWEIGHT PROBLEM.

THE REFEREE FOUND THAT CLAIMANT EXPERIENCES LIMITATION OF MOTION, PAIN AND DISCOMFORT IN HER LOW BACK, AS WELL AS PAIN AND DISCOMFORT IN HER RIGHT HIP WHICH IS MATERIALLY DISABLING AND AS A RESULT SHE HAS BEEN EFFECTIVELY EXCLUDED FROM HER FORMER OCCUPATIONS AS WELL AS THOSE OCCUPATIONS IN THE GENERAL INDUSTRIAL LABOR MARKET WHICH REQUIRE HEAVY LIFTING, BENDING, STOOPING, TWISTING OR TURNING, PROLONGED SITTING OR WALKING, AND PROLONGED STANDING. SHE IS NOT AN APPROPRIATE CANDIDATE FOR VOCATIONAL REHABILITATION OR RETRAINING BECAUSE OF HER PHYSICAL LIMITATIONS, AGE, EDUCATION AND TRAINING AND VOCATIONAL APTITUDES.

TAKING INTO CONSIDERATION THE ABOVE FACTORS, THE REFEREE CONCLUDED THAT CLAIMANT IS, IN FACT, PERMANENTLY AND TOTALLY DISABLED BECAUSE OF THE RESIDUAL EFFECTS FROM HER INDUSTRIAL INJURY AS WELL AS THE CONTRIBUTORY EFFECT OF HER OVERWEIGHT CONDITION, BUT THE FUND CANNOT BE HELD RESPONSIBLE FOR THE LATTER. THEREFORE, CLAIMANT IS NOT ENTITLED TO BE CONSIDERED AS PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF HER INDUSTRIAL INJURY, BUT CLAIMANT'S LOSS OF EARNING CAPACITY IS SO SEVERE THAT AN AWARD OF 100 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE IS JUSTIFIED.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT CLAIMANT IS NOT, IN FACT, PERMANENTLY AND TOTALLY DISABLED BUT DOES AGREE WITH THE AWARD OF PERMANENT PARTIAL DISABILITY MADE BY THE REFEREE AND AFFIRMS HIS ORDER.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 15, 1975 IS AFFIRMED.

WCB CASE NO. 75-2480 MARCH 22, 1976

JAMES HUNTING, CLAIMANT

FABRE AND EHLERS, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH DENIED CLAIMANT'S CLAIM FOR THE PAYMENT OF MEDICAL EXPENSES PROVIDED BY DR. CARLSON FOR TREATMENTS GIVEN CLAIMANT IN CONNECTION WITH HIS MARCH 7, 1971 INDUSTRIAL INJURY AS WELL AS TRANSPORTATION EXPENSES INCIDENTAL THERETO.

CLAIMANT HAD SUFFERED A COMPENSABLE INJURY TO HIS LOW BACK ON MARCH 7, 1971 AND HIS CLAIM WAS CLOSED ON MAY 31, 1972 WITH AN AWARD

OF 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY, LATER REOPENED BY STIPULATION DATED OCTOBER 4, 1972 FOR SURGERY BY DR. DONALD A. SMITH OF WALLA WALLA, WASHINGTON AND THEN CLOSED AGAIN ON MAY 8, 1974 WITH AN ADDITIONAL AWARD OF 32 DEGREES. THE CLAIMANT REQUESTED A HEARING AND REFEREE LEAHY IN HIS OPINION AND ORDER ENTERED DECEMBER 31, 1974, INCREASED CLAIMANT'S AWARD TO 112 DEGREES FOR 35 PER CENT UNSCHEDULED LOW BACK DISABILITY.

FOLLOWING THE HEARING, CLAIMANT'S SYMPTOMATOLOGY PERSISTED AND HE WAS REFERRED BY HIS BROTHER-IN-LAW TO DR. CARLSON OF SALMON, IDAHO. BETWEEN JANUARY 17, 1975 AND AUGUST 20, 1975 CLAIMANT RECEIVED A TOTAL OF 57 CHIROPRACTIC TREATMENTS, THE TOTAL CHARGE FOR WHICH WAS 1,115 DOLLARS. ADDITIONALLY, CLAIMANT INCURRED TRAVEL EXPENSES - HE MADE FIVE TRIPS BETWEEN PENDLETON, OREGON AND SALMON, IDAHO.

ON FEBRUARY 28, 1975 CLAIMANT'S ATTORNEY ADVISED THE FUND OF THE CIRCUMSTANCES OF CLAIMANT'S FIRST TRIP TO SEE DR. CARLSON, ON JANUARY 17, 1975 AND REQUESTED REIMBURSEMENT FOR TRAVEL EXPENSES AND MEDICAL CHARGES. HE ALSO REQUESTED AUTHORIZATION FOR TRANSPORTATION AND MEDICAL EXPENSES THAT CLAIMANT ANTICIPATED WOULD BE INCURRED. A COPY OF DR. CARLSON'S REPORT WAS ENCLOSED WHICH DESCRIBED THE TYPE OF TREATMENT DR. CARLSON ANTICIPATED WOULD BE NECESSARY AND ALSO ESTIMATED THE TOTAL COST OF SUCH TREATMENTS TO BE AT LEAST 1,000 DOLLARS PLUS THE TRANSPORTATION EXPENSES. ON MARCH 13, 1975 THE FUND RESPONDED WITH A LETTER STATING IT WAS 'QUITE PREPARED TO ASSUME THE RESPONSIBILITY FOR REASONABLE MEDICAL TREATMENT' AND WOULD ALSO 'PAY REASONABLE TRAVEL EXPENSES ASSOCIATED WITH SUCH TREATMENT.' THIS LETTER ALSO REQEUSTED AN EXPLANATION BY THE CLAIMANT AS TO WHY HE SOUGHT THE SERVICES OF DR. CARLSON IN IDAHO AND ENCLOSED A FORM 483 FOR MAKING A CLAIM FOR REIMBURSEMENT. CLAIMANT RETURNED THE VOUCHER AND THE FUND REIMBURSED CLAIMANT FOR TRAVEL EXPENSES IN THE AMOUNT OF 118.58 DOLLARS.

ON MARCH 27, 1975 THE FUND NOTIFIED CLAIMANT'S ATTORNEY THAT IT WOULD NEED PRIOR AUTHORIZATION FOR FURTHER OUT-OF-STATE MEDICAL TREATMENT OR TRAVEL EXPENSES IN CONNECTION THEREWITH. ON APRIL 9, 1975 THE FUND REFUSED TO PAY TRANSPORTATION EXPENSES OTHER THAN THOSE PREVIOUSLY PAID AND ON JUNE 11, 1975 THE FUND REFUSED PAYMENT OF THE MEDICAL CARE AND TREATMENT BECAUSE THE INFORMATION IN HIS FILE DID NOT SHOW DR. CARLSON'S TREATMENT WAS RELATED TO CLAIMANT'S INDUSTRIAL INJURY.

THE REFEREE FOUND THAT THE FUND'S CONTENTION THAT THE MEDICAL CARE AND TREATMENT WAS NOT CAUSALLY RELATED TO HIS INDUSTRIAL INJURY OF MARCH 7, 1971 HAD NO MERIT AND THAT DR. CARLSON'S CHARGES WERE NOT UNREASONABLE. HE FOUND THAT THE FUND HAD A CONTINUING OBLIGATION TO PROVIDE MEDICAL CARE AND TREATMENT, AFTER A FINAL AWARD OF PERMANENT PARTIAL DISABILITY, FOR CLAIMANT'S CONDITION RESULTING FROM A COMPENSABLE INJURY, BUT CONCLUDED THAT, IN THE ABSENCE OF SHOWING PRIOR AUTHORIZATION, NECESSITY OR SOME OTHER COMPELLING REASON, THIS OBLIGATION IS LIMITED TO MEDICAL SERVICES AND TRANSPORTATION EXPENSES INCIDENTAL THERETO WITHIN THE STATE OF OREGON. THEREFORE, THE MEDICAL EXPENSES INCURRED BY THE CLAIMANT FROM DR. CARLSON AS WELL AS THE TRANSPORTATION EXPENSES INCIDENTAL THERETO WERE NOT THE RESPONSIBILITY OF THE FUND. THE CLAIMANT HAD TAKEN IT UPON HIMSELF, WITHOUT PRIOR AUTHORIZATION FROM THE FUND, TO SEEK MEDICAL SERVICES OUTSIDE THE STATE OF OREGON.

THE BOARD, ON DE NOVO REVIEW, DISAGREES WITH THE REFEREE ON HIS CONCLUSION. THE BOARD FINDS THAT THE LETTER FROM THE FUND, DATED MARCH 13, 1975, RESPONDING TO CLAIMANT'S REQUEST FOR REIMBURSEMENT FOR TRAVEL EXPENSES AND MEDICAL CHARGES AND AUTHORIZATION FOR FURTHER ANTICIPATED TRANSPORTATION AND MEDICAL EXPENSES WAS SUFFICIENT AUTHORIZATION AND, THEREFORE, THE FUND HAD A CONTINUING OBLIGATION TO PROVIDE

MEDICAL CARE AND TREATMENT WHICH WAS RECEIVED BY CLAIMANT FROM DR. CARLSON.

WITH RESPECT TO THE REIMBURSEMENT FOR TRANSPORTATION EXPENSES INCIDENTAL TO SUCH TREATMENT, THE BOARD FINDS THAT ON APRIL 9, 1975 THE FUND ADVISED THE CLAIMANT THAT IT WOULD NOT PAY ANY MORE TRANSPORTATION - THIS WAS SUFFICIENT TO PUT THE CLAIMANT ON NOTICE THAT HIS TRANSPORTATION EXPENSES WOULD NO LONGER BE PAID - HOWEVER, IT DID NOT RELIEVE THE FUND OF THE RESPONSIBILITY OF PAYING FOR ALL OF THE TRANSPORTATION EXPENSES INCURRED BY CLAIMANT PRIOR TO THAT DATE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 16, 1975 IS REVERSED.

UNDER THE PROVISIONS OF ORS 656.245 THE STATE ACCIDENT INSURANCE FUND IS DIRECTED TO PAY FOR ALL OF THE MEDICAL CARE AND TREATMENT WHICH CLAIMANT HAS RECEIVED FROM DR. CARLSON BETWEEN JANUARY 17, 1975 AND AUGUST 20, 1975 AND ALSO TO PAY FOR SUCH TRANSPORTATION EXPENSES INCURRED INCIDENTAL TO THE TREATMENT INCURRED BY THE CLAIMANT BETWEEN JANUARY 17, 1975 AND APRIL 9, 1975.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THE HEARING BEFORE THE REFEREE THE SUM OF 800 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-1798 MARCH 22, 1976

FLOYD R. HOWARD, CLAIMANT

NEWHOUSE, FOSS, WHITTY AND ROESS,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF A REFEREE'S ORDER WHICH FOUND CLAIMANT ENTITLED TO AN AWARD OF PERMANENT TOTAL DISABILITY.

ON SEPTEMBER 17, 1974, CLAIMANT, A THEN 57 YEAR OLD FALLER AND BUCKER, INJURED HIS BACK WHEN HE FELL DOWN THROUGH THE LIMBS OF A TREE HE HAD JUST FELLED. CLAIMANT'S CONDITION WAS DIAGNOSED AS LONGSTANDING, SEVERE HYPERTROPHIC OSTEOARTHRITIS OF THE LUMBAR SPINE, WITH EVIDENCE OF NEUROPATHY OF THE S-1 NERVE ROOT ON THE LEFT, SUPERIMPOSED ON DEGENERATIVE DISC DISEASE.

CLAIMANT HAS NOT WORKED SINCE THE INJURY. HE TESTIFIED HE WOULD BE UNABLE TO DO SO BECAUSE OF PAIN IN THE LOW BACK AND LEG WHICH BECOMES SO SEVERE THE LEG WILL HARDLY HOLD HIM UP. THE PAIN IS EXACERBATED BY SITTING, RIDING IN A CAR, BENDING, LIFTING AND ANY PHYSICAL ACTIVITY. CLAIMANT COMPLETED 8 GRADES IN SCHOOL AND, WITH THE EXCEPTION OF ABOUT FOUR YEARS, HAS SPENT HIS ENTIRE WORKING LIFE IN THE WOODS WHERE HE WORKED STEADILY AT A GOOD RATE OF PAY.

DR. ADAMS, A TREATING ORTHOPEDIST, WAS OF THE OPINION THAT IT WOULD BE EXTREMELY UNLIKELY CLAIMANT WOULD EVER RETURN TO LOGGING,

THAT HE WAS VIRTUALLY NOT RETRAINABLE, AND THAT HE SHOULD BE MEDICALLY RETIRED. A COUNSELOR OF THE DIVISION OF VOCATIONAL REHABILITATION STATED THAT BECAUSE OF CLAIMANT'S AGE AND LEVEL OF SCHOOLING IT WOULD BE OUT OF THE QUESTION FOR CLAIMANT TO GET ANOTHER JOB AND HE RECOMMENDED CLAIMANT SHOULD APPLY FOR SOCIAL SECURITY BENEFITS.

PERMANENT TOTAL DISABILITY AS DEFINED IN ORS 656.206 MEANS, ...'THE LOSS, INCLUDING PREEXISTING DISABILITY, OF USE OR FUNCTION OF ANY SCHEDULED OR UNSCHEDULED PORTION OF THE BODY WHICH PERMANENTLY INCAPACITATES THE WORKMAN FROM REGULARLY PERFORMING ANY WORK AT A GAINFUL AND SUITABLE OCCUPATION.'

IN DECIDING WHETHER A WORKMAN IS PERMANENTLY AND TOTALLY DISABLED ONE MUST LOOK FOR THE REMAINING ABILITIES POSSESSED BY THE WORKMAN AND WHETHER THESE ABILITIES CAN BE MARKETED TO MEET THE REQUIREMENTS OF THE STATUTE. WHEN THE PRESENT ABILITIES OF THIS CLAIMANT ARE EVALUATED IN A REALISTIC MANNER, IT IS NOT LOGICAL TO ASSUME THAT CLAIMANT CAN REGULARLY PERFORM WORK AT A GAINFUL AND SUITABLE OCCUPATION.

THE BOARD CONCURS WITH THE FINDING OF THE REFEREE THAT CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED AND AFFIRMS HIS ORDER.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 10, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 74-4653IF MARCH 22, 1976

JAMES O. RHYNE, CLAIMANT

DYE AND OLSON, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH UPHELD THE STATE ACCIDENT INSURANCE FUND'S DENIAL OF CLAIMANT'S CLAIM.

CLAIMANT, AN INMATE AT THE OREGON STATE PENITENTIARY, ALLEGED HE SUFFERED AN INJURY WHILE WORKING IN THE PRISON FURNITURE FACTORY ON AN UNSPECIFIED DAY IN APRIL 1973. THERE WAS NO INJURY REPORT MADE BY CLAIMANT, OR BY ANY EMPLOYER OF THE PRISON, FOR A WORK ACCIDENT INVOLVING CLAIMANT IN 1973 - THE FIRST MENTION OF AN INCIDENT AT THE FURNITURE FACTORY APPEARED IN DR. BECKER'S REPORT OF MARCH 1974. DR. BECKER HAD COMMENCED SEEING CLAIMANT SOME 6 MONTHS EARLIER.

THE REFEREE FOUND NO MEDICAL OPINION THAT CLAIMANT'S PRESENT OR POST-APRIL 1973 CONDITION WAS CAUSED BY THE WORK ACTIVITY IN APRIL 1973 IN THE FURNITURE FACTORY. HE CONCLUDED THAT ALTHOUGH CLAIMANT WAS HAVING BACK DIFFICULTIES SUBSEQUENT TO APRIL 1973, CLAIMANT HAD NOT MET HIS BURDEN OF ESTABLISHING THAT SUCH DIFFICULTIES WERE CAUSED BY THE SPECIFIC WORK ACTIVITY AS ALLEGED.

WITH RESPECT TO THE FUND'S CONTENTION THAT THE MATTER SHOULD BE DISMISSED AS CLAIMANT FAILED TO FILE HIS CLAIM WITHIN 90 DAYS AFTER THE INJURY AS PROVIDED BY ORS 655.520 AND, OR THAT CLAIMANT FAILED TO REQUEST

A HEARING WITHIN THE TIME PERIOD SPECIFIED IN ORS 656.319. THE REFEREE BELIEVED THE CLAIMANT'S STATEMENT THAT HE WAS UNAWARE OF THE EXISTENCE OF THE INMATE INJURY FUND AND OF HIS RIGHT TO FILE A CLAIM. THE REFEREE FOUND NO EVIDENCE THAT NOTICE OF THE EXISTENCE OF THE INMATE INJURY FUND WAS POSTED IN THE WORK AREAS AT THE PENITENTIARY - CLAIMANT LEARNED OF THE FUND FROM AN INMATE. HE CONCLUDED THAT CLAIMANT'S IGNORANCE WAS SUPPORTED BY THE EVIDENCE AND WAS GOOD CAUSE FOR HIS FAILURE TO FILE A CLAIM WITHIN 90 DAYS OF THE ALLEGED INJURY, AND THAT SUCH DELAY HAD NOT PREJUDICED THE STATE ACCIDENT INSURANCE FUND.

WITH RESPECT TO THE CONTENTION THAT CLAIMANT DID NOT TIMELY REQUEST A HEARING, THE REFEREE FOUND THAT THE FUND'S DENIAL WAS DATED SEPTEMBER 4, 1974 AND THE REQUEST FOR HEARING WAS NOT RECEIVED BY THE BOARD UNTIL DECEMBER 24, 1974 AND BY THE FUND TWO DAYS LATER. AT THE TIME DENIAL WAS ISSUED CLAIMANT WAS BEING REPRESENTED BY ROLF T. OLSON, AN ATTORNEY AT LAW, AND HAD BEEN SO REPRESENTED FOR SOME SIX MONTHS PREVIOUS. THE FUND WAS AWARE OF THIS BUT DID NOT MAIL MR. OLSON A COPY OF THE DENIAL.

THE REFEREE CONCLUDED THAT ALTHOUGH THE USUAL PRACTICE OF THE FUND (NOT FOLLOWED IN THIS CASE) TO SEND COPIES OF NOTICES TO CLAIMANT'S ATTORNEY WHEN IT WAS AWARE CLAIMANT HAD ONE AND WHO HE WAS, WAS A COMMENDABLE PRACTICE, NEVERTHELESS IT WAS NOT MANDATORY AND AN ATTORNEY IS NOT ENTITLED TO NOTICE AS A PARTY. THE CLAIMANT SIMPLY FORGOT TO TELL MR. OLSON ABOUT THE DENIAL AND CLAIMANT'S FORGETFULNESS DOES NOT CONSTITUTE GOOD CAUSE FOR FAILURE TO REQUEST A HEARING WITHIN 60 DAYS. THE REFEREE UPHELD THE DENIAL.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 17, 1975 IS AFFIRMED.

WCB CASE NO. 75-1516 MARCH 22, 1976

PERCY N. MANUEL, CLAIMANT

POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON, MOORE AND PHILLIPS.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH UPHELD THE EMPLOYER'S DENIAL OF CLAIMANT'S CLAIM FOR AGGRAVATION.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON AUGUST 17, 1971. HIS CLAIM WAS CLOSED WITH AN AWARD OF 32 DEGREES FOR 10 PER CENT UNSCHEDULED DISABILITY AND, AFTER HEARING REQUESTED BY CLAIMANT, THIS AWARD WAS AFFIRMED BY AN OPINION AND ORDER ENTERED AUGUST 21, 1972.

CLAIMANT HAD SUFFERED NECK AND LOW BACK INJURIES IN 1968 AND AGAIN IN 1970, BOTH RESULTING FROM A REAR-END AUTOMOBILE COLLISION. THERE IS NO EVIDENCE WHETHER OR NOT CLAIMANT WAS WORK RESTRICTED AS A RESULT OF THE 1968 INJURY, HOWEVER, AFTER THE 1970 INJURY HE COULD NOT DO WORK WHICH INVOLVED EXCESSIVE LIFTING, STOOPING, BENDING, ETC. PRIOR TO HIS INDUSTRIAL INJURY CLAIMANT WAS ABLE TO PERFORM DESK WORK,

INCLUDING SCHEDULING AND EXPEDITING, AND SHORTLY BEFORE HIS INJURY HE BECAME A STOCK CLERK.

SUBSEQUENT TO HIS LAST AWARD OR ARRANGEMENT OF COMPENSATION, (AUGUST 21, 1972), CLAIMANT WAS SEEN BY DR. KAYSER, AN ORTHOPEDIC SURGEON, AND LATER REFERRED BY HIM TO DR. HUMMEL, AN NEUROSURGEON. ON JANUARY 21, 1975 BOTH DOCTORS PERFORMED A DECOMPRESSIVE BILATERAL TOTAL LAMINECTOMY, L4-5 AND S-1, WITH L4-5 AND L5-S1 PARTIAL FORAMINOTOMIES, BILATERALLY FOR A SPINAL STENOSIS SYNDROME WITH SPINAL STENOSIS CLAUDIFICATION. DR. KAYSER TESTIFIED THAT THE 1971 INJURY AGGRAVATED CLAIMANT'S PREEXISTING CONDITION - HOWEVER, THERE IS NO MEDICAL OPINION OR EVIDENCE THAT CLAIMANT'S CONDITION HAS BECOME AGGRAVATED SINCE AUGUST 21, 1972. CLAIMANT TESTIFIED HIS CONDITION HAS BEEN GETTING WORSE SINCE HIS CLAIM WAS CLOSED AND THAT HE THOUGHT AT THE TIME OF THE PRIOR HEARING HE WAS PERMANENTLY AND TOTALLY DISABLED - CLAIMANT HAS NOT RETURNED TO WORK SINCE THE 1971 INJURY.

DR. HUMMEL STATED, 'ANY CAUSAL RELATIONSHIP BETWEEN A SINGLE EPISODE OF TRAUMA AND THE CHRONIC DEGENERATIVE SPINE CHANGES MUST REMAIN ENTIRELY CONJECTURAL'. DR. KAYSER FELT THE PRESENT FINDINGS AS A RESULT OF CLAIMANT'S PRESENT PHYSICAL CONDITION WERE MORE THAN LIKELY THE RESULT OF A NORMAL AGING PROCESS. HE TESTIFIED THAT THE OPERATION IN JANUARY 1975 WAS FOR THE PURPOSE OF RELIEVING THE CLAIMANT'S SPINAL STENOSIS CONDITION - THAT THERE WOULD BE A CAUSAL OR AGGRAVATIONAL RELATIONSHIP BETWEEN THE CLAIMANT'S SPINAL STENOSIS AND HIS INDUSTRIAL INJURY ONLY IF THE DOCTORS HAD FOUND A HERNIATED OR PROTRUDED LUMBAR DISC. THEY DID NOT DO SO AND DR. KAYSER WAS OF THE OPINION THAT THE INDUSTRIAL INJURY DID NOT AGGRAVATE THE SPINAL STENOSIS.

THE REFEREE CONCLUDED, BASED ON THE OPINIONS EXPRESSED BY DR. KAYSER AND DR. HUMMEL, THAT THERE WAS NOT SUFFICIENT MEDICAL OPINION TO SUPPORT CLAIMANT'S CONTENTION THAT HIS PRESENT CONDITION WAS AN AGGRAVATION OF HIS 1971 INJURY.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT THE PREPONDERANCE OF THE EVIDENCE RELATES THE JANUARY 1975 SURGERY TO CLAIMANT'S SPINAL STENOSIS CONDITION AND THAT SUCH CONDITION WAS NEITHER CAUSED OR AGGRAVATED BY THE INDUSTRIAL INJURY OF 1971. THE REFEREE'S ORDER WOULD BE AFFIRMED.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 6, 1975 IS AFFIRMED.

WCB CASE NO. 75-2678 MARCH 22, 1976

RONALD WELCH, CLAIMANT

MERTEN AND SALTVEIT, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED HIM 45 DEGREES FOR 30 PER CENT OF THE LEFT LEG.

CLAIMANT, A HEAVY EQUIPMENT MECHANIC, SUSTAINED A COMPENSABLE INJURY TO BOTH LEGS ON FEBRUARY 14, 1974 WHEN HIS LEGS WERE CRUSHED BETWEEN TWO PIECES OF EQUIPMENT. THE LEFT LEG SUFFERED A COMMINUTED FRACTURE IN THE REGION OF THE ANKLE AND THE SETTING INVOLVED THE USE

OF TWO SURGICAL SCREWS THROUGH THE BONE. CLAIMANT WAS TREATED THROUGHOUT BY DR. CASE, AN ORTHOPEDIC SURGEON. HE WAS ALSO EXAMINED BY DR. PARSONS, A NEUROLOGIST, FOR NERVE INVOLVEMENT.

CLAIMANT RETURNED TO HIS OLD JOB ON MAY 28, 1974 AND HAS WORKED STEADILY SINCE THAT DAY WITHOUT ANY LOSS OF TIME BECAUSE OF THE INJURY - HOWEVER, HE TESTIFIED HE STILL HAS PROBLEMS WITH HIS LEFT ANKLE GIVING AWAY. HE HAS TROUBLE WALKING IN ROUGH AREAS, HE HAS TO WALK SLOWLY AND HE SEES DR. CASE PERIODICALLY FOR INJECTIONS IN THE LEFT ANKLE TO RELIEVE THE PAIN. AN ARTHROGRAM TAKEN APPROXIMATELY TWO WEEKS PRIOR TO THE HEARING WAS NEGATIVE. CLAIMANT TESTIFIED THAT HIS RIGHT LEG BOTHERED HIM, THE PRINCIPAL SYMPTOM BEING OCCASIONAL NUMBNESS. THE CLAIM HAD BEEN CLOSED ON DECEMBER 30, 1974 BY A DETERMINATION ORDER WHICH AWARDED CLAIMANT 30 DEGREES FOR 20 PER CENT OF THE LEFT LEG.

THE REFEREE, BASED ON DR. CASE'S PROGNOSIS THAT CLAIMANT'S RIGHT LEG WILL BE SYMPTOM-FREE IN ABOUT SIX MONTHS, FOUND THAT CLAIMANT HAD SUSTAINED NO PERMANENT DISABILITY TO HIS RIGHT LEG. THE REFEREE FOUND THAT THE EVIDENCE INDICATING THE CONTINUING SYMPTOMS OF PAIN IN THE LEFT LEG WERE MEDICALLY VERIFIED AND THAT CLAIMANT WAS ENTITLED TO AN AWARD OF 45 DEGREES FOR 30 PER CENT OF HIS LEFT LEG, AN INCREASE OF 15 DEGREES.

THE BOARD, ON DE NOVO REVIEW, NOTES THAT CLAIMANT CONTENDS HE HAS SOME BACK PAIN WHICH HE ATTRIBUTES TO HAVING BEEN HIT IN THE BACK AT THE TIME OF HIS ACCIDENT. DR. PARSONS, WHO EXAMINED CLAIMANT ON JANUARY 6, 1975, STATED THERE WAS CLINICAL EVIDENCE FOR A POSSIBLE L5 NERVE ROOT LESION ALTHOUGH HE WAS UNSURE AT THAT TIME HOW IT CORRELATED WITH THE LEG INJURY. HE FELT THAT A FURTHER EVALUATION IN THE FORM OF ELECTROMYOGRAPHIC STUDY OF THE LEFT LOWER EXTREMITY MIGHT BE HELPFUL. THE EMG STUDY DETERMINED THAT THE SITUATION WAS NORMAL AND, ON JANUARY 21, 1975, DR. PARSONS STATED THERE WAS NO EVIDENCE OF NERVE ROOT IMPINGEMENT, ENTRAPMENT OR COMPRESSION.

THE BOARD CONCLUDES THAT CLAIMANT HAS NOT SUFFERED ANY PERMANENT DISABILITY TO AN UNSCHEDULED AREA AND THAT THE AWARD MADE BY THE REFEREE FOR CLAIMANT'S SCHEDULED LEFT LEG DISABILITY SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 15, 1975, AS AMENDED BY THE ORDER DATED OCTOBER 23, 1975, IS AFFIRMED.

WCB CASE NO. 75-1148 MARCH 22, 1976

ANNETTE FLYNN, CLAIMANT

KEITH D. SKELTON, CLAIMANT'S ATTY.
MERTEN AND SALTVEIT, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE EMPLOYER REQUESTS BOARD REVIEW ONLY OF THAT PORTION OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 9.6 DEGREES FOR 5 PER CENT LOSS OF HER LEFT ARM AND 64 DEGREES FOR 20 PER CENT UNSCHEDULED SHOULDER AND NECK DISABILITY.

CLAIMANT SUSTAINED A COMPENSABLE INJURY TO HER LEFT SHOULDER AND CERVICAL SPINE ON OCTOBER 16, 1974. CLAIMANT COMMENCED RECEIVING MEDICAL TREATMENT THE FOLLOWING DAY FROM DR. SHERWIN, WHO HAS REMAINED

CLAIMANT'S PRINCIPAL TREATING PHYSICIAN. HOWEVER, CLAIMANT WAS TREATED AND, OR EXAMINED BY OTHER DOCTORS AND WAS HOSPITALIZED ON TWO OCCASIONS IN PORTLAND.

FOLLOWING A REPORT BY DR. SHORT ON JANUARY 7, 1975, A DETERMINATION ORDER WAS MAILED ON FEBRUARY 20, 1975 AWARDING CLAIMANT TIME LOSS FROM OCTOBER 17, 1974 THROUGH JANUARY 7, 1975, LESS TIME WORKED, ONLY.

ON FEBRUARY 7, 1975 DR. SHERWIN HAD ISSUED A REPORT INDICATING HE WAS NOT IN AGREEMENT WITH DR. SHORT'S REPORT, HE FELT THAT CLAIMANT'S PAIN WAS REAL AND THAT SHE WOULD BE UNABLE TO WORK FOR AN ADDITIONAL THREE TO SIX MONTHS. ON APRIL 28, 1975 THE EVALUATION DIVISION OF THE BOARD BY AN ADMINISTRATIVE DETERMINATION ORDER INDICATED THAT DR. SHERWIN'S REPORT HAD NOT BEEN AVAILABLE WHEN THE DETERMINATION ORDER WAS ISSUED AND, AS A RESULT OF THE ADDITIONAL INFORMATION RECEIVED, IT WAS CONCLUDED THAT THE PRIOR ORDER HAD BEEN ERRONEOUSLY ISSUED BECAUSE CLAIMANT'S CONDITION WAS NOT, AT THAT TIME, MEDICALLY STATIONARY. THE DETERMINATION ORDER WAS SET ASIDE IN ITS ENTIRETY AND THE EMPLOYER WAS ORDERED TO PROVIDE SUCH FURTHER TREATMENT AND COMPENSATION BENEFITS AS CLAIMANT'S CONDITION SHOULD WARRANT, INCLUDING TEMPORARY DISABILITY COMPENSATION.

SUBSEQUENTLY, CLAIMANT WAS EXAMINED BY DR. PASQUESI, AN ORTHOPEDIC SURGEON, WHO DIAGNOSED SHOULDER-ARM SYNDROME OF RATHER CHRONIC NATURE AND FELT THAT CLAIMANT HAD PERMANENT IMPAIRMENT OF THE WHOLE BODY ON THE BASIS OF THE RESIDUAL SYMPTOMATOLOGY IN HER UPPER BACK AND SHOULDER AND PERMANENT IMPAIRMENT OF THE LEFT ARM FROM LOSS OF STRENGTH, ATROPHY AND LOSS OF MUSCLE POWER. HE INDICATED THAT NO FURTHER CURATIVE TREATMENT WAS ADVISED AND THAT CLAIMANT'S CONDITION WAS MEDICALLY STATIONARY AT THAT TIME. DR. SHERWIN CONCURRED IN THE REPORT OF DR. PASQUESI AND A SPECIAL DETERMINATION ORDER, DATED JULY 16, 1975, WAS ISSUED INDICATING CLAIMANT'S CONDITION WAS DETERMINED TO BE MEDICALLY STATIONARY AT THAT TIME, NO FURTHER CURATIVE MEDICAL TREATMENT WAS REQUIRED AND CLAIMANT WAS ENTITLED TO ADDITIONAL TEMPORARY TOTAL DISABILITY THROUGH JUNE 26, 1975 BUT WAS NOT ENTITLED TO AN AWARD FOR PERMANENT PARTIAL DISABILITY.

DR. PASQUESI INDICATED THAT CLAIMANT WOULD NOT BE ABLE TO RETURN TO ANY WORK REQUIRING OVERHEAD WORK OR REPETITIVE FAST MOTIONS OF PRONATION OR SUPINATION OF THE LEFT ARM IN THE FUTURE, THEREFORE, CLAIMANT IS UNABLE TO RETURN TO HER FORMER EMPLOYMENT AND IS ALSO PRECLUDED FROM PERFORMING VARIOUS OTHER TYPES OF HEAVY AND LIGHT WORK REQUIRING THE ACTIVITIES WHICH DR. PASQUESI INDICATED SHE COULD NO LONGER PERFORM.

THE REFEREE CONCLUDED THE EVIDENCE ESTABLISHES THAT CLAIMANT HAS SCHEDULED DISABILITY OF HER LEFT ARM AND HE ACCEPTED DR. PASQUESI'S EVALUATION OF THE EXTENT OF SUCH PERMANENT IMPAIRMENT IN THE AMOUNT EQUAL TO 5 PER CENT OF THE LEFT ARM.

THE UNSCHEDULED DISABILITY, FROM THE EFFECTS OF THE SHOULDER-ARM SYNDROME ON HER ABILITY TO WORK, THE REFEREE FOUND TO BE MINIMAL, NEVERTHELESS, SUCH PHYSICAL IMPAIRMENT PRECLUDED HER RETURN TO HER FORMER JOB AND OTHER JOBS, EITHER LIGHT OR HEAVY IN NATURE, WHICH REQUIRED OVERHEAD WORK OR REPETITIVE FAST USE OF HER LEFT ARM. CLAIMANT DOES HAVE SEVERAL OTHER TYPES OF SKILLS SHE CAN UTILIZE IN OBTAINING REGULAR EMPLOYMENT AND THE REFEREE CONCLUDED THAT A FAIR EVALUATION OF THE DISABLING EFFECTS OF HER INJURY WOULD ENTITLE HER TO A PERMANENT PARTIAL DISABILITY AWARD OF 20 PER CENT.

THE BOARD, ON DE NOVO REVIEW, NOTES THAT THERE WERE SIX ISSUES BEFORE THE REFEREE AT THE HEARING, HOWEVER, THE REQUEST FOR REVIEW BY THE EMPLOYER WAS LIMITED TO THE REFEREE'S AWARDS FOR CLAIMANT'S SCHEDULED AND UNSCHEDULED DISABILITIES, THEREFORE, THE BOARD ASSUMES

THAT THE EMPLOYER HAS ACCEPTED THE FINDINGS MADE BY THE REFEREE WITH RESPECT TO THE OTHER FIVE ISSUES.

THE REFEREE IN THE BODY OF HIS OPINION AND ORDER FOUND THAT THE EMPLOYER HAD NOT PAID TEMPORARY DISABILITY COMPENSATION FOR THE PERIOD BETWEEN MAY 7, 1975 AND JUNE 26, 1975 (OR JULY 1, 1975) UNTIL AFTER THE DETERMINATION ORDER ISSUED ON JULY 16, 1975. HE CONCLUDED THAT THIS FAILURE TO PAY TEMPORARY DISABILITY COMPENSATION DURING THAT PERIOD OF TIME CONSTITUTED UNREASONABLE DELAY IN PAYMENT OF COMPENSATION AND THAT 'A PENALTY WILL BE ALLOWED FOR THAT UNREASONABLE CONDUCT' - HOWEVER, INADVERTENTLY THE 'ORDER' PORTION OF THE OPINION AND ORDER DID NOT IMPOSE SUCH A PENALTY. THE BOARD CONCLUDES IT IS NECESSARY, THEREFORE, TO MODIFY THE REFEREE'S ORDER BY IMPOSING THE PENALTY WHICH THE REFEREE HAD CONCLUDED SHOULD BE ALLOWED - IN ALL OTHER RESPECTS THE BOARD AFFIRMS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 24, 1975 IS MODIFIED. THE EMPLOYER IS DIRECTED TO PAY ADDITIONAL COMPENSATION TO CLAIMANT AS A PENALTY EQUAL TO 25 PER CENT OF THE AMOUNT OF THE COMPENSATION DUE CLAIMANT BETWEEN MAY 7, 1975 AND JULY 1, 1975.

IN ALL OTHER RESPECTS THE ORDER OF THE REFEREE IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE EMPLOYER.

CLAIM NO. C 604 8821 REG MARCH 22, 1976

FREDERICK J. ESTABROOK, CLAIMANT

KEITH D. SKELTON, DEFENSE ATTY.
OWN MOTION DETERMINATION

CLAIMANT SUSTAINED A COMPENSABLE INJURY OCTOBER 1, 1968 TO THE LOW BACK. DR. TSAI PERFORMED A LAMINECTOMY IN APRIL 1969 AND CLAIMANT RECEIVED AN AWARD OF 64 DEGREES FOR 20 PER CENT OF THE MAXIMUM FOR UNSCHEDULED DISABILITY BY A DETERMINATION ORDER MAILED DECEMBER 17, 1969.

IN JUNE 1972 DR. ELLISON PERFORMED AN EXCISION OF THE DISC FROM CERVICAL INTERSPACE LEVELS 6 AND 7. A SECOND DETERMINATION ORDER GRANTED CLAIMANT AN ADDITIONAL 5 PER CENT UNSCHEDULED NECK DISABILITY.

IN OCTOBER 1973, DR. GERSTNER PERFORMED SURGERY FOR A THORACIC OUTLET SYNDROME, RIGHT, AND AN ADDITIONAL AWARD OF 10 PERCENT UNSCHEDULED DISABILITY FOR NECK AND SHOULDER WAS GRANTED TO CLAIMANT, MAKING A TOTAL OF 35 PER CENT.

THE CLAIM WAS REOPENED FOR AN OPERATION FOR LEFT THORACIC OUTLET SYNDROME IN JUNE 1975, ALSO PERFORMED BY DR. GERSTNER WHO REPORTED CLAIMANT WAS MEDICALLY STATIONARY AS OF FEBRUARY 2, 1976.

CLAIMANT'S AGGRAVATION RIGHTS HAVE EXPIRED - THEREFORE THE CLAIM IS PROCESSED UNDER THE BOARD'S OWN MOTION' JURISDICTION. THE MATTER WAS SUBMITTED TO THE EVALUATION DIVISION OF THE BOARD WHICH FOUND CLAIMANT HAS A DEFICIT IN FUNCTION OF THE RIGHT ARM DUE TO AN ULNAR NERVE LESION AND IS ENTITLED TO AN AWARD FOR THIS SCHEDULED DISABILITY.

ORDER

IT IS THEREFORE ORDERED THAT CLAIMANT BE GRANTED TEMPORARY TOTAL DISABILITY COMPENSATION FROM JUNE 5, 1975 THROUGH FEBRARY 2, 1976.

IT IS FURTHER ORDERED THAT CLAIMANT BE GRANTED 19.2 DEGREES OF A MAXIMUM OF 192 DEGREES FOR LOSS OF THE RIGHT ARM. THIS AWARD IS IN ADDITION TO THE UNSCHEDULED AWARDS PREVIOUSLY GRANTED.

SAIF CLAIM NO. HC 210401 MARCH 22, 1976

LEE R. WARD, CLAIMANT
OWN MOTION DETERMINATION

CLAIMANT SUSTAINED INJURY TO HIS BACK AND LEFT ELBOW ON SEPTEMBER 14, 1969. HE RECEIVED NO AWARD FOR PERMANENT PARTIAL DISABILITY.

ON ADVICE FROM DR. BERSELLI, WHO EXAMINED CLAIMANT ON MAY 22, 1975, THE STATE ACCIDENT INSURANCE FUND VOLUNTARILY REOPENED THE CLAIM, AND A LAMINECTOMY AT L4-5 WAS PERFORMED ON JUNE 19, 1975.

CLAIMANT'S CONDITION IS NOW STATIONARY. HIS CLAIM WAS SUBMITTED TO THE EVALUATION DIVISION FOR DETERMINATION OF CLAIMANT'S DISABILITY, IF ANY. THE EVALUATION DIVISION HAS NOW SUBMITTED ITS RECOMMENDATION, AND

IT IS HEREBY ORDERED THAT CLAIMANT IS GRANTED TEMPORARY TOTAL DISABILITY COMPENSATION FROM MAY 20, 1975 THROUGH JANUARY 30, 1976.

IT IS FURTHER ORDERED THAT CLAIMANT IS GRANTED AN AWARD OF 32 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY.

SAIF CLAIM NO. PC 17322 MARCH 22, 1976

JAY R. PYLES, CLAIMANT
OWN MOTION DETERMINATION

THIS CLAIMANT WAS INJURED ON MAY 16, 1966 WHEN HE STEPPED ON A BROKEN BOTTLE WHICH CUT THROUGH THE DISTAL PLANTER MEDIAL ASPECT OF HIS RIGHT FOOT. A LARGE PIECE OF GLASS AND SEVERAL SMALLER PIECES WERE REMOVED AND THE WOUND WAS CLEANED AND SUTURED. THE CLAIM WAS CLOSED BY A DETERMINATION ORDER ON OCTOBER 12, 1967 ALLOWING COMPENSATION FOR TEMPORARY TOTAL DISABILITY ONLY.

SUBSEQUENTLY, THE CLAIMANT EXPERIENCED DIFFICULTIES AND ADDITIONAL PIECES OF GLASS WERE REMOVED. IN 1975 THE FOOT AGAIN CAUSED PROBLEMS AND THE STATE ACCIDENT INSURANCE FUND REOPENED THE CLAIM FOR FURTHER SURGERY. INSTEAD OF EXPECTED PIECES OF GLASS, DR. A. J. SMITH FOUND A GROWTH DIAGNOSED AS AN ANGLIOLIPOMA AND SURGICALLY EXCISED IT. SOME RESIDUALS REMAIN BECAUSE OF REMOVAL OF PROTECTIVE TISSUE OVER THE MAIN WEIGHT BEARING PORTION OF THE RIGHT FOOT, HOWEVER, EXCEPT FOR THIS TENDERNESS OVER THE SESAMOID, CLAIMANT'S FOOT HAS IMPROVED CONSIDERABLY AND DR. SMITH FEELS HE IS MEDICALLY STATIONARY.

THE CLAIM WAS SUBMITTED TO THE EVALUATION DIVISION OF THE BOARD AND, PURSUANT TO THEIR ADVISORY RATING, THE BOARD AGREES THAT CLAIMANT HAS SUSTAINED A MINIMAL DEGREE OF PERMANENT DISABILITY.

ORDER

IT IS ORDERED CLAIMANT IS TO RECEIVE TEMPORARY TOTAL DISABILITY COMPENSATION INCLUSIVELY FROM JULY 9, 1975 THROUGH JULY 27, 1975, LESS TIME WORKED.

IT IS FURTHER ORDERED THAT CLAIMANT BE AWARDED 5 PER CENT PERMANENT PARTIAL DISABILITY FOR LOSS OF USE OF THE RIGHT FOOT.

WCB CASE NO. 75-1317 MARCH 24, 1976

ZELMA R. DUGDALE, CLAIMANT

POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT
CROSS REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED HER TEMPORARY TOTAL DISABILITY COMPENSATION FROM OCTOBER 11, 1974 TO JANUARY 14, 1975 INCLUSIVE - DIRECTED THE STATE ACCIDENT INSURANCE FUND TO REIMBURSE CLAIMANT IN THE SUM OF 540 DOLLARS FOR DOMESTIC HELP NECESSITATED BY HER SURGERY OF OCTOBER 30, 1973 - TO PAY THE 143.70 DOLLAR DEBT CLAIMANT INCURRED AT THE SKYLINE HOSPITAL IN WHITE SALMON, WASHINGTON BETWEEN MARCH 13 AND MARCH 15, 1974 - SET ASIDE THE DETERMINATION ORDER MAILED FEBRUARY 4, 1975, DECLARING THE DETERMINATION ORDER MAILED MAY 19, 1975 TO BE THE FIRST DETERMINATION ORDER FOR THE PURPOSE OF THE COMMENCEMENT OF AGGRAVATION RIGHTS PURSUANT TO ORS 656.273 - AND AFFIRMED IN ALL OTHER RESPECTS THE DETERMINATION ORDER OF MAY 19, 1975 WHICH AWARDED CLAIMANT 96 DEGREES FOR 30 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT CONTENDS SHE IS PERMANENTLY AND TOTALLY DISABLED. THE FUND CROSS REQUESTS BOARD REVIEW, STATING THAT IT IS NOT RESPONSIBLE FOR CLAIMANT'S PRESENT DISABILITY, IF SHE HAS ANY, AND THAT THE EVIDENCE FAILED TO PROVE THAT THE DEBT INCURRED BY CLAIMANT TO THE SKYLINE HOSPITAL IN WHITE SALMON, WASHINGTON WAS RELATED TO HER CLAIM AND, FINALLY, THAT THE REFEREE COULD NOT SET ASIDE THE DETERMINATION ORDER MAILED FEBRUARY 4, 1975 AFTER MAKING A FINDING THAT IT WAS PROPER AT THE TIME IT WAS ENTERED.

CLAIMANT HAD SUFFERED A LOW BACK COMPENSABLE INJURY IN OCTOBER 1968 WHILE EMPLOYED AT A CANNERY. IN APRIL 1969 DR. MC GOUGH HAD PERFORMED A HEMILAMINECTOMY AT L4-5 ON THE RIGHT WITH DISCECTOMY, FUSION OF L5-S1 AND EXCISION OF AREA OF FAT NECROSIS OF THE RIGHT HIP.

A YEAR LATER, DR. MCGOUGH'S OPINION WAS THAT CLAIMANT'S CONDITION WAS MEDICALLY STATIONARY. THAT CLAIM WAS CLOSED WITH AN AWARD OF 96 DEGREES FOR 30 PER CENT UNSCHEDULED LOW BACK DISABILITY. AFTER A HEARING, THE AWARD WAS INCREASED IN SEPTEMBER 1970 TO 160 DEGREES FOR 50 PER CENT UNSCHEDULED LOW BACK DISABILITY.

THE PRESENT INJURY WAS INCURRED BY CLAIMANT ON MARCH 15, 1974 WHILE SHE WAS EMPLOYED AS A NURSE'S AIDE. AGAIN THE INJURY WAS TO HER LOW BACK. IN OCTOBER 1973 DR. MCGOUGH PERFORMED A LAMINECTOMY, DISCECTOMY, L4-5 RIGHT - FUSION L4-5. NEARLY A YEAR LATER CLAIMANT WAS REFERRED TO THE DISABILITY PREVENTION DIVISION AND TO DIVISION OF VOCATIONAL REHABILITATION AND SHORTLY THEREAFTER RETURNED TO MISSOURI

WHERE SHE PRESENTLY RESIDES. THE CLAIM WAS CLOSED BY THE FIRST DETERMINATION ORDER MAILED FEBRUARY 4, 1975 WHICH DID NOT AWARD CLAIMANT ANY COMPENSATION FOR PERMANENT DISABILITY. THE CLAIM WAS REOPENED AND SUBSEQUENTLY CLOSED BY A SECOND DETERMINATION ORDER MAILED MAY 19, 1975 WHEREBY CLAIMANT WAS AWARDED 96 DEGREES FOR 30 PER CENT UNSCHEDULED LOW BACK DISABILITY RESULTING FROM HER INJURY OF MARCH 16, 1973.

THE FIRST DETERMINATION ORDER MAILED FEBRUARY 4, 1975 AWARDED CLAIMANT COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM MARCH 16, 1973 THROUGH OCTOBER 30, 1974. THE SECOND DETERMINATION ORDER MAILED MAY 19, 1975 AWARDED CLAIMANT COMPENSATION FOR ADDITIONAL TEMPORARY TOTAL DISABILITY FROM JANUARY 15, 1975 THROUGH MARCH 19, 1975.

THE REFEREE FOUND THERE WAS NO EVIDENCE THAT CLAIMANT WAS MEDICALLY STATIONARY ON OCTOBER 10, 1974, NOR WAS THERE ANY MEDICAL EVIDENCE INDICATING CLAIMANT WAS MEDICALLY STATIONARY PRIOR TO MARCH 19, 1975. THEREFORE, HE FOUND CLAIMANT ENTITLED TO TEMPORARY TOTAL DISABILITY COMPENSATION FROM OCTOBER 11, 1974 THROUGH JANUARY 14, 1975 INCLUSIVE.

THE REFEREE FOUND THAT IN DECEMBER 1973 THE FUND WAS NOTIFIED BY A COLLEAGUE OF DR. MC GOUGH THAT CLAIMANT WAS IN NEED OF HOUSEHOLD HELP - APPROXIMATELY SIX HOURS A DAY FOR ABOUT A MONTH. CLAIMANT OBTAINED A BABYSITTER FROM OCTOBER 31, 1973 TO JANUARY 22, 1974, A TOTAL OF 84 DAYS. THE FUND APPARENTLY PAID FOR THE BABYSITTING EXPENSES FOR A PERIOD OF 30 DAYS. ON JANUARY 21, 1974 DR. HOGBERG NOTIFIED THE FUND THAT CLAIMANT NEEDED FULL TIME DOMESTIC CARE UP TO AND INCLUDING THE PRESENT TIME. THE REFEREE FOUND NO CONTRARY EVIDENCE AND CONCLUDED CLAIMANT WAS ENTITLED TO BE REIMBURSED AN ADDITIONAL SUM OF 540 DOLLARS FOR HOUSEHOLD HELP BETWEEN OCTOBER 31, 1973 AND JANUARY 22, 1974.

THE FUND CONTENDS THAT CLAIMANT'S HOSPITALIZATION IN WHITE SALMON BETWEEN MARCH 13 AND MARCH 15, 1974 WAS FOR PANCREATITIS AND WAS NOT CAUSED BY HER LOW BACK - HOWEVER, THE MEDICAL EVIDENCE INDICATES THAT THE HOSPITALIZATION WAS APPARENTLY FOR SEVERE MUSCLE SPASM AND LOW BACK PAIN. THE REFEREE CONCLUDED THE FUND WAS LIABLE FOR THE HOSPITAL BILL.

IN OCTOBER 1974, SHORTLY AFTER CLAIMANT HAD RETURNED TO MISSOURI, SHE REQUESTED THAT HER CLAIM BE CLOSED WITH A LUMP SUM PAYMENT OF 12,000 DOLLARS. THE CLAIM WAS CLOSED BY THE DETERMINATION ORDER OF FEBRUARY 4, 1974 WHICH MADE NO AWARD FOR PERMANENT DISABILITY AND CLAIMANT NOW CONTENDS THAT THAT CLOSURE WAS PREMATURE. THE REFEREE HAD PREVIOUSLY FOUND THAT CLAIMANT WAS NOT MEDICALLY STATIONARY PRIOR TO MARCH 19, 1975, THEREFORE, ALTHOUGH THE DETERMINATION ORDER OF FEBRUARY 4, 1974 WAS PROPER AT THE TIME IT WAS MADE, HE CONCLUDED IT NOW SHOULD BE SET ASIDE AND THE DETERMINATION ORDER DATED MAY 19, 1975 DECLARED TO BE THE FIRST DETERMINATION ORDER FOR PURPOSES OF FILING A CLAIM FOR AGGRAVATION.

WITH RESPECT TO CLAIMANT'S CONTENTION THAT SHE IS NOW PERMANENTLY AND TOTALLY DISABLED, THE REFEREE RELIED UPON THE OPINION EXPRESSED BY DR. MCGOUGH WHO COMPARED HER CONDITION ON JULY 28, 1975 WITH HER CONDITION ON MAY 18, 1970 WHICH WAS THAT CLAIMANT'S CONDITION WAS ESSENTIALLY THE SAME AND HE DID NOT BELIEVE WORSE THAN WHEN HE HAD EXAMINED HER IN MAY 1970. THE REFEREE FOUND NO EVIDENCE TO SUPPORT CLAIMANT'S CONTENTION THAT SHE IS PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF HER MARCH 16, 1973 INJURY. HE FURTHER FOUND NO EVIDENCE THAT CLAIMANT'S LOSS OF EARNING CAPACITY EXCEEDED THE 80 PER CENT SHE HAD HERETOFORE BEEN AWARDED (30 PER CENT AS A RESULT OF THE WITHIN INJURY AND 50 PER CENT AS A RESULT OF THE INJURY OF OCTOBER 16, 1968). HE ALSO QUESTIONED CLAIMANT'S MOTIVATION AND VERACITY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE AWARD MADE BY THE REFEREE IN HIS ORDER BUT ONLY BECAUSE THE MEDICAL EVIDENCE INDICATES THAT CLAIMANT'S LOSS OF WAGE EARNING CAPACITY AS A RESULT OF HER MARCH 16, 1973 INJURY ADEQUATELY COMPENSATES CLAIMANT FOR SUCH LOSS OF EARNING CAPACITY.

THE SUPREME COURT HELD IN GREEN V. SIAC (UNDERSCORED), 197 OR 160 (1953) THAT ORS 656.214(4) WHICH RELATES TO UNSCHEDULED DISABILITY, PROVIDES THAT THE NUMBER OF DEGREES OF DISABILITY SHALL BE A MAXIMUM OF 320 DEGREES DETERMINED BY THE EXTENT OF THE DISABILITY COMPARED TO THE WORKMAN BEFORE SUCH INJURY (UNDERSCORED) AND WITHOUT SUCH DISABILITY. (EMPHASIS SUPPLIED). THE COURT HELD THAT THE LEGISLATURE BY USING THE WORDS 'SUCH INJURY' INTENDED THE INJURY FROM WHICH THE PARTICULAR CLAIM IS MADE. A LIBERAL INTERPRETATION OF THIS SECTION, IN THE OPINION OF THE COURT, WOULD REQUIRE THAT THE LIMITATION OF FIXED OR UNSCHEDULED INJURIES APPLY ONLY TO THE PARTICULAR INJURY WHICH RESULTS FROM A PARTICULAR ACCIDENT. IT WOULD BE UNJUST TO DENY A WORKMAN SUFFERING A SUBSEQUENT ACCIDENT RESULTING IN ADDITIONAL PERMANENT PARTIAL DISABILITY ANY COMPENSATION THEREFOR WHEN IT WAS JUST A COINCIDENCE THAT THE WORKMAN'S SECOND INJURY AFFECTED THE IDENTICAL PORTION AS THE FIRST. THAT FACT COULD HAVE NO BEARING ON HIS RIGHT TO RECEIVE COMPENSATION FOR THE PERMANENT PARTIAL DISABILITY ACTUALLY SUFFERED AS A RESULT OF THE SECOND INJURY.

IF THE AFFECTS OF THE FIRST INJURY HAVE SO DISSIPATED THAT THE WORKMAN IS AGAIN GAINFULLY EMPLOYED AND EARNING A NORMAL AND REASONABLE WAGE FOR HIS LABORS, IT SEEMS REASONABLE TO CONCLUDE THAT WHATEVER INJURY AND PERMANENT PARTIAL DISABILITY SUFFERED AS A RESULT THEREOF ARE ATTRIBUTABLE TO IT AND THE PREVIOUS PERMANENT PARTIAL DISABILITY AWARD OR AWARDS WOULD HAVE NO LOGICAL RELEVANCE IN DETERMINING THE THEN EXISTING ACTUAL PERMANENT PARTIAL DISABILITY OF THE WORKMAN. HOWEVER, IF THE FIRST INJURY OCCURRED ONLY A SHORT TIME PRIOR TO THE SECOND INJURY SO THAT AT THE TIME OF THE SECOND INJURY THE WORKMAN WAS STILL RECEIVING PERMANENT PARTIAL DISABILITY BENEFITS, OR WAS STILL MEDICALLY AFFECTED BY THE INJURY, IT WOULD BE PROPER, IN DETERMINING THE PROPOSED AWARD, TO CONSIDER THE COMBINED EFFECTS OF HIS INJURIES AND HIS PAST RECEIPT OF BENEFITS FOR SUCH DISABILITIES.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 6, 1975, AS CORRECTED BY THE ORDER DATED OCTOBER 13, 1975, IS AFFIRMED.

WCB CASE NO. 75-4520 MARCH 24, 1976

CLARA BUTTERFIELD, CLAIMANT

LINDSTEDT AND BUONO, CLAIMANT'S ATTYS.
ACKER, UNDERWOOD, BEERS AND SMITH,
DEFENSE ATTYS.
ORDER ON MOTION

ON MARCH 18, 1976 THE BOARD RECEIVED A MOTION TO DISMISS THE ABOVE ENTITLED MATTER ON THE GROUND AND FOR THE REASON THAT CLAIMANT'S REQUEST FOR HEARING WAS NOT RECEIVED BY THE BOARD WITHIN 30 DAYS OF ISSUANCE OF THE REFEREE'S OPINION AND ORDER.

ORS 656.289(3) STATES THE ORDER OF THE REFEREE SHALL BE FINAL UNLESS, WITHIN 30 DAYS AFTER THE DATE ON WHICH A COPY OF THE ORDER IS MAILED TO THE PARTIES, ONE OF THE PARTIES REQUESTS A REVIEW BY THE BOARD UNDER THE PROVISIONS OF ORS 656.295. ORS 656.295 PROVIDES THAT THE REQUEST FOR REVIEW NEED ONLY STATE THAT THE PARTY REQUESTS A REVIEW OF THE ORDER AND SUCH REQUEST FOR REVIEW SHALL BE MAILED TO THE BOARD.

REFEREE ST. MARTIN'S ORDER WAS ENTERED ON FEBRUARY 9, 1976, THEREFORE, EITHER PARTY HAD UNTIL MARCH 10, 1976 WITHIN WHICH TO REQUEST A REVIEW OF THE ORDER. THE BOARD'S RECORDS INDICATE THAT CLAIMANT'S LETTER, DATED MARCH 1, 1976 REQUESTING A REVIEW OF THE AFORESAID ORDER, WAS MAILED NO LATER THAN MARCH 10, 1976. THE ENVELOPE SHOWS A POSTAGE METER DATE OF MARCH 6, 1976 AND SUPERIMPOSED THEREON IS A PORTLAND POST-MARK SHOWING MARCH 10, 1976. THE BOARD HAS NO MEANS OF DETERMINING THE REASON FOR THE DELAY BETWEEN MARCH 6 AND MARCH 10, HOWEVER, THIS IS NOT NECESSARY, AS BOTH DATES ARE WITHIN THE 30 DAY PERIOD.

THE BOARD CONCLUDES THAT CLAIMANT HAS TIMELY REQUESTED REVIEW OF THE ABOVE ENTITLED MATTER BY THE BOARD AND THAT THE MOTION TO DISMISS THE REQUEST FOR REVIEW MUST BE DENIED.

IT IS SO ORDERED.

WCB CASE NO. 75-2090 MARCH 24, 1976

GLADYS CREAGER, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DENIAL OF CLAIMANT'S CLAIM BY THE STATE ACCIDENT INSURANCE FUND.

CLAIMANT IS A 65 YEAR OLD JANITRESS WHO ALLEGED SHE SUSTAINED AN ACCIDENTAL INJURY ON MARCH 21, 1975 AS A RESULT OF OPERATING A VACUUM CLEANER ACROSS A SHAG RUG AT HER PLACE OF EMPLOYMENT. CLAIMANT FILED A CLAIM ON APRIL 28, 1975 INDICATING THAT THE INJURY TOOK PLACE ON MARCH 20, 1975 AT APPROXIMATELY 10.00 P.M. THE FUND CONTENDS THE CLAIM SHOULD BE DENIED FOR LACK OF TIMELY FILING WITHIN THE 30 DAY PERIOD. THE REFEREE FOUND THIS CONTENTION TO BE WITHOUT MERIT, THAT THERE WAS NO INDICATION IN ANY EVENT THAT THE FUND OR THE EMPLOYER HAD BEEN PREJUDICED BY THE LATE FILING.

CLAIMANT CONTENDS THAT THE EMPLOYER HAD ACTUAL KNOWLEDGE ON MARCH 24, 1975 BY VIRTUE OF HER CALL TO HER SUPERVISOR. THE REFEREE FOUND THAT THE INFORMATION GIVEN TO THE SUPERVISOR WAS THAT CLAIMANT WAS UNABLE TO WORK AND THAT SHE HAD INJURED HER SHOULDER - HE CONCLUDED THAT THESE TWO STATEMENTS TAKEN ALONE WERE NOT SUFFICIENT TO INDICATE KNOWLEDGE OF AN ACCIDENTAL INJURY, THEREFORE, THE EMPLOYER DID NOT HAVE ACTUAL KNOWLEDGE OF THE INJURY UNTIL ON OR ABOUT APRIL 25, 1975 AND THAT THEREAFTER A DENIAL IN PROPER FORM WAS MADE BY THE FUND ON MAY 12, 1975.

CLAIMANT HAD FIRST BEEN SEEN BY DR. ZERZAN OF THE PERMANENTE CLINIC ON MARCH 27, 1975. AFTER THREE VISITS, DR. ZERZAN INDICATED CLAIMANT WAS SUFFERING FROM CERVICAL SPONDYLOSIS, NARROWING DISC SPACES C-4 TO C-7, C4-5 SPONDYLOLISTHESIS, CALCIFICATION AND SUPRASPINATUS TENDON, RIGHT. HE FELT THAT THIS WAS AN ILLNESS NOT ARISING OUT OF HER EMPLOYMENT.

DR. ADLHOCH, ON JULY 1, 1975, INDICATED THAT THE INJURY WAS NOT CAUSED BY CLAIMANT'S EMPLOYMENT, STATING THAT WHEN HE EXAMINED CLAIMANT ON OR ABOUT JUNE 5, 1975 SHE TOLD HIM THAT SHE HAD INJURED HER RIGHT SHOULDER WHILE SHE WAS SHAKING (UNDERSCORED) A SHAG RUG. DR. POST,

ON AUGUST 1, 1975, SAID CLAIMANT TOLD HIM AT THAT TIME THAT THE INJURY OR THE TIME THAT SHE BEGAN EXPERIENCING PAIN ON THE RIGHT SIDE OF HER NECK AND SHOULDER WAS ON MARCH 21. HE DIAGNOSED HER PROBLEM AS NECK AND RIGHT SHOULDER PAIN SECONDARY TO CERVICAL DEGENERATIVE ARTHRITIS AND STATED THAT HE SUSPECTED HER LIMITATION OF MOTION DESCRIBED IN HIS REPORT WAS NOT PARTICULARLY RELATED TO THE INJURY BUT TO THE UNDERLYING DEGENERATIVE ARTHRITIC CONDITION. HE FOUND THAT CLAIMANT HAD MINIMAL RESIDUAL SYMPTOMS AND PHYSICAL FINDINGS.

ON SEPTEMBER 19, 1975, DR. POST SAID THAT THE ON-THE-JOB INJURY OF MARCH 1975 AGGRAVATED THE PREEXISTING SYMPTOMATIC DEGENERATIVE ARTHRITIC CONDITION IN CLAIMANT'S CERVICAL SPINE.

THE REFEREE FELT THAT CLAIMANT VACILLATED TO A CONSIDERABLE EXTENT IN HER TESTIMONY WITH RESPECT TO THE DATE OF THE CLAIMED INJURY- ALSO CLAIMANT HAD REACHED THE RETIREMENT AGE OF 65 AND HAD ANNOUNCED HER RETIREMENT. HE FELT THAT THE INCONSISTENCIES IN CLAIMANT'S OWN TESTIMONY RAISED CONSIDERABLE QUESTION AS TO HER CREDIBILITY.

TAKING INTO CONSIDERATION ALL THE EVIDENCE, CLAIMANT'S LACK OF CREDIBILITY, BOTH ORAL AND WRITTEN, AND THE DIFFERENT HISTORIES RELATED BY CLAIMANT TO THE TREATING DOCTORS, THE REFEREE CONCLUDED THAT CLAIM- ANT HAD NOT SUSTAINED A COMPENSABLE INJURY AND, THEREFORE, THE DENIAL BY THE STATE ACCIDENT INSURANCE FUND WAS PROPER BUT BECAUSE THE CLAIM WAS DENIED WITHIN THE 14 DAY PERIOD AFTER NOTICE, NO TEMPORARY TOTAL DISABILITY COMPENSATION, PENALTIES OR ATTORNEY'S FEES WOULD BE ALLOWED.

THE BOARD, ON DE NOVO REVIEW, DISAGREES WITH THE CONCLUSION REACHED BY THE REFEREE. IT FEELS THAT THE MEDICAL EVIDENCE DOES SUP- PORT CLAIMANT'S CONTENTION THAT SHE SUFFERED A COMPENSABLE INJURY. THE BOARD FINDS THAT CLAIMANT WAS SOMEWHAT CONFUSED BY THE ATTORNEYS AT THE HEARING, THAT SHE SHOULD BE CONSIDERED AS A CREDIBLE WITNESS AND HER CLAIM SHOULD BE ACCEPTED BY THE FUND. HOWEVER, BECAUSE OF THE CONFUSION SURROUNDING THIS PARTICULAR CASE, NO PENALTIES SHOULD BE IMPOSED.

THE BOARD CONCLUDES THAT CLAIMANT'S CLAIM SHOULD BE REMANDED TO THE STATE ACCIDENT INSURANCE FUND TO BE ACCEPTED AND FOR THE PAY- MENT OF COMPENSATION AS PROVIDED BY LAW, AND HER ATTORNEY SHOULD BE AWARDED A REASONABLE ATTORNEY'S FEE TO BE PAID BY THE FUND PURSUANT TO THE PROVISIONS OF ORS 656.386.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 31, 1975 IS REVERSED.

CLAIMANT'S CLAIM IS REMANDED TO THE STATE ACCIDENT INSURANCE FUND FOR ACCEPTANCE AND PAYMENT OF COMPENSATION, AS PROVIDED BY LAW, COMMENCING MARCH 21, 1975 AND UNTIL THE CLAIM IS CLOSED PURSUANT TO THE PROVISIONS OF ORS 656.268.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE, PURSUANT TO THE PROVISIONS OF ORS 656.386, THE SUM OF 600 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 74-4391 MARCH 24, 1976

EDDIE M. STAGGS, CLAIMANT
COONS, COLE AND ANDERSON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH DIRECTED IT TO PAY CLAIMANT COMPENSATION FOR PERMANENT TOTAL DISABILITY, EFFECTIVE THE DATE OF HIS ORDER (OCTOBER 17, 1975).

CLAIMANT SUFFERED A COMPENSABLE INJURY ON MAY 14, 1965 WHICH REQUIRED A LAMINECTOMY AND DISC REMOVAL ON JULY 21, 1965. CLAIMANT WAS REFERRED TO WHAT IS NOW DENOMINATED AS THE DISABILITY PREVENTION DIVISION OF THE WORKMEN'S COMPENSATION BOARD IN THE LATTER PART OF 1965 WHERE THE EVALUATIONS REVEALED LIMITED INTELLIGENCE AND SERIOUS PSYCHOPATHOLOGY - THE PROGNOSIS FOR REHABILITATION WAS GUARDED ALTHOUGH CLAIMANT WAS CONSIDERED A FAIR CANDIDATE FOR RETRAINING. CLAIMANT WAS DISCHARGED WITH A FINDING OF 'MODERATE' PHYSICAL DISABILITY.

IN THE EARLY PART OF 1967 CLAIMANT HAD A SPINAL FUSION AND AGAIN WAS REFERRED TO PORTLAND WHERE SIMILAR PSYCHOLOGICAL FINDINGS WERE MADE. THE DISCHARGE SUMMARY DATED JULY 1968 REVEALED MODERATE PHYSICAL DISABILITY AND MODERATE PSYCHOPATHOLOGY. ON DECEMBER 2, 1968 CLAIMANT HAD ANOTHER FUSION. DR. EMBICK, AN ORTHOPEDIC SURGEON WHO WAS CLAIMANT'S PRIMARY TREATING DOCTOR THROUGHOUT THE PERIOD, STATED IN A CLOSING REPORT DATED JUNE 4, 1970 THAT THERE WAS A SOLID FUSION, HOWEVER, THE UNION WAS NOT ENCOURAGING AND THE BACK AND LEG PAIN WOULD LIKELY CONTINUE BECAUSE OF THE ARACHNOIDITIS. CLAIMANT HAD PERMANENT DISABILITY WHICH HE RATED AT 75 PER CENT LOSS OF FUNCTION OF AN ARM. ON JULY 22, 1970 A DETERMINATION ORDER AWARDED CLAIMANT 108.75 DEGREES FOR 75 PER CENT LOSS OF AN ARM FOR UNSCHEDULED DISABILITY.

THEREAFTER, CLAIMANT WAS SEEN BY DR. FOX, AN OSTEOPATHIC PHYSICIAN, COMPLAINING OF A WORSENED CONDITION AND WAS EXAMINED BY DR. HOCKEY, A NEUROSURGEON, IN MARCH 1971. DR. HOCKEY FOUND POST-OP LUMBAR LAMINECTOMIES AND FUSIONS AND STATED THERE WAS CONSIDERABLE FUNCTIONAL OVERLAY BUT THAT CLAIMANT SHOULD BE ABLE TO DO SOME TYPE OF WORK. CLAIMANT HAD HAD A TRANSVERSE PROCESS FUSION IN 1970.

CLAIMANT WAS THEN SEEN BY DR. KUYKENDALL, A NEUROSURGEON, WHO STATED THAT CLAIMANT HAD ARACHNOIDITIS AND NERVE ROOT SCARRING DUE TO THE MULTIPLE OPERATIONS. IN AUGUST 1973, DR. KIMBERLEY, AN ORTHOPEDIC SURGEON, EXAMINED CLAIMANT AND STATED THAT IT WAS IMPOSSIBLE FOR CLAIMANT TO DO ANY WORK, HE SUGGESTED ANOTHER FUSION. ON SEPTEMBER 17, 1973 THE FUND REOPENED THE CASE AND ON OCTOBER 18, 1973 THE FUSION WAS PERFORMED.

DR. KIMBERLEY, IN A CLOSING REPORT DATED JULY 10, 1974, INDICATED A GUARDED PROGNOSIS, STATING CLAIMANT'S ATTITUDE TOWARDS WORK WAS GOOD BUT THAT CLAIMANT SHOULD LOSE WEIGHT. ON AUGUST 23, 1974 A SECOND DETERMINATION ORDER AWARDED CLAIMANT AN ADDITIONAL 21.75 DEGREES FOR 15 PER CENT UNSCHEDULED LOW BACK DISABILITY AND ON AUGUST 29, 1974 AN AMENDED DETERMINATION ORDER WAS ISSUED WHICH MERELY CORRECTED THE VALUE OF THE AWARD.

AFTER THE ENTRY OF THE TWO DETERMINATION ORDERS, DR. KIMBERLEY

ON OCTOBER 9, 1974, INDICATED THAT THE ADDITIONAL RATING CLAIMANT RECEIVED WAS ADEQUATE AND THAT CLAIMANT DEFINITELY WAS NOT A PERMANENT TOTAL CASE AND HE WAS NOT IN NEED OF ACTIVE TREATMENT. HOWEVER, A LETTER FROM THE SUPERVISING COUNSELOR FOR THE VOCATIONAL REHABILITATION DIVISION IN CLAIMANT'S AREA, DATED FEBRUARY 28, 1975, STATED THAT CLAIMANT WOULD NOT BE ABLE TO RESUME TRAINING IN ANY OCCUPATION EXCEPT WHERE HE HAD TO WORK ONLY ONE AND A HALF HOURS AT A TIME AND THEN HAVE 20 OR 30 MINUTES AVAILABLE FOR REST. THIS REPORT INDICATED CLAIMANT WAS ATTEMPTING TO LEARN TELEVISION REPAIR IN A SMALL TELEVISION AND RADIO SHOP BUT THE COUNSELOR FELT CLAIMANT WOULD HAVE DIFFICULTY MAKING HEADWAY IN THAT BUSINESS BECAUSE OF LIMITED CLIENTELE.

IN MAY 1975 CLAIMANT WAS SEEN BY DR. ROBINSON, AN ORTHOPEDIST, WHO INDICATED THAT CLAIMANT WAS SEVERELY DISABLED. WHETHER CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED WAS QUESTIONABLE AND HE SUGGESTED CLAIMANT BE REFERRED TO THE ORTHOPEDIC CONSULTANTS FOR AN EVALUATION. ON AUGUST 26, 1975, THE ORTHOPEDIC CONSULTANTS INDICATED THAT ONE MORE ATTEMPT AT VOCATIONAL REHABILITATION SHOULD BE MADE TO PUT CLAIMANT IN A SEDENTARY OCCUPATION SUCH AS LIGHT BENCH WORK AND THAT CLAIMANT SHOULD BE 'WEANED' FROM NARCOTICS. IT WAS THEIR OPINION THAT CLAIMANT'S TOTAL LOSS FUNCTION OF THE BACK WAS SEVERE AND THAT IT WAS DOUBTFUL THAT CLAIMANT COULD SUCCESSFULLY HANDLE A BUSINESS VENTURE WHICH HE HAD ATTEMPTED.

CLAIMANT HAS AN EIGHTH GRADE EDUCATION AND MOST OF HIS ADULT WORKING LIFE HAS BEEN IN HEAVY EQUIPMENT OPERATION. HE HAS NOT WORKED FOR WAGES SINCE JANUARY 1971 ALTHOUGH HE ATTEMPTED TO WORK IN AN ON-THE-JOB SITUATION REGARDING SMALL APPLIANCES BUT WAS UNSUCCESSFUL.

THE REFEREE FOUND THAT CLAIMANT'S NEED FOR FURTHER MEDICAL CARE AND TREATMENT WAS NOT SUPPORTED BY THE EVIDENCE NOR DID THE EVIDENCE SUPPORT CLAIMANT'S ENTITLEMENT TO TEMPORARY TOTAL DISABILITY COMPENSATION BEYOND THAT WHICH HAD BEEN PROVIDED FOR BY THE DETERMINATION ORDERS IN AUGUST 1974.

THE REFEREE, AFTER TAKING INTO ACCOUNT CLAIMANT'S AGE, EDUCATION, TRAINING AND POTENTIAL, TOGETHER WITH HIS MULTIPLE SURGERIES AND RESIDUALS, CONCLUDED THAT CLAIMANT WAS UNABLE TO WORK GAINFULLY, SUITABLY AND REGULARLY AND, THEREFORE, WAS ENTITLED TO AN AWARD FOR PERMANENT TOTAL DISABILITY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ON FEBRUARY 14, 1975 THE FUND FILED A MOTION FOR AN ORDER DISMISSING CLAIMANT'S REQUEST FOR HEARING ON THE GROUNDS AND FOR THE REASON THAT THE ACCIDENT INVOLVED OCCURRED ON OR ABOUT MAY 14, 1965, THE CASE WAS ORIGINALLY CLOSED BY A DETERMINATION ORDER OF JULY 22, 1970, AND THE FUND, BY ITS LETTER OF SEPTEMBER 17, 1973, EXERCISED ITS OWN MOTION JURISDICTION IN REOPENING THE CASE AND THAT SINCE THE FUND DID NOT DIMINISH THE FORMER AWARD NOR DID IT DENY ANY MEDICAL CARE OR HOSPITAL CARE, THE DETERMINATION ORDER OF AUGUST 23, 1974, AS AMENDED, WAS NOT AN APPEALABLE ORDER. ALTHOUGH THIS MOTION WAS BEFORE THE REFEREE, NO DECISION WAS MADE BY HIM. THE BOARD FINDS THE MOTION WHOLLY WITHOUT MERIT AND, BY THIS ORDER, DENIES IT.

THE BOARD ALSO FINDS THAT THE FUND SHOULD PAY THE ORTHOPEDIC CONSULTANTS THEIR FEE FOR THE EXAMINATION OF CLAIMANT INASMUCH AS IT WAS DONE TO PROPERLY DETERMINE CLAIMANT'S DISABILITY AND NOT FOR THE PURPOSE OF ASSISTING CLAIMANT IN THE PROSECUTION OF HIS CASE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 17, 1975 IS AFFIRMED.

THE MOTION MADE BY THE STATE ACCIDENT INSURANCE FUND ON FEBRUARY 14, 1975 TO DISMISS CLAIMANT'S REQUEST FOR HEARING IS DENIED.

THE STATE ACCIDENT INSURANCE FUND IS DIRECTED TO PAY TO THE ORTHOPEDIC CONSULTANTS THEIR FEE CHARGED FOR THE EXAMINATION OF CLAIMANT ON AUGUST 25, 1975.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-1161 MARCH 24, 1976

EARNEST L. KITTS, CLAIMANT

RASK AND HEFFERIN, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH DIRECTED IT TO PAY TEMPORARY TOTAL DISABILITY COMPENSATION FROM APRIL 15, 1975 UNTIL TERMINATION IS AUTHORIZED PURSUANT TO ORS 656.268 BUT PERMITTED THE FUND TO OFFSET ANY PAYMENTS FOR PERMANENT PARTIAL DISABILITY MADE AFTER THE MARCH 11, 1975 DETERMINATION ORDER AND DURING THE SAME PERIOD OF TIME THE TEMPORARY TOTAL DISABILITY PAYMENT WAS ORDERED TO BE PAID.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON DECEMBER 12, 1973. HE RECEIVED TREATMENT FROM DR. WISDOM AND, ULTIMATELY, WAS HOSPITALIZED IN THE PROVIDENCE HOSPITAL IN PORTLAND IN TRACTION FOR A PERIOD OF TEN DAYS. THE DESIRED RELIEF WAS NOT ACCOMPLISHED AND CLAIMANT WAS REHOSPITALIZED ON MAY 2, 1974 AND A MYELOGRAM REVEALED A PROBLEM AT L4-5. A LAMINECTOMY WAS PERFORMED ON MAY 8, 1974 AND DR. WISDOM LAST SAW CLAIMANT ON JULY 12, 1974 AT WHICH TIME CLAIMANT WAS STILL HAVING SIGNIFICANT LOW BACK PAIN, PRIMARILY MUSCULAR. DR. WISDOM ADVISED CLAIMANT HE WOULD BE UNABLE TO RETURN TO HIS PREVIOUS WORK AND SHOULD SEEK RETRAINING IN ANOTHER FIELD.

IN AUGUST 1974 CLAIMANT MOVED TO WASHINGTON AND SOUGHT MEDICAL ATTENTION FROM DR. HOFFMAN, WHO RESIDED IN LEWISTON, IDAHO. AFTER TREATING CLAIMANT THROUGH NOVEMBER 1974, DR. HOFFMAN REFERRED HIM TO DR. COLBURN WHO CONTINUED TO TREAT CLAIMANT. HE WAS AWARE CLAIMANT WAS HAVING VERY SERIOUS PROBLEMS BUT DID NOT FEEL THAT THERE WAS MUCH THAT HE COULD DO TO ALLEVIATE THEM. HE DID NOT FEEL ANY SURGICAL PROCEDURE WAS INDICATED AND THOUGHT THAT AN EVALUATION BY THE PAIN CLINIC IN PORTLAND MIGHT BE USEFUL, HOWEVER, CLAIMANT WAS NEVER SEEN BY THE PAIN CLINIC. ON FEBRUARY 6, 1975 DR. COLBURN ADVISED THE FUND THAT HE THOUGHT CLAIMANT HAD REACHED A STATIONARY LEVEL AND HE HAD NO FURTHER PLANS OR TREATMENT. BASED UPON THAT REPORT, A DETERMINATION ORDER WAS MAILED ON MARCH 11, 1975 WHEREBY CLAIMANT WAS AWARDED 64 DEGREES FOR 20 PER CENT UNSCHEDULED LOW BACK DISABILITY.

IMMEDIATELY FOLLOWING THE ISSUANCE OF THE DETERMINATION ORDER CLAIMANT REQUESTED A HEARING. DR. THORSON, A COLLEAGUE OF DR. COLBURN, ON APRIL 16, 1975 WROTE A 'TO WHOM IT MAY CONCERN' LETTER ADDRESSED TO THE ATTORNEY GENERAL, PORTLAND, OREGON (THIS LETTER WAS RECEIVED BY THE FUND ON APRIL 23, 1975), STATING THAT CLAIMANT WAS INDEFINITELY DISABLED FROM CUSTOMARY OCCUPATION AT THIS POINT AND THAT IF HE WAS TO BE GAINFULLY EMPLOYED HE MUST BE RETRAINED FOR LIGHTER WORK, THE

SOONER THE BETTER. SINCE THE ISSUANCE OF THE DETERMINATION ORDER, THE FUND HAS PAID COMENSATION IN COMPLIANCE WITH THE DETERMINATION ORDER BUT HAS NOT PROVIDED CLAIMANT WITH ANY MEDICAL CARE OR TREATMENT.

CLAIMANT'S REQUEST WAS SET FOR HEARING ON JULY 1, 1975 - IT WAS POSTPONED BECAUSE ON JUNE 11, 1975 CLAIMANT HAD BEEN ADMITTED TO THE HOSPITAL BY DR. THORSON AND REMAINED HOSPITALIZED UNTIL JULY 1, 1975. UPON HIS DISCHARGE FROM THE HOSPITAL CLAIMANT RETURNED TO PORTLAND WHERE HE IS PRESENTLY RESIDING. CLAIMANT HAS NOT RECEIVED ANY MEDICAL CARE AND TREATMENT SINCE HIS DISCHARGE FROM THE HOSPITAL ALTHOUGH HE STILL TAKES MUSCLE RELAXANTS FOR PAIN.

THE REFEREE FOUND SUBSTANTIAL EVIDENCE THAT CLAIMANT HAS A CONTINUING PROBLEM AND HE IS NOT IMPROVING. HE EXPRESSED CONCERN OVER THE REFUSAL BY THE FUND TO DO ANYTHING SINCE THE CLAIM WAS CLOSED BY THE DETERMINATION ORDER IN MARCH 1975, DESPITE THE REPORT IT RECEIVED FROM DR. THORSON. THERE WERE NUMEROUS MEDICAL AND HOSPITAL BILLS FROM LEWISTON, IDAHO INVOLVING THE TREATMENT RECEIVED BY CLAIMANT - HOWEVER, THE REFEREE FOUND THAT THESE WERE NOT FURNISHED TO THE FUND OR TO HIM UNTIL OCTOBER 2, 1975, A FEW DAYS PRIOR TO THE HEARING. THERE WAS NO EVIDENCE SUBMITTED AT THE HEARING THAT THE FUND HAD ANY PRIOR KNOWLEDGE OF THESE - HOWEVER, THE FUND HAD BEEN NOTIFIED IN APRIL 1975 THAT FURTHER TREATMENT WAS BEING GIVEN TO CLAIMANT AND THAT FURTHER DIFFICULTIES WERE BEING EXPERIENCED. THE REFEREE FOUND THAT THE FUND ALSO KNEW THAT THE FIRST HEARING HAD BEEN POSTPONED BECAUSE OF CLAIMANT'S HOSPITALIZATION BUT THERE WAS NOTHING IN THE RECORD TO SHOW THAT ANY ACTION HAD BEEN TAKEN BY THE FUND EITHER BY WAY OF DENIAL, ACCEPTANCE OR FURTHER INQUIRY TO DETERMINE THE CIRCUMSTANCE.

THE REFEREE FELT THAT BECAUSE OF THE CONFUSION DUE TO THE FACT THAT MOST OF THE MEDICAL CARE AND TREATMENT WAS RECEIVED BY CLAIMANT AFTER HE HAD LEFT OREGON AND WAS LIVING IN ANOTHER STATE THE IMPOSITION OF PENALTIES WAS NOT WARRANTED. HOWEVER, BECAUSE IT WAS NECESSARY FOR CLAIMANT TO SEEK LEGAL HELP AND GO TO HEARING DUE TO THE FUND'S FAILURE TO RESPOND, THIS DID JUSTIFY AWARDING ATTORNEY FEES PAYABLE BY THE FUND.

THE REFEREE FELT THAT DETERMINATION OF PERMANENT PARTIAL DISABILITY WOULD BE PREMATURE BECAUSE HE WAS UNABLE TO DETERMINE WHETHER OR NOT CLAIMANT COULD, AT THAT TIME, RETURN TO WORK AND BECAUSE IT HAD BEEN A SUBSTANTIALLY LONG TIME SINCE HIS LAST MEDICAL CARE AND TREATMENT, HE CONCLUDED THAT CLAIMANT SHOULD HAVE BEEN RECEIVING THE TEMPORARY TOTAL DISABILITY COMPENSATION AS OF APRIL 15, 1974, THE DATE DR. THORSON EXAMINED CLAIMANT AND ADVISED THE FUND THAT CLAIMANT WAS UNABLE TO DO ANY FURTHER WORK AND, AS CLAIMANT DOES NOT APPEAR TO BE MEDICALLY STATIONARY, UNTIL HIS CLAIM IS CLOSED PURSUANT TO ORS 656.268.

THE FUND HAS BEEN COMPLYING WITH THE DETERMINATION ORDER OF MARCH 1975 AND PAYING PERMANENT PARTIAL DISABILITY, THEREFORE, THE REFEREE ALLOWED THE FUND TO OFFSET SUCH PAYMENTS AGAINST THE TEMPORARY TOTAL DISABILITY COMPENSATION WHICH HE ORDERED PAID TO CLAIMANT.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE REFEREE'S ORDER.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 4, 1975 IS AFFIRMED.

WCB CASE NO. 75-1284 MARCH 24, 1976
WCB CASE NO. 75-1679

HELEN M. PRINCE, CLAIMANT

STEVEN PICKENS, CLAIMANT'S ATTY.
MERLIN MILLER, EMPLOYER'S ATTY.
DEPT. OF JUSTICE, STATE'S ATTY.
SECOND AMENDED ORDER

AN ORDER ON REVIEW WAS ENTERED IN THE ABOVE ENTITLED MATTER ON MARCH 5, 1976 AND AMENDED ON MARCH 10, 1976.

THE ORDER, AS AMENDED, FAILED TO AWARD CLAIMANT'S COUNSEL A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES AT THE HEARING BEFORE THE REFEREE. THE BOARD HAD FOUND THAT CLAIMANT SHOULD HAVE PREVAILED AGAINST THE EMPLOYER, 3 M COMPANY, AT THE HEARING ON THE ISSUE OF COMPENSABILITY.

THE ORDER IS FURTHER AMENDED BY INSERTING BETWEEN THE FIRST AND SECOND PARAGRAPHS ON PAGE 4, THE FOLLOWING -

"CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES AT THE HEARING BEFORE THE REFEREE, THE SUM OF 750 DOLLARS, PAYABLE BY THE EMPLOYER, 3 M COMPANY."

WCB CASE NO. 75-1855 MARCH 25, 1976

LEE E. BEEBE, CLAIMANT

STIPULATION OF FACTS, CONTENTIONS
OF PARTIES, DISPUTED CLAIM
SETTLEMENT AND ORDER OF DISMISSAL

IT IS HEREBY STIPULATED BY LEE E. BEEBE, CLAIMANT AND THE EMPLOYER, SCHMITT STEEL, INC., BY AND THROUGH INDUSTRIAL INDEMNITY COMPANY, ITS COMPENSATION CARRIER, AS FOLLOWS -

THE CLAIMANT WAS EMPLOYED BY THE EMPLOYER ON JANUARY 21, 1975. IT IS THE CLAIMANT'S CONTENTION THAT HE SUSTAINED A COMPENSABLE INJURY ON THE JOB ON THAT DATE CONSISTING OF A CORONARY EPISODE, BEING ANGINA PECTORIS. CLAIMANT HAS BEEN EXAMINED AND TREATED BY DR. GEORGE BAKER, A CARDIOLOGIST OF PORTLAND, OREGON.

CONTENTIONS OF CLAIMANT

CLAIMANT CONTENDS THAT THE EMPLOYER SHOULD PAY COMPLETE WORKMEN'S COMPENSATION BENEFITS FROM JANUARY 21, 1975, AND THAT THE CLAIM IS WHOLLY COMPENSABLE.

CONTENTIONS OF EMPLOYER

THE EMPLOYER CONTENDS THAT AS A MATTER OF MEDICAL FACT AND EVIDENCE, THE CLAIMANT'S TRANSITORY PERIOD OF ANGINA OCCURRED BUT THAT SUCH DISSIPATED ON THE SAME DAY OF OCCURRENCE, AND SUBSEQUENT THERETO THERE WAS NO OTHER WORK ACTIVITY AT SCHMITT STEEL, INC., WHICH WAS A MATERIAL CONTRIBUTING FACTOR TO THE CLAIMANT'S EVENTUAL CONDITION.

THE EMPLOYER ALSO CONTENDS THAT THE WORK ACTIVITY ON JANUARY 21, 1975, DID NOT ENHANCE NOR MAKE MORE PROGRESSIVE THE CLAIMANT'S ALREADY EXISTENT DEGREE OF SCLEROTIC HEART DISEASE.

PROCEEDINGS

THEREAFTER, A HEARING WAS HELD AND THE REFEREE, BY HIS OPINION AND ORDER OF OCTOBER 10, 1975, FOUND THE CLAIMANT'S WORK ACTIVITIES OF JANUARY 21 AND 22, 1975, WERE NOT THE CAUSE OF THE CLAIMANT'S NATURAL PROGRESSION OF SCLEROTIC HEART DISEASE BUT RATHER SUCH WAS OTHER THAN AS PRECIPITATED BY WORK ACTIVITIES ON JANUARY 21 AND 22, 1975, AND THAT THE RESPONSIBILITY OF THE EMPLOYER CEASED ON OR BEFORE JANUARY 28, 1975, BUT DID NOT EXTEND BEYOND THAT DATE. THE CLAIMANT APPEALED FROM THIS OPINION AND ORDER.

SETTLEMENT AND COMPROMISE

THE CLAIMANT AND THE EMPLOYER PRIOR TO THE HEARING HAD VIEWS OF THE COMPENSABILITY OF THE CLAIM WHICH WERE OPPOSITE EACH OTHER AND SUCH VIEWS ARE STILL MAINTAINED AND ASSERTED IN THIS PETITION. THE PARTIES REALIZE THAT THEIR VIEWS ARE DIAMETRICALLY OPPOSED TO EACH OTHER AND THAT A CONFLICT EXISTS AS TO THE LEGAL AND MEDICAL CAUSES OF THE CLAIMANT'S CONDITION. WITH SUCH BEFORE THE PARTIES, THEY HAVE AGREED TO THIS STIPULATION AND ALL MATTERS SET FORTH IN IT. THIS AGREEMENT HAS BEEN MADE PURSUANT TO THE WISHES OF THE CLAIMANT INDEPENDENTLY AND WITH THE ADVICE OF HIS ATTORNEY.

THE PARTIES REPRESENT THAT THIS SETTLEMENT AND COMPROMISE IS FAIR AND REASONABLE AND THAT AFTER EXTENSIVE REVIEW, HAVE REALIZED THAT A BONA FIDE DISPUTE EXISTS AS TO THE MATTER OF COMPENSABILITY OF THE CLAIM BEYOND THE DATE OF, TO WIT – JANUARY 28, 1975.

THE CLAIMANT AND HIS ATTORNEY, DAN O'LEARY, AND THE STATED EMPLOYER, BY AND THROUGH ITS COMPENSATION CARRIER, BY ITS ATTORNEYS, HAVE ENTERED INTO AN AGREEMENT TO DISPOSE OF THE WHOLE MATTER OF ALL THE ISSUES AND CLAIMS AS SUCH EXIST, INCLUDING THE OPINION AND ORDER AND ALL THE TERMS AND CONDITIONS THEREOF, AS SET FORTH BY THE REFEREE OF OCTOBER 10, 1975, AND ANY OTHER CLAIMS WHICH MAY EXIST AS A RESULT OF THE EMPLOYMENT BY THE EMPLOYER OF THE CLAIMANT ON JANUARY 21 AND 22, 1975, OR AT ANY OTHER TIME DURING THE PERIOD OF SUCH EMPLOYMENT, TO THE DATE OF THIS AGREEMENT.

THE PARTIES AGREE THAT SUCH AN ORDER IN THIS CLAIM SHALL BE –

SCHMITT STEEL, INC., AND ITS INDUSTRIAL COMPENSATION CARRIER, INDUSTRIAL INDEMNITY COMPANY, SHALL PAY OR CAUSE TO BE PAID TO THE CLAIMANT THE SUM OF TWENTY THOUSAND DOLLARS (20,000 DOLLARS) IN FULL, COMPLETE SETTLEMENT OF THE CLAIM OF CLAIMANT FOR THE CORONARY EPISODE ALLEGED TO HAVE ARISEN FROM AND OUT OF THE EMPLOYMENT OF CLAIMANT ON JANUARY 21, 22, 1975, OR AT ANY OTHER TIME DURING EMPLOYMENT TO THIS DATE BY THE SAID EMPLOYER, IN A LUMP SUM, IN FULL, COMPLETE SETTLEMENT OF ALL CLAIMS ARISING OUT OF THAT SAID CLAIM OR INJURY, OR CLAIM OF INJURY, FOR ALL BENEFITS OF ANY TYPE UNDER THE PROVISIONS OF THE OREGON WORKMEN'S COMPENSATION ACT, INCLUDING THE PROVISIONS OF THE OPINION AND ORDER OF THE REFEREE OF OCTOBER 10, 1975, AND INCLUDING BUT NOT LIMITED TO TEMPORARY DISABILITY PAYMENTS, MEDICAL EXPENSE, ATTORNEY'S FEES, AGGRAVATION, SURVIVORSHIP BENEFITS TO THE WIDOW AND MINOR CHILDREN, IF ANY, PERMANENT LOSS OF EARNING CAPACITY OR ANY PERMANENT PARTIAL DISABILITY AWARD OR PERMANENT TOTAL DISABILITY AWARD, OR ANY DISABILITY AWARD WHATSOEVER – AND

2. THAT OF AND FROM THE SAID SUM OF 20,000 DOLLARS THERE SHALL BE PAID BY THE CLAIMANT TO HIS ATTORNEY, DAN O'LEARY, OF POZZI, WILSON AND ATCHISON, THE SUM OF 3,000 DOLLARS AS AND FOR LEGAL SERVICES RENDERED HEREIN – AND

3. THAT THE EMPLOYER AND ITS COMPENSATION CARRIER SHALL DEFEND AND

HOLD THE CLAIMANT HARMLESS ON ACCOUNT OF ANY CLAIMS MADE AGAINST HIM ON BEHALF OF PERSONS OR CONCERNS WHICH FURNISHED HIM MEDICAL OR HOSPITAL SERVICES UPON HIS CLAIM FOR NONINDUSTRIAL BENEFITS - AND

4. THAT SUCH SETTLEMENT AND AGREEMENT IS MADE AND FILED PURSUANT TO THE PROVISIONS OF ORS 656.289(4) AUTHORIZING REASONABLE DISPOSITION OF DISPUTED CLAIMS AND IT IS EXPRESSLY UNDERSTOOD AND AGREED THAT THIS IS A SETTLEMENT OF A DOUBTFUL AND DISPUTED CLAIM AS TO RESPONSIBILITY BEYOND THE DATE OF JANUARY 28, 1975, AND THAT FOR PURPOSES OF MAKING THIS SETTLEMENT, THIS SETTLEMENT INCLUDES ALL OBLIGATIONS OF RESPONSIBILITY AS ALLOWED IN THE OPINION AND ORDER OF THE REFEREE OF OCTOBER 10, 1975. THIS IS A SETTLEMENT OF ANY AND ALL CLAIMS WHETHER SPECIFICALLY MENTIONED HEREIN OR NOT THAT MAY ARISE IN THE FUTURE AND WHICH ARE SOUGHT TO BE ATTRIBUTABLE TO THE CLAIM OF THE INCIDENTS OF JANUARY 21, 22, 1975, AT THE TIME OF EMPLOYMENT BY THIS EMPLOYER OR AT ANY OTHER TIME OF EMPLOYMENT BY IT TO DATE.

WCB CASE NO. 75-2992 MARCH 25, 1976

GUADALUPE SERRANO, CLAIMANT

WENDELL GRONSO, CLAIMANT'S ATTY.
ROGER R. WARREN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE EMPLOYER REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED AS DEFINED BY ORS 656.206.

CLAIMANT SUFFERED A COMPENSABLE INJURY IN NOVEMBER 1967 - SHE WAS WORKING AS A POTATO SORTER AND HER RIGHT ARM WAS DRAWN INTO A CONVEYOR BELT ROLLER ASSEMBLY.

DR. DANFORD, CLAIMANT'S TREATING PHYSICIAN, IN A CLOSING EXAMINATION OF CLAIMANT, INDICATED SHE HAD NORMAL HEAD AND NECK MOVEMENT BUT WITH PAIN, AND ALSO HAD NORMAL RANGE OF MOTION IN THE RIGHT SHOULDER BUT WITH PAIN BEGINNING AT 60 DEGREES AND WORSENING AS THE ARM WAS RAISED OVERHEAD AND WITH ROTATION. PAIN WAS ALSO NOTED WITH MOTION AT THE BICEPS, TRICEPS, FOREARM, WRIST AND HAND. IT WAS DR. DANFORD'S OPINION THAT CLAIMANT'S DISABILITY WAS DUE ENTIRELY TO SUBJECTIVE PAIN.

IN MAY 1968 THE FIRST DETERMINATION ORDER GRANTED CLAIMANT AN AWARD OF 20.8 DEGREES FOR 15 PER CENT LOSS OF THE RIGHT ARM.

CLAIMANT'S PAIN PERSISTED, WITH SWELLING IN THE ARM AND GENERALIZED WEAKNESS AFTER ACTIVITY AND HER CLAIM WAS REOPENED, HOWEVER, NO NEUROLOGICAL DEFECT WAS FOUND NOR WAS ANY SURGERY RECOMMENDED. IN MARCH 1970 A SECOND DETERMINATION ORDER WAS ENTERED WHICH DID NOT PROVIDE FOR AN AWARD FOR PERMANENT PARTIAL DISABILITY IN EXCESS OF THAT GIVEN BY THE FIRST DETERMINATION ORDER.

AFTER THE ISSUANCE OF THE SECOND DETERMINATION ORDER CLAIMANT COMMENCED TO HAVE PAIN EXTENDING FROM THE NECK DOWN THE ARM TO THE THIRD AND FOURTH FINGERS OF THE RIGHT HAND. AN AGGRAVATION CLAIM WAS FILED AND DENIED BY THE EMPLOYER. AFTER A HEARING, AN OPINION AND ORDER, ENTERED IN APRIL 1973, FOUND THE DENIAL TO BE IMPROPER. THE CLAIM WAS REMANDED TO THE EMPLOYER FOR ACCEPTANCE AND PAYMENT OF COMPENSATION AS PROVIDED BY LAW. SUBSEQUENTLY, THE CLAIM WAS CLOSED BY A THIRD DETERMINATION ORDER DATED JUNE 27, 1975 WHICH ALSO PROVIDED NO ADDITIONAL AWARD OF PERMANENT PARTIAL DISABILITY IN EXCESS OF THAT GRANTED BY THE FIRST DETERMINATION ORDER.

AT THE PRESENT TIME CLAIMANT HAS CONSTANT PAIN AT THE RIGHT SIDE OF HER NECK, RIGHT SHOULDER AND RIGHT ARM WHICH IS AGGRAVATED BY USE. SHE CAN MOVE HER ARM, BUT NOT FULLY OR REPETITIVELY WITHOUT DISCOMFORT.

THE REFEREE FOUND THAT CLAIMANT HAD BEEN AWARDED COMPENSATION FOR SCHEDULED ARM DISABILITY ONLY AND THAT THE MEDICAL EVIDENCE CONSISTENTLY REVEALED NECK AND SHOULDER SYMPTOMS IN THE FORM OF PAIN WHICH ESTABLISHES THE INVOLVEMENT OF UNSCHEDULED AREAS.

CLAIMANT CONTENDS THAT THE COMBINATION OF SCHEDULED AND UNSCHEDULED DISABILITY RENDERS HER PERMANENTLY AND TOTALLY DISABLED.

CLAIMANT'S WORK EXPERIENCE IS BASICALLY THAT OF FARM LABOR ALTHOUGH SHE HAS WORKED FOR PERIODS OF TIME IN A CANNERY. ALL OF THE WORK CLAIMANT HAS DONE HAS BEEN PHYSICAL, REQUIRING THE USE OF BOTH ARMS AND SHOULDERS. CLAIMANT HAS NOT SOUGHT WORK SINCE HER INJURY BECAUSE SHE FELT THERE WAS NO TYPE OF WORK THAT SHE COULD DO WHICH WOULD NOT REQUIRE THE USE OF HER RIGHT SHOULDER AND ARM. DR. DANFORD WAS OF THE OPINION THAT CLAIMANT WAS NOT SUITED TO RETURN TO HER PRIOR WORK.

CLAIMANT IS SPANISH-AMERICAN, SHE HAS ONLY A FIFTH GRADE EDUCATION WHICH WAS OBTAINED IN MEXICO - SHE IS ABLE TO READ AND WRITE SPANISH BUT CANNOT READ OR WRITE ENGLISH. AT THE HEARING CLAIMANT TESTIFIED THROUGH THE USE OF AN INTERPRETER. CLAIMANT HAS ATTEMPTED TO LEARN THE ENGLISH LANGUAGE BUT HAS NOT BEEN SUCCESSFUL.

THE REFEREE FOUND THAT CLAIMANT HAD MADE A GOOD FAITH EFFORT TO LEARN THE ENGLISH LANGUAGE WHICH MIGHT HAVE ENHANCED HER JOB OPPORTUNITIES AND HAD FAILED. IN ASSESSING CLAIMANT'S PRESENT SUITABILITY FOR EMPLOYMENT IN THE BROAD FIELD OF GENERAL INDUSTRIAL EMPLOYMENT, THE REFEREE FOUND CLAIMANT TO BE PRECLUDED FROM HER PRIOR WORK DUE TO THE PHYSICAL LIMITATIONS ALTHOUGH SHE IS PHYSICALLY SUITED FOR WORK WHICH DOES NOT INVOLVE USE OF THE RIGHT UPPER EXTREMITY. THE MANIFESTED DISABILITY IS PAIN AND ALTHOUGH CLAIMANT HAS NECK, SHOULDER AND ARM MOTION, NEVERTHELESS, SHE IS RESTRICTED IN RANGE AND REPEATABILITY BY THIS PAIN AND AS A RESULT OF THIS DISCOMFORT CLAIMANT'S ACTIVITY IS LIMITED TO COOKING IN HER OWN HOME. SHE DOES NOT CLEAN HOUSE OR WASH DISHES DUE TO THIS PAIN.

THE REFEREE CONCLUDED THAT NO REGULAR EMPLOYMENT SUITED TO CLAIMANT'S MEAGER ABILITIES HAD BEEN SHOWN TO BE AVAILABLE IN HER AREA OR ANY OTHER PLACE AND, TAKING INTO CONSIDERATION CLAIMANT'S PHYSICAL LIMITATIONS AND HER INABILITY TO COMMUNICATE IN THE ENGLISH LANGUAGE, HE CONCLUDED THAT CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS AND CONCLUSIONS REACHED BY THE REFEREE. BASED UPON ITS DE NOVO REVIEW, THE BOARD FINDS THAT CLAIMANT SHOULD BE CONSIDERED AS PERMANENTLY AND TOTALLY DISABLED COMMENCING MAY 26, 1975 INASMUCH AS CLAIMANT'S TEMPORARY TOTAL DISABILITY COMPENSATION WAS TERMINATED ON MAY 25, 1975 AND THERE IS NO EVIDENCE TO INDICATE THAT CLAIMANT'S CONDITION MATERIALLY CHANGED BETWEEN THAT DATE AND OCTOBER 24, 1975, THE DATE OF THE REFEREE'S ORDER.

ORDER

THE REFEREE'S ORDER DATED OCTOBER 24, 1975 IS AFFIRMED.

CLAIMANT SHALL BE CONSIDERED AS PERMANENTLY AND TOTALLY DISABLED AS DEFINED BY ORS 656.206(1), COMMENCING MAY 26, 1975.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE

FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-437 MARCH 25, 1976

WILLIAM J. CLEMO, CLAIMANT

JOHN W. SONDEREN, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE AUTHORIZATION OF TERMINATION OF COMPENSATION OF CLAIMANT'S TEMPORARY TOTAL DISABILITY COMPENSATION BY THE BOARD ON JANUARY 24, 1975 PURSUANT TO ORS 656.325(2) AND ALSO AFFIRMED THE DETERMINATION ORDER MAILED MAY 29, 1975 WHICH AWARDED CLAIMANT COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM MAY 17, 1970 THROUGH JANUARY 24, 1975.

CLAIMANT, A 43 YEAR OLD LABORER, SUFFERED A COMPENSABLE INJURY TO HIS LEFT SHIN ON MAY 16, 1970. BETWEEN MAY 1970 AND JANUARY 24, 1975 CLAIMANT WAS TREATED AND-OR EXAMINED BY NUMEROUS PHYSICIANS, INCLUDING PSYCHIATRISTS, BUT DESPITE MULTIPLE SKIN GRAFTS, THE WOUNDED AREA FAILED TO HEAL BECAUSE OF VARIOUS INFECTIOUS PROCESSES.

THE STATE ACCIDENT INSURANCE FUND REQUESTED THE BOARD TO TERMINATE PAYMENT OF CLAIMANT'S TEMPORARY TOTAL DISABILITY ON JANUARY 24, 1975, ALLEGING CLAIMANT WAS COMMITTING UNSANITARY OR INJURIOUS PRACTICES WHICH IMPERILED OR RETARDED HIS RECOVERY.

THE REFEREE FOUND THAT THE PHYSICIANS WHO TREATED AND-OR EXAMINED CLAIMANT OVER THIS PERIOD OF NEARLY FIVE YEARS FINALLY AGREED CLAIMANT'S LEG COULD NOT HAVE REMAINED INFECTED FOR THAT PERIOD OF TIME WITHOUT CLAIMANT'S ASSISTANCE.

CLAIMANT CONTENDS HE ACCIDENTALLY CAUSED ONE INFECTION WHEN HE ATTEMPTED TO REMOVE AN INGROWN HAIR WITH A PIN BUT THAT HE COULD NOT HAVE INFECTED HIS WOUND AS IT WAS ALWAYS IN A CAST AFTER EACH SKIN GRAFT - HOWEVER, THE OPERATIVE REPORTS DO NOT SUPPORT THIS CONTENTION. TO THE CONTRARY, THE REPORTS SUPPORT THE FUND'S CONTENTION THAT CLAIMANT INHIBITED AND RETARDED HIS RECOVERY FOR ALMOST FOUR AND ONE HALF YEARS BY WILLFULLY AND INTENTIONALLY INTRODUCING INFECTION FOR THE PURPOSE OF FRAUDULENTLY AND INTENTIONALLY PROLONGING HIS WORKMEN'S COMPENSATION BENEFITS.

THE REFEREE FURTHER FOUND THAT CLAIMANT WOULD NOT HAVE HAD ANY PERMANENT DISABILITY RESULTING FROM HIS MAY 17, 1970 INJURY IN THE NORMAL COURSE OF EVENTS AND THAT ANY DISABILITY HE MIGHT NOW HAVE IN HIS LEFT LEG WAS SELF-INDUCED FOR THE PURPOSE OF OBTAINING WORKMEN'S COMPENSATION BENEFITS.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE ORDER OF THE REFEREE. CLAIMANT WAS PRESENTED TO THE DERMATOLOGY STAFF CONFERENCE BY DR. HANIFIN, ASSISTANT PROFESSOR IN THAT DEPARTMENT AT THE UNIVERSITY OF OREGON MEDICAL SCHOOL, ON MAY 8, 1974 - IT WAS THE UNANIMOUS AGREEMENT THAT CLAIMANT'S DISABILITY WAS IN ALL LIKELIHOOD DUE TO FACTITIAL ETIOLOGY AND PSYCHIATRIC CONSULTATION WAS RECOMMENDED.

DR. CARLISLE, A PSYCHIATRIST, AFTER EXAMINING CLAIMANT TWICE, EXPRESSED HIS OPINION THAT MOST, IF NOT ALL, OF CLAIMANT'S LESIONS

HAD BEEN CAUSED BY HIMSELF EITHER THROUGH CONSCIOUS NEGLIGENCE OR CONSCIOUS INTENT MOTIVATED BY THE GRATIFICATIONS HE RECEIVED IN THE FORM OF SECONDARY GAINS. HE FELT THE ONLY TO INTERRUPT THE PROCESS WAS TO STOP THE GRATIFICATION BY DESISTING FROM ANY FURTHER EFFORTS TO COMPENSATE CLAIMANT FOR ANY FURTHER MEDICAL EFFORTS DIRECTED TOWARD CLAIMANT'S INFECTIONS = ONCE RESPONSIBILITY FOR THE INFECTIONS ARE PLACED UPON CLAIMANT'S SHOULDERS THE INFECTIONS WILL SUBSIDE OF THEIR OWN ACCORD.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 10, 1975 IS AFFIRMED.

WCB CASE NO. 76—743 MARCH 26, 1976

RAYMOND BAIRD, CLAIMANT

GRANT, FERGUSON AND CARTER,
CLAIMANT'S ATTYS.
OWN MOTION PROCEEDING REFERRED
FOR HEARING

ON MARCH 23, 1976 THE CLAIMANT, THROUGH HIS ATTORNEYS, REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND REOPEN CLAIMANT'S CLAIM IN THE ABOVE ENTITLED CASE FOR FURTHER MEDICAL TREATMENT AND COMPENSATION BASED UPON AN AGGRAVATION AND WORSENING OF HIS CONDITION SINCE THE LAST ARRANGEMENT OF COMPENSATION. IN SUPPORT OF CLAIMANT'S REQUEST MEDICAL REPORTS FROM DR. THOMAS C. BOLTON AND MARIO CAMPAGNA WERE ATTACHED. CLAIMANT'S CLAIM WAS INITIALLY CLOSED BY DETERMINATION ORDER MAILED DECEMBER 19, 1967 AND CLAIMANT'S AGGRAVATION RIGHTS HAVE EXPIRED.

ON FEBRUARY 11, 1976 CLAIMANT REQUESTED A HEARING ON THE DENIAL OF A CLAIM FOR AGGRAVATION FILED BY THE CLAIMANT WITH THE EMPLOYER'S CARRIER. A HEARING IS PRESENTLY SET FOR MARCH 31, 1976 IN MEDFORD, OREGON BEFORE REFEREE GAYLE GEMMELL.

THE BOARD, AT THE PRESENT TIME, DOES NOT HAVE SUFFICIENT MEDICAL EVIDENCE UPON WHICH TO DETERMINE THE MERITS OF CLAIMANT'S REQUEST TO REOPEN THIS CLAIM UNDER ITS OWN MOTION JURISDICTION AND, THEREFORE, REFERS SUCH REQUEST TO REFEREE GEMMELL WITH INSTRUCTIONS TO TAKE EVIDENCE AT THE HEARING SCHEDULED FOR MARCH 31, ON THE ISSUE OF WHETHER CLAIMANT'S PRESENT CONDITION AND NEED FOR MEDICAL CARE AND TREATMENT IS RELATED TO CLAIMANT'S INDUSTRIAL INJURY SUFFERED ON JUNE 8, 1967 AND-OR WHETHER CLAIMANT IS ENTITLED TO SUCH MEDICAL CARE AND TREATMENT ONLY UNDER THE PROVISIONS OF ORS 656.245.

UPON CONCLUSION OF THE HEARING THE REFEREE SHALL CAUSE A TRANSCRIPT OF THE PROCEEDINGS TO BE PREPARED AND SUBMITTED TO THE BOARD TOGETHER WITH HER FINDINGS AND HER RECOMMENDATION THAT EITHER THE REQUEST TO REOPEN UNDER THE BOARD'S OWN MOTION JURISDICTION BE GRANTED OR DENIED.

WCB CASE NO. 74-1507 MARCH 29, 1976

JAMES BEELER, CLAIMANT

WILLIAMSON AND WHIPPLE,
CLAIMANT'S ATTYS.
A. THOMAS CAVANAUGH,
DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH DIRECTED THE EMPLOYER TO ACCEPT CLAIMANT'S CLAIM AND PAY TO CLAIMANT'S REPRESENTATIVE, THE WIDOW, BENEFITS TO WHICH SHE IS ENTITLED TO BY LAW AND TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE.

CLAIMANT, A 60 YEAR OLD CAR SALESMAN, SUFFERED A MYOCARDIAL INFARCTION ON MARCH 9, 1974 WHICH HE ALLEGED RESULTED FROM PHYSICAL EXERTION AND EMOTIONAL STRESS ON HIS JOB.

CLAIMANT HAD WORKED AS A CAR SALESMAN SINCE 1945 AND HAD BEEN IN GOOD HEALTH UNTIL 1969 WHEN HE SUFFERED A HEART ATTACK WHICH REQUIRED HIM TO REMAIN OFF WORK FOR APPROXIMATELY 10 MONTHS. BETWEEN 1969 AND 1974 CLAIMANT APPEARED TO HAVE RECOVERED VERY WELL AND FOR APPROXIMATELY TWO YEARS PRIOR TO MARCH 9, 1974 CLAIMANT HAD NOT HAD TO TAKE ANY MEDICATION EXCEPT NITROGLYCERIN PILLS WHICH HE ALWAYS CARRIED WITH HIM.

ON THE DAY IN QUESTION CLAIMANT HAD A CUSTOMER WHO WAS INTERESTED IN BUYING TWO USED CARS. CLAIMANT TOOK ONE CAR TO THE CAR WASH AND WAS TOWELING IT DOWN AFTER THE CAR HAD BEEN WASHED, THE OTHER CAR, A PICKUP, WAS SHORT OF GAS AND THE ONLY AVAILABLE GAS WAS AN EMERGENCY TANK WITH A HAND PUMP. CLAIMANT PUMPED SOME 15 GALLONS OF GAS IN THE PICKUP WHICH TOOK HIM APPROXIMATELY 2 OR 3 MINUTES AND INVOLVED EXERTING A PRESSURE ON THE HAND PUMP OF 10 TO 12 POUNDS.

CLAIMANT WENT HOME FOR LUNCH, ADVISED HIS WIFE THAT HE WAS IN A HURRY AND HAD TO BE BACK TO WORK AS SOON AS POSSIBLE - HE WAS EXTREMELY CONCERNED ABOUT THE SALE. EARLY THAT AFTERNOON CLAIMANT EXPERIENCED SEVERE CHEST PAINS WHICH WERE NOT RELIEVED BY THE NITRO TABLETS AND THE SALES MANAGER DROVE HIM TO THE HOSPITAL WHERE HE WAS ADMITTED AT 5.00 P.M. UNDER THE CARE OF DR. ZESCHIN, WHO DIAGNOSED A MYOCARDIAL INFARCTION. CLAIMANT WAS RELEASED FROM THE HOSPITAL ON APRIL 5, 1974 - HE HAD FAILED A CLAIM ON MARCH 25, 1974. ON APRIL 17, 1974 THE EMPLOYER'S CARRIER DENIED RESPONSIBILITY FOR THE HEART ATTACK AND ON APRIL 22, 1974 THE CLAIMANT REQUESTED A HEARING ON HIS DENIED CLAIM.

DR. GROSSMAN, AN INTERNIST, EXAMINED CLAIMANT ON AUGUST 28, 1974 AND IN HIS REPORT OF SEPTEMBER 18, 1974, WHICH WAS BASED UPON HISTORY GIVEN TO HIM BY CLAIMANT AS WELL AS HIS EXAMINATION OF CLAIMANT, SAID HIS IMPRESSION WAS - 'RECURRENT CORONARY THROMBOSIS WITH MYOCARDIAL INFARCTION IS LIKELY WITH SMALL CEREBRAL EMBOLUS, PROBABLY FROM MURAL THROMBUS, AND MORE RECENT ACUTE CONGESTIVE FAILURE. THE PHYSICAL EXERTION AND EMOTIONAL STRESSES OF THE WORK ACTIVITIES ON MARCH 9, 1974 WERE SIGNIFICANT FACTORS IN THE PRECIPITATION OF THE ACUTE EPISODE.'

DR. GRISWOLD, A CARDIOLOGIST, IN HIS REPORT OF MARCH 5, 1975 CONCLUDED THAT THERE WAS NO RELATIONSHIP BETWEEN CLAIMANT'S JOB ACTIVITY AND HIS MYOCARDIAL INFARCTION ON MARCH 9, 1974.

ON JUNE 13, 1975 ANOTHER REQUEST FOR HEARING WAS RECEIVED FROM THE WIDOW, WILMA BEELER, WHICH RECITED THAT THE DECEASED CLAIMANT

HAD FILED A REQUEST FOR HEARING WHICH WAS SCHEDULED FOR MAY 21, 1975 BUT THAT CLAIMANT HAD DIED ON APRIL 23, 1975 WITHOUT DISPOSITION HAVING BEEN MADE REGARDING HIS CLAIM.

THE REFEREE CHOSE NOT TO ACCEPT DR. GRISWOLD'S OPINION, FIRST, BECAUSE IT WAS BASED, IN PART, UPON A RECORDED STATEMENT OF CLAIMANT DATED APRIL 11, 1974 WHICH WAS NOT IN EVIDENCE AND THE CONTENTS OF WHICH WERE UNKNOWN AND, SECOND, BECAUSE THE REPORT STATED, IN PART, 'THERE IS NO HISTORY THAT HE (CLAIMANT) WAS UNUSUALLY ANXIOUS OR UPSET'. THE REFEREE FOUND THIS WAS CONTRADICTED BY THE EVIDENCE.

THE REFEREE CONCLUDED THAT DR. GROSSMAN'S OPINION WAS BASED ESSENTIALLY UPON THE HISTORY DEVELOPED AT THE HEARING AND, THEREFORE, SHOULD BE ACCEPTED AND THAT THE EVIDENCE SUPPORTED A FINDING THAT CLAIMANT HAD SUFFERED A COMPENSABLE INJURY. HE DIRECTED THAT DEFENDANT ACCEPT THE CLAIM AND PAY CLAIMANT'S REPRESENTATIVE, THE WIDOW, BENEFITS TO WHICH SHE WAS ENTITLED BY LAW.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 7, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 350 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-2429 MARCH 29, 1976

DONALD R. CLUSTER, CLAIMANT

FRANKLIN, BENNETT, OFELT AND JOLLES,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON, MOORE AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 87.75 DEGREES FOR PARTIAL LOSS OF HIS LEFT FOOT, 81 DEGREES FOR PARTIAL LOSS OF HIS RIGHT FOOT AND 32 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY, CONTENDING THAT HE IS PERMANENTLY AND TOTALLY DISABLED.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON SEPTEMBER 11, 1973 WHEN HE WAS WORKING ON A SCAFFOLDING WHICH FELL A DISTANCE OF ABOUT 16 FEET. CLAIMANT SUFFERED A COMMINUTED FRACTURE OF THE LEFT TIBIA AND FIBULA AND A FRACTURE OF THE RIGHT OS CALCIS AND SEVERAL BONES OF THE RIGHT FOOT. ADDITIONALLY CLAIMANT INJURED HIS BACK WHICH IS CONSTANTLY AGGRAVATED BY HIS ALTERED GAIT, SECONDARY TO THE BILATERAL LEG INJURIES.

CLAIMANT IS A 59 YEAR OLD CARPENTER. IMMEDIATELY AFTER THE ACCIDENT HE WAS ADMITTED TO KAISER HOSPITAL WHERE CASTS WERE APPLIED ON BOTH LEGS. IN JUNE 1974 CLAIMANT HAD SURGERY FOR A RIGHT DIRECT INGUINAL HERNIA WHICH WAS RELATED TO THE INDUSTRIAL INJURY. IN AUGUST 1974 CLAIMANT CAME UNDER THE CARE OF DR. RUSCH WHO CONTINUED TO SEE HIM UNTIL MARCH 3, 1975.

ON APRIL 8, 1975 DR. RUSCH, IN A CLOSING EVALUATION, STATED THAT CLAIMANT'S CLAIM MIGHT BE CLOSED AND ON MAY 20, 1975 CLAIMANT WAS INTERVIEWED BY THE EVALUATION TEAM OF THE BOARD, WHICH, ACCORDING TO CLAIMANT, ADVISED HIM THAT THE EFFECTIVE DATE OF ANY SETTLEMENT WOULD BE MAY 20. CLAIMANT CONTENDS HE IS STILL UNABLE TO WORK SO THAT THE TEMPORARY TOTAL DISABILITY COMPENSATION SHOULD BE CONTINUED - HOWEVER, THE REFEREE FOUND CLAIMANT WAS MEDICALLY STATIONARY, ACCORDING TO DR. RUSCH, ON MARCH 3, 1975, THEREFORE THE TEMPORARY TOTAL DISABILITY COMPENSATION WAS PROPERLY TERMINATED ON THAT DATE.

A DETERMINATION ORDER WAS MAILED ON MAY 22, 1975 AWARDING CLAIMANT TIME LOSS FOR DIFFERENT PERIODS OF TIME, 54 DEGREES FOR 40 PER CENT LOSS OF HIS RIGHT FOOT AND 40.5 DEGREES FOR 30 PER CENT LOSS OF HIS LEFT FOOT.

THE FUND CONTENDS THAT WHEN IT ACCEPTED THE CLAIM AS COMPENSABLE FOR FRACTURE OF BOTH LEGS IT WAS UNAWARE OF ANY BACK INJURY AND THAT CLAIMANT COULD NOT NOW CLAIM A BACK INJURY BECAUSE THE ONE YEAR STATUTE OF LIMITATIONS HAD RUN SINCE THE ISSUANCE OF THE DETERMINATION ORDER - FURTHER CONTENDING THAT CLAIMANT COULD NOT BE AWARDED PERMANENT TOTAL DISABILITY BECAUSE THE STATUTE IN EFFECT AT THE TIME CLAIMANT WAS INJURED DID NOT PERMIT A FINDING OF PERMANENT TOTAL DISABILITY WHERE THE INJURY WAS SOLELY TO A SCHEDULED AREA.

DR. RUSCH ON APRIL 8, 1975 HAD REPORTED THAT CLAIMANT ALSO HAD COMPLAINTS OF LOW BACK PAIN WHICH WAS AGGRAVATED BY BENDING AND LIFTING AND BY CLAIMANT'S ALTERED GAIT PATTERN WHICH WAS THE RESULT OF THE BILATERAL ANKLE AND LEG COMPLAINTS. HE SAID THAT ANY ATTEMPT AT PROLONGED WALKING RESULTED IN BILATERAL ANKLE, FOOT AND LEG COMPLAINTS AND THEN AN AGGRAVATION OF HIS BACK COMPLAINTS.

EVIDENCE INDICATES THAT CLAIMANT'S BACK PROBLEMS BEGAN APPROXIMATELY 10 YEARS PRIOR TO HIS INJURY BUT DURING THE FIVE YEARS IMMEDIATELY PRECEDING THE ACCIDENT, HIS BACK DID NOT CAUSE HIM ANY PROBLEMS NOR HAD HE LOST ANY TIME FROM WORK BECAUSE OF HIS BACK PRIOR TO THIS INJURY IN SEPTEMBER 1973.

THE REFEREE FOUND NO EVIDENCE WHICH REVEALED ANY BACK COMPLAINTS PRIOR TO AUGUST 27, 1974 - BOTH CLAIMANT AND DR. RUSCH HAD BEEN OF THE OPINION THAT THE ALTERED GAIT PATTERN CAUSED BY THE INJURY AGGRAVATED THE PREEXISTING LOW BACK PAIN. THE REFEREE AGREED AND CONCLUDED THAT CLAIMANT WAS NOT PRECLUDED FROM BEING COMPENSATED FOR THE CONSEQUENCES OF HIS COMPENSABLE INJURY BUT THAT HE DID NOT QUALIFY AS AN 'ODD-LOT' PERMANENT TOTAL FOR SEVERAL REASONS, PRIMARILY, BECAUSE OF LACK OF MOTIVATION.

THE REFEREE CONCLUDED THAT CLAIMANT DID HAVE SUBSTANTIAL LOSS OF PHYSICAL FUNCTION OF HIS LOWER EXTREMITIES AND MINIMAL UNSCHEDULED LOW BACK DISABILITY AND, ACCORDINGLY, INCREASED THE AWARDS FOR THE SCHEDULED DISABILITIES - HE ALSO AWARDED CLAIMANT 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY.

THE BOARD, ON DE NOVO REVIEW, DISAGREES WITH THE CONCLUSION REACHED BY THE REFEREE THAT CLAIMANT IS NOT AN 'ODD-LOT' PERMANENT TOTAL. THE BOARD FINDS THAT CLAIMANT FALLS WITHIN THIS CATEGORY REGARDLESS OF MOTIVATION. HOWEVER, THE EVIDENCE INDICATES THAT CLAIMANT IS MOTIVATED TO RETURN TO WORK BUT IS PHYSICALLY UNABLE TO DO SO.

IN HIS REPORT OF APRIL 8, 1975 DR. RUSCH, WHO HAD TREATED CLAIMANT SINCE AUGUST 1974, EXPRESSED HIS OPINION THAT CLAIMANT HAD BEEN TOTALLY DISABLED AS A RESULT OF COMPLAINTS REFERABLE TO BOTH LOWER EXTREMITIES AND HIS BACK AND STATED -

'IN MY OPINION, CONSIDERING MR. CLUSTER'S MEDICAL COMPLAINTS OF BILATERAL FEET, ANKLE AND LEG COMPLAINTS, HIS EDUCATION AND HIS AGE AND HIS EXPERIENCE, PREVENTS HIM FROM PERFORMING ANY KIND OF FULL TIME WORK THAT COULD BE THOUGHT OF...'

THE BOARD FINDS NO EVIDENCE WHICH CONTRADICTS THIS MEDICAL OPINION NOR ANY MEDICAL EVIDENCE INTRODUCED BY THE FUND WHICH WOULD SUPPORT A FINDING OF DISABILITY LESS THAN PERMANENT AND TOTAL.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 10, 1975 IS REVERSED.

CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED AND SHALL BE CONSIDERED AS SUCH FROM THE DATE OF THIS ORDER.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, 25 PER CENT OF THE COMPENSATION AWARDED CLAIMANT BY THIS ORDER, PAYABLE FROM SAID COMPENSATION AS PAID, NOT TO EXCEED THE SUM OF 2,300 DOLLARS.

WCB CASE NO. 75-1479 MARCH 29, 1976

NAOMI E. GOODWIN, CLAIMANT

EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
ORDER OF DISMISSAL

A REQUEST FOR REVIEW OF THE ABOVE ENTITLED MATTER WAS DULY FILED BY THE CLAIMANT. A CROSS REQUEST FOR REVIEW WAS DULY FILED BY THE STATE ACCIDENT INSURANCE FUND.

THE PARTIES, NOW HAVING STIPULATED THAT THE REQUEST FOR REVIEW AND THE CROSS REQUEST FOR REVIEW BE WITHDRAWN,

IT IS THEREFORE ORDERED THIS MATTER PENDING BEFORE THE BOARD IS HEREBY DISMISSED AND THE ORDER OF THE REFEREE IS FINAL BY OPERATION OF LAW.

WCB CASE NO. 75-1883 MARCH 29, 1976

SCANDRA KHAL, CLAIMANT

RASK AND HEFFERIN, CLAIMANT'S ATTYS.
GEARIN, CHENEY, LANDIS, AEBI AND KELLEY,
DEFENSE ATTYS.
ORDER ON MOTION

ON MAY 5, 1976 THE CLAIMANT IN THE ABOVE ENTITLED MATTER MOVED THE BOARD FOR AN ORDER DISMISSING THE PENDING REQUEST FOR REVIEW MADE BY THE EMPLOYER AND ITS INSURANCE CARRIER.

THE AFFIDAVIT IN SUPPORT OF THE MOTION STATES THAT SHORTLY AFTER THE EMPLOYER AND ITS CARRIER FILED A REQUEST FOR REVIEW ON FEBRUARY 5, 1976, CLAIMANT'S COUNSEL RECEIVED TWO CHECKS FROM THE CARRIER, ONE MADE OUT TO THE CLAIMANT IN THE AMOUNT OF 5,040 DOLLARS, THE OTHER

MADE OUT TO THE LAW FIRM OF RASK AND HEFFERIN IN THE AMOUNT OF 1,680 DOLLARS. THE TOTAL OF THE TWO SUMS EQUALS THE AWARD MADE BY THE REFEREE IN HIS OPINION AND ORDER ENTERED JANUARY 28, 1976 WHEREBY CLAIMANT WAS GRANTED 96 DEGREES, WHICH WOULD AMOUNT TO 6,720 DOLLARS, AND CLAIMANT'S COUNSEL WAS AWARDED 25 PER CENT OF SUCH COMPENSATION. THE FULL PAYMENT TO CLAIMANT AND HER ATTORNEY OF THE AMOUNTS AWARDED BY THE REFEREE HAVING BEEN MADE THE EMPLOYER AND ITS INSURANCE CARRIER'S REQUEST FOR REVIEW SHOULD BE DISMISSED.

ON MARCH 17, 1976 THE CARRIER RESPONDED TO THE MOTION STATING, FIRST, THAT THE EMPLOYER AND CARRIER WERE NOT ABANDONING THE APPEAL AND WERE RESISTING THE ADDITIONAL AWARD MADE BY THE REFEREE IN HIS OPINION AND ORDER. THE CARRIER ALLEGES THAT THE TWO CHECKS WERE ERRONEOUSLY MAILED ON FEBRUARY 11, 1976 – THAT AT THAT TIME THE CLAIMANT WAS STILL RECEIVING PERMANENT PARTIAL DISABILITY PAYMENTS FROM HER FIRST AWARD UNDER THE DATE OF MAY 7, 1975 AND AT THAT DATE SHE WAS STILL TO RECEIVE 1,273.41 DOLLARS ON THE BASIS OF SUCH FIRST AWARD, THEREFORE, THE SECOND AWARD GRANTED BY THE OPINION AND ORDER ENTERED JANUARY 20, 1976 WOULD NOT BECOME PAYABLE UNTIL AFTER THE FULL PAYMENT OF THE AWARD MADE MAY 7, 1975.

THE CARRIER FURTHER CONTENDS THAT IT WAS NOT PERMITTED BY STATUTE TO PAY THE AWARD MADE BY THE OPINION AND ORDER OF JANUARY 28, 1976 IN A LUMP SUM BECAUSE THE AWARD EXCEEDED 32 DEGREES AND SUCH LUMP SUM PAYMENT COULD ONLY BE MADE BY THE CARRIER WHEN APPROVED BY THE BOARD UNDER THE PROVISIONS OF ORS 656.230.

THE CARRIER IN ITS OPPOSITION TO THE MOTION REQUESTS THE BOARD TO ISSUE ITS ORDER OF REIMBURSEMENT REQUIRING CLAIMANT AND HER COUNSEL TO REIMBURSE THE CARRIER FOR THE MONEY MISTAKENLY FORWARDED TO THEM, OR, IN THE ALTERNATIVE, SUSPENDING THE FURTHER PAYMENT OF COMPENSATION TO CLAIMANT, PREDICATED UPON HER ORIGINAL AWARD UNDER HER EARLIER DETERMINATION ORDER, OR, IN THE OTHER ALTERNATIVE, PERMITTING A CREDIT AS AGAINST THE INCREASED AWARD MADE BY THE REFEREE, BY THE AMOUNT OWING TO THE CLAIMANT AS TO THE BALANCE OF HER INITIAL AWARD BY THE DETERMINATION ORDER AS SUCH AMOUNT EXISTED AT THE DATE OF THE OPINION AND ORDER OF REFEREE LEAHY, I.E., 1,273.41 DOLLARS.

THE BOARD, AFTER FULL CONSIDERATION OF THIS MATTER, CONCLUDES THAT THE MOTION MADE BY CLAIMANT TO DISMISS THE EMPLOYER'S REQUEST FOR REVIEW SHOULD BE DENIED.

THE BOARD FURTHER CONCLUDES THAT THE CARRIER MAY TAKE AS A CREDIT AGAINST THE AWARD MADE BY THE OPINION AND ORDER OF JANUARY 28, 1976 THE AMOUNT OF 1,273.41 DOLLARS.

IT IS SO ORDERED.

WCB CASE NO. 75–990 MARCH 29, 1976

TOMMY G. PAYNE, CLAIMANT

VAN NATTA AND PETERSON, CLAIMANT'S ATTYS.
LINDSAY, NAHSTOLL, HART AND KRAUSE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED JUNE 25, 1974 WHEREBY CLAIMANT WAS AWARDED 30 DEGREES FOR 20 PER CENT LOSS OF HIS LEFT LEG.

CLAIMANT IS A 39 YEAR OLD JOURNEYMAN PLUMBER WHO SUSTAINED A COMPENSABLE INJURY ON FEBRUARY 12, 1973 WHEN A HEAVY FLANGE STRUCK THE INNER SIDE OF HIS LEFT LOWER LEG FROM THE KNEE TO THE ANKLE. THE FIRST PHYSICIAN WHO EXAMINED CLAIMANT FOUND AN ECCHYMOSIS AND DIAGNOSED A CONTUSION SPRAIN OF THE LEFT KNEE AND LEFT CALF ANKLE. AN ARTHROGRAM OF THE LEFT KNEE WAS ESSENTIALLY NEGATIVE BUT BECAUSE OF CONTINUING SYMPTOMATOLOGY CLAIMANT HAD SURGERY ON APRIL 18, 1973 AT WHICH TIME A TEAR OF THE MEDIAL MENISCUS WAS DISCOVERED AS WELL AS A TRAUMATIC SYNOVITIS OF THE ANTERIOR FAT PAD. A MENISCECTOMY WAS PERFORMED.

FOLLOWING HIS SURGERY CLAIMANT'S SYMPTOMATOLOGY CONTINUED AND HE WAS REFERRED TO VARIOUS ORTHOPEDIC PHYSICIANS AND TO A NEUROSURGEON, ALL OF WHOM WERE UNABLE TO FIND ANYTHING ON AN OBJECTIVE BASIS TO EXPLAIN THIS SYMPTOMATOLOGY. DR. JONES SUGGESTED AN ARTHROGRAM WHICH WAS REFUSED BY CLAIMANT - ULTIMATELY, AN ARTHROSCOPY WAS PERFORMED ON JANUARY 14, 1975 AND THE ONLY OBJECTIVE FINDING WAS MILD CHONDROMALACIA, LEFT FEMORAL CONDYLE. IN JUNE 1975 DR. KEIZER, AFTER EXAMINING CLAIMANT, RECOMMENDED CONTINUED ACTIVITY AND WEIGHT LOSS.

IN OCTOBER 1973 CLAIMANT HAD BEEN EVALUATED AT THE DISABILITY PREVENTION DIVISION AND IN APRIL 1974 HE HAD BEEN EVALUATED AT THE PAIN CLINIC IN PORTLAND. DISABILITY PREVENTION DIVISION RECOMMENDED FURTHER TREATMENT, PARTICULARLY OF A GOUTY ARTHRITIS AND A WEIGHT REDUCTION PROGRAM - THE PAIN CLINIC REPORTED IT COULD NOT BENEFIT THE WORKMAN BECAUSE OF HIS ATTITUDE. THEREAFTER THE CLAIM WAS CLOSED BY THE DETERMINATION ORDER OF JUNE 25, 1974.

CLAIMANT CONTENDS HIS CLAIM WAS PREMATURELY CLOSED AND IT SHOULD BE REOPENED AND THAT HE IS ENTITLED TO TEMPORARY TOTAL DISABILITY COMPENSATION UNTIL HE IS ABLE TO WORK. HE ALSO STATED HE DESIRED SOME TYPE OF VOCATIONAL TRAINING.

THE REFEREE FOUND NO MEDICAL BASIS FOR REOPENING THE CLAIM - MOST OF THE DOCTORS HAVE INDICATED THEY ARE UNAWARE OF ANY TREATMENT WHICH WOULD BE OF HELP TO CLAIMANT. AT THE TIME CLAIMANT WAS EXAMINED AT THE PAIN CLINIC IN PORTLAND, DR. NEWMAN TESTIFIED THAT THE BASIC REASON CLAIMANT DID NOT RECEIVE ANY BENEFITS FROM THE PSYCHOLOGICAL AND MEDICAL SERVICES AVAILABLE TO HIM THERE WAS BECAUSE HE REFUSED TO BE HELPED. THERE WAS SOME INDICATION THAT CLAIMANT HAD A HYSTERICAL CONVERSION AND SECONDARY GAIN BUT HIS DISABILITY WAS MILD.

THE REFEREE, AFTER LISTENING TO CLAIMANT'S TESTIMONY AT THE HEARING, CONCLUDED THAT CLAIMANT FELT 'EVERYONE WAS OUT OF STEP BUT HIMSELF' AND HE QUESTIONED CLAIMANT'S CREDIBILITY AS WELL. AFTER GIVING CONSIDERATION TO ALL THE EVIDENCE, THE REFEREE CONCLUDED THERE WAS NO BASIS TO ALTER THE AWARD MADE BY THE DETERMINATION ORDER OF JANUARY 25, 1974 AND HE AFFIRMED THE SAME.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 29, 1975 IS AFFIRMED.

WCB CASE NO. 75-2247 MARCH 29, 1976

MAE WILLIAMS, CLAIMANT

HOLMES, JAMES AND CLINKINBEARD,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF A REFEREE'S ORDER WHICH AFFIRMED THE STATE ACCIDENT INSURANCE FUND'S DENIAL OF HER CLAIM FOR AGGRAVATION.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON OCTOBER 13, 1970 TO HER RIGHT LEG AND HIP. SHE RECEIVED 40 PER CENT UNSCHEDULED LOW BACK DISABILITY PURSUANT TO A DETERMINATION ORDER. AFTER A HEARING, CLAIMANT WAS GRANTED AN ADDITIONAL AWARD OF 20 PER CENT ON SEPTEMBER 18, 1973, MAKING A TOTAL OF 60 PER CENT OF THE MAXIMUM FOR UNSCHEDULED DISABILITY. THIS AWARD WAS AFFIRMED BY THE BOARD, THE CIRCUIT COURT AND IN JANUARY 1975, BY THE COURT OF APPEALS.

CLAIMANT SOUGHT MEDICAL ATTENTION IN FEBRUARY 1975 FROM DR. N. J. WILSON CONCERNING A FALL WHEN HER RIGHT LEG BUCKLED. AGAIN ON MARCH 12, 1975, CLAIMANT SUFFERED PAIN IN THE LOW BACK AND LOWER EXTREMITY. DR. WILSON FELT THAT CLAIMANT HAD BECOME SYMPTOMATIC ON THE BASIS OF A PSEUDOARTHROSIS OF HER SPINAL FUSION AT THE L4-5 LEVEL WITH ADDITIONAL NERVE ROOT IRRITATION AND COMPRESSION. HE FELT THE CONDITION WAS CHRONIC AND WOULD NECESSITATE INTERMITTENT MEDICAL CARE AND TREATMENT.

THE ORTHOPAEDIC CONSULTANTS EXAMINED CLAIMANT ON AUGUST 25, 1975. THEIR REPORT INDICATED NO AGGRAVATION OF THE LOW BACK CONDITION AND THAT CLAIMANT'S PRESENT WORSENED CONDITION WAS IN THE UPPER BACK AND STEMMED FROM HER FEBRUARY 1, 1975 ACCIDENT.

THE REFEREE FOUND THAT CLAIMANT HAD FAILED TO PRODUCE EVIDENCE TO SHOW THAT HER POTENTIAL EARNING CAPACITY HAD CHANGED SINCE HER LAST AWARD - ALSO THE SYMPTOMS CLAIMANT NOW COMPLAINS OF ARE THE SAME ONES SHE COMPLAINED OF AT HER FIRST HEARING. HE UPHELD THE FUND'S DENIAL.

THE BOARD, ON DE NOVO REVIEW, AGREES THAT CLAIMANT HAS NEITHER SHOWN ANY LOSS OF WAGE EARNING CAPACITY NOR THAT HER PRESENT WORSENED CONDITION IS THE RESULT OF HER INDUSTRIAL INJURY. THE BOARD AFFIRMS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 17, 1975 IS AFFIRMED.

WCB CASE NO. 75-1629 MARCH 29, 1976

OMAR SANTANA, CLAIMANT

EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
KEITH SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 64 DEGREES FOR 20 PER CENT UNSCHEDULED DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE INJURY IN OCTOBER 1972 WHEN HE SLIPPED ON A CORE BENCH AND SLIGHTLY INJURED HIS LEFT KNEE AND BACK. AT THE PRESENT TIME THE KNEE IS COMPLETELY HEALED AND THE ONLY ISSUE IS THE EXTENT OF THE BACK DISABILITY.

CLAIMANT IS 36 YEARS OLD AND A NATIVE OF MEXICO WHERE HE COMPLETED A THIRD GRADE EDUCATION. HE IS ABLE TO READ SOME ENGLISH. CLAIMANT HAD SOME DIFFICULTY EXPRESSING HIMSELF IN ENGLISH AT THE HEARING ALTHOUGH THE REFEREE FOUND THAT HE APPEARED ABLE TO UNDERSTAND MOST OF THE QUESTIONS.

AFTER COMING TO THE UNITED STATES, CLAIMANT WORKED FOR A FEW MONTHS AS A CHOKER SETTER AND THEN OBTAINED A JOB WITH THE EMPLOYER AND HAS BEEN IN ITS EMPLOYMENT EVER SINCE.

FOLLOWING THE INDUSTRIAL INJURY CLAIMANT RETURNED TO WORK, AFTER A PERIOD OF RECOVERY, AND BID ON AND RECEIVED A JOB WHICH WAS CONSIDERED MORE STRENUOUS THAN THE ONE HE WAS DOING AT THE TIME HE WAS INJURED. HOWEVER, CLAIMANT FELT THAT ALTHOUGH THE HEAVIER LIFTING PUT A BIGGER STRAIN ON HIS INJURED BACK, THIS WAS PARTLY COMPENSATED BY THE NEED TO DO LESS BENDING. CLAIMANT COMPLAINS OF ALMOST CONTINUOUS PAIN IN HIS LOWER BACK JUST ABOVE THE BELT LINE WHICH RADIATES DOWN BOTH LEGS AS THE WORK DAY PROGRESSES. CLAIMANT LIVES ON A FARM WITH HIS TWO BROTHERS, EACH LIVE IN A DIFFERENT HOME ON THE FARM, AND HE IS NOW ABLE TO DO VERY LITTLE OF THE FARM WORK.

AFTER THE INDUSTRIAL INJURY CLAIMANT ATTEMPTED TO WORK FOR A FEW DAYS BUT BECAUSE OF THE PERSISTENT PAIN WAS HOSPITALIZED UNDER THE CARE OF DR. DENKER - HE WAS FINALLY RELEASED FOR WORK IN APRIL 1973 AND WORKED UNTIL NOVEMBER WHEN HE AGAIN DEVELOPED SEVERE LOW BACK PAIN AND WAS READMITTED TO THE HOSPITAL BY DR. DENKER. HE RETURNED TO WORK IN MARCH 1974 AND WORKED UNTIL NOVEMBER OF THAT YEAR AT WHICH TIME HE WAS REFERRED TO DR. ELLISON WHO CONTINUED TO CARE FOR HIM UNTIL MARCH 1974. CLAIMANT WAS ALSO EXAMINED BY DR. MELGARD, A NEUROLOGIST.

NEITHER DR. ELLISON NOR DR. MELGARD INDICATED THERE WAS MUCH THAT COULD BE DONE FOR CLAIMANT, THE OBJECTIVE FINDINGS WERE QUITE NEGATIVE AND THE CLAIMANT'S CLAIM WAS CLOSED BY A DETERMINATION ORDER ISSUED APRIL 11, 1975 WHEREBY CLAIMANT WAS AWARDED 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY.

AFTER THE CLAIM WAS CLOSED CLAIMANT WAS SEEN BY DR. STEELE, AN ORTHOPEDIC SURGEON, WHO, AFTER EXAMINATION, FELT CLAIMANT HAD DEGENERATIVE DISC DISEASE AT L5-S1 WITH CHRONIC LOW BACK STRAIN. HE FELT THAT BECAUSE OF THE DIAGNOSTIC STUDIES PREVIOUSLY MADE AND THE NEGATIVE MYELOGRAM THAT FURTHER DIAGNOSTIC STUDIES WERE NOT FEASIBLE. CLAIMANT DOES HAVE A CHRONIC LOW BACK CONDITION WHICH HE WILL HAVE TO

LEARN TO LIVE WITH AND DO HIS BEST TO STAY EMPLOYED. DR. STEELE'S OPINION WAS THAT CLAIMANT WOULD BE PERMANENTLY PREVENTED FROM ENGAGING IN WORK INVOLVING HEAVY LIFTING OR PROLONGED SITTING.

THE REFEREE FOUND THAT CLAIMANT HAD NOT SUFFERED ANY ACTUAL LOSS OF WAGES AT THE TIME OF THE HEARING. HE WAS PRESENTLY EMPLOYED AT A JOB WHICH PAID MORE THAN HE WAS MAKING PRIOR TO HIS INDUSTRIAL INJURY - HOWEVER, IT WAS OBVIOUS THAT CLAIMANT WAS HAVING DIFFICULTY WITH HIS WORK. ALSO, THERE WAS SOME DOUBT AS TO WHETHER CLAIMANT WOULD BE ABLE TO MAINTAIN HIMSELF ON HIS PRESENT JOB.

THE REFEREE FOUND THAT CLAIMANT HAD A CHRONIC BACK CONDITION AND THAT HIS WAGE EARNING POTENTIAL WAS EXTREMELY LIMITED. CONSIDERING THIS, TOGETHER WITH THE CLAIMANT'S BARE KNOWLEDGE OF ENGLISH, HIS LIMITED EDUCATION PRIMARILY IN SPANISH AND HIS WORK BACKGROUND WHICH IS BASICALLY MANUAL LABOR, THE REFEREE CONCLUDED CLAIMANT HAS LOST A SUBSTANTIAL PORTION OF THE LABOR MARKET PREVIOUSLY AVAILABLE TO HIM.

THE REFEREE FURTHER CONCLUDED THAT CLAIMANT HAD NOT BEEN ADEQUATELY COMPENSATED FOR THIS LOSS BY THE AWARD OF 10 PER CENT AND ACCORDINGLY, INCREASED THE AWARD TO 20 PER CENT EQUAL TO 64 DEGREES OF THE MAXIMUM.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 29, 1975 IS AFFIRMED.

WCB CASE NO. 73-2522-E MARCH 29, 1976

NORMAN ZEEK, CLAIMANT

BARTON AND ARMBRUSTER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS PHILLIPS AND MOORE.

THE STATE ACCIDENT INSURANCE FUND SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED MARCH 1, 1973 WHEREBY CLAIMANT WAS AWARDED 25 PER CENT FOR UNSCHEDULED LOW BACK DISABILITY AND 25 PER CENT LOSS OF THE LEFT LEG.

CLAIMANT IS A HORSESHOER AND SADDLE MAKER WHO SUFFERED A COMPENSABLE INJURY TO HIS LEFT HIP AND KNEE ON MARCH 24, 1972. CLAIMANT WAS ORIGINALLY TREATED BY DR. BARKER WHO LATER REFERRED CLAIMANT TO DR. ROBINSON, AN ORTHOPEDIST, WHO DIAGNOSED EARLY OSTEOARTHRITIC CHANGES OF THE LEFT HIP WITH THE INDUSTRIAL ACCIDENT PRODUCING A FLARE-UP OF TRAUMATIC ARTHRITIS, RESIDUALS OF A SEVEN YEAR OLD FRACTURED PELVIS AND LUMBOSACRAL BACK STRAIN SYNDROME, MILD.

IN THE LATTER PART OF 1972 CLAIMANT WAS SEEN AND EXAMINED BY THE PHYSICIANS AT THE DISABILITY PREVENTION DIVISION IN PORTLAND WHO FOUND CLAIMANT HAD CHRONIC LUMBOSACRAL STRAIN, POST-TRAUMATIC ARTHRITIS OF THE LEFT HIP, (CLEARED) OLD FRACTURE OF PELVIS WITH RESIDUAL DEFORMITY INVOLVING SACROILIAC AND LUMBOSACRAL JOINTS. THE BACK EVALUATION CLINIC EXAMINED CLAIMANT AND FOUND LUMBOSACRAL STRAIN

WITH HIP FLEXION DEFORMITY AND RESTRICTED RANGE OF MOTION WITH ARTHRITIS IN THE LEFT S-1 JOINT. THEY FELT CLAIMANT COULD RETURN TO A MILD OCCUPATION BUT SHOULD NOT CONTINUE TO DO HORSESHOEING AND THAT HE SHOULD BE VOCATIONALLY RETRAINED. LOSS OF FUNCTION OF THE INJURED PART WAS CONSIDERED MODERATE.

DR. BROWN, ONE OF THE MEMBERS OF THE BACK EVALUATION CLINIC, STATED THAT PROBABLY THE INJURY OF MARCH 24, 1972 AGGRAVATED A PRE-EXISTING PROBLEM.

THE REFEREE FOUND THAT THE SYMPTOMS CLAIMANT EXPERIENCED FOLLOWING HIS INDUSTRIAL INJURY WERE SUBSTANTIALLY RELATED TO THAT INCIDENT. DR. ROBINSON HAD FOUND LEFT HIP AND BACK SYMPTOMS AS HAD THE DISABILITY PREVENTION DIVISION PHYSICIANS.

THE REFEREE FOUND THAT SINCE THE INDUSTRIAL INJURY CLAIMANT HAD DONE A VARIETY OF JOBS INCLUDING SOME COMPETITIVE HORSE RIDING - HOWEVER, THE FACTS WERE INSUFFICIENT TO OVERCOME THE CONCLUSION THAT CLAIMANT DID, AT THE TIME OF THE DETERMINATION ORDER AND SUBSEQUENTLY THERETO, HAVE A PERMANENT LOSS OF WAGE EARNING CAPACITY BECAUSE OF THE INJURY AND ITS RESIDUALS. HE COULD NO LONGER LIFT, BEND OR INDULGE IN SUCH ACTIVITIES SUCH AS HORSESHOEING EXCEPT ON A REDUCED BASIS.

THE REFEREE, AFTER CONSIDERING ALL OF THE EVIDENCE, CONCLUDED THE AWARD OF 25 PER CENT FOR UNSCHEDULED DISABILITY SHOULD NOT BE REDUCED - THAT CLAIMANT HAD SUFFERED A SUFFICIENT LOSS OF WAGE EARNING CAPACITY TO JUSTIFY THE 25 PER CENT AWARD.

WITH RESPECT TO THE SCHEDULED LEG INJURY, THE REFEREE FOUND THAT THE MEDICAL EVIDENCE INDICATED LEFT LEG DISABILITY WAS TRACEABLE TO THE INJURY, THAT THE LEFT TROCHANTER BURSITIS WAS INJURY-RELATED AND CLAIMANT HAD A LIMP ON THE LEFT. THE REFEREE CONCLUDED, SINCE THE DISABILITY EXTENDED BEYOND THE HIP, A SCHEDULED LEG AWARD WAS APPROPRIATE CITING, IN THE MATTER OF THE COMPENSATION OF CRAIG LUCAS, CLAIMANT (UNDERSCORED), WCB CASE NO. 74-4169.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 31, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 300 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-1842 MARCH 31, 1976

WALTER EDMISON, CLAIMANT

RINGO, WALTON AND EVES,
CLAIMANT'S ATTYS.
KEITH D. SKELTON, DEFENSE ATTY.
ORDER ON MOTION

ON FEBRUARY 13, 1976 THE BOARD ENTERED AN ORDER ON MOTION DENYING THE EMPLOYER'S REQUEST FOR AN ORDER STOPPING VOCATIONAL REHABILITATION.

ON FEBRUARY 26, THE EMPLOYER RENEWED THE MOTION REALLEGING ITS FORMER CONTENTIONS TOGETHER WITH A LETTER FROM A COUNSELOR OF THE CALIFORNIA DEPARTMENT OF REHABILITATION.

THE CLAIMANT'S RESPONSE WAS RECEIVED MARCH 22, 1976.

MUCH OF THE ARGUMENT PRESENTED DEALS WITH THE ISSUE OF WHETHER CLAIMANT IS VOCATIONALLY HANDICAPPED WHICH IS ONE OF THE BASIC ISSUES TO BE DECIDED WHEN THE CASE IS REVIEWED. THAT ISSUE WILL BE DECIDED AFTER REVIEW OF THE RECORD RATHER THAN UPON CONSIDERATION OF THIS MOTION.

THE PROCEDURAL ARGUMENTS AGAIN RAISED HAVE BEEN PREVIOUSLY DEALT WITH.

WE CONCLUDE THE EMPLOYER'S MOTION OF FEBRUARY 26, 1976 SHOULD BE DENIED.

IT IS SO ORDERED.

WCB CASE NO. 75-1161 MARCH 31, 1976

EARNEST L. KITTS, CLAIMANT

RASK AND HEFFERIN, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
AMENDED ORDER ALLOWING ATTORNEY FEE

THE BOARD'S ORDER ON REVIEW ENTERED MARCH 24, 1976 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 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 75-119 MARCH 31, 1976

KENNETH R. LEONARD, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
ORDER

ON MARCH 15, 1976 AN ORDER ON REVIEW WAS ENTERED IN THE ABOVE ENTITLED MATTER. SUBSEQUENTLY, THE BOARD WAS FURNISHED A STIPULATION WHICH HAD BEEN ENTERED INTO BY AND BETWEEN CLAIMANT AND THE STATE ACCIDENT INSURANCE FUND ON FEBRUARY 27, 1976 WHEREIN IT WAS AGREED THAT CLAIMANT'S CLAIM BE REOPENED AS OF DECEMBER 9, 1975 FOR FURTHER MEDICAL CARE AND TREATMENT AS RECOMMENDED BY DR. POST, A COPY OF HIS REPORT WAS ATTACHED.

UPON RECEIPT OF THE STIPULATION, BOTH PARTIES WERE ADVISED THE BOARD HAD ALREADY ENTERED ITS ORDER ON REVIEW. ON MARCH 26, 1976 A MOTION WAS RECEIVED FROM THE FUND REQUESTING THE BOARD TO RESCIND THIS ORDER AND APPROVE THE STIPULATION.

BASED UPON THE STIPULATION AND THE MOTION, COPIES OF WHICH ARE ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF, THE BOARD APPROVES THE STIPULATION ENTERED ON FEBRUARY 27, 1976 AND RESCINDS ITS ORDER ON REVIEW ENTERED ON MARCH 15, 1976.

STIPULATION

IT IS HEREBY STIPULATED AND AGREED BY AND BETWEEN THE ABOVE-NAMED CLAIMANT, ACTING THROUGH HIS ATTORNEY, KEITH TICHENOR, AND THE STATE ACCIDENT INSURANCE FUND, ACTING THROUGH LAWRENCE J. HALL, OF ITS ATTORNEYS, THAT THE WORKMEN'S COMPENSATION BOARD MAY DISPOSE OF THE PENDING REQUEST FOR REVIEW BEFORE IT BY DISMISSING SAME WITHOUT FURTHER AWARD FOR PERMANENT PARTIAL DISABILITY AND ORDERING THAT THE ABOVE-MENTIONED CLAIM BE REOPENED AS OF DECEMBER 9, 1975, FOR FURTHER MEDICAL CARE AND TREATMENT AS RECOMMENDED BY DR. POST IN HIS REPORT OF JANUARY 26, 1976, (COPY ATTACHED), ON THE BASIS OF AN AGGRAVATION OF THE INSURED INJURY BY LIFTING AN ARGON GAS TANK IN THE COURSE OF AUTHORIZED VOCATIONAL REHABILITATION AT TECHNICAL TRAINING SERVICE, PORTLAND, NECESSITATED BY THE INSURED INJURY.

IT IS FURTHER STIPULATED THAT KEITH TICHENOR, CLAIMANT'S ATTORNEY, SHALL BE PAID 25 PER CENT OF THE ADDITIONAL COMPENSATION, EXCLUDING MEDICAL BILLS, NOT TO EXCEED 100 DOLLARS, AS HIS ATTORNEY'S FEE, THE SAME TO BE A LIEN UPON AND PAYABLE OUT OF SUCH ADDITIONAL COMPENSATION.

WCB CASE NO. 75-2955 APRIL 2, 1976

PHILLIP MORRISON, CLAIMANT

HAROLD ADAMS, CLAIMANT'S ATTY.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM FOR OCCUPATIONAL DISEASE TO IT FOR PAYMENT OF COMPENSATION AS PROVIDED BY LAW, COMMENCING JANUARY 31, 1975 AND UNTIL THE CLAIM IS CLOSED PURSUANT TO ORS 656.278 AND AWARDED CLAIMANT'S ATTORNEY A FEE OF 600 DOLLARS PAYABLE BY THE EMPLOYER.

ON AUGUST 21, 1975 CLAIMANT FILED A CLAIM FOR AN OCCUPATIONAL DISEASE, ALLEGING THAT BECAUSE OF HEAVY LIFTING, BENDING AND TWISTING HE HAD DEVELOPED LOW BACK DIFFICULTIES. ON AUGUST 27, 1975 THE EMPLOYER DENIED THE CLAIM.

CLAIMANT IS 29 YEARS OLD AND HAS WORKED FOR THE EMPLOYER SINCE NOVEMBER 1970 DOING VARIOUS JOBS. DURING HIS EMPLOYMENT CLAIMANT HAS HAD A RELATIVELY BAD RECORD OF ABSENTEEISM DUE TO SICKNESS OR INJURIES. ON JANUARY 29, 1975 CLAIMANT COMMENCED HIS GRAVEYARD SHIFT AT 11:00 P.M. AND HE WORKED THE ENTIRE SHIFT. ON JANUARY 31, 1975 HE SOUGHT MEDICAL ATTENTION AFTER DECIDING NOT TO RETURN TO WORK BECAUSE OF THE PAIN IN HIS LOW BACK. DR. REGIER, CLAIMANT'S FAMILY DOCTOR, WAS TOLD BY THE CLAIMANT THAT CLAIMANT HAD BEEN LIFTING BOXES OF JARS IN HIS GARAGE ON THE EVENING OF JANUARY 30 AND AS A RESULT HAD PAIN IN HIS LOW BACK. AFTER TREATING CLAIMANT FOR SOME TIME, DR. REGIER REFERRED CLAIMANT TO DR. LAWTON WHO HAS CONTINUED WITH DR. REGIER TO TREAT CLAIMANT FOR A LUMBAR SPRAIN.

THE REFEREE FOUND THAT CLAIMANT HAD LIED TO BOTH DR. REGIER AND DR. LAWTON WHEN HE STATED THAT HE HAD SUFFERED AN OFF-JOB INJURY. CLAIMANT STATED THE REASON HE LIED WAS SO THAT HE COULD SECURE COVERAGE UNDER A POLICY HE HAD WITH JOHN HANCOCK INSURANCE COMPANY WHICH PROVIDED ONLY FOR OFF-THE-JOB COMPENSATION AND MEDICAL BILLS. THE REFEREE FOUND THAT, INITIALLY, CLAIMANT ALSO LIED TO HIS OWN ATTORNEY ABOUT

THE INCIDENT - THAT THE ATTORNEY DID NOT KNOW UNTIL THE DAY PRIOR TO THE HEARING THAT CLAIMANT HAD NEVER LIFTED ANY FRUIT JARS.

THE REFEREE FOUND THAT CLAIMANT'S TESTIMONY HAS TO BE ACCEPTED WITH UTMOST CAUTION - HOWEVER, DESPITE HIS DOUBTS ABOUT CLAIMANT'S CREDIBILITY THERE WERE SEVERAL FACTORS WHICH CONVINCED HIM THAT CLAIMANT TOLD THE TRUTH AT THE HEARING. HE FOUND THAT CLAIMANT HAD A MOTIVE TO LYING TO HIS DOCTORS, I.E. HE HAD A POLICY THAT PAID ONLY OFF-THE-JOB INJURIES AND HE HAD NO SPECIFIC INCIDENT OF INJURY THAT HE COULD REFER TO HIS WORK ACTIVITY - ALSO, HE HAD A BAD RECORD WITH HIS EMPLOYER AND THERE WAS EVIDENCE THAT HE WAS WORRIED ABOUT PROCEEDING AGAINST HIS EMPLOYER ON THE GROUNDS OF AN OCCUPATIONAL DISEASE OR INJURY ESPECIALLY WHEN HE HAD NO SPECIFIC INCIDENT UPON WHICH HE COULD BASE HIS BACK PROBLEMS. BASED UPON THESE FACTORS, THE REFEREE ACCEPTED CLAIMANT'S TESTIMONY AT THE HEARING AS BEING TRUE.

THE REFEREE FOUND THAT THE MEDICAL EVIDENCE SUPPORTED CLAIMANT'S CONTENTION THAT HE HAD SUFFERED AN OCCUPATIONAL DISEASE. DR. LAWTON'S REPORT OF OCTOBER 21, 1975 STATES THAT CLAIMANT'S CONDITION WAS THAT OF A CHRONIC LUMBOSACRAL STRAIN, CONGENITAL VARIATIONS OF THE LUMBOSACRAL JOINT AND LUMBAR LODOSIS, REPRESENTING A COMBINATION OF PROBLEMS THAT CLAIMANT WAS BORN WITH AND HAVE GRADUALLY DEVELOPED OVER THE YEARS. DR. LAWTON STATED THAT CLAIMANT'S BACK CONDITION WAS CLEARLY AGGRAVATED BY BENDING, TWISTING, LIFTING AND SO FORTH. THE REFEREE CONCLUDED THAT CLAIMANT HAD SUFFERED A COMPENSABLE OCCUPATIONAL DISEASE.

THE BOARD, ON DE NOVO REVIEW, DISAGREES WITH THE CONCLUSIONS REACHED BY THE REFEREE. THE BOARD FINDS THAT CLAIMANT HAD APPLIED FOR, AND RECEIVED BENEFITS FOR AN OFF-THE-JOB INJURY BASED ON THE JANUARY 1975 INCIDENT AND CONTINUED TO RECEIVE NONINDUSTRIAL BENEFITS, HOWEVER, HE HIRED AN ATTORNEY TO PURSUE A COMPENSATION CLAIM IN JULY 1975. CLAIMANT ALLEGES HE TOLD HIS ATTORNEY THAT HE HAD HURT HIS BACK AT WORK VARIOUS TIMES AND THAT HE HAD MERELY IRRITATED IT WITH THE LIFTING OF FRUIT JARS - HE TESTIFIED AT THE HEARING THAT THE STORY HE HAD TOLD DR. REGIER AND TO DR. LAWTON OF BEING INJURED WHILE CARRYING A BOX OF FRUIT JARS WAS PURE FABRICATION AND HE PERSISTED IN THIS LIE UNTIL A FEW DAYS PRIOR TO THE HEARING AT WHICH HE TESTIFIED THAT THERE HAD BEEN NO ACTUAL DISABLING INCIDENT AT ALL.

THE BOARD REALIZES THAT THE REFEREE, HAVING HAD THE OPPORTUNITY OF OBSERVING CLAIMANT AT THE HEARING, IS THE BEST JUDGE OF HIS CREDIBILITY - HOWEVER, IN THIS CASE IT SEEMS THAT, AT BEST, CLAIMANT'S CREDIBILITY MUST BE CONSIDERED DOUBTFUL.

WITHOUT GOING FURTHER INTO THE QUESTION OF CLAIMANT'S DISABILITY, THE BOARD FINDS THAT THERE IS NOT SUFFICIENT MEDICAL EVIDENCE TO SUPPORT A FINDING OF A COMPENSABLE OCCUPATIONAL DISEASE. DR. LAWTON DIAGNOSED CLAIMANT'S CONDITION AS BEING CONGENITAL AND WHICH GRADUALLY DEVELOPED OVER THE YEARS AND WAS AGGRAVATED BY REPETITIVE LIFTING AND BENDING. HE WAS SPECIFICALLY ASKED WHETHER THE WORK CLAIMANT HAD DONE AT THE EMPLOYER'S MATERIALLY AFFECTED HIS BACK CONDITION - HIS ANSWER WAS 'PROBLEMATICAL'.

THE CLAIMANT BEARS THE BURDEN OF PROVING CAUSATION BY A PREPONDERANCE OF THE MEDICAL EVIDENCE AND ONLY IN RARE CASES WHERE THE QUESTION OF CAUSATION IS A SIMPLE MATTER OF VERY OBVIOUS DIRECT PHYSICAL INJURY TO A SPECIFIC PART OF THE BODY IS EXPERT MEDICAL TESTIMONY NOT REQUIRED. URIS V. COMPENSATION DEPARTMENT (UNDERSCORED), 247 OR 420. CLAIMANT, IN THIS CASE, FAILED TO SHOW BY A PREPONDERANCE OF THE MEDICAL EVIDENCE THAT HIS WORK MATERIALLY CONTRIBUTED TO HIS DISABILITY. DR. LAWTON CONCLUDED THAT CAUSATION WAS DOUBTFUL, THE PORTION OF HIS REPORT WHICH NOTED THAT CLAIMANT'S CONGENITAL BACK PROBLEM COULD BE AGGRAVATED BY ANY REPEATED LIFTING OR BENDING REFERRED TO TEMPORARY AGGRAVATIONS.

THE OBSERVATIONS MADE BY BOTH DR. REGIER AND DR. LAWTON, WHO EXAMINED AND-OR TREATED CLAIMANT FROM JANUARY 3, 1975 THROUGH JULY 1975, STRONGLY SUGGEST THAT CLAIMANT'S ORIGINAL STORY OF INJURING HIS BACK WHILE MOVING FRUIT JARS WAS CORRECT. DR. REGIER HAD BEEN CLAIMANT'S TREATING PHYSICIAN FOR MANY YEARS AND NOWHERE IN THE MEDICAL RECORDS IS THERE ANY COMMENT BY HIM TO SUPPORT CLAIMANT'S CONTENTION OF A GRADUAL DEVELOPMENT OF BACK SYMPTOMS OVER THE YEARS LEADING UP TO HIS DEPARTURE FROM WORK ON JANUARY 30, 1975.

THE FINDING BY THE REFEREE THAT CLAIMANT'S WORK HISTORY SUPPORTED HIS CONTENTION THAT HE WAS HAVING BACK PROBLEMS AND THAT HE QUIT SEVERAL JOBS AT HIGHER PAY BECAUSE THE JOBS WERE JUST TOO DIFFICULT IS NOT SUPPORTED BY THE EVIDENCE. CLAIMANT'S RATHER HIGH RECORD OF ABSENTEEISM INDICATES NO HINT OF BACK PROBLEMS UNTIL JANUARY 1975 - THE NOTATION OF ABSENCES FROM 1970 THROUGH 1975 LISTS NUMEROUS AILMENTS SPECIFICALLY BUT THERE IS NO INDICATION OF ANY SEVERE BACK PROBLEMS DURING THIS PERIOD.

THE BOARD CONCLUDES THAT CLAIMANT HAS FAILED TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE, BOTH MEDICAL AND LAY, THAT HE HAS SUFFERED A COMPENSABLE OCCUPATIONAL DISEASE AND, THEREFORE, HIS CLAIM WAS PROPERLY DENIED.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 10, 1975 IS REVERSED.

WCB CASE NO. 74-4202 APRIL 2, 1976

JOHN R. TAYLOR, CLAIMANT

MOORE, WURTZ AND LOGAN,
CLAIMANT'S ATTYS.
THWING, ATHERLY AND BUTLER,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DENIAL BY THE EMPLOYER OF CLAIMANT'S CLAIM FOR RIGHT ANKLE INJURIES SUFFERED ON OCTOBER 24 AND OCTOBER 28, 1974.

ON OCTOBER 30, 1974 CLAIMANT REPORTED A RIGHT ANKLE INJURY SUFFERED ON OCTOBER 24, 1974 WHEN HE JUMPED OFF A STUMP - HE HAD BEEN SEEN BY DR. SCHACHNER ON OCTOBER 25 AND TOLD HIM THAT ON THE PRECEDING NIGHT, WHILE HUNTING, HE SUSTAINED AN INJURY TO HIS RIGHT ANKLE. DR. SCHACHNER FOUND MODERATE SWELLING AND FELT CLAIMANT COULD RETURN TO WORK WITH A LIGHT ACE BANDAGE TO SUPPORT THE ANKLE.

THE FOLLOWING MONDAY, OCTOBER 28, CLAIMANT REPORTED FOR WORK AT 7.00 AND AT 11.30 ALLEGES HE REINJURED THE RIGHT ANKLE WHEN HE SLIPPED AND TWISTED HIS LEG WHILE CARRYING A CHAIN SAW. CLAIMANT TESTIFIED HE TOLD HIS FOREMAN WHEN HE WAS BEING TAKEN HOME THAT HE HAD HURT HIS ANKLE AGAIN. CLAIMANT WAS HOSPITALIZED ON NOVEMBER 4, AND UNDERWENT A WATSON-JONES TENODESIS OF THE PERONEUS BREVIS WITH PLACEMENT THROUGH THE FIBULA AND TALUS.

THE HOSPITAL RECORDS INDICATE THAT CLAIMANT INJURED HIS RIGHT ANKLE JUMPING OFF A LOG ON OCTOBER 24, 1974, HOWEVER, CLAIMANT TOLD THE NURSE AT THE HOSPITAL THAT HE HAD TWISTED HIS RIGHT ANKLE ON OCTOBER 24 AND AGAIN ON OCTOBER 28. CLAIMANT FILED NO CLAIM FOR THE OCTOBER 28, 1974 INJURY. HE HAD DISCUSSED THE SURGERY WITH DR. SCHACHNER

BEFORE OCTOBER 28, BUT HAD NEVER INFORMED HIM OF THE OCTOBER 28 INJURY UNTIL HE WAS HOSPITALIZED. THE CLAIMANT HAD BEEN PREVIOUSLY TREATED IN 1972 BY DR. SCHACHNER FOR AN INDUSTRIAL INJURY TO HIS RIGHT ANKLE WHICH HAD BEEN DIAGNOSED AS A MILD STRAIN.

CLAIMANT'S FOREMAN TESTIFIED THAT WHEN HE TOOK CLAIMANT HOME ON OCTOBER 28, CLAIMANT DID NOT STATE THAT HE HURT HIS ANKLE THAT DAY - HE ONLY SAID HIS ANKLE WAS BOTHERING HIM AND HE COULD NOT WORK, COMMENTING THAT HE HAD AN OLD INJURY A COUPLE OF YEARS AGO WHICH WAS CAUSING HIM PROBLEMS AND WOULD HAVE TO HAVE SURGERY ON HIS ANKLE BUT COULD NOT AFFORD IT.

ON OCTOBER 29, 1974 CLAIMANT CALLED THE EMPLOYER'S OFFICE REQUESTING A CLAIM FORM STATING HE HAD INJURED HIMSELF ON THE PREVIOUS THURSDAY, HE MENTIONED NOTHING ABOUT THE DEER HUNTING EPISODE AT THAT TIME.

THE REFEREE FOUND EVIDENCE INDICATED THAT THE INJURY OF OCTOBER 24, 1974 WAS THE RESULT OF DEER HUNTING ACTIVITIES AFTER WORK HOURS AND WAS NOT AN ACCIDENTAL INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT. CLAIMANT MIGHT HAVE BEEN PAID FOR THE TIME HE WAS DEER HUNTING BUT, IF SO, HE WAS VIOLATING COMPANY POLICY AND WAS ENGAGED IN AN UNAUTHORIZED ACT.

THE ONLY INJURY WHICH CLAIMANT REPORTED WAS THE ONE WHICH OCCURRED ON OCTOBER 24, 1974, NO NOTICE WAS EVER GIVEN OF AN ALLEGED REINJURY ON OCTOBER 28, NOR DID THE EMPLOYER HAVE KNOWLEDGE OF SUCH ALLEGED REINJURY. THE REFEREE CONCLUDED THAT CLAIMANT, BEING FAMILIAR WITH THE PROCEDURES OF FILING A CLAIM FOR AN INDUSTRIAL INJURY, UNDOUBTEDLY WOULD HAVE REPORTED THE REINJURY OF OCTOBER 28 TO EITHER HIS CO-WORKER, HIS FOREMAN, DR. SCHACHNER OR HIS EMPLOYER HAD HE ACTUALLY SUFFERED SUCH A REINJURY. THE ONLY PERSON TO WHOM CLAIMANT RELATED THE ALLEGED REINJURY WAS THE NURSE AT THE HOSPITAL.

THE REFEREE CONCLUDED THAT CLAIMANT HAD THE BURDEN OF PROVING HIS CLAIM BY A PREPONDERANCE OF THE EVIDENCE, THAT THE ISSUE BEFORE HIM HINGED ON CLAIMANT'S CREDIBILITY AND THAT THE EVIDENCE WOULD NOT SUPPORT A FINDING THAT CLAIMANT HAD REINJURED HIMSELF ON OCTOBER 28, 1974 AND THE INJURY SUFFERED ON OCTOBER 24, 1974 WAS NOT A COMPENSABLE INJURY, THEREFORE, THE DENIAL OF BOTH CLAIMS SHOULD BE SUSTAINED.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 9, 1975 IS AFFIRMED.

WCB CASE NO. 75-1910-NC APRIL 2, 1976

IN THE MATTER OF THE COMPENSATION OF
LOLA M. BEAZIZO, CLAIMANT
AND IN THE MATTER OF THE COMPLYING STATUS
OF KENNETH W. DENNISON, DBA KEN
DENNISON REALTORS, EMPLOYER
NEWHOUSE, FOSS, WHITTY AND ROESS,
CLAIMANT'S ATTYS.
EVOHL F. MALAGON, EMPLOYER'S ATTY.
DEPT. OF JUSTICE, STATE'S ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO THE COMPLIANCE DIVISION OF THE BOARD FOR SUBMISSION TO THE STATE ACCIDENT INSURANCE FUND FOR ACTION PURSUANT TO ORS 656.054 AND ALLOWED CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE IN THE AMOUNT OF 700 DOLLARS TO BE PAID BY THE FUND AND RECOVERED BY THE BOARD FROM THE EMPLOYER PURSUANT TO ORS 656.054.

THE ISSUES BEFORE THE REFEREE WERE WHETHER THE EMPLOYER WAS A SUBJECT EMPLOYER UNDER THE PROVISIONS OF THE OREGON WORKMEN'S COMPENSATION LAW AND WHETHER CLAIMANT HAD SUSTAINED A COMPENSABLE INJURY. THE ALLEGED EMPLOYER WAS A REAL ESTATE BROKER AND ON JULY 19, 1973 CLAIMANT WAS A SALESPERSON IN THE BANDON BRANCH OF HIS AGENCY. ON THAT DATE CLAIMANT WAS INVOLVED IN AN AUTOMOBILE ACCIDENT WHILE DRIVING HER OWN CAR IN WHICH PASSENGERS WHO WERE PROSPECTIVE PURCHASERS OF PROPERTY LOCATED SOUTH OF BANDON WERE RIDING.

AN AGREEMENT HAD BEEN ENTERED INTO BETWEEN CLAIMANT AND THE ALLEGED EMPLOYER ON MAY 3, 1973. THE ALLEGED EMPLOYER TESTIFIED THAT HE HAD SPECIFICALLY INSTRUCTED HIS ATTORNEY AT THAT TIME TO DRAW AN AGREEMENT WHICH WOULD BE THE WORKING AGREEMENT BETWEEN THE REAL ESTATE AGENCY AND ALL OF ITS SALESPERSONS AND WOULD BE WRITTEN SO AS TO RELIEVE THE AGENCY OF THE NECESSITY OF COMPLYING WITH THE PROVISIONS OF THE WORKMEN'S COMPENSATION LAW. LATER IN DECEMBER 1974 CLAIMANT READ AN ARTICLE WHICH STATED THAT REAL ESTATE BROKERS WERE SUBJECT TO THE WORKMEN'S COMPENSATION LAW AND, ACCORDINGLY, HE OBTAINED SUCH COVERAGE UNDER PROTEST.

THE REFEREE FOUND THAT THE ALLEGED EMPLOYER HAD SUBSTANTIAL CONTROL OVER THE ACTIVITIES OF CLAIMANT - SHE WORKED EXCLUSIVELY FOR HIM, HER IDENTIFICATION CARD ISSUED BY THE OREGON REAL ESTATE COMMISSIONER IDENTIFIES HER AS A REAL ESTATE SALESMAN AND KEN DENNISON AS 'EMPLOYING BROKER'. FURTHERMORE, CLAIMANT CONSIDERS MR. DENNISON TO BE HER 'BOSS' AND THOUGHT THAT ALTHOUGH SHE MIGHT OBJECT TO DIRECTIONS GIVEN SHE WOULD BE OBLIGED TO FOLLOW THEM AND THAT SHE COULD BE FIRED AT ANY TIME AT HIS PLEASURE.

THE REFEREE, RELYING UPON THE LEADING CASES OF BOWSER V. SIAC (UNDERSCORED), 182 OR 42 AND BUTTS V. SIAC (UNDERSCORED), 193 OR 417, FOUND THAT MR. DENNISON HAD THE RIGHT OF CONTROL WHICH WAS THE PRIMARY TEST IN DETERMINING THE STATUS OF EMPLOYER-EMPLOYE AS DISTINGUISHED FROM INDEPENDENT CONTRACTOR. ALTHOUGH THE AGREEMENT RECITED THAT A SALESPERSON SHOULD OTHERWISE BE DEEMED TO BE AN INDEPENDENT CONTRACTOR AND NOT A SERVANT, EMPLOYE, JOINT ADVENTURER OR PARTNER OF BROKER, SUCH RECITAL IS NOT CONTROLLING. CLAIMANT'S STATUS AS AN INDEPENDENT CONTRACTOR OR EMPLOYE IS A FACTUAL-LEGAL MATTER FOR DETERMINATION UNDER THE LAW AS APPLICABLE TO WORKMEN'S COMPENSATION COVERAGE.

THE REFEREE CONCLUDED THAT THE RELATIONSHIP BETWEEN KENNETH W. DENNISON, DBA KEN DENNISON REALTORS, AND CLAIMANT WAS THAT OF EMPLOYER-EMPLOYE AND THAT THE FORMER WAS A SUBJECT EMPLOYER - THAT CLAIMANT HAD SUSTAINED A COMPENSABLE INJURY ON JULY 19, 1973 AT WHICH TIME THE SUBJECT EMPLOYER DID NOT HAVE WORKMEN'S COMPENSATION COVERAGE AS REQUIRED BY LAW.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 24, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS ALLOWED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS TO BE PAID BY THE STATE ACCIDENT INSURANCE FUND AND RECOVERED BY THE WORKMEN'S COMPENSATION BOARD FROM THE EMPLOYER, KENNETH W. DENNISON, DBA KEN DENNISON REALTORS, PURSUANT TO ORS 656.054.

SAIF CLAIM NO. 159361 APRIL 2, 1976

EUGENE SEITZ, CLAIMANT

SANTOS AND SCHNEIDER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER

CLAIMANT HAD SUSTAINED A COMPENSABLE INDUSTRIAL INJURY TO HIS BACK ON NOVEMBER 6, 1965 - THE CLAIM WAS CLOSED ON JULY 21, 1966 WITH AN AWARD OF 48 DEGREES FOR 25 PER CENT LOSS OF AN ARM FOR UNSCHEDULED DISABILITY.

ON NOVEMBER 28, 1975, CLAIMANT REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION PURSUANT TO ORS 656.278 AND REOPEN HIS CLAIM, ALLEGING THAT HIS PRESENT CONDITION WAS THE DIRECT RESULT OF THE 1965 INJURY. ON NOVEMBER 10, 1975 THE STATE ACCIDENT INSURANCE FUND HAD DENIED CLAIMANT'S REQUEST TO REOPEN HIS CLAIM FOR AGGRAVATION. THE BOARD DID NOT HAVE SUFFICIENT EVIDENCE UPON WHICH TO MAKE A DETERMINATION OF THE MERITS OF CLAIMANT'S REQUEST AND REMANDED THE MATTER TO THE HEARINGS DIVISION FOR THE TAKING OF EVIDENCE. THE BOARD NOW HAS THE REFEREE'S RECOMMENDATION.

THE REFEREE FOUND THAT CLAIMANT HAD HAD CONTINUOUS BACK PROBLEMS FROM THE DATE OF THE 1965 INJURY. AFTER HIS CLAIM HAD BEEN CLOSED IN 1966, CLAIMANT WAS EMPLOYED BY DORFILE MANUFACTURING COMPANY IN MAY 1967 AND CONTINUED TO WORK FOR THEM UNTIL JULY 1975. ALTHOUGH THERE WAS NO EVIDENCE THAT CLAIMANT LOST ANY TIME FROM WORK AND CLAIMANT DID NOT COMPLAIN ABOUT HIS BACK DESPITE THE FACT THAT IT DID HURT, HE HAD SOUGHT RELIEF FOR HIS BACK PAIN IN SEPTEMBER 1972, IN FEBRUARY 1973, BETWEEN SEPTEMBER AND DECEMBER 1975 AND, FINALLY, IN APRIL 1974. SINCE 1969 CLAIMANT HAS BEEN A PATIENT OF DR. NORRIS, WHO, IN SEPTEMBER 1975, STATED CLAIMANT HAD NEVER FULLY RECOVERED FROM HIS 1966 SURGERY.

THE WORK WHICH CLAIMANT WAS DOING FOR DORFILE UNTIL JANUARY 1975 WAS NOT HEAVY TYPE WORK, HOWEVER, IN JANUARY HE REQUESTED A TRANSFER TO THE ANODIZING DEPARTMENT WHICH REQUIRED WORK INVOLVING REPETITIVE LIFTING BY TWO PERSONS OF 69 POUND RACKS OF ALUMINUM PARTS. CLAIMANT DID THIS HEAVIER TYPE WORK ON A REGULAR WORKDAY BASIS UNTIL JULY 10, 1975 WHEN RECURRING BACK PAINS BECAME SO SEVERE HE QUIT.

ON OR ABOUT MAY 30, 1975 CLAIMANT PURCHASED A SMALL SACK OF PREMIX CONCRETE FOR A HOME CONSTRUCTION PROJECT AND WHILE LIFTING THESE SACKS HURT HIS BACK - HE WAS ALSO INVOLVED IN A MOTORCYCLE ACCIDENT. THE FUND CONTENDS THAT THESE TWO ACCIDENTS ALONG WITH THE HEAVIER WORK DURING THE FIRST SIX MONTHS OF 1975 CONSTITUTED NEW ACCIDENTS OR INCIDENTS GIVING RISE TO NEW CLAIMS AND THEREFORE INSULATED THE OLD CLAIM AND DEFEATED THE AGGRAVATION CLAIM.

THE REFEREE FOUND NO CONVINCING EVIDENCE THAT ANY ONE OR ALL THREE OF THE LAST THREE INCIDENTS COMBINED WOULD HAVE PRODUCED CLAIMANT'S BACK PROBLEM. THE EVIDENCE INDICATES THAT CLAIMANT'S WORK DURING THE FIRST SIX MONTHS OF 1975 DID NOT REQUIRE CONTINUOUS REPETITIVE LIFTING WHICH WOULD, OF ITSELF, SUPPORT A CLAIM FOR A BACK INJURY.

THE REFEREE FOUND THAT THE CLAIMANT WAS CREDIBLE AND HE CONCLUDED THE PREPONDERANCE OF THE MEDICAL EVIDENCE WAS THAT CLAIMANT HAD SUFFERED AN EXACERBATION OF HIS ORIGINAL INJURY AND HE RECOMMENDED THAT THE CLAIM BE REOPENED AS OF JULY 10, 1975 FOR THE PAYMENT OF MEDICAL BILLS AND THE APPROVAL OF SUCH ATTORNEY'S FEES OR FEE AGREEMENT AS MAY THEN BE IN EXISTENCE.

THE BOARD, RELYING UPON THE REFEREE'S RECOMMENDATIONS, CONCLUDES THAT THE CLAIMANT'S REQUEST THAT THE BOARD EXERCISE ITS OWN MOTION JURISDICTION AND REOPEN HIS CLAIM SHOULD BE GRANTED.

THE BOARD NOTES THAT THE REFEREE'S RECOMMENDATION INADVERTENTLY PROVIDED FOR A NOTICE OF APPEAL. THE REFEREE'S RECOMMENDATION IS NOT AN APPEALABLE ORDER AND THE PARTIES ARE HEREBY ADVISED TO DISREGARD THAT NOTICE. THE ONLY APPEAL RIGHTS APPLICABLE IN THIS MATTER ARE THOSE PROVIDED BY ORS 656.278.

CLAIMANT'S COUNSEL HAD FILED A MOTION FOR AN ORDER ALLOWING ATTORNEY'S FEES ON THE BASIS OF THE FUND'S DENIAL OF CLAIMANT'S CLAIM FOR AGGRAVATION. THE BOARD FINDS THAT CLAIMANT'S AGGRAVATION RIGHTS HAD EXPIRED ON JULY 21, 1971.

ORDER

CLAIMANT'S CLAIM IS REMANDED TO THE STATE ACCIDENT INSURANCE FUND TO BE ACCEPTED AND FOR THE PAYMENT OF COMPENSATION, AS PROVIDED BY LAW, COMMENCING ON JULY 10, 1975, AND UNTIL THE CLAIM IS CLOSED PURSUANT TO THE PROVISIONS OF ORS 656.278.

CLAIMANT'S ATTORNEY SHALL BE ALLOWED AS A REASONABLE ATTORNEY'S FEE, 25 PER CENT OF THE COMPENSATION AWARDED TO CLAIMANT BY THIS ORDER, PAYABLE FROM SUCH COMPENSATION AS PAID, NOT TO EXCEED 400 DOLLARS.

WCB CASE NO. 75-2979 APRIL 2, 1976

PAUL REYES, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE EMPLOYER ASKED THE BOARD TO REVIEW THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 35 PER CENT LOSS FUNCTION OF HIS RIGHT ARM AND 25 PER CENT LOSS FUNCTION OF HIS LEFT ARM.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON OCTOBER 23, 1973 WHEN HE STRAINED HIS RIGHT ARM, A CARPAL TUNNEL SYNDROME WAS DIAGNOSED AND CLAIMANT UNDERWENT A CARPAL TUNNEL RELEASE ON BOTH THE RIGHT WRIST AND THE LEFT WRIST. AFTER SURGERY IT WAS FOUND THAT THE NERVE CONDUCTION STUDIES WERE WITHIN NORMAL LIMITS AND DR. NATHAN CONCLUDED THAT ALL RANGES OF MOTION IN THE RIGHT WRIST WERE WITHIN NORMAL LIMITS AND THERE WAS NO IMPAIRMENT OF FUNCTION IN THAT WRIST - HOWEVER, BASED UPON THE SUBJECTIVE COMPLAINTS HE CONCLUDED THAT CLAIMANT HAD AN IMPAIRMENT EQUIVALENT TO 5 PER CENT OF THE HAND. DR. NATHAN'S FINDINGS WITH RESPECT TO THE LEFT HAND WERE BASICALLY THE SAME AND HE FOUND THAT CLAIMANT'S IMPAIRMENT WAS EQUAL TO 5 PER CENT OF THE LEFT HAND.

CLAIMANT'S TREATING PHYSICIAN, DR. THOMPSON, AFTER REVIEWING DR. NATHAN'S REPORT, CONCURRED THAT CLAIMANT'S CONDITION WAS MEDICALLY STATIONARY AND THAT CLAIMANT WAS RELEASED TO RETURN TO WORK. THE RIGHT WRIST SURGERY WAS DONE ON NOVEMBER 25, 1974 AND THE LEFT WRIST SURGERY ON FEBRUARY 18, 1975 - DR. NATHAN'S EVALUATION WAS BASED ON AN EXAMINATION OF CLAIMANT ON JUNE 4, 1974. ON JULY 17, 1975 A DETERMINATION ORDER WAS MAILED WHEREBY CLAIMANT WAS AWARDED 7.5 DEGREES FOR 5 PER CENT LOSS OF HIS RIGHT FOREARM AND 7.5 DEGREES FOR 5 PER CENT LOSS OF HIS LEFT FOREARM.

WHILE CLAIMANT WAS OFF WORK RECEIVING TREATMENT, HE COMMENCED A NURSE'S TRAINING COURSE AT PORTLAND COMMUNITY COLLEGE. SOMETIME IN JULY 1975 CLAIMANT RETURNED TO HIS FORMER JOB AS A PILE BUCK, HE WORKED FOR FOUR AND ONE-HALF DAYS AND THEN INJURED HIS TOE WITH A JACKHAMMER. CLAIMANT FILED ANOTHER INDUSTRIAL INJURY CLAIM AND DID NOT RETURN TO WORK. BEFORE BEING RELEASED TO RETURN TO WORK FROM HIS TOE INJURY, CLAIMANT HAD AGAIN REGISTERED AT PORTLAND COMMUNITY COLLEGE AND CONTINUES TO TAKE HIS NURSE'S TRAINING COURSE.

CLAIMANT CLAIMS HE CANNOT WORK WITH HIS ARMS OVER HIS HEAD AS THEY BECOME NUMB AND THAT HE HAS LOST CONSIDERABLE AMOUNT OF MANUAL DEXTERITY AND WHEN HE IS REQUIRED TO DO HEAVY LIFTING HE HAS PAIN AND DISCOMFORT AND NUMBNESS IN THE FOREARMS AND HANDS.

THE REFEREE FOUND CLAIMANT HAD APPARENTLY COOPERATED FULLY WITH HIS DOCTORS AND HAD DONE EVERYTHING TO REHABILITATE HIMSELF BY WAY OF EXERCISES AND ATTEMPTING TO RETURN TO WORK. HE CONCLUDED THAT CLAIMANT WAS ENTITLED TO AN INCREASED AWARD ON BOTH FOREARMS AND INCREASED THE AWARD FOR THE RIGHT FOREARM BY 30 PER CENT AND THE AWARD FOR THE LEFT FOREARM BY 20 PER CENT.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT THE EVIDENCE DOES NOT JUSTIFY THE INCREASES GRANTED BY THE REFEREE.

CLAIMANT FELT THAT HE WOULD BE ABLE TO HANDLE NURSE'S WORK WITHOUT ANY PROBLEM EVEN THOUGH IT REQUIRED LIFTING HEAVY PATIENTS. CLAIMANT AT THE PRESENT TIME IS INVOLVED IN A REGULAR PHYSICAL WORKOUT PROGRAM WHICH INCLUDES WEIGHT LIFTING, HE DOES CURLS, PRESSES AND LAT PULLS BEHIND HIS NECK USING SUBSTANTIAL WEIGHT ON THE EQUIPMENT. ALL OF THESE EXERCISES REQUIRE A GREAT DEAL OF PHYSICAL EFFORT BY THE WRISTS AND FOREARMS. THE BOARD FINDS THAT CLAIMANT WAS ABLE TO RETURN TO THE SAME TYPE OF WORK HE HAD BEEN DOING PRIOR TO HIS SURGERY AND, ALTHOUGH HE DID HAVE SOME PROBLEMS WITH HIS WRISTS, HE MISSED NO WORK AND CONTINUED TO OPERATE A JACKHAMMER AND DO HEAVY LIFTING AND OTHER TYPES OF HEAVY PHYSICAL WORK UNTIL HE INJURED HIS TOE AND WAS FORCED TO QUIT WORK AS A RESULT OF THAT ACCIDENT.

THE SOLE TEST FOR EXTENT OF SCHEDULED PERMANENT PARTIAL DISABILITY IS LOSS OF FUNCTION OF THE INJURED MEMBER. SURRATT V. GUNDERSON BROS. (UNDERSCORED), 259 OR 65 (1971). THE BOARD CONCLUDES THAT CLAIMANT HAS SUFFERED MORE THAN 5 PER CENT LOSS OF FUNCTION OF EACH

FOREARM - HOWEVER, THE EVIDENCE DOES INDICATE THAT CLAIMANT HAS RETAINED SUBSTANTIAL USE OF BOTH FOREARMS AS INDICATED BY HIS WEIGHT LIFTING ACTIVITIES AND HIS RETURN TO HIS FORMER HEAVY-TYPE WORK PRIOR TO HIS TOE INJURY. THE LOSS OF FUNCTION OF EACH FOREARM IS MORE ADEQUATELY REFLECTED BY AWARDS OF 25 PER CENT FOR THE RIGHT FOREARM AND 15 PER CENT FOR THE LEFT FOREARM.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 14, 1975 IS MODIFIED.

CLAIMANT IS AWARDED 37.5 DEGREES FOR 25 PER CENT LOSS FUNCTION OF HIS RIGHT ARM AND 22.5 DEGREES FOR 15 PER CENT LOSS FUNCTION OF HIS LEFT ARM. THESE AWARDS ARE IN LIEU OF THE AWARDS MADE BY THE REFEREE IN HIS OPINION AND ORDER DATED NOVEMBER 14, 1975, WHICH, IN ALL OTHER RESPECTS, IS AFFIRMED.

WCB CASE NO. 74-344 APRIL 5, 1976

GAYLE R. MOORE, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
LINDSAY, NAHSTOLL, HART, DUNCAN, DAFOE AND KRAUSE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER ON RECONSIDERATION ENTERED AUGUST 1, 1975 WHICH DIRECTED THE EMPLOYER TO ACCEPT CLAIMANT'S CLAIM FOR AGGRAVATION AND PAY CLAIMANT BENEFITS TO WHICH HE IS ENTITLED BY LAW, INCLUDING, BUT NOT LIMITED TO, TEMPORARY TOTAL DISABILITY COMPENSATION FROM APRIL 15, 1974, TO PAY FOR ALL RELATED MEDICAL AND TRAVEL EXPENSES AND TO PROCESS THE CLAIM UNDER ORS 656.268. THIS ORDER ALSO DIRECTED THE EMPLOYER TO PAY CLAIMANT AN ADDITIONAL AMOUNT EQUAL TO 25 PER CENT OF THE TEMPORARY TOTAL DISABILITY COMPENSATION PAID OR PAYABLE TO CLAIMANT FOR THE PERIOD FROM APRIL 15, 1974 TO SEPTEMBER 10, 1974 TOGETHER WITH AN AMOUNT EQUAL TO 25 PER CENT OF THE 100.16 DOLLARS UNDERPAID ON OCTOBER 1, 1974, PLUS AN AMOUNT EQUAL TO 25 PER CENT OF THE 250.40 DOLLARS PAID A WEEK LATER ON JANUARY 28, 1975 AND TO PAY 1,100 DOLLARS TO CLAIMANT'S ATTORNEY AS A REASONABLE ATTORNEY'S FEE.

CLAIMANT SUFFERED A COMPENSABLE BACK INJURY ON JULY 7, 1972. DR. STEELE, WHO ORIGINALLY TREATED CLAIMANT, FOUND HIM TO BE MEDICALLY STATIONARY ON JULY 25, 1972, BUT PREDICTED CLAIMANT WOULD LIKELY HAVE FURTHER BACK STRAIN. THE PREDICTION CAME TRUE AND CLAIMANT UNDERWENT A BILATERAL LAMINECTOMY AND EXCISION OF L5-S1 INTERVERTEBRAL DISC ON JANUARY 18, 1973. DR. STEELE RELEASED CLAIMANT FOR LIGHT WORK ON APRIL 27, 1973 AND, BASED UPON HIS CLOSING REPORT OF SEPTEMBER 28, 1973, A DETERMINATION ORDER MAILED DECEMBER 4, 1973 AWARDED CLAIMANT TIME LOSS BOTH TOTAL AND PARTIAL FOR CERTAIN PERIODS OF TIME BETWEEN JULY 25, 1972 AND SEPTEMBER 15, 1973 AND ALSO 40 PER CENT UNSCHEDULED LOW BACK DISABILITY EQUAL TO 128 DEGREES.

SHORTLY AFTER THE DETERMINATION ORDER WAS MAILED, CLAIMANT REQUESTED A HEARING, CONTENDING HIS CLAIM WAS PREMATURELY CLOSED, THAT HE NEEDED TEMPORARY TOTAL DISABILITY COMPENSATION AS HE WAS ENGAGING IN VOCATIONAL REHABILITATION OR, IN THE ALTERNATIVE, IF NOT PREMATURELY CLOSED, HIS PERMANENT PARTIAL DISABILITY WAS IN EXCESS OF THE AWARD WHICH HE RECEIVED THEREFOR.

ON APRIL 12, 1974 CLAIMANT WAS EXAMINED BY DR. CHERRY WHO, IN A LETTER DATED APRIL 15, 1974 AND ADDRESSED TO CLAIMANT'S ATTORNEY, STATED THAT CLAIMANT HAD A LOW BACK STRAIN, SEVERE AND THAT HE COULD NOT WORK AND HAD NOT HAD ANY RETRAINING. HE SUGGESTED CLAIMANT BE SEEN BY A NEUROSURGEON, PREFERABLY DR. DONALD T. SMITH, AND PROBABLY HAVE A MYELOGRAM. HE FELT CLAIMANT WAS TOO YOUNG NOT TO TREAT AND IF CLAIMANT COULD NOT BE HELPED BY TREATMENT AFTER THE MYELOGRAM IT WOULD BE HIGHLY DESIRABLE FOR CLAIMANT TO BE SEEN AT THE PORTLAND PAIN CLINIC.

COMMENCING ON APRIL 19, 1974 WITH A LETTER FROM CLAIMANT'S ATTORNEY TO THE ATTORNEY REPRESENTING THE EMPLOYER AND HIS CARRIER THERE FOLLOWED AN ABUNDANCE OF CORRESPONDENCE WHICH DID VERY LITTLE TO BENEFIT CLAIMANT. FINALLY, ON SEPTEMBER 9, 1974 AN EMPLOYEE OF THE CARRIER ADVISED DR. SMITH THAT TEMPORARY TOTAL DISABILITY PAYMENTS WOULD START WITH ACTIVE TREATMENT AND ON SEPTEMBER 19, 1974 SHE WROTE CLAIMANT'S COUNSEL INDICATING CLAIMANT'S TEMPORARY TOTAL DISABILITY COMPENSATION WOULD COMMENCE AS OF SEPTEMBER 10, 1974, THE DATE CLAIMANT WAS ADMITTED TO EMANUEL HOSPITAL.

CLAIMANT CONTENDS HE IS ENTITLED TO ADDITIONAL TEMPORARY TOTAL DISABILITY COMPENSATION FROM JULY 15, 1972 THROUGH DECEMBER 4, 1972 PLUS A 25 PER CENT PENALTY AND ATTORNEY'S FEES. THE REFEREE FOUND THAT CLAIMANT HAD BEEN DECLARED MEDICALLY STATIONARY BY DR. STEELE, FIRST, ON JULY 25, 1972 AND IN A REPORT DATED SEPTEMBER 5, 1972 DR. STEELE STATED CLAIMANT'S SYMPTOMS HAD RETURNED IN AUGUST BUT THAT HE WAS NOW ASYMPTOMATIC. ON NOVEMBER 9, 1972 HE STATED CLAIMANT HAD BEEN WORKING FULL TIME ON LIGHT JOBS, AND ON DECEMBER 27, 1972 REPORTED THAT CLAIMANT HAD BEEN ABLE TO WORK UNTIL DECEMBER 14, 1972. HE GAVE NO EVIDENCE ON WHAT DAYS, IF ANY, BETWEEN JULY 15, 1972 AND DECEMBER 4, 1972 CLAIMANT WAS UNABLE TO WORK BECAUSE OF HIS BACK.

THE REFEREE CONCLUDED THAT THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY AWARDING CLAIMANT ADDITIONAL TEMPORARY DISABILITY COMPENSATION FOR THE PERIOD BETWEEN JULY 15, 1972 THROUGH DECEMBER 4, 1972. INASMUCH AS CLAIMANT HAS FAILED TO SUPPORT HIS CONTENTION THERE IS NO BASIS FOR THE IMPOSITION OF PENALTIES OR AN AWARD OF ATTORNEY'S FEES IN CONNECTION THEREWITH.

WITH RESPECT TO CLAIMANT'S CONTENTION THAT THE CLAIM SHOULD HAVE BEEN REOPENED ON APRIL 15, 1974 AND THAT HE IS ENTITLED TO TEMPORARY TOTAL DISABILITY COMPENSATION FROM THAT DATE UNTIL HE BECOMES MEDICALLY STATIONARY, PLUS AN ADDITIONAL AMOUNT EQUAL TO 25 PER CENT OF SUCH COMPENSATION PAID OR PAYABLE TO CLAIMANT FROM APRIL 15, 1974 TO SEPTEMBER 10, 1974 AS A PENALTY AND PAYMENT OF HIS ATTORNEY'S FEE, THE REFEREE, BASED UPON DR. CHERRY'S REPORT OF APRIL 15, 1975, CONCLUDED THAT SUCH REPORT WAS A PROPER REQUEST FOR REOPENING THE CLAIM AND THAT THE CARRIER FAILED TO DO SO, THEREFORE, CLAIMANT'S CONTENTION WAS WELL FOUNDED.

INITIALLY, CLAIMANT, BY HIS REQUEST FOR HEARING, HAD CHALLENGED THE ADEQUACY OF THE DETERMINATION ORDER, HOWEVER, BY LETTER OF APRIL 19, 1974 FROM CLAIMANT'S COUNSEL IT BECOMES APPARENT THAT CLAIMANT HAD THEN ELECTED TO REOPEN UNDER THE AGGRAVATION CLAIM RULE. THE REFEREE FOUND THAT IN EITHER CASE, THERE HAD BEEN UNREASONABLE RESISTANCE ON THE PART OF THE CARRIER AND DELAYED PAYMENT OF COMPENSATION AND HE AWARDED CLAIMANT THE ADDITIONAL TEMPORARY TOTAL DISABILITY COMPENSATION PLUS THE PENALTY AND AN ATTORNEY'S FEE OF 900 DOLLARS.

THE REFEREE ENTERED HIS ORDER ON JUNE 2, 1975 - SUBSEQUENTLY CLAIMANT REQUESTED MODIFICATION ON THE GROUNDS THAT THE REFEREE (1) FAILED TO VOID THE DETERMINATION ORDER MAILED DECEMBER 4, 1973, (2) FAILED TO AWARD PENALTIES ON THE LATE PAYMENT OF TEMPORARY TOTAL

DISABILITY COMPENSATION SUBSEQUENT TO CLAIM REOPENING ON SEPTEMBER 18, 1974 AND (3) FAILED TO AWARD REASONABLE ATTORNEY'S FEE.

THE REFEREE, AFTER RECONSIDERING, CONCLUDED THAT THERE WAS NO FINDING THAT CLAIMANT WAS NOT MEDICALLY STATIONARY AT THE TIME THE FIRST DETERMINATION ORDER WAS MAILED, THEREFORE, THE FACTUAL SITUATION DIFFERED FROM THAT IN THE CASE OF LORA DALTON (UNDERSCORED) WCB CASE NO. 73-1344, WHEREIN CLAIMANT'S CONDITION WAS NOT STATIONARY AT THE TIME THE DETERMINATION ORDER WAS ENTERED AND, THEREFORE, BEING PREMATURELY ISSUED CLAIMANT'S AGGRAVATION TIME WOULD NOT COMMENCE FROM ITS DATE.

WITH RESPECT TO THE FAILURE TO AWARD PENALTIES ON THE LATE PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION AFTER SEPTEMBER 18, 1974, THE REFEREE ALLOWED CLAIMANT'S REQUEST FOR MODIFICATION, STATING THAT THE PAYMENTS IN TWO INSTANCES WERE IMPROPERLY PROCESSED. THE OCTOBER 1, 1974 PAYMENT SHOULD HAVE BEEN 250.40 DOLLARS INSTEAD OF 150.24 DOLLARS AND THE JANUARY 28, 1975 CHECK FOR 375.60 DOLLARS WAS A WEEK LATE. FOR THE FOREGOING REASONS, THE REFEREE ASSESSED A PENALTY IN THE AMOUNT OF 25 PER CENT OF THE 100.16 DOLLARS UNDERPAID ON OCTOBER 1 AND AN AMOUNT EQUAL TO 25 PER CENT OF THE 250.40 DOLLARS PAID A WEEK LATE ON JANUARY 28, 1975, AND BASED UPON THIS ADDITIONAL AWARD OF PENALTIES, THE REFEREE INCREASED CLAIMANT'S ATTORNEY'S FEE FROM 900 DOLLARS TO 1,100 DOLLARS.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS BOTH THE REFEREE'S OPINION AND ORDER DATED JUNE 2, 1975 AND THE ORDER ON RECONSIDERATION DATED AUGUST 1, 1975. HOWEVER, THE BOARD FEELS OBLIGATED TO COMMENT ON THE OVERALL CIRCUMSTANCES OF THIS PARTICULAR CASE. IT IS APPARENT THAT BOTH COUNSEL, BY THEIR OWN ACTIVITIES, CREATED MUCH UNNECESSARY DELAY IN THE PROCESSING OF THIS CLAIM. THE BOARD ALSO WISHES TO COMMENT ON THE BRIEFS SUBMITTED BY COUNSEL. THEY WERE NOT OF GREAT HELP BECAUSE THEY DID NOT DEAL DIRECTLY WITH THE MAIN ISSUE, BUT INSTEAD SPENT MANY PAGES ATTEMPTING TO EXPLAIN THE DIFFERENCE BETWEEN A REQUEST FOR HEARING ON THE ADEQUACY OF A DETERMINATION ORDER WITHIN A ONE YEAR PERIOD AFTER THE MAILING DATE OF THE DETERMINATION ORDER, A REQUEST TO REOPEN A CLAIM WITHIN THIS PERIOD AND A CLAIM FOR AGGRAVATION FILED WITHIN THAT SAME PERIOD - FACTS OF LITTLE CONSEQUENCE IN THIS PARTICULAR CASE.

THE BOARD ALSO WISHES TO COMMENT ON THE ADDITIONAL ATTORNEY'S FEE OF 200 DOLLARS AWARDED CLAIMANT'S COUNSEL UPON RECONSIDERATION. AS A RESULT OF THE RECONSIDERATION THE ADDITIONAL COMPENSATION PAID TO THE CLAIMANT WAS LESS THAN 90 DOLLARS. BECAUSE THE BOARD FEELS SUCH INCREASE WAS OUT OF LINE WHEN THE BENEFIT TO CLAIMANT IS CONSIDERED IT WILL AWARD A MINIMAL ATTORNEY'S FEE TO CLAIMANT'S COUNSEL FOR PREVAILING AT BOARD REVIEW.

ORDER

THE ORDER OF THE REFEREE DATED JUNE 2, 1975 AND HIS ORDER ON RECONSIDERATION DATED AUGUST 1, 1975 ARE AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS REVIEW, THE SUM OF 100 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-1128 APRIL 6, 1976

MARY ANN WITT, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH SET ASIDE A DETERMINATION ORDER MAILED MARCH 19, 1975 AND REMANDED THE CLAIM TO THE FUND WITH INSTRUCTIONS TO REOPEN AND COMMENCE PAYMENT OF COMPENSATION FOR TEMPORARY TOTAL DISABILITY EFFECTIVE MARCH 10, 1975 AND UNTIL THE CLAIM IS CLOSED PURSUANT TO ORS 656.268. THE ORDER FURTHER PROVIDED THAT CLAIMANT SHOULD BE ENTITLED TO ALL MEDICAL TREATMENT AND SERVICES AUTHORIZED BY HER ATTENDING ORTHOPEDIC PHYSICIAN, INCLUDING PAYMENT OF THE ORTHOPEDIC MATTRESS CLAIMANT PURCHASED UPON PRESCRIPTION FROM DR. GAMBEE AND ANY INTEREST OR INSTALLMENT CHARGES PAID BY HER THEREFOR. THE ORDER FURTHER DIRECTED THE FUND TO PAY CLAIMANT A SUM EQUAL TO 25 PER CENT OF THE COST OF THE MATTRESS AND SPRINGS AS A PENALTY PROVIDED BY ORS 656.262(8) AND TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE IN THE AMOUNT OF 1,200 DOLLARS.

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HER COCCYX AND HER LOW BACK ON APRIL 1, 1973. DURING THE COURSE OF HER CLAIM, PARTIAL REJECTIONS WERE ISSUED CONCERNING TREATMENT OF CERTAIN ANATOMICAL AREAS. A HEARING HAD BEEN HELD ON NOVEMBER 2, 1973 AND, THEREAFTER, ON NOVEMBER 29, 1973 AN OPINION AND ORDER REOPENED CLAIMANT'S CLAIM AND DIRECTED THAT THE DENIED AREAS BE ACCEPTED. CLAIMANT HAD BEEN UNDER THE CARE OF DR. GAMBEE, AN ORTHOPEDIC PHYSICIAN, FROM THE TIME OF HER INJURY AND YET AT THE TIME OF THE ATTEMPTED CLOSURE IN OCTOBER 1973, REPORTS OF DR. GAMBEE HAD NOT BEEN PROVIDED TO THE EVALUATION DIVISION OF THE WORKMEN'S COMPENSATION BOARD.

CLAIMANT IS STILL UNDER THE CARE OF DR. GAMBEE AND SHE CONTINUES TO HAVE PAINFUL SYMPTOMATOLOGY AFFECTING HER LOW BACK AND COCCYX AREA AS WELL AS OTHER AREAS OF HER BODY. IN NOVEMBER 1974 CLAIMANT WAS REFERRED TO DR. BERG, AN ORTHOPEDIC PHYSICIAN, WHO KNEW OF NO TYPE OF TREATMENT WHICH WOULD BE OF BENEFIT TO CLAIMANT AND APPARENTLY RECOMMENDED THE CLAIM BE CLOSED. A COPY OF THIS REPORT WAS SENT TO DR. GAMBEE FOR HIS CONCURRENCE - DR GAMBEE STATED ON JANUARY 7, 1975 THAT HE DIFFERED ONLY IN THAT HE FELT HER DISABILITY WAS MORE THAN 'MILD' - HOWEVER, HE ALSO STATED THAT CLAIMANT'S CONDITION WAS NOT MEDICALLY STATIONARY AT THAT TIME AND THAT THE ESTIMATED LENGTH OF HER FURTHER TREATMENT WAS UNDETERMINED. THESE TWO REPORTS WERE SUBMITTED TO EVALUATION AND A DETERMINATION ORDER WAS ISSUED ON MARCH 19, 1975 CLOSING THE CLAIM WITH AN AWARD OF 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY.

THE REFEREE FOUND NO EVIDENCE THAT EITHER THE FUND OR EVALUATION HAD MADE ANY INQUIRY OF DR. GAMBEE FOR CLARIFICATION OF HIS REPORT. THE DETERMINATION ORDER, APPARENTLY, WAS BASED UPON DR. BERG'S REPORT THAT CONSIDERATION COULD BE TAKEN AT THAT TIME TO ADJUST OR CLOSE CLAIMANT'S CLAIM WITH A DISABILITY RATING.

DR. GAMBEE HAD ORDERED A SPECIAL ORTHOPEDIC MATTRESS FOR CLAIMANT TO ALLEVIATE HER PAINFUL BACK SYMPTOMATOLOGY. THE FUND REFUSED TO PAY FOR THIS ALTHOUGH IT NEVER ISSUED A FORMAL DENIAL TO CLAIMANT. CLAIMANT ALSO PURCHASED SOME CRUTCHES FOR WHICH THE FUND REFUSED TO PAY, AGAIN WITHOUT A FORMAL DENIAL. THERE IS A BILL FOR A BRAIN SCAN APPARENTLY ORDERED BY DR. STORINO WHICH REMAINS UNPAID, HOWEVER, IT

IS UNCLEAR WHETHER THAT EXPENSE WAS EVER BILLED TO THE FUND. CLAIMANT TESTIFIED AT THE HEARING THAT SHE CONTINUED TO HAVE PAINFUL BACK SYMPTOMS, THAT THE ORTHOPEDIC MATTRESS IMPROVED HER SLEEPING ABILITY AND PROVIDED SOME RELIEF FROM HER BACK PAIN. SHE ALSO TESTIFIED THAT DR. GAMBEE HAD REFERRED HER TO DR. STORINO AND ALSO TO A PSYCHIATRIST, DR. PARVARESH. THE LATTER FOUND A CAUSAL CONNECTION BETWEEN CLAIMANT'S DEPRESSION AND HER INDUSTRIAL INJURY AND RECOMMENDED SPECIFIC TYPES OF TREATMENT.

THE REFEREE FOUND NO EVIDENCE THAT DR. GAMBEE'S UNDERSTANDING OF THE TERM 'MEDICALLY STATIONARY' DIFFERED FROM THE LEGAL DEFINITION OF THAT TERM, YET NO ONE HAD BOTHERED TO CHECK WITH HIM BEFORE CLAIM CLOSURE WAS REQUESTED EARLY IN 1975. HAD THAT BEEN DONE, IT WOULD HAVE BEEN APPARENT THAT IN DR. GAMBEE'S OPINION THE CLAIM WAS NOT READY FOR CLOSURE. THE RESPONSIBILITY OF PROVIDING COMPENSATION TO AN INJURED WORKMAN LIES WITH THE FUND AND THE REFEREE CONCLUDED THAT THE FUND SHOULD HAVE MADE FURTHER INQUIRY OF DR. GAMBEE BEFORE SUBMITTING THE MATTER TO EVALUATION FOR CLAIM CLOSURE AND, BASED UPON THE MEDICAL OPINION OF DR. GAMBEE, HE CONCLUDED THE CLAIM SHOULD NOT HAVE BEEN CLOSED ON MARCH 19, 1975.

THE REFEREE FURTHER CONCLUDED THAT THE COST OF THE ORTHOPEDIC MATTRESS SHOULD HAVE BEEN PAID BY THE FUND AS A LEGITIMATE CLAIM EXPENSE BUT THERE WAS INSUFFICIENT EVIDENCE THAT THE PAYMENT FOR THE CRUTCHES WAS A LEGITIMATE CLAIM EXPENSE.

THE REFEREE FURTHER FOUND THE EVIDENCE INSUFFICIENT FOR HIM TO MAKE A DETERMINATION AT THE PRESENT TIME CONCERNING THE COMPENSABILITY OF THE INJURY SUSTAINED WHEN CLAIMANT FELL IN HER FATHER'S HOME IN EITHER JUNE OR JULY OF 1974.

CLAIMANT HAD ASKED FOR PENALTIES FOR PREMATURE CLOSING. THE REFEREE FOUND THAT SINCE THE EVALUATION DIVISION OF THE WORKMEN'S COMPENSATION BOARD WAS THE AGENCY WHICH ACTUALLY AUTHORIZED CLOSURE OF THE CLAIM, THERE WERE NO GROUNDS FOR ASSESSING PENALTIES AGAINST THE FUND. HOWEVER, SUBMISSION OF THE CLAIM TO EVALUATION IN THE FIRST INSTANCE WAS SUFFICIENT AS TO CONSTITUTE UNREASONABLE RESISTANCE TO THE PAYMENT OF COMPENSATION, THEREFORE, THE FUND MUST PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE.

CLAIMANT HAD ALSO REQUESTED PENALTIES AND ATTORNEY'S FEES WITH REGARD TO THE REFUSAL OF THE FUND TO PAY FOR THE ORTHOPEDIC MATTRESS. THE REFEREE CONCLUDED THE FUND DIDN'T EVEN OBSERVE THE BASIC RUDIMENTS OF SOCIAL COURTESY IN ITS FAILURE TO ADVISE CLAIMANT IT CONSIDERED THE MATTRESS A NON-COVERED ITEM - THAT IT DID NOT OBSERVE THE DUTIES IMPOSED UPON IT BY STATUTE WITH REGARD TO MAKING A DENIAL AND STATING THE REASONS THEREFOR. HE CONCLUDED THAT CLAIMANT WAS ENTITLED TO PENALTIES, BUT SINCE HE HAD ALREADY FOUND CLAIMANT ENTITLED TO PAYMENT OF THE ATTORNEY'S FEE BY THE FUND HE WOULD NOT PRORATE IT AS BETWEEN THE UNREASONABLE RESISTANCE TO PAYMENT OF COMPENSATION AND THE FUND'S IMPROPER HANDLING OF THE CLAIM FOR THE MATTRESS.

THE REFEREE FOUND THE DETERMINATION ORDER OF MARCH 19, 1975, ALTHOUGH ENTITLED A 'SECOND' ORDER WASN'T EVEN A 'FIRST' ORDER - THAT THE OPINION AND ORDER ISSUED IN NOVEMBER 1973 CLEARLY HELD THAT THE CLAIM WAS IMPROPERLY CLOSED BY THE DETERMINATION ORDER OF OCTOBER 4, 1973. HE ALSO SET ASIDE THE DETERMINATION ORDER OF MARCH 19, 1975 AS A PREMATURE CLOSURE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE WELL WRITTEN AND THOROUGH ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 19, 1975 IS AFFIRMED.

CLAIMANT'S ATTORNEY IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 350 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-4293 APRIL 6, 1976

MARY ANN WITT, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH FOUND UNREASONABLE DELAY AND UNREASONABLE REFUSAL ON THE PART OF STATE ACCIDENT INSURANCE FUND TO PAY FOR MEDICAL SERVICES AND ITS REFUSAL TO ABIDE BY THE PREVIOUS ORDER OF REFEREE H. DON FINK AND ORDERED (1) THE FUND TO PAY CLAIMANT, IN ADDITION TO THE PREVIOUS PERMANENT PARTIAL DISABILITY PAYMENTS, TEMPORARY TOTAL DISABILITY FROM MARCH 2, 1975 AS HERETOFORE ORDERED BY REFEREE FINK, SAVE AND EXCEPT THEREFROM THE AMOUNT OF MONEY PAID BY THE FUND ON ACCOUNT OF TIME LOSS BETWEEN MARCH 10 AND MARCH 24, 1975 - (2) THAT THE FUND PAY CLAIMANT THE SUM OF 150 DOLLARS PAID BY HER FOR THE ORTHOPEDIC MATTRESS AND SPRINGS RECOMMENDED BY HER DOCTOR AND THE FURTHER SUM OF 106.45 DOLLARS EXPENDED BY CLAIMANT FOR PRESCRIPTIONS FOR MEDICINE, AND (3) THAT THE FUND PROMPTLY PAY TO GOOD SAMARITAN HOSPITAL THE AMOUNT OF 195 DOLLARS INCURRED BY CLAIMANT AND ALL OTHER OUTSTANDING CHARGES FOR MEDICAL SERVICES. THE ORDER ALSO ASSESSED PENALTIES OF 25 PER CENT OF THE TEMPORARY TOTAL DISABILITY COMPENSATION DUE AND PAYABLE UNDER THE TERMS OF THIS PRESENT ORDER UNTIL THE DATE OF THIS ORDER, 25 PER CENT OF THE 150 DOLLARS WHICH CLAIMANT HAD PAID FOR THE ORTHOPEDIC MATTRESS AND SPRINGS, 25 PER CENT OF THE 106.45 DOLLARS EXPENDED BY CLAIMANT FOR PRESCRIPTION MEDICINE, 25 PER CENT OF THE BILL OF 195 DOLLARS FROM GOOD SAMARITAN HOSPITAL, 25 PER CENT OF THE REMAINING UNPAID COST OF THE MATTRESS AND SPRINGS TO CLAIMANT, EXCLUSIVE OF THE INSTALLMENT CHARGES AND INTEREST AND DIRECTED THE FUND TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE IN THE AMOUNT OF 850 DOLLARS.

ON SEPTEMBER 19, 1975 REFEREE H. DON FINK ENTERED HIS OPINION AND ORDER IN THE MATTER OF THE COMPENSATION OF MARY ANN WITT, CLAIMANT (UNDERSCORED), WCB CASE NO. 75-1128. AN ORDER ON REVIEW DATED APRIL 6, 1976 AFFIRMED REFEREE FINK'S ORDER. IT IS NOT NECESSARY TO REITERATE HEREIN THE FACTS, FINDINGS AND CONCLUSIONS OF REFEREE FINK, SUFFICE IT TO SAY, THAT REFEREE EDWIN A. YORK FOUND THAT CLAIMANT IS PRESENTLY IN THE HOSPITAL UNDERGOING PSYCHIATRIC TREATMENT WHICH DR. PARVARESH IN HIS REPORT INDICATED WAS CAUSALLY RELATED TO CLAIMANT'S INDUSTRIAL INJURY, THAT CLAIMANT HAS BEEN RECEIVING MONTHLY PERMANENT PARTIAL DISABILITY COMPENSATION PAYMENTS ON AN AWARD WHICH WILL TERMINATE ON JANUARY 1, 1976.

THE FUND CONTENDS THAT CLAIMANT IS BEING PAID SOME FORM OF COMPENSATION AND IT IS MERELY A MATTER OF WHAT THE REFEREE WISHES TO LABEL IT, EITHER PERMANENT PARTIAL DISABILITY OR TEMPORARY TOTAL DISABILITY, I.E., MERELY A MATTER OF BOOKKEEPING ENTRY, AND THAT THIS WILL TAKE CARE OF THE TEMPORARY TOTAL DISABILITY COMPENSATION QUESTION

UNTIL JANUARY 1, 1976 AT WHICH TIME THE PERMANENT PARTIAL DISABILITY AWARD WILL TERMINATE. THE FUND ALSO CONTENDS THAT INASMUCH AS THERE HAD BEEN A 25 PER CENT PENALTY ALREADY ASSESSED ON THE COST OF THE MATTRESS AND SPRINGS, WHICH HAD BEEN ORDERED PAID BY REFEREE FINK, THAT REFEREE YORK WAS WITHOUT JURISDICTION OR AUTHORITY TO ASSESS A FURTHER PENALTY ON THIS AMOUNT, THAT THE REFEREE IS WITHOUT AUTHORITY TO ASSESS PENALTIES UPON THE REFUSAL TO PAY A PENALTY.

THE REFEREE CONCLUDED THAT PENALTIES SHOULD ONLY BE ASSESSED AGAINST COMPENSATION AND MEDICAL SERVICES AND THAT THERE WAS NO PROVISION IN THE WORKMEN'S COMPENSATION LAW FOR THE ASSESSING OF A PENALTY FOR UNREASONABLE REFUSAL OR DENIAL TO PAY PENALTIES.

WITH RESPECT TO THE QUESTION OF WHETHER THE FUND MUST PAY TEMPORARY TOTAL DISABILITY PAYMENTS FOR THE PERIOD OF TEMPORARY TOTAL DISABILITY WHEN IT IS PAYING PERMANENT PARTIAL DISABILITY AWARDS IN AN EQUIVALENT AMOUNT DURING SUCH PERIOD OF TEMPORARY TOTAL DISABILITY, THE REFEREE FOUND THAT THE FUND HAD MADE NO APPLICATION FOR ADJUSTMENT IN THE PREVIOUS HEARING BEFORE REFEREE FINK, BUT UNILATERALLY MADE THE ADJUSTMENT FOR CREDIT AND NOW URGES THAT CLAIMANT IS RECEIVING COMPENSATION AND THAT ALL THAT REMAINS IS FOR THE REFEREE TO DENOMINATE THE MONTHLY COMPENSATION PAID AS TEMPORARY TOTAL DISABILITY PAYMENTS. THE REFEREE CONCLUDED THAT, IN EFFECT, THE FUND WAS ASKING FOR CLAIMANT TO PAY HER OWN TEMPORARY TOTAL DISABILITY COMPENSATION UNTIL JANUARY 1, 1976.

IT HAS BEEN HELD PROPER AND LAWFUL FOR AN INJURED WORKMAN TO RECEIVE SIMULTANEOUSLY TEMPORARY TOTAL DISABILITY COMPENSATION AND PERMANENT PARTIAL DISABILITY COMPENSATION FROM A PREVIOUS AWARD. HORN V. TIMBER PRODUCTS, INC. (UNDERSCORED), 12 OR APP 365. WINGFIELD V. NATIONAL BISCUIT (UNDERSCORED), 8 OR APP 408. THE REFEREE FOUND THAT THE FUND'S UNILATERAL TERMINATION OR ADJUSTMENT WAS IN CONTRAVENTION OF THE RULING IN JACKSON V. SAIF (UNDERSCORED), 7 OR APP 109. REFEREE FINK'S ORDER WAS CLEAR AND UNAMBIGUOUS ON THE ISSUE THAT CLAIMANT WAS TO RECEIVE TEMPORARY TOTAL DISABILITY COMPENSATION AND NOT PERMANENT PARTIAL DISABILITY COMPENSATION IN LIEU THEREOF. HE CONCLUDED THE CONTINUED RESISTANCE AND REFUSAL OF THE FUND TO PAY TEMPORARY TOTAL DISABILITY COMPENSATION WAS UNREASONABLE AND THEREFORE A PENALTY SHOULD BE ASSESSED ON THE TOTAL AMOUNT OF TEMPORARY TOTAL DISABILITY DUE CLAIMANT FROM THE DATE IT WAS ORDERED BY REFEREE FINK (MARCH 10, 1972) UNTIL IT IS PAID.

THE REFEREE ALSO FOUND THAT CLAIMANT WAS ENTITLED TO PENALTIES FOR THE UNREASONABLE DELAY IN THE PAYMENT OF MEDICAL SERVICES, THE PAYMENT OF THE ORTHOPEDIC MATTRESS AND SPRINGS, THE PAYMENT OF A BILL FROM GOOD SAMARITAN HOSPITAL AND ALSO CERTAIN PRESCRIPTION MEDICATION CHARGES, ALL OF WHICH HAD BEEN ORDERED PAID BY REFEREE FINK AND WHICH, AT THE TIME OF THIS HEARING, REMAINED UNPAID.

THE REFEREE FOUND THERE HAD BEEN AN UNREASONABLE DELAY AND AN UNREASONABLE REFUSAL ON THE PART OF THE FUND TO PAY FOR THE MEDICAL SERVICES AND NO JUSTIFICATION FOR THE FUND'S REFUSAL TO ABIDE BY THE PREVIOUS ORDER OF REFEREE FINK.

THE FUND CONTENDED THE REFEREE HAD NO AUTHORITY TO ASSESS ANY MORE PENALTIES WITH RESPECT TO THE COST OF THE ORTHOPEDIC MATTRESS AND SPRINGS AND THE INSTALLMENT CHARGES AND INTEREST THEREON AS A FULL STATUTORY 25 PER CENT PENALTY HAD PREVIOUSLY BEEN AWARDED BY REFEREE FINK. REFEREE YORK CONCLUDED, TAKING INTO CONSIDERATION THE PREAMBLE TO THE PRESENT WORKMEN'S COMPENSATION ACT, THAT A POLICY WAS MANDATED TO REMOVE WORKMEN'S COMPENSATION FROM THE COURTS TO REDUCE THE COST OF LITIGATION AND TO GIVE BOTH THE EMPLOYER AND THE INJURED WORKMAN SPEEDY, SIMPLE AND EFFICIENT REMEDIES, AND CERTAINLY THE ADVENT OF PENALTIES WOULD PROVIDE ONE METHOD OF ENFORCING THE

PROVISIONS OF THE ACT AND THE ORDERS OF THE BOARD, ACTING THROUGH ITS HEARINGS DIVISION. THAT MIGHT BE THE REASON THE LEGISLATURE DID NOT SET FORTH ANY SPECIFIC MEANS OF ENFORCING THE BOARD'S OR REFEREE'S ORDERS. THE ONLY EFFECTIVE MEANS AND METHOD OF ENFORCEMENT OF SUCH ORDERS IS THE IMPOSITION OF THESE PENALTIES.

HE FURTHER CONCLUDED THE BOARD, ACTING THROUGH ITS REFEREES, WAS NOT PROHIBITED FROM ASSESSING SUCCESSIVE PENALTIES WHICH IS ENTIRELY DIFFERENT FROM ASSESSING PENALTIES FOR UNREASONABLE REFUSAL OR DENIAL TO PAY PENALTIES.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS IN ITS ENTIRETY THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 25, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

CLAIM NO. 36A 901251 APRIL 7, 1976

HAROLD C. NIHART, CLAIMANT

OWN MOTION DETERMINATION

CLAIMANT HAD SUFFERED A COMPENSABLE INJURY ON SEPTEMBER 21, 1968 WHICH WAS CLOSED BY A DETERMINATION ORDER MAILED DECEMBER 11, 1968 AWARDING CLAIMANT SOME TIME LOSS BUT NO COMPENSATION FOR PERMANENT PARTIAL DISABILITY. CLAIMANT'S AGGRAVATION RIGHTS EXPIRED ON DECEMBER 12, 1973.

CLAIMANT WAS EXAMINED BY DR. K. R. SMITH ON NOVEMBER 26, 1973 - HE DIAGNOSED A RIGHT ULNAR NERVE ENLARGEMENT DUE TO INJURY AND REFERRED CLAIMANT TO DR. FRANCIS NASH, A NEUROSURGEON, WHO ON SEPTEMBER 6, 1974 PERFORMED PERINEURAL ADHESIOLYSIS OF THE RIGHT ULNAR NERVE TRUNK AT ULNAR NOTCH AND TRANSLOCATION OF THE TRUNK ANTERIORLY AT THE ELBOW LEVEL. DR. NASH CONTINUED TO TREAT CLAIMANT UNTIL NOVEMBER 5, 1975 WHEN HE RELEASED CLAIMANT FROM HIS CARE.

BASED UPON DR. NASH'S CLOSING EVALUATION RECEIVED NOVEMBER 25, 1975, THE EVALUATION DIVISION RECOMMENDED THAT THE BOARD EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND GRANT CLAIMANT ADDITIONAL TEMPORARY TOTAL DISABILITY COMPENSATION FROM SEPTEMBER 5, 1974 THROUGH FEBRUARY 20, 1976, THE DATE THE SECOND REQUEST FOR CLOSURE WAS MADE BY THE CARRIER, AND AWARD CLAIMANT 28.8 DEGREES FOR 15 PER CENT LOSS FUNCTION OF THE RIGHT ARM.

IT IS SO ORDERED.

WCB CASE NO. 73-2690 APRIL 7, 1976

MARY SCHNEIDER, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
GEARIN, CHENEY, LANDIS, AEBI AND KELLEY,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER HAD REQUESTED BOARD REVIEW OF THE REFEREE'S ORDER DATED JANUARY 25, 1974 WHICH GRANTED CLAIMANT AN AWARD OF PERMANENT TOTAL DISABILITY. CLAIMANT'S ATTORNEYS, APPEARING SPECIALLY, MOVED THE BOARD FOR AN ORDER DISMISSING THE EMPLOYER'S REQUEST FOR REVIEW ON THE GROUNDS THAT THE EMPLOYER FAILED TO SERVE A COPY OF ITS REQUEST FOR BOARD REVIEW UPON THE CLAIMANT AS PROVIDED BY ORS 656.295(2). THE BOARD, BY ORDER DATED MARCH 27, 1974, DISMISSED THE EMPLOYER'S REQUEST FOR REVIEW. THE EMPLOYER APPEALED TO THE CIRCUIT COURT WHICH, ON JUNE 17, 1975, REVERSED THE BOARD'S ORDER OF DISMISSAL AND ITS ORDER ON RECONSIDERATION, ENTERED SOON THEREAFTER, AND ORDER THE BOARD TO TAKE JURISDICTION OF THE APPELLANT'S APPEAL, AS SUCH APPEAL WAS DATED APRIL 16, 1974 AND TO REVIEW SUCH MATTER AS IS BEFORE IT PURSUANT TO SUCH APPEAL, BASED UPON THE RULING OF THE COURT OF APPEALS IN SCHNEIDER V. EMANUEL HOSPITAL (UNDERSCORED), 75 ADV SH 956.

THE BOARD DID NOT FEEL IT HAD SUFFICIENT UP-TO-DATE MEDICAL EVIDENCE OF RECORD TO MAKE A DETERMINATION ON THE ISSUE OF CLAIMANT'S PERMANENT DISABILITY AFTER THE MATTER WAS REMANDED TO IT AND IT THEREFORE ISSUED ITS ORDER OF REMAND TO THE HEARINGS DIVISION ON SEPTEMBER 5, 1975 TO TAKE EVIDENCE RELATING TO CLAIMANT'S PRESENT PHYSICAL CONDITION AND TO DETERMINE WHAT, IF ANY, ATTEMPTS HAD BEEN MADE TOWARD REHABILITATIVE EFFORTS EXTENDED IN CLAIMANT'S BEHALF. AT THE CONCLUSION OF THE HEARING, THE REFEREE WAS DIRECTED TO CAUSE A TRANSCRIPT OF THE HEARING TO BE PREPARED AND SUBMITTED TO THE BOARD TOGETHER WITH HIS FINDINGS AND RECOMMENDATIONS.

THE BOARD HAS NOW BEEN FURNISHED WITH A TRANSCRIPT OF THE PROCEEDINGS WHICH WERE HELD ON DECEMBER 5, 1975 AND FEBRUARY 18, 1976, TOGETHER WITH THE FINDINGS, OPINION AND RECOMMENDATIONS MADE BY THE REFEREE.

THE REFEREE, BASED, IN PART, UPON THE TESTIMONY OF DR. SNODGRASS OF THE ORTHOPAEDIC CONSULTANTS, FOUND THAT CLAIMANT HAS A PSYCHOPATHOLOGY DUE TO THE INDUSTRIAL INJURY OR AT LEAST AGGRAVATED BY THAT INJURY. THIS PSYCHOPATHOLOGY IS WORSENING AND PREVENTS CLAIMANT FROM FUNCTIONING IN A NORMAL FASHION. CLAIMANT HAS AN IQ OF 82 AND OBVIOUSLY THERE WOULD BE GREAT DIFFICULTY CONFRONTING ANY AGENCY OR PRACTITIONER OF THE HEALING ARTS WITH RESPECT TO ATTEMPTING TO PLACE CLAIMANT BACK ON THE EMPLOYMENT FORCE.

DR. GRITZKA TESTIFIED THAT HIS EXPERIENCE SHOWED THAT IF A PERSON IS OFF WORK ONE OR TWO YEARS IT IS DOUBTFUL THAT SUCH PERSON WILL EVER RETURN TO THE WORK FORCE. CLAIMANT HAS BEEN OFF WORK FOR OVER THREE YEARS - AT THE TIME SHE WAS WORKING SHE HAD A RATHER LOW LEVEL JOB AND EVEN THAT WAS ABOVE HER CAPACITY.

DR. CHERRY WAS OF THE OPINION, IN AUGUST 1974, THAT CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED WITH A CHRONIC LOW BACK STRAIN - THAT HER PSYCHOPATHOLOGY WAS THE RESULT OF HER INDUSTRIAL INJURY. AT THE HEARING DR. GRITZKA TESTIFIED CLAIMANT WOULD NOT BE ABLE TO DO THE WORK SHE HAD DONE PREVIOUSLY - SHE HAD COOPERATED WITH HIM IN HER TREATMENT BUT HE KNEW OF NOTHING WHICH WOULD RELIEVE CLAIMANT OF HER PAIN.

THE CLINICAL PSYCHOLOGIST WAS OF THE OPINION THAT CLAIMANT WAS AN EXCEEDINGLY POOR CANDIDATE FOR EMPLOYMENT DUE TO LEVEL OF INTELLIGENCE, LACK OF VOCATIONAL SKILLS, POOR VOCATIONAL APTITUDES. THIS IS SUPPORTED BY A REPORT FROM MR. FISHER, A SENIOR REHABILITATION COUNSELOR, DATED APRIL 15, 1975, IN WHICH HE STATES THAT CLAIMANT'S FILE HAD BEEN CLOSED SINCE HER DISABLING CONDITION PREVENTED HER FROM ACTIVELY PARTICIPATING IN VOCATIONAL REHABILITATION SERVICES. CLAIMANT TESTIFIED SHE WAS RECEIVING HOME TUTORING FOR AWHILE BUT THE TUTORING STOPPED FOR REASONS OF WHICH SHE WAS NOT AWARE. SHE DID TESTIFY THAT SHE WAS UNABLE TO LEARN SUCH THINGS AS FRACTIONS AND DECIMALS AND WAS UNABLE TO DO LONG DIVISION PROBLEMS.

THE REFEREE CONCLUDED, IN HIS RECOMMENDATIONS, THAT NOW THAT CLAIMANT'S BACK WAS IN SUCH A CONDITION THAT IT WAS NOT AVAILABLE TO HER FOR THE PERFORMANCE OF EVEN LOW LEVEL JOBS AND HER INTELLIGENCE PRECLUDED TRAINING FOR A HIGHER LEVEL JOB OR A SEDENTARY TYPE JOB AND, FURTHER, BECAUSE NONE OF THE PHYSICIANS HAD ANY SUGGESTIONS OF ANY TYPE OF TREATMENT (DR. GRITZKA DID RECOMMEND CLAIMANT BE REFERRED TO THE PORTLAND PAIN REHABILITATION CENTER BUT THIS WAS ONLY BECAUSE HE DIDN'T KNOW OF ANYTHING ELSE TO TRY), THAT THE OPINION AND ORDER OF THE REFEREE, DATED JANUARY 25, 1974, WHICH GRANTED CLAIMANT AN AWARD OF PERMANENT TOTAL DISABILITY SHOULD BE AFFIRMED BY THE BOARD.

THE BOARD, HAVING READ THE TRANSCRIPT OF THE PROCEEDING AND GIVEN FULL CONSIDERATION TO THE FINDINGS AND OPINIONS AND RECOMMENDATIONS OF THE REFEREE, CONCLUDES THAT THE OPINION AND ORDER OF THE REFEREE DATED JANUARY 25, 1974 SHOULD BE AFFIRMED.

THE BOARD FURTHER FINDS THAT DR. CHERRY'S BILL FOR EXAMINING CLAIMANT ON NOVEMBER 22, 1975 SHOULD BE PAID BY THE EMPLOYER.

ORDER

THE ORDER OF THE REFEREE DATED JANUARY 25, 1974 IS AFFIRMED.

CLAIMANT'S COUNSEL IS ENTITLED AS A REASONABLE ATTORNEY'S FEE THE SUM OF 800 DOLLARS PAYABLE BY THE EMPLOYER FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW.

WCB CASE NO. 73-3542 APRIL 7, 1976

VIOLET SCHIMKE, CLAIMANT

COREY, BYLER AND REW,
CLAIMANT'S ATTYS.
ROBERT T. MAUTZ, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH FOUND THAT CLAIMANT'S CONDITION WAS NOT MEDICALLY STATIONARY ON NOVEMBER 15, 1972, REVERSED THE DETERMINATION ORDER MAILED ON THAT DATE, ORDERED THE EMPLOYER TO PAY FOR MEDICAL SERVICES AFTER NOVEMBER 16, 1970 AND AWARDED CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE PAYABLE BY THE EMPLOYER.

CLAIMANT IS A 47 YEAR OLD FEMALE LAUNDRY WORKER WITH A MEDICAL HISTORY OF LUMBAR SYMPATHECTOMIES, HEADACHE PROBLEMS AND A HISTORY OF FOUR AUTOMOBILE ACCIDENTS.

THE FIRST (NON-WORK-RELATED) AUTOMOBILE ACCIDENT OCCURRED IN JUNE 1962 AND RESULTED IN A VERTICAL FRACTURE OF THE C2 VERTEBRA WITHOUT ANY SERIOUS DISPLACEMENT OF THE FRAGMENTS AND A PARESTHESIS OF THE RIGHT ARM.

THE SECOND AUTOMOBILE ACCIDENT OCCURRED ON JUNE 10, 1970 AND WAS AN INDUSTRIAL INJURY - AGAIN, CLAIMANT SUSTAINED INJURY TO HER NECK WHICH WAS DIAGNOSED AS A RUPTURE OF THE INTERVERTEBRAL DISC BETWEEN C4 AND C5 WITH FURTHER DIAGNOSIS OF DISC DEGENERATION DUE TO ARTHRITIS AT THE C-5, C-6 LEVEL. THERE WERE ALSO FINDINGS OF LOW BACK PAIN AND MUSCLE SPASM AT THAT TIME AND AN ANTERIOR INTER-BODY FUSION WAS PERFORMED AT C4-5 LEVEL.

FOUR MONTHS AFTER THIS SURGERY, CLAIMANT WAS INVOLVED IN A THIRD (NON-WORK RELATED) AUTOMOBILE ACCIDENT (OCTOBER 5, 1970) IN WHICH HER NECK WAS FURTHER INJURED NECESSITATING SURGERY FOR REMOVAL OF THE DISC AND INTER-BODY FUSION AT THE C-3, C-4 LEVELS.

CLAIMANT WAS HOSPITALIZED IN MAY 1971 AND AGAIN IN JUNE 1971 UNDERWENT A THIRD OPERATION WHICH WAS AN ANTERIOR INTER-BODY FUSION OF C5-6, AN AREA OF CLAIMANT'S NECK WHICH HAD ALREADY BEEN FOUND TO BE IN A DEGENERATIVE CONDITION AT THE TIME OF HER WORK-RELATED INJURY IN JUNE 1970.

BETWEEN THE THIRD SURGERY OF JUNE 1971 AND JULY 1973, CLAIMANT WAS HOSPITALIZED THREE TIMES ON ACCOUNT OF NECK PAIN. ON JULY 31, 1973 CLAIMANT WAS INVOLVED IN HER FOURTH AUTOMOBILE ACCIDENT WHICH AGAIN INJURED HER NECK AND REQUIRED HOSPITALIZATION AND TRACTION FOR APPROXIMATELY FIVE DAYS. FROM THAT TIME UNTIL THE DATE OF THE HEARING CLAIMANT CONTINUED TO BE IN PAIN.

CLAIMANT'S CLAIM HAD BEEN CLOSED BY A DETERMINATION ORDER MAILED NOVEMBER 15, 1972 WHEREIN CLAIMANT WAS AWARDED TIME LOSS TO SEPTEMBER 15, 1972 AND 64 DEGREES FOR 20 PER CENT UNSCHEDULED CERVICAL AND LEFT SHOULDER DISABILITY.

THE EMPLOYER AND ITS CARRIER HAD DENIED RESPONSIBILITY FOR THE SURGERY NECESSITATED BY THE OCTOBER 5, 1970 ACCIDENT WHICH WAS THE ANTERIOR INTER-BODY FUSION C3-4 AND THE SURGERY PERFORMED ON JUNE 29, 1971 WHICH WAS THE ANTERIOR INTER-BODY FUSION C5-6 LEVEL.

THE REFEREE FOUND THAT THE INDUSTRIAL INJURY SUFFERED ON JUNE 10, 1970, (SECOND AUTOMOBILE ACCIDENT) WAS IMPOSED ON THE PREEXISTING INJURED CERVICAL SPINE (THE FIRST AUTOMOBILE ACCIDENT) AND THAT THE INDUSTRIAL INJURY NECESSITATED THE FUSION AT THE C4-5 LEVEL, NOTING THAT AT THAT TIME THERE WAS ALSO DIAGNOSIS OF A DEGENERATIVE DISC DUE TO ARTHRITIS AT THE C5-6 LEVEL UPON WHICH THE INDUSTRIAL INJURY WAS SUPERIMPOSED.

THE REFEREE FOUND THAT ALTHOUGH CLAIMANT'S DISEASED AND INJURED NECK MIGHT HAVE PREDISPOSED HER TO FURTHER INJURY, NEITHER THE TREATING DOCTOR NOR THE EXAMINING DOCTOR WERE OF THE OPINION THAT THE SECOND SURGICAL INTERVENTION, I.E., THE DISCECTOMY AND INTER-BODY FUSION AT C3-4, WERE RELATED TO THE INDUSTRIAL ACCIDENT, THEREFORE, THE EMPLOYER WAS NOT REQUIRED TO PAY FOR THE SURGERY OR HOSPITALIZATION BETWEEN OCTOBER 23 AND NOVEMBER 16, 1970 BUT IT WAS LIABLE FOR ALL TREATMENT BEFORE AND AFTER THAT DATE AND TEMPORARY TOTAL DISABILITY PAID DURING THE HOSPITALIZATION BECAUSE, ACCORDING TO THE MEDICAL RECORDS, CLAIMANT WAS TEMPORARILY AND TOTALLY DISABLED AT THAT POINT IN TIME AND STILL CONVALESCING FROM HER FIRST SURGERY.

BASED UPON THE OPINIONS OF THE TREATING PHYSICIAN, DR. PLATNER, AND DR. KEIST, AN EXAMINING PHYSICIAN, THE REFEREE FOUND THAT THE SURGERY AT THE C4-5 LEVEL AND THE SURGERY AT THE C5-6 LEVEL, BOTH FUSIONS, WERE RELATED TO THE INDUSTRIAL INJURY.

WITH RESPECT TO TREATMENT AFTER THE NON-WORK RELATED AUTOMOBILE ACCIDENT OF SEPTEMBER 19, 1973, WHICH REQUIRED NO SURGERY BUT ONLY ADDITIONAL MEDICAL TREATMENT, THE REFEREE FOUND THAT THE INDUSTRIAL INJURY OF JUNE 10, 1970 WAS A MATERIAL CONTRIBUTING FACTOR FOR THE NEED OF THIS CONTINUING TREATMENT AND CARE AND THEREFORE THE RESPONSIBILITY OF THE EMPLOYER.

ON THE ISSUE OF WHETHER OR NOT CLAIMANT'S CONDITION IS MEDICALLY STATIONARY AND, IF SO, WHEN IT BECAME MEDICALLY STATIONARY, THE REFEREE FOUND THAT AT THE TIME THE CLAIM WAS CLOSED ON NOVEMBER 15, 1972 CLAIMANT WAS IN THE HOSPITAL PREPARATORY TO UNDERGOING TREATMENT BY WAY OF MANIPULATION OF HER NECK UNDER ANESTHESIA - THE EVIDENCE DOES NOT INDICATE WHETHER OR NOT THE EVALUATION DIVISION OF THE BOARD WAS AWARE OF THIS AT THAT TIME, NEVERTHELESS, THE REFEREE CONCLUDED THAT, BASED UPON THE MEDICAL RECORDS AND THE TESTIMONY OF THE CLAIMANT, WHO WAS FOUND TO BE A CREDIBLE WITNESS IN HER OWN BEHALF, THAT CLAIMANT'S CONDITION WAS NOT STATIONARY AT THAT TIME.

THE REFEREE CONCLUDED THAT BECAUSE OF THE CONFUSION OF ACCIDENTS, THROUGH NO FAULT OF CLAIMANT, PENALTIES WOULD NOT BE IN ORDER AS THE EMPLOYER WAS CERTAINLY ENTITLED TO REQUIRE THE CLAIMANT TO PROVE THE COMPENSABILITY OF THE PARTIAL DENIALS - HOWEVER, BECAUSE PARTIAL ACCEPTANCES WERE ORDERED A REASONABLE ATTORNEY'S FEE WILL BE AWARDED PAYABLE BY THE EMPLOYER.

THE BOARD, ON DE NOVO REVIEW, DOES NOT CONCUR IN THE FINDINGS AND CONCLUSIONS OF THE REFEREE. THE BOARD FINDS THAT CLAIMANT'S CONDITION WHICH WAS THE RESULT OF HER WORK-RELATED AUTOMOBILE ACCIDENT WAS STATIONARY ON SEPTEMBER 15, 1972, THE DATE CLAIMANT'S COMPENSATION FOR TEMPORARY TOTAL DISABILITY BY THE DETERMINATION ORDER MAILED NOVEMBER 15, 1972, ALTHOUGH THERE IS EVIDENCE THAT CLAIMANT WAS NOT MEDICALLY STATIONARY AT THAT TIME AS A RESULT OF THE NON-WORK- RELATED ADDITIONAL INJURY AND THE REQUIRED OPERATION. DR. PLATNER, CLAIMANT'S TREATING PHYSICIAN, DEFINITELY INDICATED THAT THE WORK-RELATED INJURIES WERE OR WOULD HAVE BEEN STATIONARY AT LEAST BY SEPTEMBER 15, 1972 HAD IT NOT BEEN FOR THE SUBSEQUENT INJURIES WHICH WERE NON-WORK-RELATED. DR. KEIST ESTIMATED THAT BUT FOR THE NON-WORK-RELATED OPERATIONS, CLAIMANT WOULD HAVE FULLY RECOVERED WITHIN 6 TO 9 MONTHS AFTER HER THIRD OPERATION WHICH WOULD HAVE MADE CLAIMANT'S CONDITION STATIONARY SOMETIME BETWEEN DECEMBER 1971 AND MARCH 1972. AFTER A COMPLETE EXAMINATION THE BACK EVALUATION CLINIC IN THEIR REPORT OF SEPTEMBER 14, 1972 CONCLUDED THAT CLAIMANT'S MEDICAL CONDITION WAS STATIONARY AND RECOMMENDED THAT THE CLAIM BE CLOSED.

THE BOARD FINDS THAT THE ONLY RESPONSIBILITY WHICH COULD BE IMPOSED UPON THE EMPLOYER IS FOR CLAIMANT'S CONDITION WHICH RESULTED DIRECTLY FROM HER INDUSTRIAL INJURY ON JUNE 10, 1970, HER SECOND AUTOMOBILE ACCIDENT. THE EMPLOYER IS NOT RESPONSIBLE MERELY BECAUSE BEFORE CLAIMANT FULLY RECOVERED FROM HER INDUSTRIAL ACCIDENT, SHE SUFFERED SUBSEQUENT INJURIES WHICH WERE NOT WORK-RELATED BUT DID HAVE THE EFFECT OF PROLONGING CLAIMANT'S CONDITION.

THE BOARD FINDS THAT CLAIMANT HAS NOT BEEN ADEQUATELY COMPENSATED FOR HER LOSS OF WAGE EARNING CAPACITY, AFTER TAKING INTO CONSIDERATION ALL THE FACTORS ENUMERATED IN SURRATT V. GUNDERSON BROS. (UNDERSCORED), 259 OR 65. THE BOARD CONCLUDES THAT CLAIMANT IS ENTITLED TO AN AWARD OF 96 DEGREES FOR 30 PER CENT UNSCHEDULED CERVICAL AND LEFT SHOULDER DISABILITY.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 29, 1975 IS REVERSED.

CLAIMANT IS AWARDED 96 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED CERVICAL AND LEFT SHOULDER DISABILITY.

ALTHOUGH THE EMPLOYER PREVAILED ON REVIEW, THE CLAIMANT'S COMPENSATION FOR HER UNSCHEDULED DISABILITY HAS BEEN INCREASED BY THE BOARD, THEREFORE, CLAIMANT'S COUNSEL IS ALLOWED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES AT BOARD REVIEW, 25 PER CENT OF THE COMPENSATION INCREASED BY THIS ORDER ON REVIEW, PAYABLE OUT OF SAID COMPENSATION AS PAID, NOT TO EXCEED THE SUM OF 1,000 DOLLARS.

WCB CASE NO. 75-1967 APRIL 8, 1976

JOHN GEORGE, CLAIMANT

MYRICK, COULTER, SEAGRAVES AND NEALY,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED TO IT CLAIMANT'S CLAIM FOR THE PAYMENT OF BENEFITS AS PROVIDED BY STATUTE FROM THE DATE OF THE INJURY UNTIL CLOSURE PURSUANT TO ORS 656.268.

CLAIMANT IS A 29 YEAR OLD SALESMAN FOR AN AUTOMOBILE WAREHOUSE DISTRIBUTOR AND IN THE COURSE OF HIS EMPLOYMENT HE USES HIS OWN CAR AND IS REQUIRED TO CARRY CATALOGS AND BROCHURES IN A WOODEN BOX DESIGNED TO FIT IN THE BACK SEAT OF THE CAR. THIS BOX WEIGHED BETWEEN 75 AND 100 POUNDS AND THE PLACEMENT OF THE HANDLES ON EACH SIDE OF THE BOX WAS SO LOW THAT WHEN TWO PERSONS ATTEMPTED TO CARRY IT IT WAS RATHER UNWIELDY.

SHORTLY PRIOR TO FEBRUARY 3, 1975 CLAIMANT WAS PREPARING TO MAKE A SALES TRIP TO ROSEBURG IN HIS 1966 MUSTANG CONVERTIBLE - CLAIMANT ASSISTED THE SON OF THE EMPLOYER'S MANAGER IN CARRYING THE BOX OUT TO THE CAR AND THEN PLACING IT IN THE BACK DIRECTLY BEHIND THE DRIVER'S SEAT. CLAIMANT WAS IN A RATHER AWKWARD POSITION WITH HIS LEFT HAND AGAINST THE DOOR PILLAR POST AND HIS RIGHT HAND GRASPING ONE OF THE BOX HANDLES WHILE THE TWO OF THEM ATTEMPTED TO MANEUVER THE BOX UP AND BEHIND THE FRONT SEAT INTO THE BACK SEAT. CLAIMANT ADMITTED HE WAS NOT AWARE OF ANY SPECIFIC INJURY DURING HIS MANEUVER BUT DID FEEL A 'STRAIN'. THE CLAIMANT TESTIFIED THIS WAS DONE ON THE FIRST DAY THE BOX WAS READY AND USED. HE WASN'T SURE OF THE DATE BUT SAID THAT IT WOULD HAVE BEEN WITHIN THE EIGHT DAY PERIOD PRIOR TO HIS EXAMINATION BY DR. MCCARTHY ON FEBRUARY 3, 1975. DR. MCCARTHY TOOK CHEST X-RAYS AND TREATED CLAIMANT WITH CERTAIN MEDICATION AND SUBSEQUENTLY REFERRED HIM TO DR. RENAUD, AN ORTHOPEDIC SURGEON.

ON FEBRUARY 6, 1975, THREE DAYS AFTER FIRST SEEING DR. MCCARTHY, CLAIMANT QUIT BECAUSE OF HIS INABILITY TO DRIVE A CAR - HE TESTIFIED THAT BETWEEN THE 3RD AND 6TH OF FEBRUARY HE HAD TOLD HIS EMPLOYER THAT THE PAIN IN HIS SHOULDER WAS GETTING SO BAD HE COULD NOT USE HIS ARM EVEN WITHIN HALF HIS CAPABILITY. HE THOUGHT HE HAD MENTIONED TO THE EMPLOYER THAT THERE WAS A POSSIBILITY THAT PLACING THE BOX IN THE CAR MIGHT HAVE HAD SOMETHING TO DO WITH THIS BUT HE WASN'T SURE.

DR. RENAUD, AFTER A NEUROLOGICAL EXAMINATION OF CLAIMANT, WAS OF THE IMPRESSION CLAIMANT HAD A CERVICAL SPONDYLOSIS WITH ACUTE EXACERBATION BUT HE DID NOT RULE ON THE POSSIBILITY OF NERVE ROOT IMPINGEMENT AND SUGGESTED CONSERVATIVE TREATMENT TOGETHER WITH PHYSICAL

THERAPY FOR THE CERVICAL AREA IN TERMS OF TRACTION, HEAT AND MASSAGE.

ON FEBRUARY 21, 1975 DR. RENAUD REFERRED CLAIMANT TO DR. CAMPAGNA FOR A DETERMINATION WITH RESPECT TO PRESENCE OF A HERNIATED DISC. DR. CAMPAGNA EXAMINED CLAIMANT ON MARCH 6, 1975 AND FOUND SEVERE NERVE ROOT COMPRESSION C7 RIGHT, SECONDARY TO PROTRUDED C6-7 DISC, ON THE RIGHT. DR. CAMPAGNA PERFORMED A DECOMPRESSIVE LAMINOTOMY OF C6-7, RIGHT, WITH REMOVAL OF EXTRUDED CERVICAL DISC ON MARCH 12, 1975.

ON APRIL 1, 1975 CLAIMANT FILED A CLAIM AND ON MAY 8, 1975 THE FUND DENIED THE CLAIM, STATING THE CLAIMANT'S CONDITION AS DIAGNOSED BY DR. CAMPAGNA WAS NOT RELATED TO HIS ON-THE-JOB ACTIVITIES AS A SALESMAN.

ON JULY 21, 1975 DR. HARWOOD ADVISED THE FUND THAT IT WAS NOT MEDICALLY PROBABLE THAT THE CONDITION FOR WHICH DR. CAMPAGNA PERFORMED THE SURGERY WAS CAUSALLY CONNECTED WITH HIS EMPLOYMENT. HE STATED THAT IT WOULD BE MOST UNUSUAL TO HAVE A HERNIATED NUCLEUS PULPOSUS OCCURRING SPONTANEOUSLY WITHOUT INJURY.

THE REFEREE FOUND CLAIMANT TO BE A CREDIBLE WITNESS - ALSO, THE EMPLOYER TESTIFIED THAT HE THOUGHT CLAIMANT, WHO HAD WORKED FOR HIM FOR A PERIOD OF THREE YEARS, WAS A VERY CREDIBLE PERSON. THE REFEREE FOUND THAT ALTHOUGH THERE WAS SOME QUESTION AS TO THE EXACT TIME THE INCIDENT OCCURRED, THERE WAS NO EVIDENCE OF ANY OTHER ACTIVITY IN WHICH CLAIMANT WAS ENGAGED, EITHER BEFORE OR AFTER THIS TWISTING-LOADING INCIDENT, THAT COULD HAVE IN ANY WAY CAUSED A STRAIN OR INJURY TO HIS BACK.

BASED UPON THE MEDICAL REPORTS, CLAIMANT'S TESTIMONY AND THE EXHIBITS, THE REFEREE CONCLUDED THAT THERE WAS NOTHING THEREIN TO DISCREDIT CLAIMANT'S TESTIMONY - ACTUALLY HIS STORY WAS SUPPORTED BY SUCH MEDICAL REPORTS.

THE FUND ATTEMPTED TO RELY ON AN ALLEGED DELAY IN FILING THE CLAIM BY CLAIMANT. IT CONTENDED THAT CLAIMANT HAD FILED A CLAIM FOR AN INDUSTRIAL INJURY PREVIOUSLY AND, THEREFORE, SHOULD HAVE BEEN AWARE OF THE CLAIM FILING PROCEDURES. THE REFEREE FOUND THAT THE PREVIOUS INDUSTRIAL INJURY TO WHICH THE FUND ALLUDED OCCURRED ON DECEMBER 2, 1972 AND IT WAS NOT UNTIL FEBRUARY 21, 1973, OVER TWO MONTHS LATER, THAT THE CLAIMANT FILED A CLAIM. HE CONCLUDED THAT THIS CERTAINLY DID NOT INDICATE CLAIMANT HAD ANY KNOWLEDGE OF CLAIM FILING PROCEDURES, TO THE CONTRARY, IT WAS GROUNDS FOR BELIEVING THAT THE CLAIMANT WAS UNAWARE OF THE NECESSITY FOR PROMPT REPORTING OF INDUSTRIAL INJURY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE REFEREE'S ORDER.

THE FUND RELIED PRIMARILY ON DR. HARWOOD'S REPORT WHICH STATED, IN EFFECT, THAT IT IS NECESSARY TO HAVE SPONTANEOUS TRAUMA TO CAUSE HERNIATION OF A DISC AND THAT THERE WAS NO EVIDENCE OF A TRAUMATIC EVENT. THE BOARD FINDS THAT THE INCIDENT AT WORK, I.E., THE LIFTING OF AND REACHING BACK WITH THE BOX, A HEAVY, AWKWARD PIECE OF EQUIPMENT, WHICH RESULTED AT THE TIME IN A PULLING SENSATION OF FEELING IN THE NECK, RESOLVED LATER INTO A PAIN PROBLEM REQUIRING SURGERY IS AN ADEQUATE DESCRIPTION, WHICH WAS UNIMPEACHED, OF A CHAIN OF EVENTS TYING THE NEED FOR MEDICAL CARE AND TREATMENT TO THE ON-THE-JOB OCCURRENCE.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 30, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

CLAIM NO. C 604 8821 REG APRIL 8, 1976

FREDERICK J. ESTABROOK, CLAIMANT

EMMONS, KYLE, KROPP AND KRYGER,
DEFENSE ATTYS.
ORDER

ON MARCH 22, 1976 THE BOARD ENTERED ITS OWN MOTION DETERMINATION IN THE ABOVE ENTITLED MATTER. ON MARCH 30, 1976 THE BOARD WAS INFORMED THAT ON FEBRUARY 11, 1976, THE EMPLOYER, AND ITS CARRIER, HAD VOLUNTARILY REOPENED CLAIMANT'S CLAIM AND WAS GOING TO ASK FOR A NEW DETERMINATION ORDER. BECAUSE OF THIS VOLUNTARY REOPENING, THE CLAIMANT, ON FEBRUARY 16, 1976, WITHDREW THE REQUEST FOR HEARING WHICH HE HAD TIMELY FILED WITH THE BOARD ON MARCH 5, 1975 QUESTIONING THE ADEQUACY OF THE THIRD DETERMINATION ORDER DATED FEBRUARY 25, 1975.

THE BOARD FINDS THAT HAD THE MATTER BEEN HEARD BY A REFEREE ON THE DATE SET FOR HEARING, MARCH 5, 1976, AN ORDER COULD HAVE BEEN ENTERED BY THE REFEREE, DEPENDING UPON THE EVIDENCE ADDUCED AT THE HEARING, REMANDING THE CLAIM TO THE CARRIER FOR PAYMENT OF COMPENSATION PURSUANT TO LAW UNTIL THE CLAIM WAS AGAIN CLOSED UNDER THE PROVISIONS OF ORS 656.268. THE CLAIMANT WITHDREW HIS REQUEST FOR HEARING ONLY BECAUSE THE CARRIER VOLUNTARILY REOPENED HIS CLAIM.

BASED UPON THE FOREGOING CIRCUMSTANCES, THE BOARD CONCLUDES THAT WHEN THE CARRIER REQUESTED CLOSURE OF THE CLAIM AND A DETERMINATION OF CLAIMANT'S DISABILITY, SUCH CLOSURE AND DETERMINATION SHOULD HAVE BEEN MADE PURSUANT TO ORS 656.268 - THAT THIS IS NOT A MATTER TO BE DETERMINED UNDER THE BOARD'S OWN MOTION JURISDICTION GRANTED BY ORS 656.278 DESPITE THE FACT THAT CLAIMANT'S AGGRAVATION RIGHTS HAVE EXPIRED.

THE BOARD FURTHER CONCLUDES THAT ALTHOUGH CLAIMANT DID NOT HAVE THE RIGHT TO FILE A CLAIM FOR AGGRAVATION UNDER THE PROVISIONS OF ORS 656.273, HE DID HAVE ONE YEAR FROM THE DATE OF THE THIRD DETERMINATION ORDER WITHIN WHICH TO REQUEST A HEARING THEREON. CLAIMANT HAD MADE SUCH REQUEST WHICH WAS THE BASIS FOR THE VOLUNTARY REOPENING OF THE CLAIM BY THE CARRIER.

ORDER

THE OWN MOTION DETERMINATION ORDER ENTERED BY THE WORKMEN'S COMPENSATION BOARD ON MARCH 22, 1976 IS HEREBY SET ASIDE IN ITS ENTIRETY, AND THE CLAIM IS REMANDED TO THE EVALUATION DIVISION FOR CLOSURE PURSUANT TO ORS 656.268.

WCB CASE NO. 75-2521 APRIL 8, 1976
WCB CASE NO. 75-2522

RAM LAKHAM, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
MC KEOWN, NEWHOUSE, FOSS AND WHITTY,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

Reviewed by Board Members Wilson and Phillips.

Claimant requests the Board to review the referee's order in which he affirmed the employer's denial of responsibility for hospital costs incurred by claimant from March 6 to 12, 1975.

Claimant is a 44 year old mill worker who came from the Fiji Islands in 1968. He sustained a compensable injury to his elbow on December 31, 1970 and a compensable back injury on December 20, 1971. The claims remain in an open status.

By June 1972, Dr. Cox felt claimant had received maximum relief for his side and back complaints and it remained questionable that claimant would return to mill work.

Claimant was hospitalized from March 6 to 12, 1975 for a diagnostic workup. Dr. Cox, the treating physician, ascribed claimant's hospitalization to diverticulosis with abdominal pain, and x-rays were taken to rule out whether or not this was his back bothering him. This procedure confirmed that claimant's hospitalization was due to the intestinal disorder, diabetes and gout, and was not related to either of the industrial claims.

The Board, on de novo review, concurs with the finding of the referee that compensation cannot be awarded unless there is competent evidence that a medical-causal relationship exists between the employment and the alleged disability. The fact that claimant entered the hospital with back and side pain and underwent the medical diagnostic tests necessary to determine the real cause does not make the claim compensable. The requisite medical-causal relationship had not been established.

ORDER

The order of the referee dated December 4, 1975 is affirmed.

WCB CASE NO. 75-3337 APRIL 8, 1976

ORVILE L. LYONS, CLAIMANT

MOORE, WURTZ AND LOGAN,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

Reviewed by Board Members Wilson and Moore.

Claimant requests the Board review the referee's order which increased claimant's award for permanent partial right leg disability from 10 per cent to 20 per cent loss of the right leg, contending he is entitled to a greater award of permanent disability.

ON JULY 17, 1974 CLAIMANT SUSTAINED A COMPENSABLE INJURY TO HIS RIGHT KNEE WHEN HIS PREVIOUSLY INJURED LEFT KNEE GAVE WAY AND HE FELL. DR. MCHOLICK PERFORMED SURGERY ON THE RIGHT KNEE IN FEBRUARY 1975. DESPITE EXTENSIVE PATHOLOGY AND REPAIR, DR. MCHOLICK'S CLOSING EVALUATION REPORT REFLECTED CLAIMANT HAD PROGRESSED SATISFACTORILY BUT HE FELT THE KNEE WOULD CONTINUE TO HAVE SYMPTOMS OF DEGENERATIVE CHANGE.

CLAIMANT RETURNED TO WORK, NOT HIS FORMER JOB AT A ROCK CRUSHER, BUT TO LOG HAULING WHICH ALLOWED HIM TO BE IN A SITTING POSITION 75 PER CENT OF THE TIME. THE DETERMINATION ORDER DATED JULY 15, 1975, GRANTED CLAIMANT 15 DEGREES FOR 10 PER CENT PARTIAL LOSS OF THE RIGHT LEG.

IN 1973 CLAIMANT HAD INJURED HIS LEFT KNEE AND HAD TWO SURGERIES PERFORMED BY DR. DONALD SCHROEDER. PURSUANT TO STIPULATION DATED JULY 31, 1974, CLAIMANT HAD RECEIVED AN AWARD OF 70 PER CENT LOSS OF THE LEFT LEG.

CLAIMANT'S DISABILITY IS A SCHEDULED DISABILITY AND CAN ONLY BE MEASURED BY THE LOSS OF PHYSICAL FUNCTION. THE BOARD, ON DE NOVO REVIEW, FINDS THAT THE MEDICAL EVIDENCE DOES NOT SUPPORT A FINDING OF GREATER DISABILITY THAN THAT FOR WHICH CLAIMANT HAS BEEN AWARDED. THE BOARD AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 28, 1975 IS AFFIRMED.

SAIF CLAIM NO. A 932648 APRIL 9, 1976

KATHLEEN SCRAMSTAD, CLAIMANT

EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION PROCEEDING REFERRED FOR HEARING

ON JANUARY 19, 1976 THE CLAIMANT REQUESTED THE STATE ACCIDENT INSURANCE FUND, WITH A COPY OF THE REQUEST FORWARDED TO THE BOARD, TO VOLUNTARILY REOPEN CLAIMANT'S CLAIM BECAUSE SHE HAD RECEIVED MEDICAL TREATMENT FROM DR. DONALD CRIST. THE REQUEST WAS ACCOMPANIED BY A COPY OF DR. CRIST'S REPORT OF DECEMBER 30, 1975.

ON FEBRUARY 4, 1976 THE FUND DENIED CLAIMANT'S REQUEST TO VOLUNTARILY REOPEN HER CLAIM ON THE GROUNDS THAT IT APPEARED SHE HAD SUSTAINED A NEW INJURY ON OR ABOUT NOVEMBER 3, 1975 AND THE MEDICAL REPORTS INDICATED THAT HER PRESENT INCREASED SYMPTOMS COULD BE DIRECTLY ATTRIBUTABLE TO THE NOVEMBER 3, 1975 INJURY.

ON MARCH 18, 1976 CLAIMANT REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND ORDER THE FUND TO REOPEN THE CLAIM AND PAY THE BENEFITS TO WHICH CLAIMANT WAS ENTITLED. ENCLOSED WITH THAT LETTER WAS A COPY OF THE FUND'S LETTER OF DENIAL, A COPY OF DR. CRIST'S REPORT OF DECEMBER 30, 1975 AND A COPY OF DR. CRIST'S REPORT DATED FEBRUARY 17, 1976.

THE BOARD ADVISED THE FUND OF THIS REQUEST AND ASKED IT TO INFORM THE BOARD OF THE FUND'S PRESENT POSITION.

ON MARCH 29, 1976 THE BOARD RESPONDED STATING THE MEDICAL HISTORY RECEIVED FROM DR. CRIST INDICATED HE HAD LAST EVALUATED CLAIMANT ON OCTOBER 21, 1968, AND HAD TREATED HER ON NOVEMBER 10, 1975 WITH

NO INTERVENING TREATMENT EXCEPT FOR MEDICATION UNTIL SHE REINJURED HER BACK WHILE LIFTING A PLASTIC BOAT ON NOVEMBER 3, 1975, AT WHICH TIME SHE HAD AN IMMEDIATE EXACERBATION. THE FUND CONTENDS THAT CLAIMANT HAS SUFFERED A NEW INJURY AND THAT IT WILL NOT CONSIDER REOPENING THE CLAIM ON THE SET OF FACTS PRESENTLY FURNISHED TO IT.

THE ISSUE IS WHETHER CLAIMANT HAS SUFFERED AN AGGRAVATION OF HER INDUSTRIAL INJURY OF JUNE 15, 1962, WHICH WOULD BE THE RESPONSIBILITY OF THE FUND, OR A NEW INJURY AS A RESULT OF THE INCIDENT WHICH OCCURRED ON NOVEMBER 3, 1975. THE EVIDENCE BEFORE THE BOARD IS NOT SUFFICIENT FOR IT TO DETERMINE THIS ISSUE, THEREFORE, IT REFERS THE MATTER TO THE HEARINGS DIVISION WITH INSTRUCTIONS TO HOLD A HEARING AND TAKE ADDITIONAL EVIDENCE ON THE ISSUE OF AGGRAVATION OR A NEW 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 RECOMMENDATIONS.

WCB CASE NO. 75-1979 APRIL 9, 1976

ROBERT E. DUDDING, CLAIMANT

DYE AND OLSON, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED 15 DEGREES FOR 10 PER CENT LOSS OF THE RIGHT FOREARM, ASSESSED THE EMPLOYER, AS A PENALTY, A SUM EQUAL TO 25 PER CENT OF THE TEMPORARY TOTAL DISABILITY COMPENSATION PAYABLE FROM JULY 26 THROUGH OCTOBER 27, 1974 AND AWARDED CLAIMANT'S ATTORNEY A FEE OF 150 DOLLARS.

CLAIMANT IS AN 18 YEAR OLD PIE-LINE OPERATOR WHO SUFFERED MULTIPLE LACERATIONS TO HIS RIGHT ARM ON DECEMBER 29, 1972. CLAIMANT WAS FIRST SEEN BY DR. WINKLER, WHO FOUND FULL RANGE OF MOTION OF THE HANDS AND FINGERS WITH NO EVIDENCE OF ATROPHY. CLAIMANT WAS NEXT SEEN BY DR. TEAL, AN ORTHOPEDIC SURGEON, ON JANUARY 22, 1974. DR. TEAL CONCLUDED THE SUPERFICIAL SENSORY BRANCHES OF THE ULNAR NERVE WERE SEVERED OR DAMAGED BUT THERE DID NOT APPEAR TO BE ANY EVIDENCE OF MAJOR MOTOR OR SENSORY DEFICIT IN THE ULNAR ASPECT CONCERNING THE ULNAR NERVE RIGHT FOREARM. CLAIMANT'S CLAIM WAS CLOSED ON FEBRUARY 21, 1974 WITH TIME LOSS FROM DECEMBER 29, 1972 THROUGH FEBRUARY 19, 1973 AND AN AWARD OF 7.5 DEGREES FOR 5 PER CENT LOSS OF THE RIGHT FOREARM.

CLAIMANT WAS AGAIN SEEN BY DR. TEAL IN JULY 1974, COMPLAINING THAT HEAVY USE OF HIS RIGHT HAND CAUSED CURRENT NUMBNESS AND THAT HIS GRIP STRENGTH HAD DIMINISHED. DR. TEAL'S IMPRESSION WAS A PROBABLE CARPAL TUNNEL SYNDROME AND, AFTER EXAMINATION BY A NEUROLOGIST WHO CONCURRED, DR. TEAL PERFORMED A CARPAL TUNNEL MEDIAN NERVE COMPRESSION ON SEPTEMBER 19, 1974. DR. TEAL RELEASED CLAIMANT TO RETURN TO WORK ON OCTOBER 28, 1974. HIS EXAMINATION OF CLAIMANT ON OCTOBER 24, 1974 REVEALED LITTLE, IF ANY, PERMANENT DISABILITY EXCEPT PERHAPS THAT RELATED TO THE ULNAR NERVE SUSTAINED PREVIOUSLY AND NO REAL RESTRICTION OF WORKING CAPABILITY EXCEPT SOME STIFFNESS OF THE WRIST WHICH WAS A COMMON RESIDUAL OF SUCH SURGERY AND MOST LIKELY WOULD RESOLVE WITH RESTORATION OF ACTIVITY. THE CLAIM WAS AGAIN CLOSED BY DETERMINATION ORDER MAILED FEBRUARY 10, 1975 WHICH AWARDED CLAIMANT

ADDITIONAL TIME LOSS FROM JULY 26 THROUGH OCTOBER 27, 1974 BUT NO AWARD FOR PERMANENT PARTIAL DISABILITY.

CLAIMANT WAS LAST SEEN BY DR. TEAL ON MAY 22, 1975. HE FELT CLAIMANT WAS IMPAIRED MINIMALLY IN TERMS OF ABILITY TO PERFORM A DAY'S WORK, HIS MAIN PROBLEM CONTINUED TO BE PAIN WITH OVERUSAGE OF THE FLEXOR MUSCULATURE OF THE FOREARM AND THE PERSISTENT NUMBNESS OVER THE HAND. DR. TEAL BELIEVED THERE WAS SOME LIMITATION OF WORK ACTIVITIES, ESPECIALLY THE TYPE WHICH REQUIRED REPEATED HARD HEAVY MANUAL LABOR.

IT WAS STIPULATED BETWEEN THE PARTIES THAT BECAUSE THE EMPLOYER USED SIGHT DRAFTS FOR PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION FROM JULY 26 THROUGH OCTOBER 27, 1974, THE EMPLOYER WOULD PAY A PENALTY EQUAL TO 25 PER CENT OF SUCH COMPENSATION AND CLAIMANT'S ATTORNEY A FEE OF 150 DOLLARS. IT WAS ALSO STIPULATED THAT THE TEMPORARY TOTAL DISABILITY COMPENSATION PAYABLE FROM DECEMBER 29, 1972 THROUGH FEBRUARY 19, 1973 WHICH WAS AWARDED BY THE FIRST DETERMINATION ORDER OF FEBRUARY 21, 1974, HAD BEEN PAID BY SIGHT DRAFTS.

THE REFEREE FOUND THAT CLAIMANT HAS SUFFERED IMPAIRMENT IN HIS RIGHT FOREARM WHICH, ACCORDING TO DR. TEAL, LIMITED HIS ABILITY TO DO HEAVY MANUAL WORK - HOWEVER, BECAUSE THIS WAS A SCHEDULED INJURY RATHER THAN AN UNSCHEDULED INJURY, A LOSS OF EARNING CAPACITY CANNOT BE CONSIDERED. THE CRITERION FOR DETERMINING INJURY TO A SCHEDULED MEMBER IS LOSS OF PHYSICAL FUNCTION.

THE REFEREE CONCLUDED THAT CLAIMANT HAD SUFFERED MORE LOSS OF FUNCTION THAN 5 PER CENT AND INCREASED THE AWARD TO 10 PER CENT OF THE RIGHT FOREARM.

CLAIMANT HAD REQUESTED PENALTIES FOR THE USE OF SIGHT DRAFTS FOR THE PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION AS RECITED IN THE FIRST DETERMINATION ORDER. THE REFEREE FOUND THAT THE REQUEST FOR HEARING HAD BEEN FILED ON MAY 19, 1975, MORE THAN A YEAR FROM THE MAILING DATE OF SAID DETERMINATION ORDER, THEREFORE, ALTHOUGH THE CLAIM WAS REOPENED AND ANOTHER DETERMINATION ORDER MADE ON FEBRUARY 10, 1975, THE REOPENING OF THE CLAIM MERELY SUSPENDED THE OBLIGATION TO PAY PERMANENT PARTIAL DISABILITY UNTIL THE CLAIM WAS AGAIN EVALUATED AND DID NOT SET ASIDE THE ORIGINAL DETERMINATION ORDER.

THE REFEREE CONCLUDED THAT THE REOPENING OF THE CLAIM WITHIN THE FIRST YEAR MERELY PRECLUDED CONSIDERATION OF THE ISSUE OF PERMANENT DISABILITY AND DID NOT REVIVE THE ISSUE OF PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION AWARDED BY THE DETERMINATION ORDER OF FEBRUARY 21, 1974. THE REFEREE ALLOWED PENALTIES ONLY WITH RESPECT TO THE PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION BY SIGHT DRAFTS FOR THE PERIOD SET FORTH IN THE SECOND DETERMINATION ORDER, AND APPROVED THE AWARD OF 150 DOLLARS FOR CLAIMANT'S ATTORNEY PURSUANT TO THE STIPULATION AND ALSO APPROVED THE PAYMENT TO CLAIMANT'S ATTORNEY OF 25 PER CENT OF THE INCREASED COMPENSATION, EXCLUDING THE ADDITIONAL COMPENSATION FOR THE PENALTY, PAYABLE OUT OF SAID INCREASED COMPENSATION AS PAID.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED AUGUST 28, 1975 IS AFFIRMED.

WCB CASE NO. 75-2276-B APRIL 9, 1976
WCB CASE NO. 75-2277-B

ROBERT NEELEY, CLAIMANT

SPICER AND TAYLOR, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO IT FOR ACCEPTANCE PURSUANT TO ORS 656.268 AND DIRECTING IT TO REPAY TO EMPLOYERS INSURANCE OF WAUSAU SUCH SUMS AS HAVE BEEN ADVANCED BY WAUSAU PURSUANT TO THE ORDER DESIGNATING THE PAYING AGENT ISSUED JUNE 4, 1975.

THE ISSUE BEFORE THE BOARD IS SOLELY WHICH CARRIER IS RESPONSIBLE FOR CLAIMANT'S PRESENT CONDITION.

CLAIMANT SUSTAINED A SHOULDER INJURY ON MARCH 30, 1972 DIAGNOSED AS A DISLOCATED RIGHT SHOULDER, 'POSSIBLY PERMANENT AS THE SHOULDER HAD BEEN TORN VIOLENTLY FROM THE SOCKET'. CLAIMANT RETURNED TO WORK WITHIN A FEW DAYS AND ALSO RETURNED TO THE FUND THE CHECK HE HAD RECEIVED FROM IT FOR COMPENSATION BECAUSE HE FELT IT WAS AN OVERPAYMENT.

CLAIMANT'S RETURN TO WORK WAS COMMENTED UPON BY DR. CAUGHRAN WHO STATED 'REDISLOCATION QUITE EASILY AND SHOULD HAVE BEARING ON CLOSURE OF CLAIM'. NUMEROUS ATTEMPTS WERE MADE TO GET A CLOSING EVALUATION OF CLAIMANT'S DISABILITY BUT CLAIMANT WAS NOT COOPERATIVE - HE APPEARED TO BE GETTING ALONG WITHOUT ANY DIFFICULTY AND CONTINUED WORKING. CLAIMANT WAS ADVISED BY THE BOARD THAT A CLAIM CLOSURE HAD BEEN REQUESTED AND IF CLAIMANT WAS STILL RECEIVING TREATMENTS HE SHOULD IMMEDIATELY INFORM THE FUND. CLAIMANT FAILED TO RESPOND AND, ON NOVEMBER 9, 1972, A DETERMINATION ORDER AWARDED CLAIMANT SOME TIME LOSS BUT NO PERMANENT PARTIAL DISABILITY COMPENSATION.

BETWEEN AUGUST 1972 AND NOVEMBER 1, 1974, CLAIMANT'S SHOULDER WENT OUT ON TWO OCCASIONS. ONCE IN APRIL 1974, WHEN DISLOCATION REQUIRED TREATMENT IN THE HOSPITAL AND AGAIN IN SEPTEMBER OR OCTOBER 1974, WHEN THE SHOULDER SPONTANEOUSLY SNAPPED BACK IN THE PROPER POSITION.

ON NOVEMBER 1, 1974 WHILE CLAIMANT WAS CLIMBING UP ONTO A PRESS DURING THE COURSE OF HIS EMPLOYMENT HE RAISED HIS RIGHT ARM TO GRASP THE HORIZONTAL BAR PREPARATORY TO CLIMB. CLAIMANT ALLEGED THERE WAS NO GREAT STRESS ON HIS ARM AS HIS FOOT WAS SUPPORTING THE BULK OF HIS WEIGHT BUT THERE WAS SOME PULLING ON HIS SHOULDER AND AGAIN IT WAS DISLOCATED, CAUSING CLAIMANT TO SEEK MEDICAL ATTENTION. AT THAT TIME CLAIMANT WAS ADVISED SURGERY WAS NECESSARY TO CORRECT THE CONDITION. THIS SURGERY WAS DONE ON DECEMBER 20, 1974 AND CLAIMANT RETURNED TO WORK ON JANUARY 28, 1975.

ON MARCH 14, 1975 CLAIMANT WROTE TO THE BOARD GIVING IT A HISTORY OF THE EVENTS TO DATE, STATING THAT, AS OF THAT TIME, HE HAD RECEIVED NO DISABILITY BENEFITS - THE FUND HAD ADVISED HIM THAT WAUSAU SHOULD PAY AS IT HAD TAKEN OVER THE WORKMEN'S COMPENSATION COVERAGE FOR THE MILL ON JULY, 1972 BUT, AFTER TALKING TO ONE OF THE PERSONNEL OF WAUSAU, HE HAD BEEN INFORMED THAT THE FUND WAS RESPONSIBLE. AS A RESULT OF CLAIMANT'S LETTER AN ORDER DESIGNATING THE PAYING AGENCY UNDER THE PROVISIONS OF ORS 656.307 WAS ISSUED ON JUNE 4, 1975.

BASED UPON THE MEDICAL EVIDENCE, THE REFEREE CONCLUDED THAT CLAIMANT'S PRESENT CONDITION WAS AN AGGRAVATION RATHER THAN A NEW INJURY. HE RELIED UPON THE EARLY STATEMENTS MADE BY DR. CAUGHRAN THAT 'THE SHOULDER HAD BEEN TORN VIOLENTLY FROM THE SOCKET' AND THAT 'REDISLOCATION QUITE EASILY AND SHOULD HAVE A BEARING ON THE CLOSURE OF THE CLAIM'. THE REFEREE FOUND THE INCIDENTS OF APRIL AND OCTOBER 1974 WERE AGGRAVATIONS. AFTER CLAIMANT HAD BEEN EXAMINED BY DR. CORSON, AN ORTHOPEDIC SURGEON, IT WAS DETERMINED THAT SURGERY WAS NECESSARY TO CORRECT THESE RECURRENT DISLOCATIONS AND DR. CORSON'S LETTER, DATED NOVEMBER 18, 1974 INDICATES A CONTINUOUS SEQUENCE OF EVENTS TO CLAIMANT'S SHOULDER COMMENCING IN MARCH 1972. DR. CORSON'S UNEQUIVOCAL OPINION WAS THAT THE SHOULDER SEPARATIONS WHICH OCCURRED IN OCTOBER 1974 AND THE SUBSEQUENT SURGERY WERE RELATED TO THE INDUSTRIAL INJURY OF MARCH 1972.

THE REFEREE FOUND THE TESTIMONY OF CLAIMANT TO BE CREDIBLE. CLAIMANT TESTIFIED THAT HIS SHOULDER HAD GIVEN HIM CONSTANT AND CONTINUOUS PAIN AND DISCOMFORT SINCE MARCH 1972 AND UNTIL THE CORRECTIVE SURGERY IN DECEMBER 1974, ALTHOUGH HE WAS ABLE TO, AND DID WORK DURING THAT ENTIRE PERIOD. CLAIMANT TESTIFIED THAT HE BELIEVED THAT HE HAD ONLY SUSTAINED ONE INJURY, I.E. THE INJURY OF MARCH 30, 1972, HOWEVER, HE HAD FILED A CLAIM FOR THAT NOVEMBER 1, 1974 INCIDENT TO PROTECT HIS INTEREST IN THE EVENT THE AGGRAVATION CLAIM WAS DENIED.

THE REFEREE CONCLUDED THAT THE REPORT OF DR. NIKSCH, DATED NOVEMBER 18, 1974, WAS, BY ITSELF, SUFFICIENT TO JUSTIFY A REOPENING BY THE FUND FOR AGGRAVATION AND, THEREAFTER, THE FUND HAD RECEIVED REPORTS FROM DR. CORSON WHICH SUPPORTED DR. NIKSCH'S OPINION. FURTHERMORE, WAUSAU HAD FORWARDED DR. CORSON'S REPORTS TO THE FUND AND REQUESTED IT TO ASSUME THE CASE VOLUNTARILY AND ELIMINATE THE NEED FOR HEARING. THE FUND AT ONE TIME WAS READY TO DO THIS BUT IT LATER CHANGED ITS MIND AND RESTATED ITS DENIAL. BECAUSE OF THIS THE REFEREE FOUND THE CONDUCT OF THE FUND WAS ARBITRARY AND UNREASONABLE AND JUSTIFIED PAYMENT BY THE FUND OF CLAIMANT'S ATTORNEY'S FEE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE OPINION AND ORDER OF THE REFEREE. THE FUND HAS RELIED, IN PART, ON A CITATION FROM LARSON (UNDERSCORED) SEC. 93.12 WHICH STATES, IN PART,

> 'IF THE SECOND INCIDENT CONTRIBUTES INDEPENDENTLY TO THE INJURY, THE SECOND INSURER IS SOLELY LIABLE EVEN IF THE INJURY WOULD HAVE BEEN MUCH LESS SEVERE IN THE ABSENCE OF THE PRIOR CONDITION...'

THE BOARD FINDS THAT IN THIS CASE THE SECOND INCIDENT DID NOT CONTRIBUTE INDEPENDENTLY (UNDERSCORED) TO THE INJURY - IT IS OBVIOUS FROM THE MEDICAL REPORTS THAT THE CONDITION WHICH REQUIRED THE SURGERY IN 1974 WAS A CONTINUING UNINTERRUPTED SERIES OF AGGRAVATIONS OF A 1972 INJURY.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 1, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 250 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 73-2690 APRIL 9, 1976

MARY SCHNEIDER, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
GEARIN, CHENEY, LANDIS, AEBI AND KELLEY,
DEFENSE ATTYS.
AMENDED ORDER

THE BOARD'S ORDER ON REMAND IN THE ABOVE ENTITLED MATTER WAS INCORRECTLY DATED APRIL 7, 1975.

THE SOLE PURPOSE OF THIS ORDER IS TO CORRECT THE RECORD AND CONFIRM THE CORRECT MAILING DATE TO BE APRIL 7, 1976.

WCB CASE NO. 74-4067 APRIL 12, 1976

LOUIS P. GRECCO, CLAIMANT

DUNCAN AND WALTER, CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH APPROVED CLAIMANT'S CLOSURE ON A 'MEDICAL ONLY' BASIS, HAVING FOUND NO EVIDENCE OF PERMANENT DISABILITY.

CLAIMANT, WHO AT THE TIME OF HEARING WAS 76 YEARS OLD, SUSTAINED A COMPENSABLE INJURY TO HIS BACK ON JANUARY 6, 1974 WHILE EMPLOYED AS AN APARTMENT MANAGER. THE CARRIER TREATED THE CLAIM AS A 'MEDICAL ONLY', I.E. ONE WHICH INVOLVES NEITHER TEMPORARY NOR PERMANENT DISABILITY. CLAIMANT CONTENDS HE HAS SOME PERMANENT PARTIAL DISABILITY.

CLAIMANT WAS TREATED BY DR. CHUINARD, AN ORTHOPEDIST, WHO HAD BEEN TREATING CLAIMANT FOR OTHER CONDITIONS SINCE 1943. FOR THE JANUARY 6, 1974 INJURY HE TREATED CLAIMANT WITH NOVOCAIN INJECTIONS, PHYSIOTHERAPY TREATMENTS EXTENDING OVER A PERIOD OF ABOUT A YEAR AND PRESCRIBED PAIN PILLS. IN HIS REPORTS DR. CHUINARD INDICATES CLAIMANT HAS A CONTINUING PROBLEM WITH HIS CHRONIC ARTHRITIS BUT HAS NO PERMANENT DISABILITY RESULTING FROM THE INDUSTRIAL INJURY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 1, 1975 IS AFFIRMED.

WCB CASE NO. 75-3751 APRIL 12, 1976

JOYCE ROLER, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED AUGUST 28, 1975 AWARDING CLAIMANT COMPENSATION FOR TEMPORARY TOTAL DISABILITY INCLUSIVE FROM AUGUST 20, 1974 THROUGH AUGUST 4, 1975, LESS TIME WORKED.

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HER BACK ON AUGUST 19, 1974 WHICH WAS DIAGNOSED AS A STRAIN, CHRONIC, PARAVERTEBRAL MUSCLES, LEFT INFRASCAPULAR AREA. THERE WAS NO OBJECTIVE EVIDENCE OF NERVE ROOT COMPRESSION OR IRRITATION WHEN CLAIMANT WAS EXAMINED BY DR. VAN OSDEL ON FEBRUARY 12, 1975.

CLAIMANT TESTIFIED THAT AFTER HER INJURY SHE WORKED FOR A SHORT PERIOD OF TIME AND THEN ADVISED HER EMPLOYER THAT SHE WAS UNABLE TO WORK BECAUSE OF HER PAIN AND THE DIFFICULTY IN HER BACK AND SHOULDER AREAS. CLAIMANT'S IMMEDIATE SUPERVISOR STATED THAT THE EMPLOYER WAS AWARE OF THE COMPENSABLE INJURY BUT THAT HE DID NOT NOTICE THAT CLAIMANT WAS HAVING DIFFICULTY WITH HER WORK, SHE HAD ADVISED HIM SHE WAS QUITTING FOR THE PURPOSE OF STAYING HOME TO CARE FOR HER DAUGHTER.

CLAIMANT HAS BEEN TREATED AND-OR EXAMINED BY SEVERAL ORTHOPEDIC PHYSICIANS AND HAS BEEN EXAMINED BY THE DOCTORS AT THE DISABILITY PREVENTION DIVISION - THE EXAMINATIONS REVEAL VERY LITTLE. ON MAY 29, 1975 CLAIMANT WAS EXAMINED BY DR. JONES, AN ORTHOPEDIC SURGEON AND DR. PAXTON, A NEUROSURGEON, BOTH MEMBERS OF THE ORTHOPAEDIC CLINIC. THEY RECOMMENDED THAT THE CLAIM NOT BE CLOSED AT THAT TIME EVEN THOUGH THERE WAS NO EVIDENCE, FROM AN ORTHOPEDIC OR NEUROLOGIC STANDPOINT, OF ANY OBJECTIVE DISABILITY. THEY FELT CLAIMANT WAS IN A PERIOD OF EMOTIONAL STRESS (AT THE TIME OF THE EXAMINATION CLAIMANT WAS INVOLVED IN A DIVORCE FROM HER SECOND HUSBAND AND WAS UPSET WITH THE LEGAL PROCEEDINGS). THEY SUGGESTED A PSYCHIATRIC EVALUATION.

ON JULY 18, 1975 CLAIMANT WAS EXAMINED BY DR. PARVARESH, A PSYCHIATRIST, WHO EXPRESSED HIS CLINICAL OPINION THAT CLAIMANT DISPLAYED SYMPTOMS OF CHRONIC PSYCHONEUROTIC DISORDER BASED PRIMARILY UPON HER LIFE HISTORY, PREVIOUS LEVEL OF TENSION AND MARITAL DISCORD. HE DID NOT BELIEVE THAT HER BACK SPRAIN COULD HAVE AGGRAVATED HER CURRENT NERVOUS TENSION. FROM A PSYCHIATRIC STANDPOINT, DR. PARVARESH DID NOT FIND A SUFFICIENT DEGREE OF IMPAIRMENT WHICH WOULD PREVENT CLAIMANT FROM WORKING AT JOBS FOR WHICH SHE IS TRAINED. IF CLAIMANT WAS CLEARED, ORTHOPEDICALLY, SHE SHOULD BE ABLE TO RETURN TO WORK - HE FELT THAT HER PSYCHIATRIC CONDITION COULD BE CONSIDERED FIXED AND NOT IN NEED OF TREATMENT.

THE REFEREE FOUND THAT CLAIMANT'S TREATING PHYSICIANS WERE IN ACCORDANCE WITH THE FINDINGS OF THE ORTHOPAEDIC CONSULTANTS AND THAT THE FINDINGS OF BOTH THE PSYCHIATRIST AND PSYCHOLOGIST INDICATE THAT CLAIMANT HAS HAD LONGSTANDING EMOTIONAL DIFFICULTIES ARISING FROM FAMILY RELATIONSHIPS AND NOT CONNECTED WITH HER INDUSTRIAL INJURY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE BUT NOTES THAT THE REFEREE ERRONEOUSLY REFERS TO THE DATE OF THE DETERMINATION ORDER AS AUGUST 28, 1974 RATHER THAN AUGUST 28, 1975.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 24, 1975 IS AFFIRMED WITH A NOTATION THAT THE DETERMINATION ORDER WHICH HIS ORDER AFFIRMED WAS MAILED ON AUGUST 28, 1975.

WCB CASE NO. 75-3672 APRIL 12, 1976

EDWIN N. DAYTON, CLAIMANT

KEITH D. SKELTON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO IT FOR THE PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION FROM APRIL 10, 1974 THROUGH AUGUST 28, 1975, ALLOWING CREDITS FOR COMPENSATION FOR TEMPORARY TOTAL DISABILITY PREVIOUSLY PAID DURING THAT TIME AND DIRECTED THE FUND TO PAY CLAIMANT'S ATTORNEY A FEE OF 500 DOLLARS. THE ONLY ISSUE BEFORE THE BOARD IS THE 500 DOLLAR ATTORNEY FEE. THE FUND CONTENDS THERE IS NO STATUTORY BASIS THEREFOR AND THAT IF, IN FACT, TEMPORARY TOTAL DISABILITY PAYMENTS WERE DELAYED, SUCH DELAY WAS THE FAULT OF CLAIMANT'S COUNSEL NOT THE FUND.

CLAIMANT, A 32 YEAR OLD HOD CARRIER, SUSTAINED A COMPENSABLE INJURY ON MARCH 18, 1974. HE CONSULTED DR. MCGEE, AN OSTEOPATHIC PHYSICIAN, ON THE SAME DAY AND HIS INJURY WAS DIAGNOSED AS A LUMBOSACRAL STRAIN WITH OSTEOPATHIC SUBLUXATIONS OF THE LUMBAR, DORSAL AND CERVICAL AREAS. ON MARCH 22 CLAIMANT FILED HIS CLAIM WHICH WAS ACCEPTED AND PROCESSED BY THE FUND. THE CLAIM WAS CLOSED BY DETERMINATION ORDER, MAILED OCTOBER 23, 1975, WHEREBY CLAIMANT WAS AWARDED COMPENSATION FOR TEMPORARY TOTAL DISABILITY INCLUSIVE FROM NOVEMBER 14, 1974 THROUGH AUGUST 28, 1975 AND 48 DEGREES FOR 15 PER CENT UNSCHEDULED LOW BACK DISABILITY.

THE FIRST PAYMENT OF COMPENSATION FOR TEMPORARY TOTAL DISABILITY WAS MADE FOR THE PERIOD OCTOBER 14, 1974 THROUGH NOVEMBER 4, 1974, BASED UPON A MEDICAL REPORT FROM DR. GROTH RECEIVED BY THE FUND ON OCTOBER 18, 1974.

CLAIMANT TESTIFIED THAT HE HAD HAD TO DISCONTINUE WORKING BECAUSE OF HIS SEVERE PAIN. AN INVESTIGATIVE REPORT CONTAINED A STATEMENT FROM THE EMPLOYER THAT CLAIMANT WAS LAID OFF ON MARCH 22, 1974 BECAUSE OF LACK OF WORK - ALSO, CLAIMANT'S STATEMENT THAT HE WAS UNABLE TO WORK BECAUSE OF HIS BACK PAIN. MEDICAL SUBSTANTIATION OF CLAIMANT'S STATEMENT WAS GIVEN IN DR. SCOURFIELD'S REPORT OF AUGUST 7, 1975 WHICH STATED THAT HE HAD FIRST SEEN CLAIMANT ON APRIL 10, 1974 WITH A COMPLAINT OF A BACK SPRAIN, AND HAD TREATED CLAIMANT FROM THAT DATE UNTIL SEPTEMBER 23, 1974 WHEN CLAIMANT WAS REFERRED TO DR. BACHHUBER, AN ORTHOPEDIC PHYSICIAN, FOR FURTHER TREATMENT. DR. SCOURFIELD'S REPORT STATED HE WAS CERTAIN CLAIMANT WOULD NOT HAVE BEEN ABLE TO WORK AS A HOD CARRIER DURING THE PERIOD OF TIME HE WAS TREATING HIM.

THE REFEREE FOUND THAT DR. GROTH'S REPORT SHOWED THAT CLAIMANT WAS ENTITLED TO RECEIVE TEMPORARY TOTAL DISABILITY PAYMENTS AS OF OCTOBER 14, 1974 - HOWEVER, THE MEDICAL REPORT OF DR. SCOURFIELD DATED AUGUST 7, 1975 CLEARLY SUBSTANTIATES CLAIMANT'S CONTENTION

THAT HE WAS ENTITLED TO TEMPORARY TOTAL DISABILITY COMPENSATION PRIOR TO THAT DATE, NAMELY APRIL 10, 1974.

THE REFEREE CONCLUDED, CLAIMANT'S TEMPORARY TOTAL DISABILITY COMPENSATION SHOULD COMMENCE ON APRIL 10, 1974 AND EXTEND THROUGH AUGUST 28, 1975.

PENALTIES WERE REQUESTED, HOWEVER, THE REFEREE CONCLUDED UNDER THE CIRCUMSTANCES OF THIS CASE THAT THEY SHOULD NOT BE LEVIED BUT THAT CLAIMANT'S ATTORNEY WAS ENTITLED TO AN ATTORNEY'S FEE PAYABLE BY THE FUND.

THE FUND ARGUED THAT THE MEDICAL REPORT OF AUGUST 7, 1975 SHOULD HAVE BEEN SENT DIRECTLY TO THE FUND RATHER THAN TO THE ATTORNEY GENERAL'S OFFICE. THE REFEREE CONCLUDED THAT THE CONTENTION OF THE FUND WAS, AT BEST, PLAUSIBLE BUT NOT GENUINE.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE REFEREE'S CONCLUSION THAT CLAIMANT IS ENTITLED TO COMPENSATION FOR TEMPORARY TOTAL DISABILITY COMMENCING APRIL 10, 1974 RATHER THAN NOVEMBER 14, 1974, BASED UPON THE MEDICAL REPORT OF DR. SCOURFIELD DATED AUGUST 7, 1975 - HOWEVER, THIS REPORT WAS NEVER MADE AVAILABLE TO THE EVALUATION DIVISION OF THE WORKMEN'S COMPENSATION BOARD, AND IT WAS NOT MADE AVAILABLE TO THE FUND, EITHER DIRECTLY OR THROUGH THE AGENCY OF ITS ATTORNEY, UNTIL IT WAS RECEIVED BY THE DEPARTMENT OF JUSTICE ON DECEMBER 10, 1975, ONLY 9 DAYS PRIOR TO THE HEARING.

THERE IS NO EVIDENCE TO CONTRADICT THE FUND'S STATEMENT THAT THIS MEDICAL EVIDENCE HAD BEEN IN THE POSSESSION OF CLAIMANT'S COUNSEL SINCE AUGUST 11, 1975.

UNDER THESE CIRCUMSTANCES, THE BOARD CONCLUDES THAT THE REFEREE IMPROPERLY AWARDED CLAIMANT'S COUNSEL AN ATTORNEY'S FEE PAYABLE BY THE FUND, THAT CLAIMANT'S COUNSEL SHOULD BE ALLOWED ATTORNEY'S FEE OF 25 PER CENT PAYABLE OUT OF THE INCREASED COMPENSATION GRANTED TO CLAIMANT.

ORDER

THE ORDER OF THE REFEREE DATED JANUARY 14, 1976 IS MODIFIED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE 25 PERCENT OF THE INCREASED COMPENSATION AWARDED CLAIMANT BY THE REFEREE'S OPINION AND ORDER, PAYABLE OUT OF SUCH COMPENSATION AS PAID, NOT TO EXCEED THE SUM OF 2,000 DOLLARS. THIS IS IN LIEU OF THE ATTORNEY'S FEE OF 500 DOLLARS AWARDED CLAIMANT'S COUNSEL BY THE REFEREE IN HIS OPINION AND ORDER OF JANUARY 14, 1976 WHICH, IN ALL OTHER RESPECTS, IS AFFIRMED.

WCB CASE NO. 74-2865 APRIL 12, 1976

RAY E. HAYES, CLAIMANT

EVOHL F. MALAGON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE STATE ACCIDENT INSURANCE FUND'S DENIAL OF CLAIMANT'S AGGRAVATION CLAIM.

CLAIMANT, A PAINTER AND CARPENTER, SUFFERED A COMPENSABLE INJURY ON MAY 10, 1968 WHEN HE FELL FROM A LADDER AND SUFFERED A COMPRESSION FRACTURE AT THE T7 LEVEL. HE WAS TREATED CONSERVATIVELY BY DR. BAILES AND DR. HOLBERT, THE LATTER FOUND CLAIMANT'S CONDITION WAS STATIONARY ON JUNE 23, 1969 AND THE CLAIM WAS CLOSED ON AUGUST 4, 1969 WITH AN AWARD OF 32 DEGREES FOR UNSCHEDULED DISABILITY.

IN APRIL 1970 CLAIMANT WAS SEEN BY DR. WEINMAN, AN ORTHOPEDIC PHYSICIAN, COMPLAINING OF CONSTANT BACK PAIN AND STIFFNESS IN HIS SHOULDERS, LEGS AND NECK AREAS. THE CLAIM WAS REOPENED AND, AFTER DR. WEINMAN REPORTED CLAIMANT'S CONDITION WAS STABLE ON SEPTEMBER 22, 1970, THE CLAIM WAS AGAIN CLOSED ON OCTOBER 15, 1970 WHEREIN CLAIMANT WAS AWARDED AN ADDITIONAL 32 DEGREES FOR UNSCHEDULED MID BACK DISABILITY. THIS WAS THE DATE OF THE LAST AWARD OF COMPENSATION.

CLAIMANT WAS RECHECKED BY DR. WEINMAN ON JULY 18, 1974, CLAIMANT WAS COMPLAINING OF UPPER AND LOWER BACK AND LEG CRAMPS ALTHOUGH HE TOLD DR. WEINMAN THAT HE FELT HIS CONDITION WAS ABOUT THE SAME AS IT HAD BEEN IN SEPTEMBER 1970. THE MEASUREMENTS TAKEN BY DR. WEINMAN WITH REGARD TO RANGE OF MOTION OF THE DORSOLUMBAR SPINE WERE REMARKABLY SIMILAR TO THE MEASUREMENTS TAKEN IN SEPTEMBER 1970. THE T7 COMPRESSION FRACTURE WAS HEALED AND STABLE BUT WAS CAUSING SOME THORACIC BACK PAIN. (IN 1972, WHEN CLAIMANT HAD BEEN EXAMINED BY DR. BAILES, X-RAY FILMS REVEALED SOME EVIDENCE OF BRIDGING ON THE ANTERIOR INFERIOR SURFACE OF T7 WITH THE ANTERIOR SUPERIOR SURFACE OF T8 AND THE DISC SPACE BETWEEN T6 AND T7 AND BETWEEN T7 AND T8 WERE NARROWED.) DR. WEINMAN FELT THAT ANY INCREASE IN CLAIMANT'S SUBJECTIVE COMPLAINTS RESULTED FROM AGING AND A SEVERE SOCIO-ECONOMIC PROBLEM, HE DID NOT FEEL THAT CLAIMANT SHOULD RETURN TO HIS FORMER JOB. DR. WEINMAN FELT CLAIMANT WOULD NEED A SEMI-SEDENTARY TYPE JOB, THAT HE HAD MODERATE LOSS OF FUNCTION TO THE THORACIC AND LUMBAR SPINE.

ON AUGUST 21, 1974 THE FUND DENIED CLAIMANT'S CLAIM FOR AGGRAVATION, STATING THAT THE CURRENT MEDICAL REPORTS INDICATE CLAIMANT'S CONDITION REMAINS ESSENTIALLY THE SAME AS WHEN HIS CLAIM WAS CLOSED.

ON FEBRUARY 11, 1975 DR. SAMUEL EXAMINED CLAIMANT AND REPORTED HIS FINDINGS WERE SUBSTANTIALLY THE SAME AS DR. WEINMAN'S, HOWEVER, HE REACHED DIFFERENT CONCLUSIONS. DR. SAMUEL'S OPINION WAS THAT CLAIMANT'S CONTINUED IMPAIRMENT AND INABILITY TO WORK WAS DIRECTLY ASSOCIATED WITH HIS WORK-RELATED INJURY OF MAY 10, 1968 AND THAT HAD HE NOT SUFFERED THAT SPINAL INJURY CLAIMANT WOULD BE ABLE TO WORK AT A GREATER NUMBER AND VARIETY OF TASKS. HE DID NOT FEEL THAT CLAIMANT'S AGE, WHICH WAS 59 YEARS, WAS, BY ITSELF, ENOUGH TO RENDER CLAIMANT INCAPABLE OF EARNING A SUBSTANTIAL LIVING. HE DID NOT FEEL THAT ANY PHYSIOTHERAPEUTIC MEASURES WERE INDICATED, THEY WOULD NOT BE RESTORATIVE IN NATURE OR PUT CLAIMANT IN A CONDITION WHEREBY HE COULD RETURN TO ACTIVE WORK STATUS NOR WAS HE CONVINCED THAT ANY MEDICAL OR SURGICAL APPROACH WOULD ACCOMPLISH THAT PURPOSE.

CLAIMANT HAS PERFORMED NO GAINFUL WORK FOR OTHER PARTIES SINCE 1968, HE CONTENDS THAT HIS MID BACK PAIN HAS, WITHIN THE LAST YEAR, SETTLED INTO HIS HIPS AND HAS BECOME WORSE THAN IT WAS IN 1970.

THE REFEREE FOUND THAT THE EVIDENCE AS A WHOLE DID NOT DEMONSTRATE A WORSENING SINCE THE CLAIM WAS LAST CLOSED ON OCTOBER 15, 1970. THE CLAIMANT RELIED UPON DR. SAMUEL'S REPORTS AS MEDICAL EVIDENCE OF AN AGGRAVATION, HOWEVER, THE REFEREE WAS MORE CONVINCED BY THE REPORTS FROM DR. WEINMAN THAT THERE HAD BEEN NO WORSENING OF CLAIMANT'S CONDITION SINCE SEPTEMBER 22, 1970, WHEN HE MADE A CLOSING EVALUATION OF CLAIMANT PRIOR TO THE DETERMINATION ORDER OF OCTOBER 15, 1970.

THE REFEREE FOUND THAT DR. SAMUEL WAS CLAIMANT'S TREATING DOCTOR FOR A BRIEF PERIOD OF TIME AFTER THE INDUSTRIAL INJURY OF 1968 AND BEFORE HE CAME UNDER THE CARE OF DR. BAILES BUT DID NOT SEE CLAIMANT AGAIN UNTIL FEBRUARY 11, 1975 AT WHICH TIME HE HAD BEEN FURNISHED A COPY OF DR. WEINMAN'S REPORT OF JULY 18, 1974. THE REFEREE CONCLUDED THAT, AS A TREATING CHIROPRACTOR, DR. SAMUEL WAS QUALIFIED TO EXPRESS AN OPINION WITH RESPECT TO 'AN INCREASE IN TOTAL IMPAIRMENT RESULTING FROM THE INJURY', HOWEVER HIS OPINION, LIKE ANY MEDICAL OPINION, MUST BE GIVEN ONLY THE WEIGHT IT IS ENTITLED TO BASED UPON THE DOCTOR'S ABILITY TO DRAW THAT CONCLUSION. THE REFEREE BELIEVED THAT DR. WEINMAN WAS IN A BETTER POSITION TO KNOW ALL OF THE FACTS CONCERNING CLAIMANT'S MEDICAL HISTORY THAN DR. SAMUEL, THEREFORE, HIS OPINION WAS ENTITLED TO GREATER WEIGHT.

THERE IS NOTHING CONTAINED IN DR. WEINMAN'S REPORT OF JULY 1974 TO INDICATE THAT CLAIMANT'S CONDITION WAS ANY DIFFERENT THAN IT WAS IN SEPTEMBER 1970. THE REFEREE CONCLUDED THAT CLAIMANT HAD FAILED TO SHOW A WORSENING OF HIS CONDITION AND THAT THE DENIAL OF HIS CLAIM FOR AGGRAVATION SHOULD BE AFFIRMED.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE. THERE IS NOTHING IN DR. SAMUEL'S REPORT OF MARCH 28, 1975 TO INDICATE THAT CLAIMANT'S CONDITION AT THE PRESENT TIME IS WORSE THAN IT WAS WHEN HIS CLAIM WAS LAST CLOSED ON OCTOBER 15, 1970. BASED ON HIS EXAMINATION OF CLAIMANT, DR. SAMUEL MAKES THE SAME FINDINGS AS THOSE MADE BY DR. WEINMAN ON JULY 18, 1974. ALL DR. SAMUEL'S REPORT INDICATES IS THAT CLAIMANT'S PRESENT CONDITION IS DIRECTLY ASSOCIATED WITH HIS MAY 10, 1968 INJURY AND THERE IS NO DISPUTE ON THAT ISSUE.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 7, 1975 IS AFFIRMED.

WCB CASE NO. 75-3029 APRIL 13, 1976

EARL A. VAN DUSEN, CLAIMANT

MORLEY, THOMAS, ORONA AND KINGSLEY,
CLAIMANT'S ATTYS.
KEITH D. SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT PERMANENT TOTAL DISABILITY BENEFITS FROM AND AFTER THE LAST DAY HE PERFORMED WORK FOR THE EMPLOYER IN THE FALL OF 1975, ALLOWING PERMANENT PARTIAL DISABILITY BENEFITS PAID TO CLAIMANT SUBSEQUENT TO THAT DATE TO OFFSET LIABILITY FOR PERMANENT TOTAL DISABILITY BENEFITS OTHERWISE PAYABLE FOR THE CORRESPONDING PERIOD.

ON MAY 16, 1970 CLAIMANT, THEN A 56 YEAR OLD MECHANIC, SUSTAINED AN INJURY TO HIS LEFT ANKLE WHICH WAS CRUSHED BETWEEN THE TONG OF A LIFT TRUCK AND THE SIDE OF THE SCOOTER HE WAS OPERATING. DR. ROCKEY DIAGNOSED A COMMINUTED DISTORTED FRACTURE OF THE DISTAL TIBIA AND FIBULA WITH LOSS OF CIRCULATION AND SENSATION IN THE FOOT.

DURING THE FOLLOWING FIVE YEARS CLAIMANT RECEIVED VERY EXTENSIVE MEDICAL ATTENTION, INCLUDING AMPUTATION OF HIS LEFT LEG SOME TEN INCHES BELOW THE KNEE. CLAIMANT HAS HAD NUMEROUS SKIN GRAFTING PROCEDURES, INCLUDING A PROCEDURE IN WHICH A CROSS-LEGGED CAST WAS APPLIED

TO THE TWO LEGS TO PERMIT TRANSFERENCE OF VITAL TISSUE FROM THE RIGHT CALF TO THE LEFT LEG. ULTIMATELY, OSTEOMYELITIS, NECROSIS OF TISSUE AND THE ONSET OF GANGRENE NECESSITATED AMPUTATION IN JUNE OF 1972 OF THE LEFT LEG.

AFTER THE AMPUTATION THE STUMP HAS HAD TO BE CORRECTED ON SEVERAL OCCASIONS AND THE PROSTHESIS WHICH CLAIMANT WEARS CONTINUOUSLY EXCEPT AT NIGHT HAS BEEN FREQUENTLY MODIFIED IN AN ATTEMPT TO GIVE CLAIMANT SOME ALLEVIATION FROM PAIN AND ALSO BETTER MOBILITY.

THE CLAIMANT HAS A LOSS OF SENSATION IN THE KNEE JOINT AFTER PROLONGED SITTING AND HE IS UNABLE TO CONTROL THE LEG UNTIL, BY MANIPULATION, HE RESTORES CIRCULATION — THEN HE IS ABLE TO WALK PERHAPS 200 FEET BEFORE HE AGAIN BEGINS TO LOSE CONTROL.

IN 1973 CLAIMANT ATTEMPTED TO RETURN TO WORK ON A LIGHT-DUTY PART-TIME BASIS BUT THIS ACTIVITY EXACERBATED THE LEG CONDITION AND REQUIRED ADDITIONAL SURGICAL MODIFICATION OF THE STUMP.

IN SEPTEMBER, 1975 HE AGAIN ATTEMPTED TO WORK AT A JOB PROVIDED BY THE EMPLOYER WHICH INCORPORATED ONLY DUTIES CONSIDERED TO BE COMPATIBLE WITH CLAIMANT'S PHYSICAL LIMITATIONS, HOWEVER, BECAUSE OF ADVERSE PHYSICAL RESPONSE, CLAIMANT HAD TO QUIT WORK IN THE LATTER PART OF SEPTEMBER 1975 AND HAS NOT RETURNED TO WORK SINCE THAT DATE.

CLAIMANT COMPLAINED OF A BURNING SENSATION ACROSS THE FOREHEAD DURING THE FIRST FEW WEEKS FOLLOWING HIS INJURY AND, THEREAFTER, HAS HAD A CONTINUING SENSATION OF HUMMING OR HISSING BEHIND THE FOREHEAD UP INTO HIS SKULL, WHICH ACCORDING TO DR. SHORT, AN ORTHOPEDIST, IS A RESULT OF CLAIMANT'S INJURY ALTHOUGH THE EXACT CAUSE FOR IT WAS UNKNOWN. NEUROLOGICAL EVALUATIONS, HOWEVER, HAVE NOT TRACED THIS CONDITION TO THE INDUSTRIAL INJURY — IT IS SUGGESTED THAT IT MIGHT BE OF A FUNCTIONAL ORIGIN.

THE JOB TO WHICH CLAIMANT RETURNED IN 1975 CONSISTED OF SEVERAL DUTIES ORGANIZED BY THE EMPLOYER INTO A CLASSIFICATION SPECIFICALLY DESIGNED TO CONFORM TO CLAIMANT'S LIMITED ABILITY. CLAIMANT TESTIFIED HE HAD TO QUIT THIS JOB BECAUSE WHEN HE WAS PERFORMING BENCH WORK HE COULD NOT FACE THE BENCH SINCE HE HAD TO EXTEND HIS AMPUTATED LEG OUTWARD PARALLEL TO THE BENCH ITSELF WHICH REQUIRED CLAIMANT TO TWIST HIS TORSO TO FACE THE WORK HE WAS PERFORMING AND THIS RESULTED IN MUSCLE SPASM IN THE BACK OF SUCH SEVERITY THAT HE COULD NOT CONTINUE.

CLAIMANT'S SUPERVISOR TESTIFIED CLAIMANT HAD BEEN AN OUTSTANDING WORKMAN WILLING AND ABLE TO PERFORM ANY TASK BEFORE HIS INJURY. CLAIMANT HAS COMPILED A REMARKABLY STABLE AND RESPONSIBLE WORK RECORD HAVING SPENT 28 YEARS WITH THIS EMPLOYER. HE COMPLETED THE 7TH GRADE IN MINNESOTA BEFORE DROPPING OUT OF SCHOOL.

SINCE THE LATTER PART OF 1973 CLAIMANT HAS BEEN UNDER THE CARE OF DR. SHORT WHO, ON JUNE 5, 1975, FELT THAT CLAIMANT'S CONDITION WAS STATIONARY AND THAT HIS CLAIM SHOULD BE CLOSED ALTHOUGH CLAIMANT WOULD HAVE TO GO BACK FOR LIMB ADJUSTMENTS OR REPLACEMENT OF HIS PROSTHESIS. AT THAT TIME, DR. SHORT WAS NOT SURE WHETHER CLAIMANT COULD RETURN TO HIS FORMER OCCUPATION WITH SUCH LIMITATIONS AS HE HAD ALTHOUGH HE WOULD LIKE TO SEE HIM TRY TO. HE DID NOT FEEL CLAIMANT WAS A CANDIDATE FOR RETRAINING BUT WAS A CANDIDATE FOR JOB PLACEMENT ASSISTANCE. ON JUNE 10, 1975 A DETERMINATION ORDER WAS MAILED WHEREBY CLAIMANT WAS AWARDED 75 PER CENT LOSS FUNCTION OF THE LEFT LEG AND 7.5 PER CENT LOSS FUNCTION OF THE RIGHT LEG.

ON OCTOBER 14, DR. SHORT REPORTED THAT CLAIMANT HAD ATTEMPTED TO RETURN TO WORK FOR THE EMPLOYER BUT HAD QUIT PRIOR TO OCTOBER 1,

1975, THE DATE DR. SHORT LAST EXAMINED CLAIMANT. DR. SHORT'S OPINION WAS THAT CLAIMANT'S CONDITION COULD NOT BE IMPROVED ENOUGH FOR HIM TO WORK STEADILY AND HE ADVISED CLAIMANT THAT HE SHOULD GIVE UP THE IDEA OF TRYING TO RETURN TO WORK AND RETIRE.

IN NOVEMBER 1974, DR. NORMAN W. HICKMAN, CLINICAL PSYCHOLOGIST, EVALUATED CLAIMANT PSYCHOLOGICALLY. DR. HICKMAN FELT CLAIMANT WOULD STILL BE WORKING EXCEPT FOR HIS INDUSTRIAL ACCIDENT, THAT HE HAD STRONG VOCATIONAL INTERESTS SUGGESTING A CONTINUING HOPE THAT HE COULD RETURN TO WORK AND SOME VERY EXCELLENT APTITUDES TO SUPPORT THESE INTERESTS. HE DIAGNOSED MODERATELY SEVERE PSYCHO-PHYSIOLOGICAL REACTION WITH ANXIETY, DEPRESSION AND EXTREME PREOCCUPATION WITH PHYSICAL AND EMOTIONAL COMPLAINTS - THE PSYCHOPATHOLOGY WAS LARGELY ATTRIBUTABLE TO THE INDUSTRIAL INJURY AND THE MANY SUBSEQUENT SURGERIES AS WELL AS CLAIMANT'S TOTAL PREDICAMENT. THE PROGNOSIS FOR RESTORATION AND REHABILITATION OF CLAIMANT IS VERY POOR, ALTHOUGH CLAIMANT HAS A VERY STABLE RESPONSIBLE WORK RECORD, NOW HE IS FEARFUL THAT HE MIGHT NOT BE ABLE TO WORK OR, IF HE WAS EMPLOYED, IT WOULD ONLY BE FOR A SHORT PERIOD BEFORE HE WAS DISMISSED.

THE REFEREE RELIED SUBSTANTIALLY ON THE PSYCHOLOGICAL EVALUATION MADE BY DR. HICKMAN AND THE TESTIMONY OF CLAIMANT AND HIS WIFE ALL OF WHICH INDICATED A BASIC MOTIVATION ON THE PART OF CLAIMANT TO RETURN TO WORK AND AN EXACERBATION OF HIS PSYCHOLOGICAL DIFFICULTIES CAUSED BY CLAIMANT FINDING HIMSELF INCAPABLE OF RETURNING TO WORK AT LEAST TO A LEVEL CONSISTENT WITH HIS OWN CONCEPTION OF HIS ABILITIES.

THE REFEREE FOUND THAT CLAIMANT'S DISABILITY EXTENDED BEYOND THE SCHEDULED AREA BECAUSE OF HIS SEVERE PSYCHOPATHOLOGY WHICH WAS CAUSALLY RELATED TO THE INDUSTRIAL INJURY AND ITS CONSEQUENCES - THAT CLAIMANT HAD SUFFERED BOTH SCHEDULED IMPAIRMENT OF HIS LEGS AND UNSCHEDULED PSYCHOLOGICAL IMPAIRMENT. PSYCHOLOGICAL IMPAIRMENT IS COMPENSABLE AS IS A PHYSICAL IMPAIRMENT, PATITUCCI V. BOISE CASCADE (UNDERSCORED), 8 OR APP 503.

THE REFEREE CITED MANSFIELD V. CAPLENER (UNDERSCORED), 10 OR APP 545, WHICH HELD THAT THE CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED FROM DOING ANY WORK, THAT SUCH PERMANENT TOTAL DISABILITY WAS NOT THE RESULT BY ITSELF OF THE DISABILITY OF HIS BACK NOR WAS IT THE RESULT BY ITSELF OF THE DISABILITY IN HIS LEG - RATHER, THE COMBINATION OF ALL THE PHYSICAL INJURIES AND CLAIMANT'S BASIC MENTAL INADEQUACIES PERMANENTLY INCAPACITATED CLAIMANT FROM REGULARLY PERFORMING ANY WORK AT A GAINFUL AND SUITABLE OCCUPATION. THE CASE AT HAND IS FACTUALLY SIMILAR, THIS CLAIMANT IS SO INJURED THAT HE CANNOT PERFORM SERVICES OTHER THAN GOALS SO LIMITED IN QUALITY, DEPENDABILITY OR QUANTITY THAT A REASONABLY STABLE MARKET FOR THEM DOES NOT EXIST. THEREFORE, CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED FROM OBTAINING AND RETAINING EMPLOYMENT IN THE GENERAL INDUSTRIAL LABOR MARKET.

THE REFEREE FOUND THAT THE EMPLOYER HAD MADE A CONSCIENTIOUS AND BONA FIDE EFFORT TO ORGANIZE WORK FUNCTIONS INTO A JOB WHICH CLAIMANT COULD DO WITH HIS LIMITED PHYSICAL ABILITY AND THAT CLAIMANT HAD A STRONG MOTIVATION TO RETURN TO WORK. HE CONCLUDED THE POSSIBILITY THAT CLAIMANT'S EMPLOYMENT STATUS MIGHT BE CHANGED BY A RENEWED OR ADDITIONAL EFFORT DID NOT WARRANT A CONCLUSION THAT, AT THE PRESENT TIME, CLAIMANT WAS SUFFERING A DISABILITY LESS THAN TOTAL PERMANENT DISABILITY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE ORDER OF THE REFEREE. THE BRIEF FILED ON BEHALF OF CLAIMANT WAS VERY COMPREHENSIVE ON ALL THE ISSUES AND EXTREMELY HELPFUL TO THE BOARD.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 12, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 500 DOLLARS, PAYABLE BY THE EMPLOYER.

SAIF CLAIM NO. NC 164188 APRIL 14, 1976

LEO V. JONES, CLAIMANT

OWN MOTION DETERMINATION

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS LOWER BACK ON JANUARY 6, 1969. A FIRST DETERMINATION ORDER, MAILED AUGUST 7, 1969, GAVE CLAIMANT SOME TIME LOSS BUT NO AWARD OF PERMANENT PARTIAL DISABILITY. A SECOND DETERMINATION ORDER, MAILED AUGUST 30, 1972, AWARDED CLAIMANT FURTHER TIME LOSS AND 64 DEGREES FOR 20 PER CENT UNSCHEDULED LOW BACK DISABILITY.

ON NOVEMBER 1, 1974 A MEDICAL REPORT WAS RECEIVED FROM DR. JAMES DEGGE INDICATING CLAIMANT'S CONDITION HAD DETERIORATED AND ADVISING THAT CLAIMANT BE PROVIDED A TWO LEVEL LOW BACK FUSION. THE SURGERY WAS PERFORMED ON NOVEMBER 12, 1974, THE FUSION IS NOW SOLID AND CLAIMANT HAS BEEN RELEASED TO RETURN TO WORK AS OF JANUARY 9, 1976.

ON FEBRUARY 4, 1976 THE STATE ACCIDENT INSURANCE FUND REQUESTED A DETERMINATION BASED UPON THE JANUARY 9, 1976 REPORT FROM DR. DEGGE. ON APRIL 13, 1976 THE EVALUATION DIVISION OF THE WORKMEN'S COMPENSATION BOARD RECOMMENDED CLAIMANT BE ALLOWED COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM NOVEMBER 1, 1974 THROUGH JANUARY 9, 1976 AND AWARDED AN ADDITIONAL 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY.

ORDER

CLAIMANT SHALL RECEIVE COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM NOVEMBER 1, 1974 THROUGH JANUARY 9, 1976 AND AN AWARD FOR PERMANENT PARTIAL DISABILITY OF 10 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR UNSCHEDULED LOW BACK DISABILITY EQUAL TO 32 DEGREES. THIS IS IN ADDITION TO AND NOT IN LIEU OF THE AWARDS RECEIVED BY CLAIMANT ON AUGUST 7, 1969 AND AUGUST 30, 1972.

WCB CASE NO. 75-2245E APRIL 14, 1976

CALVIN F. SUTTON, CLAIMANT

SAHLSTROM, LOMBARD, STARR AND VINSON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH GRANTED CLAIMANT AN AWARD OF COMPENSATION FOR PERMANENT TOTAL DISABILITY COMMENCING AUGUST 29, 1972 AND DIRECTED THE FUND TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE IN THE AMOUNT OF

300 DOLLARS, SAID FEE TO BE IN ADDITION TO ANY FEE AWARDED BY THE BOARD IN ITS OWN MOTION ORDER.

ON MAY 1, 1975 THE BOARD ENTERED ITS OWN MOTION ORDER AWARDING CLAIMANT COMPENSATION FOR PERMANENT TOTAL DISABILITY TO COMMENCE AUGUST 29, 1972. UNDER THE PROVISIONS OF ORS 656.278, THE STATE ACCIDENT INSURANCE FUND WAS GIVEN THE RIGHT TO REQUEST A HEARING WITHIN 30 DAYS FROM THE DATE OF THE OWN MOTION ORDER. A HEARING WAS REQUESTED WHICH RESULTED IN THE ENTRY OF THE ORDER OF WHICH THE STATE ACCIDENT INSURANCE FUND NOW REQUESTS BOARD REVIEW.

THE FUND CONTENDS THAT ALTHOUGH THE MEDICAL EVIDENCE INDICATES CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED HE WOULD HAVE BEEN SO EVEN WITHOUT THE WORK INJURY, DUE TO THE PROGRESSION OF THE NON-RELATED HIP CONDITION AND, THEREFORE, CLAIMANT HAD SUFFERED NO LOSS OF EARNING CAPACITY BECAUSE OF HIS INDUSTRIAL INJURY.

THE REFEREE FOUND THE FUND'S CONTENTION NOT WELL TAKEN INSOFAR AS IT APPLIED TO THE PARTICULAR SET OF FACTS BEFORE HIM. HE FOUND NO CONCLUSIVE MEDICAL EVIDENCE SHOWING WHICH CONDITION PROGRESSED TO THE PERMANENT TOTAL DISABILITY STATUS FIRST IN TIME.

HE CONCLUDED THAT CLAIMANT HAD BEEN ABLE TO ENJOY AN INDUSTRIAL OCCUPATION UNTIL THE SEPTEMBER 1966 INCIDENT AND THAT AT THE PRESENT HE CANNOT DO SO - ONE OF THE REASONS HE CANNOT IS THE PROGRESSION OF THE BACK CONDITION WHICH IS DEFINITELY RELATED TO THE INDUSTRIAL INJURY. THE WORKMEN'S COMPENSATION ACT IS TO BE LIBERALLY CONSTRUED IN FAVOR OF THE WORKMAN. COLVIN V. SIAC (UNDERSCORED), 197 OR 401, TO DENY CLAIMANT THE BENEFIT OF A PERMANENT TOTAL DISABILITY AWARD BASED UPON THE FUND'S CONTENTION WOULD DEFEAT THE WHOLE STATUTORY PURPOSE OF THE ACT. THE REFEREE FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED AS OF AUGUST 29, 1972.

THE REFEREE FURTHER CONCLUDED THAT CLAIMANT'S ATTORNEY WAS ENTITLED TO BE PAID A REASONABLE ATTORNEY'S FEE BY THE FUND UNDER THE PROVISIONS OF ORS 656.382(2). THE FUND HAD REQUESTED THE HEARING AND THE REFEREE NEITHER DISALLOWED NOR REDUCED THE COMPENSATION AWARDED CLAIMANT BY THE BOARD'S OWN MOTION ORDER.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE AS ITS OWN.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 22, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-5212 APRIL 14, 1976

JACK KINDY, CLAIMANT

ROLF T. OLSON, CLAIMANT'S ATTY.
R. KENNEY ROBERTS, DEFENSE ATTY.
ORDER ON MOTION

ON MARCH 22, 1976, CLAIMANT REQUESTED THE WORKMEN'S COMPENSATION BOARD REVIEW THE OPINION AND ORDER MAILED AND ENTERED BY THE REFEREE ON FEBRUARY 20, 1976 IN THE ABOVE ENTITLED MATTER. CLAIMANT'S COUNSEL CERTIFIED THAT HE HAD MAILED CERTIFIED TRUE COPIES OF SAID

REQUEST TO ALL PARTIES CONCERNED AT THE PROPER ADDRESSES ON MARCH 22, 1976.

ON APRIL 12, 1976 THE EMPLOYER, THROUGH ITS CARRIER, FILED A MOTION TO DISMISS CLAIMANT'S REQUEST FOR REVIEW FOR THE REASON THAT IT WAS UNTIMELY FILED.

ORS 656.289(3) PROVIDES THAT THE ORDER OF THE REFEREE SHALL BE FINAL UNLESS, WITHIN 30 DAYS AFTER THE DATE ON WHICH A COPY OF THE ORDER IS MAILED TO THE PARTIES, ONE OF THE PARTIES REQUESTS A REVIEW BY THE BOARD UNDER THE PROVISIONS OF ORS 656.295.

THE BOARD FINDS THAT THE STATUTORY PERIOD OF 30 DAYS EXPIRED ON MARCH 21, 1976 - HOWEVER, MARCH 21, 1976 WAS A LEGAL HOLIDAY (SUNDAY), THEREFORE, THE STATUTORY PERIOD WAS EXTENDED TO THE FOLLOWING DAY, MARCH 22, 1976. THE DATE THE REQUEST IS MAILED NOT THE DATE IT IS RECEIVED BY THE BOARD GOVERNS.

THE BOARD CONCLUDES THAT CLAIMANT'S REQUEST FOR REVIEW BY THE BOARD WAS TIMELY FILED AND THE MOTION TO DISMISS SHOULD BE DENIED.

IT IS SO ORDERED.

WCB CASE NO. 75-2612 APRIL 16, 1976

GERTRUDE CHAMBERS, CLAIMANT

RICHARD A. SLY, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF
CROSS REQUEST BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THAT PORTION OF THE REFEREE'S ORDER, AS AMENDED, WHICH DIRECTED IT TO PAY CLAIMANT'S ATTORNEY A TOTAL ATTORNEY'S FEE OF 900 DOLLARS. THE CLAIMANT CROSS-REQUESTS BOARD REVIEW OF THOSE PORTIONS OF THE ORDER WHICH DENIED CLAIMANT TEMPORARY TOTAL DISABILITY COMPENSATION OR, IN THE ABSENCE OF TEMPORARY TOTAL DISABILITY AND IN THE ALTERNATIVE, PERMANENT PARTIAL DISABILITY AND ALSO PAYMENT FOR EXPERTS' WITNESS FEES.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON MAY 8, 1974 WHILE SHE WAS POURING HOT WATER INTO A VESSEL WHICH BROKE AND BURNED HER LEFT THIGH. SHE WAS TREATED BY DR. MARKEE WHO DRESSED THE BURNS AND PRESCRIBED MEDICATION - NO IMPAIRMENT WAS ANTICIPATED AND CLAIMANT RETURNED TO WORK ON MAY 20, 1974.

THE BURN RESULTED IN HYPERPIGMENTATION OF HER LEFT THIGH WHICH CAUSED CLAIMANT SOME EMBARRASSMENT. CLAIMANT LEFT HER EMPLOYMENT IN THE EARLY PART OF JULY 1974 AND HAS NOT WORKED SINCE. CLAIMANT TESTIFIED THAT THE EMOTIONAL PROBLEMS SHE HAS SUFFERED WERE CAUSED BY WHAT SHE CONSIDERS OTHER PEOPLE'S REACTION TO HER DISFIGUREMENT. CLAIMANT CONTENDS SHE IS PRECLUDED FROM WEARING SHORT SKIRTS, BIKINIS AND OTHER ATTIRE WHICH SHE WOULD PREFER TO WEAR AND THAT FOR THE REST OF HER LIFE SHE WILL BE FORCED TO WEAR SLACKS OR LONGER SKIRTS.

THE CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED JULY 31, 1975 WHICH GRANTED CLAIMANT COMPENSATION FOR TEMPORARY TOTAL DISABILITY INCLUSIVE FROM MAY 17, 1974 THROUGH MAY 19, 1974 BUT AWARDED NO COMPENSATION FOR PERMANENT DISABILITY.

CLAIMANT WAS EVALUATED BY DR. LARNER, A DERMATOLOGIST, WHO STATED THAT HE HAD NOT SEEN THE CLAIMANT PREVIOUSLY, THEREFORE, HE WAS UNABLE TO COMMENT ON ANY EMOTIONAL CHANGE OR INSTABILITY BUT THAT SHE CERTAINLY APPEARED EXTREMELY TENSE AND DEMANDING AT THE TIME OF EXAMINATION AND THAT HER CONCERN REGARDING THE SCARRING WAS SOMEWHAT OUT OF PROPORTION. THE FUND PAID DR. LARNER'S BILL BUT TOOK NO ACTION UPON HIS RECOMMENDED TREATMENT.

BETWEEN JUNE 4 AND JUNE 10, 1975 CLAIMANT WAS GIVEN A PSYCHOLOGICAL EXAMINATION BY DR. NORMAN W. HICKMAN, A CLINICAL PSYCHOLOGIST, AT THE REQUEST OF CLAIMANT'S ATTORNEY AND BASED UPON THE COMMENT MADE BY DR. LARNER. ON JULY 29, 1975 DR. HICKMAN ADVISED THE FUND THAT CLAIMANT WAS IN NEED OF PSYCHO-THERAPY AND PROBABLY SHOULD RECEIVE SUCH ASSISTANCE IN THE NEAR FUTURE CONSISTING OF FIVE OR SIX SESSIONS TO HELP DETERMINE WHETHER CLAIMANT WOULD RESPOND CONSTRUCTIVELY TO THE TREATMENT. IF CLAIMANT DID NOT RESPOND CONSTRUCTIVELY THE THERAPY WOULD NOT NEED TO BE ON A LONG TERM BASIS OTHER THAN TO GIVE SUPPORTIVE ASSISTANCE WHILE CLAIMANT WAS BEING VOCATIONALLY RETRAINED. THE FUND HAD AUTHORIZED THE EXAMINATION BY DR. HICKMAN.

ON SEPTEMBER 4, 1975 CLAIMANT'S COUNSEL DEMANDED IT TO REOPEN CLAIMANT'S CLAIM FOR FURTHER MEDICAL TREATMENT AND PAYMENT OF TEMPORARY TOTAL DISABILITY BENEFITS IN ACCORDANCE WITH THE RECOMMENDATIONS OF DR. HICKMAN.

ON JUNE 30, 1975 CLAIMANT HAD REQUESTED A HEARING - THE ISSUES WERE (1) FURTHER MEDICAL CARE AND TREATMENT - (2) VOCATIONAL REHABILITATION - (3) PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION - (4) AWARD OF PERMANENT PARTIAL DISABILITY - (5) DENIAL OF CLAIMANT'S CLAIM FOR FURTHER MEDICAL CARE AND TREATMENT AND DIAGNOSTIC WORKUP OF MAY 2, 1975, AND (6) PENALTIES AND ATTORNEY FEES. ON OCTOBER 2, 1975 AN AMENDED REQUEST FOR HEARING WAS FILED WHICH REITERATED ALL OF THE ISSUES SET FORTH IN THE ORIGINAL AND, ADDITIONALLY, THE ISSUES OF AGGRAVATION SINCE THE LAST AWARD OR ARRANGEMENT OF COMPENSATION, DELAY AND FAILURE ON THE PART OF THE FUND TO PAY ADDITIONAL COMPENSATION INCLUDING MEDICAL BILLS AND DISABILITY BENEFITS AND FAILURE TO RESPOND TO CLAIMANT'S FORMAL DEMAND THAT HER CLAIM BE REOPENED.

DR. HICKMAN TESTIFIED THAT CLAIMANT THINKS OF HER BODY AS SOMETHING TO EXHIBIT AND SHE NOW FEELS VOCATIONALLY HANDICAPPED BY HER INJURY BECAUSE SHE IS UNABLE TO TAKE ANY JOB WHICH MIGHT INVOLVE WEARING SHORTS, SHORT DRESSES OR BATHING SUITS - ALTHOUGH HER FEARS MIGHT SEEM IRRATIONAL TO SOMEONE ELSE THEY DID NOT SEEM SO TO HER. IT WAS HIS OPINION THAT CLAIMANT'S EMOTIONAL STATUS WAS WORSE THAN HE ORIGINALLY THOUGHT AND THAT CLAIMANT MIGHT NEED MORE THAN THE SIX PSYCHOTHERAPY SESSIONS HE ORIGINALLY PRESCRIBED. AT FIRST IT WOULD BE NECESSARY TO DETERMINE WHETHER OR NOT CLAIMANT WOULD ACCEPT COUNSELING AT ALL AND TO ATTEMPT TO FIND HER A JOB. HE FELT RETRAINING WOULD POSE PROBLEMS BECAUSE OF CLAIMANT'S LIMITED EDUCATIONAL ACHIEVEMENT AND HER SIGNIFICANT READING DISABILITY AND LIMITED APTITUDES.

DR. HICKMAN TESTIFIED AT THE HEARING IN BEHALF OF CLAIMANT, WHO CONTENDED THAT HIS FEE SHOULD BE PAID BY THE FUND OR BY THE ADMINISTRATIVE FUND OF THE WORKMEN'S COMPENSATION BOARD. THE REFEREE CONCLUDED THERE WAS NO AUTHORITY FOR THIS.

CONTRARY TO THE PSYCHOLOGICAL REPORT, CLAIMANT TESTIFIED THAT SHE IS ABLE TO WORK AT THE PRESENT TIME, THAT SHE HAS APPLIED WITHOUT SUCCESS AT SEVERAL DEPARTMENT STORES FOR A JOB AS A STOCK GIRL OR CASHIER, HOWEVER, SHE ADMITTED SHE HAD NOT LOOKED FOR WORK AS DILIGENTLY AS SHE MIGHT HAVE. THE REFEREE CONCLUDED SHE WAS NOT ENTITLED TO ANY FURTHER COMPENSATION FOR TEMPORARY TOTAL DISABILITY.

THE REFEREE CONCLUDED THAT CLAIMANT HAD A SCHEDULED INJURY WHICH RESULTED IN NO PHYSICAL IMPAIRMENT TO THE LEG BUT THAT IT HAS CAUSED AN EMOTIONAL UPSET AND CLAIMANT IS ENTITLED TO THE TREATMENT SUGGESTED BY DR. HICKMAN.

THE REFEREE CONCLUDED THAT CLAIMANT'S CLAIM FOR AGGRAVATION HAD BEEN PRESENTED TO THE FUND BY THE PSYCHOLOGICAL REPORT WHICH SHOULD HAVE BEEN PAID BY THE FUND, THAT THIS HAD BEEN IGNORED BY THE FUND AND, THEREFORE, AMOUNTED TO A DE FACTO DENIAL WARRANTING THE AWARD OF ATTORNEY'S FEES PAYABLE BY THE FUND. SINCE CLAIMANT HAD NOT SHOWN THAT SHE WAS ENTITLED TO ANY ADDITIONAL PERMANENT PARTIAL DISABILITY OR TEMPORARY TOTAL DISABILITY, THERE WAS NO MEASURABLE PENALTY. THE REFEREE ORDERED THE FUND TO PAY FOR DR. HICKMAN'S REPORT OF JULY 29, 1975, AND TO PAY FOR CLAIMANT'S TREATMENT AT THE PSYCHOLOGY CENTER UPON ENROLLMENT THERE, CONDITIONED UPON HER COMPLETION OF THE PROGRAM PRESCRIBED BY DR. HICKMAN.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE REFEREE'S ORDER. THE BOARD FURTHER STRONGLY URGES THE CLAIMANT TO COOPERATE WITH DR. HICKMAN IN THE PROGRAM WHICH HE RECOMMENDS FOR HER. CLAIMANT IS ADVISED THAT SHE IS ENTITLED TO SUCH TREATMENT UNDER THE PROVISIONS OF ORS 656.245.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 27, 1975, AS AMENDED BY THE ORDER ENTERED NOVEMBER 10, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 150 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-2531 APRIL 16, 1976

LYNN MCKINNEY, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH APPROVED THE DENIAL BY THE STATE ACCIDENT INSURANCE FUND OF ANY RESPONSIBILITY FOR CLAIMANT'S NECK AND SHOULDER CONDITIONS.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON JANUARY 26, 1971, WHILE EMPLOYED AS A CLIPPER SPOTTER, WHICH RESULTED IN A TRAUMATIC AMPUTATION OF ALL FOUR FINGERS OF CLAIMANT'S LEFT HAND. CLAIMANT WAS TAKEN TO PROVIDENCE HOSPITAL WHERE INITIAL SURGERY WAS PERFORMED BY DR. BUONOCORE. CLAIMANT FILED A CLAIM ON JANUARY 28, 1971 IN WHICH HE DESCRIBED HIS INJURY AS FOLLOWS -

> "I WAS TRYING TO REVERSE A PIECE OF VENEER INTO THE CLIPPER, SLIPPED AND GOT HAND UNDER CLIPPER KNIFE."

ADDITIONAL SURGERY WAS PERFORMED. IN AUGUST 1971 DR. ROSS, PLASTIC SURGEON, EXAMINED CLAIMANT WHO TOLD HIM THAT HE HAD APPARENTLY SLIPPED AND FALLEN INTO THE CLIPPER. CLAIMANT RETURNED TO HIS FORMER WORK ON SEPTEMBER 1, 1971 AND CONTINUED UNTIL NOVEMBER 1, 1971

WHEN HE WAS AGAIN HOSPITALIZED FOR FURTHER SURGERY AND PARTIAL AMPUTATION OF THE LEFT LITTLE AND RING FINGERS. CLAIMANT WAS FOUND TO BE MEDICALLY STATIONARY ON FEBRUARY 22, 1972 AND A DETERMINATION ORDER MAILED MARCH 14, 1972 GAVE MULTIPLE AWARDS FOR PARTIAL AND TOTAL LOSS OF THE FINGERS AND ALSO FOR PARTIAL LOSS OF OPPOSITION OF THE LEFT THUMB.

IN THE FALL OF 1972 CLAIMANT OBTAINED PART-TIME WORK AS A RELIEF NIGHT WATCHMAN FOR APPROXIMATELY NINE MONTHS, HE THEN BECAME EMPLOYED ON A FULL TIME BASIS AS A CLEANUP MAN FOR THE SAME EMPLOYER AND WORKED UNTIL AUGUST 31, 1974. ON AUGUST 23, 1974 DR. ROSS REPORTED CLAIMANT WAS CONTINUING TO HAVE PROBLEMS WITH PAIN RADIATING FROM HIS INDEX AND MIDDLE FINGERS INTO THE REMAINING ARM AND SHOULDER AND HE WAS, THEREFORE, SCHEDULING CLAIMANT FOR SURGERY. ON SEPTEMBER 6, 1974 CLAIMANT UNDERWENT SURGERY FOR REVISION OF AMPUTATION STUMPS OF THE MIDDLE AND INDEX FINGERS. ON OCTOBER 23, 1974 DR. ROSS REFERRED CLAIMANT TO DR. DUNN, A NEUROSURGEON, STATING A REVIEW OF CLAIMANT'S RECORD REVEALED PREVIOUS COMPLAINTS REFERABLE TO THE UPPER EXTREMITY AND NECK.

DR. DUNN PERFORMED A CERVICAL FUSION INVOLVING C5-6 AND C6-7 ON JANUARY 30, 1975. DR. DUNN STATED THERE WAS NO RELATIONSHIP OF THE CERVICAL SPONDYLOSIS AND NERVE ROOT COMPRESSION WHICH REQUIRED THE JANUARY 30, 1975 SURGERY TO CLAIMANT'S INDUSTRIAL INJURY IN JANUARY 1971. ON MARCH 26, 1975 CLAIMANT WAS AGAIN MEDICALLY STATIONARY, ACCORDING TO DR. ROSS WHO RECOMMENDED CLAIM CLOSURE. ON APRIL 7, 1975 CLAIMANT'S COUNSEL ASKED THE STATE ACCIDENT INSURANCE FUND IF IT INTENDED TO DENY SOME PORTION OR ALL OF THE CLAIM. THE FUND RESPONDED THAT ITS FILE DID NOT INDICATE THAT ANY CLAIM HAD BEEN MADE THAT THE CERVICAL SPONDYLOSIS AND NERVE ROOT COMPRESSION TREATED BY DR. DUNN WERE A RESULT OF CLAIMANT'S INDUSTRIAL INJURY, THEREFORE, IT DID NOT INTEND TO ISSUE A DENIAL AND WAS GOING TO SUBMIT CLAIMANT'S CLAIM FOR A FINAL DETERMINATION. ON MAY 1, 1975 A DETERMINATION ORDER WAS MAILED GRANTING TIME LOSS AND AN AWARD EQUAL TO 135 DEGREES FOR 90 PER CENT LOSS OF THE LEFT FOREARM, THIS BEING IN LIEU OF THE INITIAL AWARDS.

ON JUNE 27, 1975 CLAIMANT, FOR THE FIRST TIME, TOLD DR. DUNN HE HAD HIT HIS CHIN ON THE TABLE WHEN HE FELL. DR. DUNN, BASED ON THIS INFORMATION, FELT THAT THE ACCIDENT MIGHT HAVE INVOLVED CERVICAL TRAUMA - THAT IT WAS CONCEIVABLE THAT IT COULD HAVE AGGRAVATED CLAIMANT'S PREEXISTING CERVICAL SPONDYLOSIS. DR. DUNN STATED THAT HIS CONCLUSION AS TO THE CAUSAL RELATIONSHIP WAS ONLY AS GOOD AS THE ACCURACY OF THE HISTORY GIVEN TO HIM BY THE CLAIMANT THAT HE FELL AND HIT HIS CHIN ON THE TABLE.

AT THE HEARING TWO ALLEGED EYEWITNESSES TO THE INDUSTRIAL INJURY TESTIFIED THAT CLAIMANT DID NOT SLIP, FALL TO HIS KNEES OR HIT HIS CHIN ON THE TABLE.

THE REFEREE FOUND THAT THE FUND'S RESISTANCE OF THE CLAIM, BOTH BY ITS SUBMISSION OF THE CLAIM FOR DETERMINATION OF THE ARM CONDITION ONLY WHEN IT HAD KNOWLEDGE OF CLAIMANT'S SHOULDER AND NECK CONDITIONS WHICH WERE NOT STATIONARY AT THAT TIME AND ITS RESISTANCE AT THE TIME OF THE HEARING, WHEN BOTH PARTIES AGREED THAT THE ISSUE TO BE DETERMINED WAS WHETHER CLAIMANT'S SHOULDER AND NECK CONDITION WAS CAUSALLY RELATED TO HIS INDUSTRIAL INJURY OF 1971, CONSTITUTED A DE FACTO DENIAL OF THE CLAIM.

ALTHOUGH THE REFEREE DID NOT FIND ANYTHING IN CLAIMANT'S DEMEANOR OR IN HIS TESTIMONY WHICH WOULD CAUSE HER TO QUESTION HIS CREDIBILITY, SHE DID GIVE GREATER WEIGHT TO THE ACCOUNT OF THE TWO EYEWITNESSES, ESPECIALLY THE ONE WHO NO LONGER WORKED FOR THE EMPLOYER AND HAD NO APPARENT INTEREST IN THE CASE.

AFTER CONSIDERING ALL THE TESTIMONY, SHE CONCLUDED CLAIMANT HAD FAILED TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT HIS ACCIDENT OCCURRED IN THE MANNER IN WHICH HE CONTENDED OR THAT HIS NECK AND SHOULDER CONDITIONS WERE THE RESULT OF HIS INDUSTRIAL INJURY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 23, 1975 IS AFFIRMED.

WCB CASE NO. 75-3614 APRIL 16, 1976

JACK TURNER, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
MERTEN AND SALTVEIT,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE EMPLOYER'S DENIAL OF HIS CLAIM FOR AN ALLEGED INDUSTRIAL INJURY ON AUGUST 1, 1974.

CLAIMANT WAS A CABLE SPLICER FOR THE EMPLOYER, HE ALLEGED THAT AFTER HE HAD PARKED HIS BUCKET RIG AND STARTED TO ASCEND THE BUCKET LADDER, HE BENT OVER TO PICK UP A BAG OF TOOLS AND FELT CHEST PAINS. HE IMMEDIATELY DESCENDED, SECURED HIS RIG AND DROVE BACK TO THE YARD WHERE HE NOTIFIED HIS SUPERVISOR.

CLAIMANT WAS SEEN IN THE OFFICE OF DRS. MAC GREGOR AND WALLACE. AT THAT TIME CLAIMANT DID NOT REMEMBER ANY BACK PAINS - HIS CHEST WAS X-RAYED AND HE WAS ALSO EXAMINED FOR HEART PROBLEMS. THE FINDINGS WERE NEGATIVE AND CLAIMANT WAS ALLOWED TO LEAVE THE FOLLOWING DAY FOR A WEEK'S VACATION TRIP TO CALIFORNIA. UPON HIS RETURN HE WORKED UNTIL A SECOND WEEK'S VACATION DURING OCTOBER 1974 AT WHICH TIME HE WENT DEER HUNTING.

WHILE CLAIMANT WAS DRIVING TO CALIFORNIA HIS BACK BOTHERED HIM WHILE HE WAS DRIVING AND HE HAD TO SHIFT POSITIONS - HIS WIFE DID MOST OF THE DRIVING. UPON HIS RETURN CLAIMANT NOTICED NO PROBLEM WITH HIS BACK UNTIL THE SECOND VACATION IN OCTOBER 1974. HE CONTINUED TO WORK UNTIL MAY 1975. HIS JOB CONSISTED OF SITTING ANY WHERE FROM 4 TO 8 HOURS, SPLICING, TWISTING CABLE, DIGGING, ETC. THE EVIDENCE INDICATES CLAIMANT HAS NOT MISSED MUCH TIME FROM WORK. AT THE PRESENT TIME HE IS ON A LEAVE OF ABSENCE AND INTENDS TO RETURN TO WORK FOR THE EMPLOYER AFTER HE RECOVERS FROM A FUSION WHICH WAS PERFORMED BY DR. HOPKINS DURING AUGUST 1975.

ON OR ABOUT MAY 14, 1975 DR. MAC GREGOR SIGNED A TRAVELERS INSURANCE COMPANY FORM FOR AN OFF-THE-JOB INJURY WHICH APPARENTLY WAS FILLED OUT BY CLAIMANT.

THE REFEREE FOUND THAT DR. HOPKINS ARRIVED AT HIS CONCLUSION THAT THE INDUSTRIAL ACCIDENT INVOLVED A BACK INJURY SOLELY FROM CLAIMANT'S HISTORY AS RELATED TO HIM BY THE CLAIMANT. HE FOUND THAT THE MEDICAL EXHIBITS DID NOT RELATE CLAIMANT'S BACK PROBLEMS TO THE

AUGUST 1, 1974 INCIDENT. THE REFEREE CONCLUDED THAT THIS INCIDENT WAS NOT OF A NATURE WHICH WOULD CAUSE THE RESULTING BACK PROBLEMS AND, THEREFORE, THAT THE DENIAL OF RESPONSIBILITY FOR THE L4-S1 FUSION PERFORMED BY DR. HOPKINS IN AUGUST 1975 WAS PROPER.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE ORDER OF THE REFEREE. THE EVIDENCE INDICATES THAT CLAIMANT WAS ABLE TO DRIVE TO CALIFORNIA FOLLOWING THE ALLEGED INCIDENT, THAT HE NEVER REFERRED TO SPONTANEOUS BACK PAINS AT THE TIME HE HAD THE CHEST PAINS AND AFTER A SECOND VACATION IN OCTOBER 1974, CONTINUED TO WORK UNTIL MAY 1975 AT A JOB WHICH REQUIRED SUBSTANTIAL BACK MOVEMENTS. CLAIMANT MAY HAVE A CHRONIC LUMBOSACRAL PROBLEM BUT THERE IS NO EVIDENCE THAT THE INCIDENT OF AUGUST 1, 1974 EITHER CAUSED OR AGGRAVATED SUCH PROBLEM.

ORDER

THE ORDER OF THE REFEEE DATED NOVEMBER 26, 1975 IS AFFIRMED.

WCB CASE NO. 75-1996 APRIL 20, 1976

MICHAEL MARCOTT, CLAIMANT

DEL PARKS, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
ORDER OF REMAND

ON MARCH 15, 1976 THE CLAIMANT REQUESTED BOARD REVIEW OF THE REFEREE'S ORDER ENTERED ON MARCH 2, 1976 IN THE ABOVE ENTITLED MATTER.

ON APRIL 12, 1976 CLAIMANT'S ATTORNEY FILED A MOTION TO REOPEN THE HEARING FOR THE PURPOSE OF TAKING FURTHER EVIDENCE, TO-WIT - A DEFINITIVE STATEMENT FROM DR. JAMES E. DUNN THAT THE RECENT SURGERY PERFORMED ON CLAIMANT WAS DIRECTLY RELATED TO CLAIMANT'S INDUSTRIAL INJURY. THE MOTION WAS SUPPORTED BY CLAIMANT'S ATTORNEY'S AFFIDAVIT THAT THE STATE ACCIDENT INSURANCE FUND, BY ITS COUNSEL, REPRESENTED THAT ALL MEDICAL INFORMATION IN ITS POSSESSION HAD BEEN FURNISHED TO HIM BEFORE OR AT THE HEARING BUT IS NOW ADVISED THAT THE FUND FAILED TO DIVULGE TO HIM AND TO THE REFEREE THAT IT POSSESSED, AT THE TIME OF THE HEARING, THIS STATEMENT FROM DR. DUNN.

THE BOARD, AFTER REVIEWING THE MOTION AND THE SUPPORTING AFFIDAVIT, CONCLUDES THAT THE RECORD IS NOT COMPLETE WITHOUT SUCH MEDICAL EVIDENCE. THE OPINION AND ORDER ENTERED MARCH 2, 1976 IS SET ASIDE AND THE REFEREE IS INSTRUCTED TO REOPEN THE HEARING AND CONSIDER SUCH MEDICAL REPORT AND THEREAFTER ENTER HIS OPINION AND ORDER.

ORDER

THE OPINION AND ORDER ENTERED MARCH 2, 1976 IS SET ASIDE AND THE ABOVE ENTITLED MATTER IS REMANDED TO REFEREE HENRY L. SEIFERT FOR THE PURPOSE OF REOPENING THE HEARING IN THE ABOVE ENTITLED MATTER TO TAKE FURTHER EVIDENCE, TO-WIT - THE MEDICAL REPORT FROM DR. JAMES E. DUNN, DATED DECEMBER 19, 1975 ADDRESSED TO THE STATE ACCIDENT INSURANCE FUND AND THE LETTER, DATED MARCH 19, 1976, ADDRESSED TO CLAIMANT'S ATTORNEY.

CLAIMANT'S REQUEST FOR REVIEW SHALL BE CONSIDERED WITHDRAWN WITHOUT PREJUDICE AND THE OPINION AND ORDER ULTIMATELY ENTERED BY THE REFEREE SHALL BE CONSIDERED AS THE FINAL ORDER FROM WHICH EITHER PARTY MAY REQUEST A REVIEW BY THE BOARD.

WCB CASE NO. 75-1989 APRIL 20, 1976

PATSY CARPENTER, CLAIMANT

FROHNMAYER AND DEATHERAGE,
CLAIMANT'S ATTYS.
PHILIP A. MONGRAIN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE EMPLOYER SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH DIRECTED THE EMPLOYER, AND ITS CARRIER, TO PROVIDE CLAIMANT WITH PROPER MEDICAL CARE AND TREATMENT AS OUTLINED BY DR. DONALD T. SMITH FOR CLAIMANT'S CERVICAL PROBLEMS AND DIRECTED PAYMENT TO CLAIMANT'S ATTORNEY OF A 500 DOLLAR FEE.

CLAIMANT HAD SUFFERED A COMPENSABLE INJURY ON FEBRUARY 23, 1968. THE PRESENT CLAIM WAS FOR MEDICAL CARE AND TREATMENT ARISING OUT OF THAT 1968 INJURY. AFTER CONSERVATIVE CARE, CLAIMANT'S CLAIM HAD BEEN CLOSED ON APRIL 22, 1968 WITH AN AWARD FOR TIME LOSS ONLY. THIS INJURY AFFECTED CLAIMANT'S UPPER BACK AND NECK. ON JULY 7, 1968 CLAIMANT SUFFERED AN INJURY TO HER LOWER BACK, HER CLAIM WAS ACCEPTED AND, ON DECEMBER 16, 1968, A SINGLE LEVEL SPINAL FUSION WAS PERFORMED BY DR. THOMPSON. ON OCTOBER 27, 1969 A DETERMINATION ORDER RELATING TO THE JULY 7, 1968 INJURY AWARDED CLAIMANT 64 DEGREES FOR 20 PER CENT UNSCHEDULED LOW BACK DISABILITY.

THE FUSION APPARENTLY GAVE CLAIMANT CONSIDERABLE RELIEF AND SHE RETURNED TO WORK WITHOUT SIGNIFICANT PROBLEMS EITHER WITH HER UPPER BACK OR LOWER BACK UNTIL 1972 WHEN HER FUSION BROKE. HER CLAIM WAS ORDERED REOPENED, AFTER A HEARING, AS A CLAIM FOR AGGRAVATION. AFTER THE SECOND CLOSURE ANOTHER HEARING WAS HELD ON THE ADEQUACY OF THE AWARD OF PERMANENT PARTIAL DISABILITY AND, AS A RESULT OF THAT HEARING, A TOTAL AWARD OF 96 DEGREES WAS GIVEN TO CLAIMANT.

CLAIMANT HAD TO QUIT WORK AS A CHECKER FOR THE EMPLOYER AFTER THE REFUSION WAS DONE BY DR. THOMPSON ON AUGUST 28, 1972. SHE COMMENCED TRAINING AS A COURT REPORTER BUT HAD TO QUIT BECAUSE OF NECK AND ARM PAIN FOR WHICH SHE SOUGHT MEDICAL TREATMENT. CLAIMANT FINALLY CONCLUDED THAT BECAUSE OF HER UPPER BACK PROBLEMS SHE WOULD BE UNABLE TO CONTINUE WITH HER TRAINING AND SHE COMMENCED TRAINING AS AN ACCOUNTANT. SHE IS PRESENTLY TAKING A YEAR'S COURSE UNDER VOCATIONAL REHABILITATION IN THIS FIELD.

DR. SMITH'S REPORT OF APRIL 9, 1974 STATED THAT CLAIMANT HAD EVIDENCE OF CERVICAL SPONDYLOLYSIS C5-6 AND, ON THE BASIS OF THE HISTORY AND RECURRING COMPLAINTS AND THE MEDICAL RECORDS AVAILABLE FOR HIS REVIEW, HE FELT THE CERVICAL DORSAL PAIN HAD ITS ONSET WITH THE INDUSTRIAL INJURY OF FEBRUARY 23, 1968 AND THAT CLAIMANT WAS CONTINUING TO HAVE PAIN AND DISCOMFORT PROBABLY CAUSALLY RELATED TO THAT INDUSTRIAL INJURY.

THE EMPLOYER CONTENDS THAT FOR FIVE YEARS CLAIMANT HAD NO TROUBLE WITH HER NECK AND QUESTIONS THE CAUSAL RELATIONSHIP OF HER PRESENT CONDITION WITH THE FEBRUARY 23, 1968 INJURY. CLAIMANT TESTIFIED THAT SHE HAD BEEN ABLE TO LIVE WITH HER NECK PROBLEM AND BETWEEN HER TWO FUSIONS HAD BEEN ABLE TO WORK. SHE TESTIFIED FURTHER THAT HER REAL PROBLEMS WITH HER NECK STARTED WHEN SHE COMMENCED HER VOCATIONAL REHABILITATION PROGRAM IN SHORTHAND COURT REPORTING. THE REFEREE, RELYING STRONGLY UPON DR. SMITH'S OPINION AND RECOMMENDATION THAT THE CLAIM BE REOPENED FOR FURTHER MEDICAL CARE AND TREATMENT, CONCLUDED THAT ALTHOUGH CLAIMANT'S AGGRAVATION RIGHTS HAD EXPIRED, SHE

WAS STILL ENTITLED TO BE PROVIDED MEDICAL CARE AND TREATMENT BY THE EMPLOYER UNDER ORS 656.245 BECAUSE HER NEED FOR THIS MEDICAL CARE AND TREATMENT WAS RELATED TO HER INDUSTRIAL INJURY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE REFEREE'S ORDER.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 23, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW THE SUM OF 300 DOLLARS PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-1850 APRIL 20, 1976

GLEN GIBSON, CLAIMANT

TOM HANLON, CLAIMANT'S ATTY.
LINDSAY, NAHSTOLL, HART AND KRAUSE,
DEFENSE ATTYS.
ORDER APPROVING STIPULATION AND
DISMISSING REQUEST FOR REVIEW

ON DECEMBER 19, 1975, CLAIMANT, THROUGH HIS ATTORNEY, REQUESTED BOARD REVIEW OF A REFEREE'S OPINION AND ORDER DATED NOVEMBER 24, 1975.

THE PARTIES HAVE NOW PRESENTED A STIPULATION TO THE BOARD AMICABLY DISPOSING OF THE ISSUES IN DISPUTE. THE STIPULATION IS ATTACHED HERETO AS EXHIBIT "A".

THE BOARD NOW BEING FULLY ADVISED FINDS THE STIPULATION FAIR AND EQUITABLE TO BOTH PARTIES AND IT CONCLUDES -

(1) THAT THE AGREEMENT SHOULD BE EXECUTED ACCORDING TO ITS TERMS AND,

(2) THAT THE REQUEST FOR BOARD REVIEW BE DISMISSED.

IT IS SO ORDERED.

STIPULATION OF SETTLEMENT PENDING BOARD REVIEW

COMES NOW CLAIMANT PERSONALLY AND THROUGH HIS CO-COUNSEL, A.C. ROLL AND TOM HANLON - AND EMPLOYER, PUBLISHERS PAPER COMPANY, AND INSURER, ARGONAUT INSURANCE COMPANIES, THROUGH THEIR COUNSEL, RICHARD WM. DAVIS - AND HEREBY STIPULATE TO THE FOLLOWING SETTLEMENT OF THE ABOVE-ENTITLED MATTER -

1. 1. AN OPINION AND ORDER OF THE HEARINGS DIVISION OF THE WORKMEN'S COMPENSATION BOARD ISSUED ON NOVEMBER 4, 1975, ORDERING CLAIMANT ENTITLED TO DISABILITY AS A RESULT OF HIS JUNE 26, 1974, INJURY AS FOLLOWS -

(A) 25 PER CENT UNSCHEDULED DISABILITY, WHICH WAS AN INCREASE OF 15 PER CENT UNSCHEDULED DISABILITY OVER THAT AWARDED BY DETERMINATION ORDER OF APRIL 10, 1975.

(B) 20 PER CENT SCHEDULED DISABILITY OF THE LEFT LEG, WHICH WAS AN INCREASE OF 15 PER CENT SCHEDULED DISABILITY OF A LEG OVER THAT AWARDED BY DETERMINATION ORDER OF APRIL 10, 1975.

2. ALL PARTIES AGREE THAT CLAIMANT BE PAID A TOTAL UNSCHEDULED DISABILITY OF 40 PER CENT, AND A TOTAL SCHEDULED DISABILITY OF 20 PER CENT OF A LEG. THIS AWARD IS IN LIEU OF AND NOT IN ADDITION TO THAT DISABILITY PREVIOUSLY GRANTED BY EITHER DETERMINATION ORDER OR BY THE HEARINGS DIVISION'S OPINION AND ORDER HEREIN. INSURER AND EMPLOYER AGREE TO PAY SUCH DISABILITY TO CLAIMANT.

3. CLAIMANT AGREES HEREBY TO DISMISS HIS PENDING REQUEST FOR REVIEW BEFORE THE WORKMEN'S COMPENSATION BOARD.

4. CLAIMANT AND CLAIMANT'S COUNSEL AGREE THAT REASONABLE ATTORNEY FEES IN THIS MATTER SHALL BE EQUAL TO THE AMOUNT OF ONE-QUARTER OF THE INCREASED COMPENSATION OVER THAT AWARDED BY DETERMINATION ORDER OF APRIL 10, 1975, NOT TO EXCEED 2,300 DOLLARS. SAID ATTORNEY FEE IS TO BE PAYABLE OUT OF AND A LIEN ON THE INCREASED COMPENSATION HEREIN.

WCB CASE NO. 75-2045 APRIL 21, 1976

ROBERT J. PIERCE, CLAIMANT

STIPULATED ORDER FOR REOPENING

THIS MATTER COMING BEFORE THE WORKMEN'S COMPENSATION BOARD UPON THE STIPULATION OF THE PARTIES APPEARING BELOW AND IT APPEARING THAT THE PARTIES HAVE AGREED UPON THE REOPENING OF THIS CASE, NOW THEREFORE,

IT IS HEREBY ORDERED AS FOLLOWS -

1. THAT THE ABOVE-NUMBERED CASE BE AND HEREBY IS REOPENED FOR AGGRAVATION WITH RENEWED PAYMENT OF TEMPORARY TOTAL DISABILITY BENEFITS, MEDICAL EXPENSES AND ANY OTHER COMPENSATION BENEFITS AVAILABLE TO THE CLAIMANT UNDER THE WORKMEN'S COMPENSATION LAWS OF THE STATE OF OREGON EFFECTIVE AS OF FEBRUARY 2, 1976, AND TO CONTINUE UNTIL SUCH TIME AS THE CASE IS AGAIN CLOSED BY CLOSING AND EVALUATION.

2. THAT THE CLAIMANT SHALL SUBMIT TO EXAMINATION AND TREATMENT AT THE PAIN CLINIC IN PORTLAND, OREGON, AT TIMES TO BE ESTABLISHED BETWEEN THE PARTIES.

3. THAT THE EMPLOYER-CARRIER PAY AS AN ATTORNEY FEE TO THE LAW FIRM OF POZZI, WILSON AND ATCHISON THE SUM OF 100 DOLLARS IN ADDITION TO AND NOT OUT OF THE BENEFITS MADE PAYABLE BY THIS ORDER.

4. THAT THE CLAIMANT WITHDRAW HIS NOTICE OF APPEAL NOW PENDING BEFORE THE CIRCUIT COURT OF THE STATE OF OREGON, IN MULTNOMAH COUNTY, WHICH APPEAL WAS FILED FROM THE ORDER OF THE WORKMEN'S COMPENSATION BOARD DATED MARCH 1, 1976.

WCB CASE NO. 75-2796 APRIL 21, 1976

RALPH F. BRINK, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED AS OF OCTOBER 31, 1975.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON JANUARY 14, 1972 WHICH REQUIRED SUBSTANTIAL SURGICAL PROCEDURES PERFORMED BY DR. HO. THE CLAIM WAS INITIALLY CLOSED BY A DETERMINATION ORDER MAILED FEBRUARY 26, 1973 WHICH AWARDED CLAIMANT 48 DEGREES FOR 15 PER CENT UNSCHEDULED LOW BACK DISABILITY.

SUBSEQUENTLY, THE CLAIM WAS REOPENED AND CLAIMANT WAS TREATED BY DR. GAMBEE, ANOTHER ORTHOPEDIC PHYSICIAN, AND ALSO GIVEN A PSYCHOLOGICAL EVALUATION BY NORMAN E. HICKMAN, CLINICAL PSYCHOLOGIST. THE CLAIM WAS CLOSED BY A SECOND DETERMINATION ORDER MAILED MAY 28, 1974 WHICH AWARDED CLAIMANT AN ADDITIONAL 64 DEGREES FOR 20 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT CONTINUED TO HAVE PAIN AND AGAIN HIS CLAIM WAS REOPENED AND HE WAS, AT THIS TIME, EVALUATED BY DR. NEWMAN AT THE PORTLAND PAIN CLINIC AND THE CLAIM WAS CLOSED BY A THIRD DETERMINATION ORDER MAILED JULY 10, 1975 WHEREBY CLAIMANT RECEIVED AN ADDITIONAL 48 DEGREES FOR 15 PER CENT LOW BACK DISABILITY. MAKING A TOTAL OF 160 DEGREES FOR 50 PER CENT OF A MAXIMUM ALLOWABLE BY STATUTE FOR UNSCHEDULED DISABILITY.

AFTER THE FIRST CLOSURE IN FEBRUARY 1973 CLAIMANT RECEIVED ASSISTANCE THROUGH THE DIVISION OF VOCATIONAL REHABILITATION AND, AFTER TESTING AND COUNSELING, WAS PROVIDED WITH TWO JOBS. THE CLAIMANT LASTED FOUR DAYS ON THE FIRST JOB WHICH REQUIRED SUBSTANTIAL STANDING AND WORK WITH HIS HANDS AND ARMS EXTENDED IN FRONT OF HIM WHICH CAUSED EXTREME LOW BACK PAIN WHICH RADIATED INTO THE LEGS. THE SECOND JOB INVOLVED DRIVING A VAN FOR THE SCHOOL DISTRICT DELIVERING SMALL ITEMS. CLAIMANT LASTED ABOUT TWO MONTHS ON THIS JOB AND TESTIFIED THAT THE VIBRATION OF THE VEHICLE GRADUALLY INCREASED THE PAIN IN HIS BACK. CLAIMANT HAS NOT WORKED SINCE THE LATTER PART OF OCTOBER 1973.

CLAIMANT HAS AN 8TH GRADE EDUCATION AND HIS WORKING EXPERIENCE IS LIMITED TO THAT REQUIRING HARD PHYSICAL LABOR. AT THE PRESENT TIME CLAIMANT IS RESTRICTED FROM BENDING, STOOPING, TWISTING AND LIFTING MOVEMENTS, ALL OF WHICH WOULD BE REQUIRED IN THE ACTIVITIES IN WHICH CLAIMANT WAS ENGAGED PRIOR TO HIS INJURY. CLAIMANT CONTENDS HE IS ENTITLED TO AN AWARD OF PERMANENT TOTAL DISABILITY ON THE BASIS OF BEING WITHIN THE ODD-LOT CATEGORY. THE FUND CONTENDS THAT THE WORKMAN LACKS MOTIVATION TO RETURN TO WORK.

THE BASIC GROUNDS FOR THE FUND'S CONTENTION WERE CONTAINED IN THE CONCLUSIONS MADE BY DR. NEWMAN THAT THERE WAS QUESTIONABLE MOTIVATION ON THE PART OF THE CLAIMANT TO RETURN TO WORK, THAT HE APPEARED UNINTERESTED IN RETURNING TO WORK AND HE DOUBTED VERY SERIOUSLY IF CLAIMANT WOULD BE MAKING ANY ATTEMPT TO RETURN TO WORK BECAUSE OF HIS PRESENT FINANCIAL SITUATION WHICH WAS GOOD. HOWEVER, DR. NEWMAN ALSO CONCLUDED THAT CLAIMANT HAD "INTRACTABLE LOW BACK PAIN WITH BILATERAL LEG RADIATION."

THE REFEREE FOUND THAT DURING JANUARY 1975 CLAIMANT'S INCOME FROM VARIOUS SOURCES TOTALLED APPROXIMATELY 1,400 DOLLARS A MONTH. THE REFEREE FURTHER FOUND THAT CLAIMANT HAD RETURNED TO THE DIVISION OF VOCATIONAL REHABILITATION AFTER CONCLUSION OF HIS TREATMENT BY DR. GAMBEE AND REQUESTED ASSISTANCE BUT WAS TOLD THAT THEY DID NOT HAVE ANY HELP TO OFFER HIM AND DIDN'T FEEL HE WAS EVEN ABLE TO DO PART TIME WORK. CLAIMANT ALSO TESTIFIED THAT HE HAD, ON HIS OWN, CONTACTED SEVERAL EMPLOYERS BUT HAD BEEN UNABLE TO SECURE WORK - SOME OF THE PLACES OF EMPLOYMENT WERE NOT HIRING AT THE TIME HE APPLIED BUT OTHER PLACES WOULD NOT HIRE HIM BECAUSE OF HIS PHYSICAL CONDITION. DURING PART OF THIS TIME CLAIMANT DREW UNEMPLOYMENT BENEFITS.

WHEN CLAIMANT RETURNED TO THE PORTLAND PAIN CENTER IN MAY 1972 HE WAS EVALUATED BY DR. RUSSAKOV WHOSE OPINION WAS, BASED STRICTLY ON PHYSICAL GROUNDS AND HISTORY OF PREVIOUS SURGERIES, THAT CLAIMANT WAS MODERATELY TO MODERATELY SEVERELY DISABLED AND, IN VIEW OF HIS AGE AND WORK EXPERIENCE, THAT IT WOULD BE EXTREMELY DIFFICULT FOR CLAIMANT TO FIND EMPLOYMENT. DR. RUSSAKOV FELT CLAIMANT HAD CONCLUDED THAT HE WAS UNEMPLOYABLE AND WAS CONSIDERING HIMSELF AS RETIRED - HE DID NOT FIND THAT CONCLUSION UNREASONABLE. DR. YOSPE, A CLINICAL PSYCHOLOGIST, AFTER EXAMINING CLAIMANT, FELT THAT, IN VIEW OF CLAIMANT'S AGE AND DISABILITY, THE PROGNOSIS FOR THE OBTAINING OF SOME FORM OF MEANINGFUL EMPLOYMENT WAS HIGHLY GUARDED AND ALTHOUGH IT WAS UNLIKELY THAT CLAIMANT WOULD BE ABLE TO OBTAIN WORK WITH HIS BACK HISTORY, HE RECOMMENDED THAT EVERY EFFORT BE MADE TO HELP CLAIMANT SECURE SOME FORM OF WORK CONSISTENT WITH HIS PRESENT PHYSICAL CONDITION.

THE REFEREE CONCLUDED THAT CLAIMANT HAD MADE A PRIMA FACIE CASE THAT HE FELL WITHIN THE ODD-LOT CATEGORY, THEREFORE, IT WAS INCUMBENT UPON THE FUND TO SHOW SOME KIND OF SUITABLE WORK WHICH WAS REGULARLY AND CONTINUOUSLY AVAILABLE TO CLAIMANT. THE REFEREE FOUND THAT THE FUND NOT ONLY FAILED TO MAKE SUCH A SHOWING IT APPARENTLY TOOK THE POSITION THAT IT WAS CLAIMANT'S BURDEN TO PROVE THAT THERE WAS NO JOB REGULARLY AND CONTINUOUSLY AVAILABLE TO HIM. SUCH POSITION CONTRAVENES THE RULING OF THE COURT IN SWANSON V. WESTPORT LUMBER CO. (UNDERSCORED), 4 OR APP 417.

CONSIDERING ALL OF THE EVIDENCE, THE REFEREE CONCLUDED THERE WAS NOTHING CLAIMANT COULD HAVE DONE TO MITIGATE THE SITUATION IN WHICH HE PRESENTLY FINDS HIMSELF AS A RESULT OF THE JANUARY 14, 1972 INJURY, THEREFORE, CLAIMANT IS, IN FACT, PERMANENTLY AND TOTALLY DISABLED. THE REFEREE, BY AN AMENDED OPINION AND ORDER, FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED AS OF OCTOBER 31, 1975.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS OF THE REFEREE'S ORDERS.

ORDER

THE REFEREE'S ORDER OF NOVEMBER 7, 1975, AS SUBSEQUENTLY AMENDED BY ORDERS OF JANUARY 17, 1975 (SIC) AND NOVEMBER 19, 1975, IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-3929 APRIL 22, 1976

EDITH SIMMONS, CLAIMANT

WALTON AND YOKUM, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED MAY 15, 1975 WHEREBY CLAIMANT WAS AWARDED 112 DEGREES FOR 35 PER CENT UNSCHEDULED DISABILITY. THE CLAIMANT CONTENDS THAT SHE IS PERMANENTLY AND TOTALLY DISABLED.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON NOVEMBER 5, 1974 WHEN SHE STRAINED THE LEFT PORTION OF HER BACK WHILE LIFTING A BOX OF MERCHANDISE. SHE WAS FIRST SEEN BY DR. BRANDT WHO DIAGNOSED A LUMBOSACRAL STRAIN - HE FELT THAT NO PERMANENT INJURY RESULTED THEREFROM. LATER, CLAIMANT WAS SEEN BY DR. PFEIFFER, A CHIROPRACTIC PHYSICIAN, WHO FELT THE INJURY PREVENTED CLAIMANT FROM RETURNING TO ANY EMPLOYMENT. IN DECEMBER 1974 DR. BRANDT MODIFIED HIS ORIGINAL OPINION AND ESTIMATED FUTURE TIME OFF OF TWO TO THREE MONTHS.

ON JANUARY 13, 1975 CLAIMANT WAS EXAMINED BY DR. DONALD D. SMITH, AN ORTHOPEDIC SURGEON, WHO FELT CLAIMANT HAD A CHRONIC STRAIN OF THE MUSCLES AND LIGAMENTS OF HER BACK SUPERIMPOSED ON HER PREEXISTING HYPERTROPHIC ARTHRITIS OF THE LUMBOSACRAL AREA - HE DID NOT BELIEVE SHE HAD A HERNIATED DISC. DR. SMITH FELT IT MIGHT BE POSSIBLE FOR CLAIMANT TO RETURN TO WORK BUT PROBABLY NOT AS A SHIPPING ROOM CLERK, THE JOB SHE WAS HOLDING AT THE TIME OF HER INJURY.

DR. SMITH CONTINUED TO TREAT CLAIMANT CONSERVATIVELY AND, ON MAY 29, 1975, WAS OF THE OPINION THAT NO FURTHER TREATMENT WAS INDICATED. HE STILL DOUBTED THAT CLAIMANT WOULD BE ABLE TO RETURN TO HER PREVIOUS WORK BECAUSE IT REQUIRED CONSIDERABLE BENDING AND LIFTING. HE RECOMMENDED THE CLAIM BE CLOSED AND THE CLAIM WAS CLOSED ON AUGUST 15, 1975 WITH THE AWARD OF 112 DEGREES FOR 35 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT TESTIFIED THAT SHE HAD NOT TRIED TO WORK OR LOOKED FOR WORK BECAUSE SHE KNOWS THAT SHE CANNOT DO ANY TYPE OF WORK, SHE CANNOT EVEN DO HER HOUSEWORK, CARRY OVER FIVE POUNDS WITHOUT SOME DISCOMFORT AND IS UNABLE TO STAND OR SIT FOR LONG PERIODS OF TIME. TWO PEOPLE INTERVIEWED CLAIMANT CONCERNING WORK, MR. MURPHY OF THE DISABILITY PREVENTION DIVISION AND MR. FRYREAR WHO OPERATES AN EMPLOYMENT AGENCY. CLAIMANT TOLD BOTH OF THESE PERSONS THAT SHE WOULD LIKE TO HAVE A JOB IF THERE WAS ONE FOUND FOR HER THAT SHE WAS PHYSICALLY ABLE TO HANDLE. MR. MURPHY'S TESTIMONY WAS VAGUE AT BEST AND MR. FRYREAR, WHO CONTACTED CLAIMANT AT THE SUGGESTION OF HER ATTORNEY, TOOK AN APPLICATION FROM HER AND DETERMINED, BASED UPON HIS OFFICE RECORDS, THAT THERE WAS NO JOB IN THE AREA THAT SHE COULD HANDLE.

THE REFEREE FOUND THAT THERE APPARENTLY WAS NO JOB PRESENTLY AVAILABLE TO THE KNOWLEDGE OF CLAIMANT, THE DISABILITY PREVENTION DIVISION OR THE PRIVATE EMPLOYMENT AGENCY. HE ALSO FOUND THAT THE EMPLOYER HAD NOT PUT FORTH A VERY DILIGENT EFFORT TO ASSIST CLAIMANT IN FINDING A JOB NOR HAD CLAIMANT PUT OUT ANY GREAT EFFORT ON HER PART TO LOOK FOR A JOB. AT THE PRESENT TIME CLAIMANT IS DRAWING SOCIAL SECURITY DISABILITY BENEFITS.

THE REFEREE CONCLUDED THAT CLAIMANT WAS NOT A PERMANENTLY AND TOTALLY DISABLED PERSON - THAT SHE HAD BEEN ADEQUATELY COMPENSATED FOR HER LOSS OF EARNING CAPACITY BY THE AWARD OF 112 DEGREES WHICH IS 35 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR UNSCHEDULED DISABILITY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE. HOWEVER, THE BOARD DOES STRONGLY URGE THAT EVERY POSSIBLE EFFORT BE MADE BY THE EMPLOYER, THE DIVISION OF VOCATIONAL REHABILITATION AND THE DISABILITY PREVENTION DIVISION TO PROVIDE CLAIMANT WITH A REHABILITATION PROGRAM WHICH WILL, HOPEFULLY, RESTORE CLAIMANT TO THE EXTENT THAT SHE WILL BE ABLE TO DO SOME TYPE OF WORK IN THE FUTURE.

THE BOARD IS NOT SATISFIED WITH THE CONCLUSIONS REACHED BY MR. MURPHY AND MR. FRYREAR THAT THERE ARE NO JOBS IN THE AREA WHICH CLAIMANT COULD DO. CLAIMANT IS NOT PERMANENTLY AND TOTALLY DISABLED AT THE PRESENT TIME AND SOME REASONABLE ATTEMPTS MADE BY AND THROUGH THE PROPER AGENCY COULD RESULT IN RETURNING CLAIMANT TO THE LABOR MARKET AS A USEFUL MEMBER THEREOF.

ORDER

THE ORDER OF THE REFEREE DATED JANUARY 13, 1976 IS AFFIRMED.

WCB CASE NO. 75-2622 APRIL 22, 1976

STEPHEN DANSCA, CLAIMANT

BAILEY, DOBLIE AND BRUUN,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED HIM 30 PER CENT LOSS OF THE LEFT HAND BUT DENIED HIS CLAIM THAT HE HAD SUFFERED A COMPENSABLE CONSEQUENTIAL INJURY TO HIS FOOT AS A RESULT OF A FALL AT HOME ON AUGUST 13, 1975.

ON JANUARY 8, 1974 THE CLAIMANT SUFFERED A COMPENSABLE INJURY CONSISTING OF SECOND DEGREE ELECTRICAL BURNS ON THE THUMB, INDEX AND THIRD FINGER OF THE LEFT HAND. HE WAS SEEN BY DR. MCNEILL WHO EVENTUALLY RELEASED CLAIMANT TO RETURN TO LIGHT WORK ON MAY 6, 1974 - SUBSEQUENTLY CLAIMANT RETURNED TO REGULAR WORK.

AGAIN ON OCTOBER 16, 1974 CLAIMANT WAS SEEN BY DR. MCNEILL, HE STATED THAT LIFTING WEIGHTS OF APPROXIMATELY 70 POUNDS BROUGHT ON A RECURRENCE OF PAIN AND NUMBNESS IN HIS LEFT INDEX FINGER AND THUMB. NERVE CONDUCTION STUDIES WERE NORMAL. THERE WAS A NERVE DYESTHESIA FROM THE ORIGINAL INJURY WHICH DR. MCNEILL FELT WOULD GRADUALLY IMPROVE WITH TIME.

ON APRIL 22, 1975 CLAIMANT WAS EXAMINED BY DR. BERG, WHOSE OPINION WAS THAT CLAIMANT HAD PROGRESSIVE ARTHRITIS OF LONGSTANDING WHICH INTERFERED WITH THE GENERAL FUNCTION OF THE LEFT HAND - HE THOUGHT THESE CHANGES MAY HAVE BEEN AGGRAVATED, AT LEAST TEMPORARILY, BY THE INJURY AND THERE WAS MILD OR MINIMAL RESIDUAL PARESTHESIA OF THE LEFT HAND SECONDARY TO THE INDUSTRIAL INJURY. CLAIMANT WAS CAPABLE OF WORKING ON A STEADY BASIS AND WOULD IMPROVE IN ALL

PROBABILITY. HE ESTIMATED THE LOSS OF PHYSICAL FUNCTION TO BE 15 PER CENT OF THE LEFT UPPER EXTREMITY AT THE LEVEL OF THE WRIST.

DR. MCNEILL AGREED WITH DR. BERG'S REPORT EXCEPT THAT HE FELT THE PASSIVE RANGE OF MOTION OF THE FINGERS WAS BETTER THAN ACTIVE, AND A DETERMINATION ORDER WAS MAILED JUNE 9, 1975 WHEREBY CLAIMANT WAS AWARDED 20 PER CENT LOSS OF THE LEFT HAND.

CLAIMANT WAS BORN AND RAISED IN HUNGARY WHERE HE WAS TRAINED TO OPERATE A DRILL PRESS. HE CAME TO THE UNITED STATES IN 1956 AT THE AGE OF 24 AND WORKED FOR FREIGHTLINER CORPORATION FOR TEN YEARS AS A DRILL PRESS OPERATOR. CLAIMANT STATED THAT IT WAS DIFFICULT NOW FOR HIM TO HOLD A NAIL OR A CENTER PUNCH BECAUSE, INSTEAD OF USING HIS THUMB AND FIRST TWO FINGERS TO HOLD THESE OBJECTS, HE NOW HAS TO HOLD THEM IN THE PALM USING PRESSURE WITH THE LITTLE AND RING FINGERS. CLAIMANT TESTIFIED THAT PRIOR TO HIS INJURY HE COULD LIFT CHIPPER PARTS AND KNIVES WEIGHING APPROXIMATELY 65 POUNDS BUT NOW HE IS AFRAID TO LIFT THE SAME OBJECTS WITH BOTH HANDS.

CLAIMANT ALSO CONTENDS THAT AT HOME ONE MORNING HE WAS WALKING DOWN THE STAIRS, SLIPPED AND WHEN HE ATTEMPTED TO GRAB THE GUARDRAIL TO SAVE A FALL HE HAD INSUFFICIENT GRIP IN THE LEFT HAND TO HOLD ONTO THE RAIL AND KEEP FROM FALLING. AS A RESULT OF THE FALL HE LOST TIME AND WAS HOSPITALIZED.

THE REFEREE FOUND THAT CLAIMANT HAD SUSTAINED HIS BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE THAT THE LOSS OF PHYSICAL FUNCTION OF HIS LEFT HAND WAS GREATER THAN THAT FOR WHICH HE RECEIVED THE AWARD OF JUNE 9, 1975. THE REFEREE FOUND THAT CLAIMANT HAD NOT SUSTAINED THE BURDEN OF PROVING THAT HE SUFFERED A CONSEQUENTIAL COMPENSABLE INJURY WHEN HE FELL AT HOME – THE EVIDENCE INDICATES THAT WHEN CLAIMANT STARTED TO FALL IT WAS THEN TOO LATE TO REACH OUT AND GRAB THE RAIL.

THE REFEREE CONCLUDED THAT CLAIMANT WAS ENTITLED TO AN INCREASE IN THE AWARD FOR LOSS OF FUNCTION OF HIS LEFT HAND BUT THAT THE CLAIM FOR THE COMPENSABLE CONSEQUENTIAL INJURY WAS PROPERLY DENIED.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 4, 1975 IS AFFIRMED.

WCB CASE NO. 75-3217 APRIL 22, 1976

WILLIAM OSWALD, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER, AS AMENDED, WHICH SET ASIDE THE DETERMINATION ORDER MAILED JULY 17, 1975 FOR ALL PURPOSES INCLUDING THE COMMENCEMENT OF THE RUNNING OF THE FIVE YEAR AGGRAVATION PERIOD, ORDERED THE FUND TO REOPEN CLAIMANT'S CLAIM FOR PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION AND MEDICAL SERVICES FROM AND AFTER JULY 10, 1975 UNTIL

THE CLAIM IS CLOSED PURSUANT TO ORS 656.268 (THAT CLOSURE TO BE DEEMED THE FIRST DETERMINATION ORDER FOR THE PURPOSE OF CLAIMANT'S AGGRAVATION RIGHTS), DIRECTED THE FUND TO PAY CLAIMANT AS A PENALTY AN ADDITIONAL SUM EQUAL TO 25 PER CENT OF THE TEMPORARY TOTAL DISABILITY COMPENSATION DUE AND OWING CLAIMANT FROM AUGUST 26, 1975 TO THE DATE OF HER ORDER (NOVEMBER 17, 1975), AND DIRECTED THE FUND TO PAY CLAIMANT'S ATTORNEY THE SUM OF 800 DOLLARS AS A REASONABLE ATTORNEY'S FEE, SAID SUM TO BE PAID IN ADDITION TO AND NOT OUT OF THE COMPENSATION AWARDED BY HER ORDER.

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS BACK ON NOVEMBER 19, 1974 WHILE LIFTING HEAVY MERCHANDISE. THE INJURY WAS DIAGNOSED AS ACUTE LOW BACK STRAIN AND CLAIMANT RETURNED TO WORK WITHIN THREE DAYS AND ON NOVEMBER 29, 1974, WHILE LIFTING BOXES WHICH WEIGHED APPROXIMATELY 50 POUNDS HE AGAIN EXPERIENCED BACK PAIN. CLAIMANT FILED A CLAIM FOR EACH OF THE INCIDENTS AND THE CLAIMS WERE CONSOLIDATED AND TREATED AS ONE AND ACCEPTED BY THE FUND.

DR. BISKA DIAGNOSED SEVERE LUMBOSACRAL STRAIN AND TREATED CLAIMANT CONSERVATIVELY AND RELEASED HIM TO RETURN TO WORK ON DECEMBER 17, 1974. CLAIMANT RETURNED TO HIS SAME JOB AND CONTINUED TO WORK AT HIS JOB EXPERIENCING PERIODIC BACK PAIN. ON JUNE 25, 1975 CLAIMANT WAS EXAMINED BY DR. SHLIM AT THE REQUEST OF THE FUND. DR. SHLIM FELT NO FURTHER TREATMENT WAS NECESSARY AND RECOMMENDED CLAIM CLOSURE - HE FELT THAT CLAIMANT HAD SUFFERED NO RESIDUAL DISABILITY. ON OR ABOUT JULY 2, 1975, CLAIMANT WHILE FILLING ORDERS ON THE JOB, REACHED DOWN FOR A CASE OF PAINT AND EXPERIENCED BACK PAIN IN THE SAME AREAS OF HIS TWO PREVIOUS EPISODES AND WAS UNABLE TO FINISH THE WORK DAY. CLAIMANT WAS UNABLE TO SEE DR. BISKA, HE CALLED DR. GRITZKA AT THE PORTLAND ORTHOPEDIC CLINIC AND OBTAINED AN APPOINTMENT TO BE SEEN ON JULY 10, 1975.

ON JULY 7, 1975 A DETERMINATION OF THE CLAIM WAS REQUESTED BY THE FUND WHICH INDICATED CLAIMANT HAD BEEN RELEASED TO RETURN TO WORK BY HIS MEDICAL DOCTOR AND HAD DONE SO. ON JULY 17, 1975 A DETERMINATION ORDER WAS MAILED GRANTING CLAIMANT COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM NOVEMBER 19, 1974 THROUGH DECEMBER 16, 1974 BUT AWARDING NO PERMANENT PARTIAL DISABILITY COMPENSATION. AT THE TIME OF THE CLOSURE, DR. GRITZKA'S REPORT, BASED UPON HIS EXAMINATION OF CLAIMANT ON JULY 10, WAS NOT AVAILABLE TO BE SUBMITTED TO EITHER THE FUND OR THE EVALUATION DIVISION OF THE BOARD.

CLAIMANT CONTINUED TREATMENT WITH DR. GRITZKA AND ON AUGUST 26, 1975 HIS ATTORNEY FURNISHED THE FUND DR. GRITZKA'S REPORT DATED AUGUST 12, 1975 WHICH INDICATED HE HAD FIRST EXAMINED CLAIMANT ON JULY 10, 1975 AND DIAGNOSED A PROBABLE ACUTE LUMBOSACRAL SPRAIN AND POSSIBLE HERNIATED NUCLEUS PULPOSUS. THE REPORT INDICATED THAT CLAIMANT WAS CONTINUING TREATMENT FOR CHRONIC LUMBOSACRAL SPRAIN AND THAT CLAIMANT'S CONDITION WAS RELATED TO THE ACCEPTED INDUSTRIAL INJURY. THE REPORT FURTHER STATED THAT CLAIMANT WAS NOT MEDICALLY STATIONARY ON THE DATE HIS CLAIM WAS CLOSED, NAMELY JULY 17, 1975 AND HE RECOMMENDED COMMENCING TEMPORARY TOTAL DISABILITY COMPENSATION AS OF JULY 10, 1975, THE DAY HE FIRST EXAMINED CLAIMANT.

CLAIMANT'S ATTORNEY ASKED THAT THE DETERMINATION ORDER BE DECLARED NULL AND VOID AND THE CLAIM REOPENED FOR THE CARE AND TREATMENT RECOMMENDED BY DR. GRITZKA, THAT CLAIMANT BE REIMBURSED FOR THE COST OF DR. GRITZKA'S EXAMINATION AND REPORT AND THAT CLAIMANT BE PAID TEMPORARY TOTAL DISABILITY COMPENSATION FROM JULY 10 UNTIL SUCH TIME AS THE CLAIM WAS CLOSED. THE CLAIM WAS NOT VOLUNTARILY REOPENED BY THE FUND AND, ON OCTOBER 2, 1975, CLAIMANT REQUESTED A HEARING - THE ISSUES BEING THOSE BASICALLY SET FORTH IN THE PRECEDING SENTENCE AND, ADDITIONALLY, PENALTIES AND ATTORNEY'S FEES FOR UNREASONABLE RESISTANCE AND DELAY BY THE FUND FOR FAILING TO PAY COMPENSATION

WITHIN 14 DAYS AFTER RECEIPT OF THE ATTORNEY'S LETTER DATED AUGUST 26, 1975 WHICH ENCLOSED DR. GRITZKA'S REPORT.

THE REFEREE HELD THAT ALTHOUGH CLAIMANT WAS NOT REQUIRED TO PERFECT AN AGGRAVATION CLAIM WITHIN ONE YEAR OF THE MAILING DATE OF THE DETERMINATION ORDER, HE MAY CHOOSE TO DO SO AND, IF HE DOES FILE AN AGGRAVATION CLAIM WHICH MEETS THE REQUIREMENT OF THE STATUTE, THE FUND HAS A DUTY TO BEGIN PAYMENT OF COMPENSATION NO LATER THAN THE 14TH DAY AFTER IT HAS NOTICE OR KNOWLEDGE OF THE MEDICALLY VERIFIED INABILITY TO WORK RESULTING FROM A WORSENED CONDITION.

THE REFEREE CONCLUDED THAT DR. GRITZKA'S REPORT OF AUGUST 12, 1975 WAS A CLAIM FOR AGGRAVATION PURSUANT TO THE PROVISIONS OF ORS 656.273(3), THEREFORE, ALTHOUGH THE CLAIMANT'S ATTORNEY, INITIALLY, ASKED THE DETERMINATION ORDER BE SET ASIDE AND THE CLAIM REOPENED FOR FURTHER MEDICAL CARE AND TREATMENT, WHICH REQUEST WOULD NOT IMPOSE UPON THE FUND AN OBLIGATION TO BEGIN PAYMENT OF COMPENSATION, NEVERTHELESS, WHEN THE FUND RECEIVED DR. GRITZKA'S REPORT OF AUGUST 12, 1975, IT WAS, IN EFFECT, A CLAIM OF AGGRAVATION WHICH DID IMPOSE AN OBLIGATION UPON THE FUND TO COMMENCE PAYMENT OF COMPENSATION WITHIN 14 DAYS.

THE REFEREE CONCLUDED THAT THE DETERMINATION ORDER MAILED JULY 17, 1975 WAS PREMATURE AND SHOULD BE SET ASIDE FOR ALL PURPOSES AND THAT CLAIMANT SHOULD BE PAID TEMPORARY TOTAL DISABILITY COMPENSATION FROM JULY 10, 1975 UNTIL HIS CLAIM FOR AGGRAVATION IS CLOSED PURSUANT TO ORS 656.268 AND ASSESSED AS A PENALTY THE SUM EQUAL TO 25 PER CENT OF THE TEMPORARY TOTAL DISABILITY COMPENSATION DUE AND OWING CLAIMANT FROM AUGUST 26, 1975, THE DATE THE FUND WAS ADVISED OF THE CLAIM FOR AGGRAVATION, UNTIL NOVEMBER 17, 1975, THE DATE OF HER ORDER. THE REFEREE FURTHER CONCLUDED THAT THE CONDUCT OF THE FUND JUSTIFIED AWARDING CLAIMANT'S ATTORNEY AN ATTORNEY'S FEE IN THE AMOUNT OF 800 DOLLARS TO BE PAID BY THE FUND AND NOT OUT OF THE COMPENSATION AWARDED CLAIMANT.

THE BOARD, ON DE NOVO REVIEW, AGREES THAT DR. GRITZKA'S REPORT, DATED AUGUST 12, 1975, WAS A PROPER CLAIM FOR AGGRAVATION AND WHEN RECEIVED BY THE FUND, THE FUND WAS OBLIGATED TO COMMENCE PAYMENT OF COMPENSATION WITHIN 14 DAYS THEREAFTER AND UNTIL IT, IN FACT, EITHER DENIED OR ACCEPTED THE CLAIM. THE BOARD FURTHER AGREES THAT THE FUND'S FAILURE TO ACT UPON THE CLAIM AND ITS APPEARANCE AT THE HEARING IN OPPOSITION CONSTITUTED A DE FACTO DENIAL OF THE CLAIM WHICH SUBJECTED IT TO THE IMPOSITION OF PENALTIES AND PAYMENT OF CLAIMANT'S ATTORNEY FEES.

HOWEVER, THE BOARD FINDS NO BASIS FOR SETTING ASIDE THE DETERMINATION ORDER, MAILED JULY 17, 1975. THIS DETERMINATION ORDER WAS BASED UPON DR. BISKA'S REPORT WHICH INDICATED HE HAD RELEASED CLAIMANT TO RETURN TO REGULAR WORK AS OF DECEMBER 17, 1974 AND CLAIMANT HAD RETURNED TO THE SAME JOB HE HAD PRIOR TO THE INJURY ON THAT DATE. CLAIMANT CONTINUED TO WORK UNTIL JULY 2, 1975 WHEN HE AGGRAVATED HIS BACK CONDITION. THE BOARD FINDS NO EVIDENCE THAT THE CLAIM WAS PREMATURELY CLOSED, ALTHOUGH THE FACT THAT THE FUND DID NOT REQUEST A DETERMINATION UNTIL JULY 7, 1975 WHEN IT HAD IN ITS POSSESSION DR. BISKA'S REPORT AS WELL AS REPORTS FROM DR. SHLIM AND DR. ZOOK, ALL INDICATING CLAIMANT'S CONDITION HAD BEEN MEDICALLY STATIONARY FOR SOME PERIOD OF TIME, SEEMS SOMEWHAT PUZZLING. WITHOUT A VALID DETERMINATION ORDER THE CLAIMANT HAS NO BASIS FOR HIS CLAIM FOR AGGRAVATION. ORS 656.273(1) PROVIDES THAT AFTER THE LAST AWARD OR ARRANGEMENT OF COMPENSATION, AN INJURED WORKMAN IS ENTITLED TO ADDITIONAL COMPENSATION, INCLUDING MEDICAL SERVICES, FOR WORSENED CONDITIONS RESULTING FROM THE ORIGINAL INJURY. IF THE DETERMINATION ORDER MAILED JULY 17, 1975 IS SET ASIDE IN ITS ENTIRETY THEN THERE HAS NEVER BEEN AN AWARD OR ARRANGEMENT OF COMPENSATION.

THE BOARD CONCLUDES THAT THE REFEREE'S OPINION AND ORDER MUST BE MODIFIED INSOFAR AS IT RELATES TO SETTING ASIDE THE DETERMINATION ORDER, MAILED JULY 17, 1975 AND DIRECTING THAT THE SUBSEQUENT CLOSURE UNDER ORS 656.268 BE DEEMED THE FIRST DETERMINATION ORDER FOR PURPOSE OF CLAIMANT'S AGGRAVATION RIGHTS.

ALTHOUGH THE REFEREE ASSESSED A 25 PER CENT PENALTY ON THE TEMPORARY TOTAL DISABILITY COMPENSATION DUE AND OWING CLAIMANT FROM AUGUST 26, 1975, THE DAY THE FUND WAS ADVISED OF CLAIMANT'S CLAIM FOR AGGRAVATION, UNTIL NOVEMBER 17, 1975, THE DATE OF HER ORDER, SHE HAD STATED THAT THE FUND'S OPPOSITION AT THE HEARING MUST BE CONSTRUED AS A DE FACTO DENIAL. THE BOARD CONCLUDES THAT THE 25 PER CENT PENALTY SHOULD BE ASSESSED AGAINST THE TEMPORARY TOTAL DISABILITY COMPENSATION DUE CLAIMANT FROM THE DATE THE FUND WAS ADVISED OF THE CLAIM FOR AGGRAVATION, AUGUST 26, 1975 UNTIL OCTOBER 22, 1975, THE DATE OF THE HEARING.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 17, 1975, AS AMENDED BY THE ORDER DATED DECEMBER 5, 1975, IS MODIFIED.

THE FIRST PARAGRAPH OF THE ORDER PORTION OF THE AMENDED OPINION AND ORDER, DATED DECEMBER 5, 1975, IS DELETED THEREFROM.

THE SECOND PARAGRAPH OF THE ORDER PORTION IS AMENDED TO READ AS FOLLOWS -

> 'IT IS FURTHER ORDERED THAT THE STATE ACCIDENT INSURANCE FUND PAY TO CLAIMANT AN ADDITIONAL AMOUNT EQUAL TO 25 PER CENT OF THE TEMPORARY TOTAL DISABILITY COMPENSATION DUE AND OWING CLAIMANT FROM AUGUST 22, 1975 TO OCTOBER 22, 1975.'

IN ALL OTHER RESPECTS THE REFEREE'S ORDER, DATED NOVEMBER 17, 1975, AS AMENDED BY THE ORDER DATED DECEMBER 5, 1975, IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 350 DOLLARS PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 74-1808 APRIL 26, 1976

MARY PARKERSON, CLAIMANT

SETTLEMENT STIPULATION

IT IS STIPULATED AND AGREED BY AND BETWEEN THE CLAIMANT AND THE DEFENDANT THAT THE REQUEST FOR HEARING HERETOFORE FILED BY THE CLAIMANT FROM THE LETTER DENYING HER AGGRAVATION CLAIM SHALL BE SETTLED AND COMPROMISED BY AND BETWEEN THE PARTIES BY DEFENDANT ACCEPTING THE CLAIM FOR AGGRAVATION HERETOFORE FILED BY THE CLAIMANT, AND PROCESSING A CLAIM PURSUANT TO ORS 656.268.

IT IS FURTHER STIPULATED AND AGREED THAT DEFENDANT SHALL PAY TO POZZI, WILSON AND ATCHISON IN ADDITION TO AND NOT OUT OF THE COMPENSATION DUE THE CLAIMANT THE SUM OF 400.00 DOLLARS AS REASONABLE ATTORNEY'S FEES FOR THE SERVICE RENDERED HEREIN.

IT IS FURTHER STIPULATED AND AGREED THAT THE REQUEST FOR HEARING HERETOFORE FILED BY THE CLAIMANT MAY BE DISMISSED.

WCB CASE NO. 75-317 APRIL 26, 1976

NORMA CRAWLEY, CLAIMANT

EVOHL F. MALAGON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED MARCH 25, 1974 WHEREBY CLAIMANT WAS AWARDED TEMPORARY TOTAL DISABILITY COMPENSATION ONLY AND SUSTAINED THE FUND'S DENIAL OF CLAIMANT'S CLAIM FOR AGGRAVATION.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON NOVEMBER 8, 1973 WHILE WORKING AS A WAITRESS. SHE WAS SEEN BY DR. CAMPBELL, CHIROPRACTIC PHYSICIAN, WHO DIAGNOSED A LUMBOSACRAL STRAIN AND TREATED CLAIMANT WITH CHIROPRACTIC MANIPULATION AND PHYSIOTHERAPY - HE ALSO PRESCRIBED THE WEARING OF A LUMBAR BELT. CLAIMANT HAD INJURED THE SAME AREA OF HER BACK IN MARCH, 1973. CLAIMANT WAS OFF WORK APPROXIMATELY ONE MONTH, SHE ATTEMPTED TO RETURN TO WORK IN DECEMBER 1973 BUT BECAUSE OF CHANGE IN OWNERSHIP THERE WAS NO JOB AVAILABLE. CLAIMANT HAS NOT WORKED SINCE HER INDUSTRIAL INJURY.

HER CLAIM WAS CLOSED WITH A DETERMINATION ORDER MAILED MARCH 25, 1974 WHICH AWARDED CLAIMANT COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM NOVEMBER 8 THROUGH DECEMBER 9, 1973 BUT AWARDED HER NO COMPENSATION FOR PERMANENT PARTIAL DISABILITY.

IN MAY 1974 CLAIMANT BENT OVER TO PUT SOAP IN HER DISHWASHER AT HOME AND FELT A 'CATCH' IN HER LOWER BACK - SHE WAS UNABLE TO STRAIGHTEN UP. AGAIN SHE WAS TREATED BY DR. CAMPBELL, AND SUBSEQUENTLY REFERRED TO DR. DONAHOO WHO EXAMINED CLAIMANT BECAUSE OF HER 'CHRONIC BACK DIFFICULTY' AND FOUND SPONDYLOLYSIS AT THE L5 LEVEL BUT AT THAT TIME FOUND NO APPARENT SPONDYLOLISTHESIS. LATER, DR. DONAHOO STATED HE WAS CERTAIN THAT THE SPONDYLOLISTHESIS EXISTED IN JULY 1974 AND, BASED ON THE HISTORY AND THE PREVIOUS X-RAYS, THAT IT ALSO EXISTED IN NOVEMBER 1973. CLAIMANT CONTINUED TO BE TREATED BY DR. CAMPBELL, WHO, IN OCTOBER 1974, REPORTED CLAIMANT HAD RESPONDED FAIRLY WELL AND MOST OF HER COMPLAINTS HAD BEEN RELIEVED, INCLUDING THE LEG COMPLAINTS.

IN DECEMBER 1974 CLAIMANT WAS AGAIN SEEN BY DR. DONAHOO, AT THAT TIME HE FELT CLAIMANT'S CONDITION HAD NOT WORSENED AND HE HAD NO SPECIFIC RECOMMENDATIONS FOR TREATMENT OTHER THAN UTILIZING A BACK BRACE. HE FELT THAT CLAIMANT'S PRIMARY CONCERN WAS NOT TREATMENT BUT RATHER PAYMENT FOR TIME LOSS.

WITH THE EXCEPTION OF ATTEMPTING TO RETURN TO WORK IN THE RESTAURANT IN DECEMBER 1973 CLAIMANT HAS SOUGHT NO OTHER TYPE OF EMPLOYMENT.

THE FUND CONTENDS THAT IF CLAIMANT, AT THE PRESENT TIME, HAS A DISABILITY IT IS THE RESULT OF THE MAY 1974 INCIDENT WHICH WAS NOT COMPENSABLE. THIS WAS THE BASIS FOR ITS LETTER OF DENIAL ISSUED BY THE FUND ON MAY 29, 1975. THE CLAIMANT CONTENDS THAT THE MAY 1974 INCIDENT SHOULD NOT BE CONSIDERED AS A 'NEW INJURY' BUT SIMPLY AS AN AGGRAVATION OF HER PREEXISTING INJURY.

THE REFEREE FOUND THAT UNDER NORMAL CIRCUMSTANCES THE SIMPLE ACT OF BENDING OVER WOULD NOT USUALLY CONSTITUTE A 'NEW INJURY', HOWEVER, IN THE INSTANT CASE THE EVIDENCE INDICATES THAT AN IDENTICAL

INCIDENT OCCURRED ON MARCH 23, 1973, PRIOR TO THE INDUSTRIAL INJURY, WHEN CLAIMANT WAS BENDING OVER STACKING CANNED GOODS AND COULD NOT STRAIGHTEN UP. DR. DONAHOO HAD INDICATED THAT BOTH THE SPONDYLOLYSIS AND THE SPONDYLOLISTHESIS EXISTED AT THE TIME OF THE INDUSTRIAL INJURY, A SIMPLE AND NORMAL ACT SUCH AS BENDING, COULD CAUSE TRAUMATIC RESULTS.

THE REFEREE FOUND THAT THE INDUSTRIAL INJURY OF NOVEMBER 8, 1973 WAS, IN AND OF ITSELF, NOT A TRUE ACCIDENT BUT ONE OF A SERIES OF AGGRAVATIONS TO A PREEXISTING CONDITION, NOT DIFFERENT TO ANY GREAT EXTENT FROM THE INCIDENT OF MARCH 23, 1973 NOR THE INCIDENT IN MAY 1974.

THE REFEREE ALSO FOUND THAT CLAIMANT DID NOT SHOW ANY GREAT INDICATION OR DESIRE TO RETURN TO THE LABOR MARKET, THAT SHE HAD, IN FACT, RETIRED. HE ALSO FELT HER CREDIBILITY WAS SOMEWHAT SUSPECT, RELYING ON DR. DONAHOO'S STATEMENT THAT CLAIMANT'S MAJOR INTEREST WAS NOT TREATMENT BUT RATHER TIME LOSS AND THE STATEMENT BY CLAIMANT'S TREATING DOCTOR, DR. CAMPBELL, THAT HER CONDITION WAS NO BETTER OR WORSE NOW THAN IT HAD BEEN FOR SOME TIME, HE CONCLUDED CLAIMANT HAD NOT MET HER BURDEN OF PROOF TO SHOW THAT ANY PRESENT NEED FOR MEDICAL TREATMENT EXISTED OR THAT, BASED UPON LOSS OF EARNING CAPACITY, SHE HAD SUFFERED ANY PERMANENT DISABILITY AS A RESULT OF THE NOVEMBER 8, 1973 INJURY.

HE FURTHER CONCLUDED THAT IF CLAIMANT DID HAVE ANY PRESENT DISABILITY IT WAS THE RESULT OF THE NON-COMPENSABLE OFF-THE-JOB INCIDENT OF MAY, 1974 AND THE DENIAL OF RESPONSIBILITY THEREFOR BY THE FUND WAS PROPER.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 19, 1975 IS AFFIRMED.

WCB CASE NO. 75-3672 APRIL 26, 1976

EDWIN N. DAYTON, CLAIMANT

KEITH D. SKELTON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
ORDER

ON APRIL 12, 1976 THE BOARD ENTERED ITS ORDER ON REVIEW IN THE ABOVE ENTITLED MATTER. ON APRIL 20, 1976 CLAIMANT REQUESTED RECONSIDERATION BY THE BOARD OF ITS ORDER.

AFTER DUE CONSIDERATION, THE BOARD CONCLUDES THAT THE REQUEST FOR RECONSIDERATION SHOULD BE DENIED.

IT IS SO ORDERED.

WCB CASE NO. 75—3026 APRIL 26, 1976

HERMAN N. GREEN, CLAIMANT

CHARLES PAULSON, CLAIMANT'S ATTY.
MERTEN AND SALTVEIT, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH DENIED CLAIMANT'S CLAIM OF AGGRAVATION.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON MARCH 4, 1970, HE MISSED A FEW DAYS FROM WORK, WAS TREATED CONSERVATIVELY AND HIS CLAIM WAS CLOSED ON JUNE 17, 1970 BY A DETERMINATION ORDER WHICH AWARDED HIM COMPENSATION FOR TEMPORARY TOTAL DISABILITY. THE DETERMINATION ORDER ADVISED CLAIMANT THAT HIS AGGRAVATION RIGHTS WOULD EXPIRE JUNE 16, 1975.

CLAIMANT'S INDUSTRIAL INJURY WAS DIAGNOSED AS ABRASION AND CONTUSION OF THE RIGHT UPPER THIRD OF HIS FOREARM, SPRAIN OF THE RIGHT SHOULDER AND SPRAIN OF THE CERVICAL SPINE, AGGRAVATION OF PREEXISTING ARTHRITIS.

ON DECEMBER 11, 1970 CLAIMANT WAS SEEN BY DR. GEIST WHO DIAGNOSED CLAIMANT'S CONDITION AS A POST-TRAUMATIC TENDINITIS SUPRASPINATUS TENDON, RIGHT SHOULDER AND CONTUSION, RIGHT HAND. THE SHOULDER CONDITION HAD IMPROVED BY JANUARY 9, 1971 BUT ON MARCH 15, 1973 DR. GEIST'S RECORDS INDICATE SYMPTOMATOLOGY AFFECTING CLAIMANT'S LOW BACK AND RIGHT LEG. THE FINAL EXAMINATION BY DR. GEIST WAS IN MAY, 1975 WHEN CLAIMANT SOUGHT ATTENTION FOR RIGHT SHOULDER PAIN.

CLAIMANT SOUGHT TO HAVE HIS CLAIM REOPENED AS AN AGGRAVATION CLAIM AND WAS ADVISED ON JUNE 12, 1975 BY THE BOARD THAT HE MUST MAKE A REQUEST BEFORE HIS AGGRAVATION PERIOD EXPIRED ON JUNE 16, 1975 AND FORWARD SAID REQUEST TO THE EMPLOYER'S CARRIER. CLAIMANT TESTIFIED THAT, RELYING UPON THIS LETTER, HE WENT IN PERSON TO THE CLAIMS DEPARTMENT OF THE CARRIER AND ADVISED IT THAT HIS CONDITION WAS AGGRAVATED BUT IT WAS NOT UNTIL JUNE 20, 1975 THAT HE MADE A WRITTEN REQUEST THAT HIS CLAIM BE REOPENED TO THE CARRIER. ON JULY 10, 1975 THE REQUEST WAS DENIED.

CLAIMANT RELIES ON THE CHANGES MADE BY THE 1975 OREGON LEGISLATURE WITH RESPECT TO AGGRAVATION PROCEDURES, SAID CHANGES BECAME EFFECTIVE JULY 1, 1975 AND BY THE ACT ITSELF WERE MADE RETROACTIVE. THE EMPLOYER ARGUES THAT THE AGGRAVATION RIGHTS HAD EXPIRED PRIOR TO THE EFFECTIVE DATE OF THE 1975 ACT, THEREFORE, AT THE TIME THE REQUEST WAS MADE A MEDICAL REPORT WAS REQUIRED IN ORDER TO SUPPORT SUCH CLAIM AND NO SUCH REPORT WAS FURNISHED WITH CLAIMANT'S REQUEST.

THE REFEREE CONCLUDED THAT EVEN IF THE JURISDICTIONAL REQUIREMENTS HAD BEEN VOIDED BY THE 1975 LEGISLATION, CLAIMANT'S CLAIM FOR AGGRAVATION WAS NOT SUPPORTED BY MEDICAL EVIDENCE. THE BURDEN IS UPON CLAIMANT TO PROVE THE AGGRAVATION AND IN CASES INVOLVING MATTERS BEYOND THE KNOWLEDGE OF LAY PERSONS, EXPERT OPINION IS REQUIRED. THE REFEREE FOUND THAT ALTHOUGH CLAIMANT TESTIFIED THAT IN HIS (UNDERSCORED) OPINION HIS SHOULDER CONDITION WAS DUE TO THE INDUSTRIAL INJURY OF MARCH 4, 1970, THERE WAS NO MEDICAL EVIDENCE TO SUPPORT THIS. THE PHYSICIAN WHO TREATED CLAIMANT SUBSEQUENT TO THE INDUSTRIAL INJURY, DR. GEIST, WAS OF THE OPINION THAT IT WAS DOUBTFUL THAT CLAIMANT'S CURRENT CONDITION WAS DIRECTLY RELATED TO HIS OLD INDUSTRIAL INJURY.

THE REFEREE CONCLUDED THAT CLAIMANT HAD NOT PERFECTED HIS CLAIM FOR AGGRAVATION AND THE DENIAL WAS PROPER.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE, BUT NOTES THAT THE REFEREE APPARENTLY TAKES THE POSITION THAT BECAUSE THE REQUEST WAS MADE PRIOR TO THE EFFECTIVE DATE OF THE 1975 ACT IT WOULD HAVE BEEN NECESSARY TO SUPPORT THE CLAIM WITH A WRITTEN MEDICAL OPINION. THIS IS NOT CORRECT BECAUSE OF THE RETROSPECTIVE NATURE OF THE ACT - HOWEVER, IN THIS CASE THE EVIDENCE FAILED TO SHOW, AS A WHOLE, A WORSENING OF CLAIMANT'S CONDITION, THEREFORE, THE CLAIM FALLS BECAUSE OF THIS AND NOT BECAUSE OF THE FAILURE TO PROVIDE MEDICAL CORROBORATION WITH THE REQUEST.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 28, 1975 IS AFFIRMED.

WCB CASE NO. 74-2894 APRIL 26, 1976

ROY IVERSON, CLAIMANT

WILLIAM B. REISBICK, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

CLAIMANT INITIALLY REQUESTED BOARD REVIEW OF THE REFEREE'S ORDER ENTERED FEBRUARY 10, 1975, WHICH SUSTAINED THE DENIAL OF CLAIMANT'S OCCUPATIONAL DISEASE CLAIM OF AGGRAVATION OF HIS RHEUMATOID SPONDYLITIS. THERE WAS NO TRAUMA INVOLVED, JUST A GRADUAL INCREASE IN SYMPTOMS BECOMING SO SEVERE THAT CLAIMANT CEASED WORK AS OF JUNE 1973.

ON DE NOVO REVIEW, THE BOARD FOUND THAT THE RECORD CONTAINED DIAMETRICALLY OPPOSED MEDICAL OPINIONS. DR. RINEHART STATED CLAIMANT'S RHEUMATOID SPONDYLITIS WAS AGGRAVATED BY HIS EMPLOYMENT WHILE DR. ROSENBAUM STATED HE COULD NOT RELATE THE ILLNESS TO CLAIMANT'S OCCUPATION. THE BOARD FOUND THERE WAS INADEQUATE EXPERT MEDICAL TESTIMONY TO EITHER PROVE OR DISPROVE MEDICAL CAUSATION AND CONCLUDED THE MATTER HAD BEEN INCOMPLETELY HEARD AND ON AUGUST 4, 1975 REMANDED IT TO THE REFEREE FOR THE PURPOSE OF REFERRING CLAIMANT TO THE DISABILITY PREVENTION DIVISION FOR A COMPLETE WORKUP.

PURSUANT TO THE ORDER, THE REFEREE REFERRED CLAIMANT TO THE DISABILITY PREVENTION DIVISION AND ON OR BEFORE NOVEMBER 28, 1975 HE RECEIVED VARIOUS DOCUMENTS FROM THE DISABILITY PREVENTION DIVISION AND, UPON RECEIPT OF CLAIMANT'S SUPPLEMENTAL BRIEF ON DECEMBER 18, 1975, CLOSED THE MATTER AND ENTERED AN ORDER WHICH RATIFIED, AFFIRMED AND REPUBLISHED HIS ORDER ENTERED FEBRUARY 10, 1975.

DR. MASON AT THE DISABILITY PREVENTION DIVISION, IN A REPORT DATED NOVEMBER 6, 1975, STATED HE BELIEVED DR. RINEHART STOOD PRETTY MUCH ALONE IN STATING ACTIVITIES AT WORK HAD AGGRAVATED THE PROGRESSION OF CLAIMANT'S RHEUMATOID SPONDYLITIS - HE FELT THE GENERAL CONSENSUS OF MEDICAL OPINION WAS THE REVERSE OF THIS STATEMENT. HE FELT THAT THE NATURAL PROGRESSION OF THE DISEASE WOULD PRODUCE INCREASING DEGREE OF PAINFUL SYMPTOMS AND INCREASING LIMITATION OF MOTION WHICH CAUSED CLAIMANT HIS INCREASING DISABILITY DUE TO WORK. HE BELIEVED THAT MOST OF THE MEDICAL PROFESSION AGREED WITH DR. ROSENBAUM'S STATEMENT THAT DOCTORS SEE THIS DISEASE, I.E., RHEUMATOID SPONDYLITIS, PROGRESSING IN THE SAME MANNER IN PEOPLE WHO ARE SEDENTARY AND NOT WORKING AND NOT BEING EXPOSED TO WORK STRESSES.

THE REFEREE FOUND THAT CLAIMANT WAS MORE SYMPTOMATIC AFTER

REST RATHER THAN AFTER WORK ACTIVITY AND CONCLUDED THAT THE WORK ACTIVITY DID NOT AGGRAVATE OR 'LIGHT UP' CLAIMANT'S RHEUMATOID SPONDYLITIS. HE CONCLUDED, AS HE HAD DONE IN HIS FIRST ORDER, THAT THE DENIAL BY THE STATE ACCIDENT INSURANCE FUND SHOULD BE SUSTAINED.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 31, 1975 IS AFFIRMED.

WCB CASE NO. 75—990 APRIL 26, 1976

TOMMY G. PAYNE, CLAIMANT

ORDER

THE ABOVE ENTITLED MATTER COMING ON BEFORE THE WORKMEN'S COMPENSATION BOARD ON A STIPULATION OF THE PARTIES TO THE EFFECT THAT THE ORDER ON REVIEW, DATED MARCH 29, 1976, SHOULD BE RESCINDED AND IN LIEU THEREOF, THE CLAIMANT'S AWARD OF PERMANENT PARTIAL DISABILITY FOR LOSS OF A LEG SHOULD BE INCREASED FROM 20 PER CENT LOSS LEG TO 40 PER CENT, NOW THEREFORE IT IS HEREBY

ORDERED THAT THE ORDER OF THE WORKMEN'S COMPENSATION BOARD DATED MARCH 29, 1976, SHALL BE AND HEREBY IS RESCINDED AND THE STIPULATION OF THE PARTIES TO THE EFFECT THAT THE CLAIMANT SHOULD RECEIVE A PERMANENT PARTIAL DISABILITY AWARD OF 40 PER CENT LOSS OF A LEG BEING AN INCREASE OF 20 PER CENT SHALL BE AND HEREBY IS APPROVED AND THE REQUEST FOR REVIEW IS DISMISSED.

WCB CASE NO. 75—2969 APRIL 26, 1976

MARY E. THOMAS, CLAIMANT

JAY EDWARDS, CLAIMANT'S ATTY.
TOM P. PRICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

THE CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO THE EMPLOYER TO BE REOPENED FOR VOCATIONAL REHABILITATION PURSUANT TO ORS 656.268 AND OAR 436-61, ORDERED THE EMPLOYER TO PAY CLAIMANT TEMPORARY TOTAL DISABILITY COMPENSATION COMMENCING WITH THE DATE THE BOARD AUTHORIZED SUCH A PROGRAM OF VOCATIONAL REHABILITATION AS AGREED UPON BETWEEN CLAIMANT AND THE DIVISION OF VOCATIONAL REHABILITATION AND AWARDED CLAIMANT'S ATTORNEY 25 PER CENT OF ALL TEMPORARY TOTAL DISABILITY COMPENSATION PAYABLE TO CLAIMANT BY THE TERMS OF HIS ORDER TOGETHER WITH 25 PER CENT OF ANY PERMANENT PARTIAL DISABILITY AWARD CLAIMANT MAY BE AWARDED WHEN HER CLAIM IS SUBSEQUENTLY CLOSED PURSUANT TO ORS 656.268.

CLAIMANT CONTENDS SHE SHOULD HAVE BEEN AWARDED ADDITIONAL TEMPORARY TOTAL DISABILITY COMPENSATION, PENALTIES AND ATTORNEY FEES.

CLAIMANT HAD SUFFERED A BURN TO HER RIGHT ARM AND NECK FOR WHICH HER CLAIM WAS ACCEPTED AND FOR WHICH SHE IS CONTINUING TO RECEIVE PSYCHIATRIC CARE. THAT CLAIM HAS NOT BEEN CLOSED, HOWEVER,

CLAIMANT RETURNED TO WORK TRANSFERRING TO A DIFFERENT DEPARTMENT AND WHILE AT WORK SUSTAINED AN INJURY TO HER UPPER LUMBAR AND LOWER DORSAL BACK IN DECEMBER 1974. SHE AGAIN RETURNED TO WORK AFTER A COUPLE OF WEEKS AND WORKED UNTIL FEBRUARY 28, 1975 WHEN SHE AGAIN INJURED THE SAME AREA OF HER SPINE WHILE LIFTING SOME ARTICLES. CLAIMANT HAS NOT WORKED SINCE MARCH 3, 1975.

CLAIMANT FIRST CONSULTED DR. RAY, AN OBSTETRICIAN AND GYNECOLOGIST, FOR HER STRAIN INJURIES. IN JUNE 1975 THE EMPLOYER REFERRED CLAIMANT TO DR. PASQUESI WHO WAS UNABLE TO FIND ANY MEASURABLE PHYSICAL IMPAIRMENT AND EXPRESSED HIS OPINION THAT THE TREATMENT CLAIMANT WAS RECEIVING WAS PALLIATIVE RATHER THAN CURATIVE AND RECOMMENDED HER CLAIM BE CLOSED. DR. RAY AGREED WITH DR. PASQUESI. THE DECEMBER 6, 1975 CLAIM WAS CLOSED BY A DETERMINATION ORDER MAILED FEBRUARY 14, 1975 WHICH AWARDED CLAIMANT TIME LOSS ONLY. THE FEBRUARY 28, 1975 CLAIM WAS CLOSED BY A DETERMINATION ORDER MAILED JULY 16, 1975 AWARDING TIME LOSS FROM MARCH 3, 1975 THROUGH JUNE 12, 1975 BUT NO AWARD FOR PERMANENT DISABILITY.

THE CLAIMANT REQUESTED A HEARING ON THE ADEQUACY OF BOTH DETERMINATION ORDERS AND ALLEGING SHE WAS IN NEED OF FURTHER MEDICAL CARE AND TREATMENT AND PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION, PENALTIES AND ATTORNEY'S FEES. A FEW DAYS PRIOR TO THE HEARING CLAIMANT'S ATTORNEY REFERRED CLAIMANT TO THE DISABILITY PREVENTION DIVISION AND THE HEARING WAS CONTINUED UNTIL REPORTS WERE RECEIVED. CLAIMANT WAS REFERRED TO A SERVICE COORDINATOR WHO, ON OCTOBER 23, 1975, REFERRED CLAIMANT TO THE DIVISION OF VOCATIONAL REHABILITATION.

THE REFEREE FOUND THAT CLAIMANT HAD NOT BEEN SEEN BY DR. RAY SINCE JULY 22, 1975 AND THAT NONE OF THE MEDICAL REPORTS INDICATED CLAIMANT WOULD BENEFIT FROM ANY MEDICAL TREATMENT. HE FOUND NO EVIDENCE TO SUPPORT HER CONTENTION THAT SHE WAS IN NEED OF FURTHER MEDICAL CARE AND TREATMENT AS A RESULT OF EITHER OF THE TWO INDUSTRIAL INJURIES.

THE REFEREE FURTHER FOUND THAT SINCE THE BOARD'S SERVICE COORDINATOR HAD REFERRED CLAIMANT TO THE DIVISION OF VOCATIONAL REHABILITATION, 'AN AUTHORIZED VOCATIONAL REHABILITATION PROGRAM' WAS TO BE ANTICIPATED. HE FOUND CLAIMANT ENTITLED TO HAVE HER CLAIM REOPENED FOR THE PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION AS SOON AS CLAIMANT AND THE DIVISION OF VOCATIONAL REHABILITATION AGREED UPON A TRAINING PROGRAM AND SAID PROGRAM WAS AUTHORIZED BY THE BOARD.

WITH RESPECT TO CLAIMANT'S CONTENTION THAT SHE IS ENTITLED TO AN AWARD FOR PERMANENT DISABILITY, THE REFEREE FOUND IT WOULD BE IMPROPER TO EVALUATE HER PERMANENT DISABILITY UNTIL THE AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION HAD BEEN COMPLETED.

CLAIMANT CONTENDS SHE IS ENTITLED TO PENALTIES AND ATTORNEY'S FEES, ASSERTING THAT THE EMPLOYER FAILED TO INITIATE A VOCATIONAL REHABILITATION INQUIRY WHICH RESULTED IN A WRONGFUL AND PREMATURE CLOSURE OF HER CLAIMS. THE REFEREE FOUND THAT THE INFORMATION AVAILABLE TO THE EMPLOYER AND TO THE BOARD PRIOR TO CLOSURE DID NOT SUPPORT THIS CONTENTION. DR. PASQUESI FOUND NO MEASURABLE PHYSICAL IMPAIRMENT AND THE REFEREE GAVE VERY LITTLE, IF ANY, WEIGHT TO CLAIMANT'S STATEMENT THAT DR. PASQUESI'S EXAMINATION OF HER WAS SUPERFICIAL.

CLAIMANT HAD ADVISED THE PERSONNEL AT THE DISABILITY PREVENTION DIVISION THAT DR. RAY HAD RELEASED HER TO RETURN TO FULL TIME EMPLOYMENT WITH CERTAIN RESTRICTIONS AGAINST HIS MEDICAL JUDGMENT AND ONLY BECAUSE OF HER URGING, IMPLYING THAT THE EMPLOYER SHOULD HAVE KNOWN THAT CLAIMANT HAD PERSUADED DR. RAY TO RELEASE HER TO

FULL TIME WORK EVEN THOUGH SHE WAS NOT ACTUALLY ABLE TO DO SO. THE REFEREE FOUND THAT DR. RAY'S LETTER, DATED JULY 29, 1975, WAS UNAMBIGUOUS - IN IT HE STATED CLAIMANT HAD BEEN RELEASED AND COULD RETURN TO FULL TIME WORK WITH A LIMITATION OF HEAVY LIFTING OR PULLING. HE CONCLUDED THERE WAS NO BASIS FOR THE AWARD OF PENALTIES OR ATTORNEY FEES.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT CLAIMANT IS MEDICALLY STATIONARY INSOFAR AS HER DECEMBER 6, 1974 AND FEBRUARY 28, 1975 INDUSTRIAL INJURIES ARE CONCERNED AND WAS ON THE DATE THE DETERMINATION ORDERS WITH RESPECT TO EACH INJURY WERE MAILED - HOWEVER, ON OCTOBER 23, 1975, CLAIMANT WAS REFERRED TO THE DIVISION OF VOCATIONAL REHABILITATION.

THE BOARD FINDS THAT WHEN THE CARRIER REQUESTED A DETERMINATION WITH RESPECT TO THE FEBRUARY 28, 1975 INJURY, IT INDICATED ON THE REQUEST, 'CLAIMANT HAS ELECTED NOT TO RETURN TO WORK. SEE MEDICAL REPORT.' THE MEDICAL REPORT FROM DR. RAY, DATED MAY 16, 1975, INDICATED CLAIMANT COULD WORK HALF DAYS - ON MAY 20, 1975 CLAIMANT WAS ADVISED BY THE EMPLOYER THAT ITS PRESENT POLICY WAS NOT TO EMPLOY PART TIME HELP AND IT REGRETTED TO INFORM CLAIMANT IT WAS UNABLE TO REEMPLOY HER. ON JULY 29, 1975 DR. RAY REPORTED THAT CLAIMANT HAD BEEN RELEASED AND COULD RETURN TO FULL TIME WORK BUT, IN HIS OPINION, SHE SHOULD NOT DO ANY TYPE OF WORK WHERE SHE WOULD BE SUBJECTED TO HEAVY LIFTING OR PULLING. ON AUGUST 15, 1975 THE EMPLOYER AGAIN REPLIED, INFORMING CLAIMANT THAT IT WAS UNABLE TO RETURN CLAIMANT TO HER FORMER POSITION AS THAT JOB, LIKE ALL OF THE JOBS AT THE EMPLOYER'S PLACE OF BUSINESS, REQUIRED THAT EMPLOYES DO SOME HEAVY LIFTING. FURTHERMORE, WHEN THE EMPLOYER SUBMITTED ITS REQUEST FOR FINAL DETERMINATION IT NEGLECTED TO FILL IN THE SECTION OF THE FORM WHICH MUST BE COMPLETED WHEN THE WORKER IS OFF FOR 90 DAYS OR WHEN NEED FOR VOCATIONAL REHABILITATION BECOMES EVIDENT - HAD IT DONE SO, IT WOULD HAVE HAD TO RELY ON THE FIRST RELEASE BY THE DOCTOR WHICH ALLOWED CLAIMANT TO WORK PART TIME AND ON THE SUBSEQUENT RELEASE ALLOWING CLAIMANT TO RETURN TO FULL TIME WORK WITH THE RESTRICTIONS ON LIFTING AND PULLING. IT WOULD ALSO HAVE HAD TO INDICATE THEREON WHETHER IT, THE EMPLOYER, HAD INDICATED WHETHER IT WOULD REEMPLOY THE WORKER AT A JOB WITHIN HER PHYSICAL LIMITATIONS AND IF NOT, EXPLAIN WHY.

THE BOARD CONCLUDES THE CONDUCT OF THE EMPLOYER, ESPECIALLY IN FAILING TO COMPLETE THE FORM REQUESTING THE FINAL DETERMINATION, MISLED THE EVALUATION DIVISION OF THE BOARD. CLAIMANT'S VOCATIONAL HANDICAP WAS APPARENT TO THE REFEREE, AS EVIDENCED BY THE CONTENTS OF HIS OPINION AND ORDER - HAD THE EMPLOYER PROPERLY COMPLETED THE REQUEST FOR FINAL DETERMINATION, IT WOULD HAVE BEEN EQUALLY APPARENT TO THE BOARD AT THE TIME OF THE REQUESTED CLOSURE.

CLAIMANT'S TEMPORARY TOTAL DISABILITY COMPENSATION CEASED ON JULY 12, 1975 AND DID NOT BECOME AVAILABLE UNTIL SUBSEQUENT TO THE REFEREE'S ORDER DATED NOVEMBER 18, 1975, THEREFORE, FOR A PERIOD IN EXCESS OF FOUR MONTHS CLAIMANT WAS WITHOUT EMPLOYMENT, COMPENSATION OR ASSISTANCE IN SEEKING VOCATIONAL REHABILITATION.

THE BOARD CONCLUDES THAT THE DETERMINATION ORDER MAILED JULY 16, 1975 PREMATURELY CLOSED CLAIMANT'S CLAIM AND CLAIMANT IS ENTITLED TO RECEIVE TEMPORARY TOTAL DISABILITY COMPENSATION FROM JUNE 13, 1975 AND UNTIL SHE COMPLETES OR IS TERMINATED FROM A PROGRAM OF VOCATIONAL REHABILITATION AUTHORIZED BY THE BOARD. THE BOARD FURTHER CONCLUDES THAT THE EMPLOYER MAY BE ENTITLED TO REIMBURSEMENT FOR COMPENSATION PAID DURING REHABILITATION UNDER THE PROVISIONS OF OAR 436-61-055.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 18, 1975 IS MODIFIED.

THE DETERMINATION ORDER MAILED JULY 16, 1975 IS SET ASIDE IN ITS ENTIRETY AND THE EMPLOYER SHALL PAY CLAIMANT COMPENSATION FOR TEMPORARY TOTAL DISABILITY COMMENCING JUNE 13, 1975 AND UNTIL CLAIMANT COMPLETES OR IS TERMINATED FROM A PROGRAM OF VOCATIONAL REHABILITATION AUTHORIZED BY THE BOARD AND HER CLAIM IS CLOSED PURSUANT TO ORS 656.268.

THE EMPLOYER MAY APPLY FOR REIMBURSEMENT OF COMPENSATION PAID CLAIMANT DURING THE PERIOD OF REHABILITATION UNDER THE PROVISIONS OF OAR 436-61-055.

IN ALL OTHER RESPECTS THE ORDER OF THE REFEREE IS AFFIRMED.

WCB CASE NO. 74-1677 APRIL 29, 1976

ORDEN HASTINGS, CLAIMANT

COONS, COLE AND ANDERSON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND PHILLIPS.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED, AS DEFINED BY ORS 656.206, AS OF APRIL 15, 1974.

CLAIMANT, WHO AT THE TIME OF THE HEARING WAS 58 YEARS OLD, SUFFERED A COMPENSABLE INJURY IN JUNE 1971 WHEN HE WAS STABBED IN THE ABDOMEN BY A SPLINTERED PIECE OF LUMBER AND WAS HOSPITALIZED FOR SURGERY INCLUDING LIVER REPAIR. BY JULY CLAIMANT WAS BELIEVED TO HAVE MADE A NEAR RECOVERY WITH NO PERMANENT IMPAIRMENT EXPECTED. IN SEPTEMBER CLAIMANT ATTEMPTED TO RETURN TO HIS JOB BUT WAS UNABLE TO DO IT BECAUSE OF THE DISCOMFORT CAUSED BY BENDING OVER AND LIFTING MATERIALS TO PLACE IN THE SAW.

CLAIMANT CONTINUED TO HAVE DISCOMFORT IN HIS CHEST AND IT WAS DISCOVERED THAT HE HAD ACTIVE TUBERCULOSIS. THE FUND ACCEPTED THE RESPONSIBILITY FOR THIS CONDITION AS BEING RELATED TO THE INDUSTRIAL INJURY BECAUSE IT HAD BEEN CONTRACTED DURING CLAIMANT'S CONVALESCENCE. CLAIMANT WAS DISCHARGED FROM THE UNIVERSITY STATE TUBERCULOSIS HOSPITAL ON APRIL 6, 1972 WITH DIAGNOSES OF PULMONARY TUBERCULOSIS, MODERATELY ADVANCED, ACTIVE, IMPROVED - DIABETES MELLITUS, NEUROSENSORY HEARING LOSS AND VENTRAL INCISIONAL WEAKNESS.

ON FEBRUARY 27, 1973 CLAIMANT WAS EXAMINED BY DR. HARWOOD, A MEDICAL EXAMINER FOR THE FUND, WHO WAS UNABLE TO FIND ANY PHYSICAL IMPAIRMENT OF CLAIMANT RELATED TO THE ABDOMINAL PROBLEM SUSTAINED AT INJURY, HE FELT THAT ANY WORK RESTRICTION WOULD BE DUE PROBABLY TO THE CLAIMANT'S MARKED OBESITY. HE BELIEVED CLAIMANT WAS MEDICALLY STATIONARY AND THAT THE CLAIM COULD BE CLOSED.

ON OCTOBER 25, 1973, JULIA PERKINS, A CLINICAL PSYCHOLOGIST, EVALUATED CLAIMANT. SHE FOUND CLAIMANT HAD A SEVENTH GRADE EDUCATION, HAD WORKED AT UNSKILLED MANUAL LABOR ALL OF HIS WORKING LIFE, WAS MENTALLY DEFECTIVE, HAD A HEARING LOSS WHICH MADE COMMUNICATION DIFFICULT, LACKED IN VOCATIONAL SKILLS AND ABILITIES AND HAD SCHIZOID

CHARACTERISTICS WHICH HAD BEEN AFFECTED TO A MILD DEGREE BY HIS INDUSTRIAL INJURY. TAKING INTO CONSIDERATION ALL OF THESE FACTORS, IN ADDITION TO CLAIMANT'S AGE AND PHYSICAL HEALTH PROBLEMS, SHE FELT CLAIMANT WOULD NEVER WORK AGAIN.

ON APRIL 30, 1974 THE CLAIM WAS CLOSED BY A DETERMINATION ORDER WHICH AWARDED CLAIMANT SOME TIME LOSS BUT NO AWARD FOR PERMANENT DISABILITY. CLAIMANT CONTENDS THAT HE IS PERMANENTLY AND TOTALLY DISABLED.

THERE IS NO ARGUMENT BETWEEN THE PARTIES THAT CLAIMANT IS NOW PERMANENTLY AND TOTALLY DISABLED - HOWEVER, THE FUND CONTENDS THAT CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED PRIOR TO THE INJURY AND HAD NO EARNING CAPACITY, THEREFORE, AS A RESULT OF THE INDUSTRIAL INJURY CLAIMANT LOST NO EARNING CAPACITY, THE SOLE CRITERION FOR EVALUATING UNSCHEDULED DISABILITY, INCLUDING PERMANENT TOTAL DISABILITY.

IN OCTOBER 1974 CLAIMANT'S OVERALL CONDITION HAD BECOME SO BAD THAT HE COULD NO LONGER TAKE CARE OF HIMSELF AND HE WAS HOSPITALIZED WITH A RECOMMENDATION FOR NURSING HOME CARE. IN DECEMBER 1974, DUE TO INFECTION AND GANGRENE, CLAIMANT'S LEFT LEG WAS AMPUTATED BELOW THE KNEE.

THE REFEREE FOUND CLAIMANT HAD BEEN MENTALLY DEFICIENT SINCE BIRTH AND HAD BEEN HARD OF HEARING SINCE THE AGE OF 5. HIS FAMILY HAD TRIED TO LOOK AFTER HIM BUT FOR A PERIOD OF 11 YEARS CLAIMANT WAS ABSENT FROM HIS FAMILY AND, DURING THAT PERIOD OF TIME, HE WAS ABLE TO HOLD DOWN A JOB COMPARABLE TO THAT WHICH HE HELD AT THE TIME OF HIS INJURY. FOR THREE YEARS, DURING THAT PERIOD, HE SUPPORTED A WIFE AND FAMILY EVEN THOUGH HE WAS MENTALLY RETARDED. HE WAS MENTALLY RETARDED, BUT OBVIOUSLY WORKING, AT THE TIME OF HIS INJURY.

THE REFEREE FOUND NO OBJECTIVE EVIDENCE THAT CLAIMANT'S MENTAL OR PHYSICAL CONDITION HAD SO DETERIORATED AT THE TIME OF HIS INJURY THAT HE WAS INCAPABLE OF EARNING A LIVING. WHEN CLAIMANT WAS FOUND BY HIS FAMILY IN 1958 HE WAS WORKING IN A PLYWOOD MILL IN CALIFORNIA, LIVING ALONE AND SUPPORTING AND CARING FOR HIMSELF. CLAIMANT WAS SUBSEQUENTLY EMPLOYED AS A DRYER FEEDER BY HIS BROTHER WHO OWNED A MILL IN EUGENE, HE WAS PAID THE SAME WAGE AND WORKED THE SAME HOURS AS THE OTHER PERSONS DOING THE SAME JOB. THERE IS NO EVIDENCE THAT CLAIMANT HAD ANY PROBLEMS DOING THIS JOB - HE WAS TERMINATED BECAUSE OF A GENERAL LAYOFF. AT THE TIME OF CLAIMANT'S INJURY HIS EMPLOYER WAS ANOTHER BROTHER AND CLAIMANT HAD BEEN FEEDING THE RIPSAW AND DOING SO ADEQUATELY FOR A PERIOD OF TWO YEARS PRIOR TO HIS INJURY. THE EVIDENCE DOES NOT INDICATE THAT CLAIMANT WAS GIVEN ANY SPECIAL TREATMENT NOR WAS HE THE RECIPIENT OF EMPLOYER BENEVOLENCE BECAUSE OF FAMILIAL TIES.

DR. HOLLAND, A PSYCHIATRIST, INDICATED THAT AFTER THE INDUSTRIAL INJURY AND DURING THE PROLONGED CONVALESCENCE, CLAIMANT, WHO WAS NOT CAPABLE OF COPING AS WELL AS THE AVERAGE PERSON, BECAME OVERWHELMED AND PROGRESSIVELY APATHETIC. HE WITHDREW AND FINALLY BECAME TOTALLY UNABLE TO CARE FOR HIMSELF AND THROUGH A PROCESS OF ELIMINATION, SINCE THERE WAS NO PHYSICAL BASIS FOR CLAIMANT'S PRESENT DISABILITY, HE FELT IT WAS REASONABLE TO ASSUME CLAIMANT'S PROBLEM WAS PSYCHOLOGICAL. CLAIMANT HAD BEEN DIAGNOSED AS A MILD MENTAL RETARDED PERSON WITH DEPRESSIVE NEUROSIS. IT WAS DR. HOLLAND'S OPINION THAT THE INJURY, THE FOLLOWING SURGERY AND FINALLY THE TUBERCULOSIS CONSTITUTED AN OVERWHELMING STRESS WITH WHICH CLAIMANT COULD NOT COPE AND THIS STRESS CAUSED THE REGRESSION OF CLAIMANT'S CONDITION TO ITS PRESENT STATE.

DR. KJAER DID NOT AGREE WITH DR. HOLLAND BUT THE REFEREE FOUND THAT A NUMBER OF DR. KJAER'S CONCLUSIONS WERE NOT FOUNDED ON EVIDENCE

CONTAINED IN THE CASE BUT WERE ASSUMPTIONS THAT CLAIMANT WAS PROBABLY TOTALLY DISABLED PRIOR TO THE INJURY, BASED PARTLY ON A CONVERSATION WITH CLAIMANT'S BROTHER WHO HADN'T SEEN CLAIMANT FROM 1968 UNTIL 1973. FURTHERMORE, DR. KJAER WAS NOT AWARE OF THE QUANTITY OR QUALITY OF WORK CLAIMANT WAS DOING AT THE TIME OF HIS INJURY NOR WAS HE AWARE THAT THE JOB WAS NOT A TAILORMADE JOB OR AWARE THAT CLAIMANT WAS TREATED NO DIFFERENTLY THAN ANY OTHER PERSON DOING THAT SAME JOB.

THE REFEREE CONCLUDED THAT THE EVIDENCE INDICATED THAT CLAIMANT, PRIOR TO HIS INDUSTRIAL INJURY, DID HAVE AN EARNING CAPACITY, THAT HE WAS EARNING A REGULAR WAGE AT THE TIME OF HIS INJURY AND HAD DONE SO IN THE PAST BUT THAT AFTER HIS INJURY HE WAS UNABLE TO GAIN AND HOLD SUITABLE WORK. THE REFEREE RELIED STRONGLY ON DR. HOLLAND'S OPINIONS WHICH HE FOUND TO BE CONSISTENT WITH THE EVIDENCE, I.E., CLAIMANT WAS A PRODUCTIVE WORKER PRIOR TO INJURY EVEN THOUGH MENTALLY RETARDED, A DIABETIC AND HARD OF HEARING BUT AFTER THE INJURY HE WAS UNABLE TO WORK - DURING CONVALESCENCE HE CONTRACTED TUBERCULOSIS WHICH FURTHER ADDED TO HIS DISABILITY AND LATER AS A RESULT OF HIS DIABETIC CONDITION HE LOST THE LOWER PART OF HIS LEG. AS A RESULT OF ALL OF THESE HAPPENINGS CLAIMANT NOT ONLY COULD NOT RETURN TO WORK HE WAS UNABLE TO CARE FOR HIMSELF.

THE REFEREE CONCLUDED THAT THE EFFECT ON THE CLAIMANT OF HIS INDUSTRIAL INJURY, AND ITS AFTERMATH, WAS A MATERIAL CONTRIBUTING FACTOR TO HIS PRESENT INABILITY TO GAIN AND HOLD SUITABLE WORK.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS CLEARLY SET FORTH IN THE REFEREE'S WELL WRITTEN ORDER.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 8, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 73-1952 MAY 3, 1976
WCB CASE NO. 73-2948

ANTONIO AVALOS, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS MOORE AND PHILLIPS.

CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 65 PER CENT LOSS OF THE LEFT HAND.

CLAIMANT RECEIVED A SEVERE INJURY TO HIS LEFT HAND AND, AS A RESULT THEREOF, HAS HAD TWO AMPUTATIONS - ONE, AN AMPUTATION OF THE LEFT INDEX FINGER AT THE MID SHAFT LEVEL OF THE PROXIMAL PHALANX AND TWO, AN AMPUTATION OF THE LONG FINGER AT THE PROXIMAL INTERPHALANGEAL PHALANX LEVEL. THE CLAIM FOR THE MARCH 31, 1971 INJURY WAS FIRST CLOSED BY A DETERMINATION ORDER, AMENDED ON SEPTEMBER 6, 1973, WHICH AWARDED CLAIMANT 35 PER CENT OF THE LEFT FOREARM EQUAL TO 52.5 DEGREES.

SUBSEQUENTLY THE CLAIM WAS REOPENED AND AGAIN CLOSED BY A SECOND DETERMINATION ORDER OF APRIL 30, 1974 WHICH AWARDED CLAIMANT AN ADDITIONAL 15 PER CENT LOSS OF THE LEFT FOREARM EQUAL TO 22.5 DEGREES. THE REFEREE INCREASED THE AWARD TO 65 PER CENT OF THE LEFT FOREARM.

CLAIMANT SEEKS REVIEW, CONTENDING THAT HE IS ENTITLED TO 100 PER CENT LOSS OF THE LEFT FOREARM. THE FUND CONTENDS THAT CLAIMANT HAS BEEN OVERCOMPENSATED, THAT THE MEDICAL EVIDENCE INDICATES THAT CLAIMANT'S LEFT HAND INJURY IS EQUIVALENT TO APPROXIMATELY 40 PER CENT BASED UPON DR. NATHAN'S REPORT OF JUNE 30, 1975.

THE REFEREE FOUND THAT EVALUATION OF THE IMPAIRMENT WAS MADE DIFFICULT BY A SEEMINGLY RELUCTANCE ON THE PART OF THE CLAIMANT TO RETURN TO THE WORK FORCE. HE FELT THAT CLAIMANT HAD BEEN INFLUENCED BY AN ALLEGED STATEMENT OF A PHYSICIAN THAT HE SHOULD APPLY FOR SOCIAL SECURITY BENEFITS. CLAIMANT IS ABLE TO COMMUNICATE ONLY IN SPANISH, THEREFORE, CLAIMANT'S TESTIMONY AT THE HEARING WAS RECEIVED THROUGH AN INTERPRETER. THE REFEREE CONSTRUED THE TRANSLATION OF THE TESTIMONY TO INDICATE THAT, IN CLAIMANT'S OPINION, HIS HAND WAS VIRTUALLY USELESS.

THE REFEREE CONCLUDED THAT THE MEDICAL RECORD DID NOT SUPPORT CLAIMANT'S CONTENTION THAT THE HAND WAS USELESS BUT THAT HE DID HAVE A VERY REAL AND SUBSTANTIAL IMPAIRMENT TO THE HAND. BASED UPON THE MEDICAL EVIDENCE, THE REFEREE CONCLUDED THAT CLAIMANT HAD SUFFERED A SEVERE LOSS OF THE USE OF THE LEFT HAND WHICH HE EVALUATED AT 65 PER CENT.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE RATHER GENEROUS AWARD.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 20, 1975 IS AFFIRMED.

WCB CASE NO. 75-3327 MAY 3, 1976

PAUL A. NEMEYER, CLAIMANT

CHARLES PAULSON, CLAIMANT'S ATTY.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 65 PER CENT LOSS OF USE OF THE RIGHT LEG.

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS RIGHT KNEE ON OCTOBER 31, 1972 - AT THAT TIME CLAIMANT WAS A 49 YEAR OLD CREW FOREMAN OF A RIGHT-OF-WAY CLEARING CREW. THE INJURY WAS TO THE LATERAL SIDE OF HIS RIGHT LEG WHICH WAS STRUCK BY A ROLLING LOG. CLAIMANT WAS TREATED BY DR. HARDIMAN WHO, AT FIRST, DIAGNOSED A SPRAIN OF THE MEDIAL COLLATERAL LIGAMENT FOR WHICH HE TREATED CLAIMANT. CLAIMANT DID NOT RESPOND WELL AND CONTINUED TO HAVE DISCOMFORT IN HIS KNEE. ON JANUARY 25, 1973 DR. HARDIMAN PERFORMED AN ARTHROTOMY, DURING THE SURGERY IT WAS DISCOVERED THAT CLAIMANT HAD TORN AND STRAINED THE RIGHT MEDIAL COLLATERAL LIGAMENT, TORN THE POSTERIOR HORN OF THE MEDIAL MENISCUS AND HAD TORN THE ANTERIOR CRUCIATE LIGAMENT FROM ITS FEMORAL ATTACHMENT. THE MENISCUS WAS REMOVED AND

THE LIGAMENTS REPAIRED AND ON MARCH 21, DR. HARDIMAN RELEASED CLAIMANT TO RETURN TO WORK AS OF APRIL 1, 1973.

THE DETERMINATION ORDER MAILED JULY 24, 1973 AWARDED CLAIMANT 35 PER CENT LOSS OF THE RIGHT LEG.

CLAIMANT CONTINUED TO BE SEEN BY DR. HARDIMAN, COMPLAINING OF PAIN AND INSTABILITY IN THE KNEE AND IN AUGUST 1974, AT THE REQUEST OF DR. HARDIMAN, THE CLAIM WAS REOPENED FOR FURTHER SURGERY WHICH WAS PERFORMED ON JANUARY 20, 1975. THE CLAIM WAS AGAIN CLOSED ON JUNE 30, 1975 BY A SECOND DETERMINATION ORDER WHICH GRANTED CLAIMANT ADDITIONAL TIME LOSS BUT NO ADDITIONAL COMPENSATION FOR PERMANENT PARTIAL DISABILITY.

CLAIMANT TESTIFIED THAT WHEN HE RETURNED TO WORK FOR THE SAME EMPLOYER HE COULD NO LONGER WORK AS A FOREMAN BECAUSE HE WAS UNABLE TO CLIMB TREES WHICH PRECLUDED HIM FROM WORKING AS A TRIMMER MAN AND HE NOW HAS TO WORK AS A GROUND MAN. CLAIMANT TESTIFIED THAT HIS RIGHT KNEE WAS UNSTABLE AND THAT HIS LOWER LEG WOULD SLIDE FORWARD AND SIDEWAYS MORE THAN AN INCH. HE ALSO TESTIFIED THAT HIS KNEE DISLOCATES ON AN AVERAGE OF TWO OR THREE TIMES A WEEK BUT AT TIMES HAS DISLOCATED AS MUCH AS SIX TO EIGHT TIMES A DAY.

DR. HARDIMAN FELT THE AWARD OF 35 PER CENT LOSS OF A LEG REPRESENTED CLAIMANT'S REMAINING PERMANENT DISABILITY AT THAT TIME.

THE REFEREE, RELYING STRONGLY ON THE RULING IN MANSFIELD V. CAPLENER BROS. (UNDERSCORED), 3 OR APP 448, FELT THAT MANSFIELD HAD A FAR BETTER KNEE THAN CLAIMANT AND HE HAD AWARDED MANSFIELD 75 PER CENT LOSS WHICH WAS LATER INCREASED TO 85 PER CENT BY THE CIRCUIT COURT AND UPON APPEAL TO THE COURT OF APPEALS, MANSFIELD WAS ULTIMATELY AWARDED PERMANENT TOTAL DISABILITY.

THE REFEREE CORRECTLY STATED THAT SCHEDULED DISABILITY IS EVALUATED BY DETERMINING THE LOSS OF PHYSICAL FUNCTION - HE FELT THAT THE PRINCIPAL FUNCTIONS OF THE LOWER EXTREMITIES ARE AMBULATION AND WEIGHT BEARING AND THAT THOUGH CLAIMANT WAS ABLE TO PERFORM BOTH OF THESE FUNCTIONS ON A SMOOTH, LEVEL SURFACE WITHOUT PAIN OR DIFFICULTY HE HAD A DEGREE OF INSTABILITY WHICH EXCEEDED ANY THAT HE, THE REFEREE, HAD ENCOUNTERED IN THE NINE YEARS HE HAD BEEN EVALUATING DISABILITY.

BASED UPON THE EVIDENCE PRESENTED AND THE COMPARISON OF CLAIMANT'S LOSS OF FUNCTION AS COMPARED TO OTHER WORKMEN, INCLUDING MANSFIELD, THE REFEREE CONCLUDED CLAIMANT HAD SUFFERED 65 PER CENT LOSS OF PHYSICAL FUNCTION OF HIS RIGHT LEG.

THE BOARD, ON DE NOVO REVIEW, DISAGREES WITH THE CONCLUSION OF THE REFEREE. MANSFIELD ULTIMATELY RECEIVED AN AWARD OF PERMANENT TOTAL DISABILITY BASED ON BOTH SCHEDULED AND UNSCHEDULED DISABILITIES. FURTHERMORE, THE CLAIMANT'S TREATING PHYSICIAN, DR. HARDIMAN, CONCLUDED THAT THE AWARD OF 35 PER CENT LOSS OF FUNCTION OF THE RIGHT LEG WAS SUFFICIENT AND FELT THAT A COMPARISON OF WHAT CLAIMANT HAD BEEN ABLE TO DO PRIOR TO THE INJURY AND NOW WAS ABLE TO DO SUBSTANTIATED HIS CONCLUSION.

IT IS TRUE THAT CLAIMANT CANNOT CLIMB TREES, OR WALK DOWN A STEEP HILL WITHOUT SUPPORT AND THAT HIS KNEE POPS OUT TWO TO THREE TIMES A WEEK AND HIS RIGHT LEG IS WEAKER THAN HIS LEFT LEG - HOWEVER, THE EVIDENCE ALSO INDICATES THAT CLAIMANT HAS NOT SEEN A DOCTOR SINCE APRIL 1975, NOR IS HE TAKING ANY MEDICATION, HE DOES NOT WEAR ANY TYPE OF SUPPORTIVE BRACE FOR HIS INJURED LEG NOR DOES HE WALK WITH A LIMP. CLAIMANT IS ABLE TO WORK IN THE FIELD ON AN 8 HOUR A DAY BASIS, BOTH IN COLD WEATHER AND WARM, ON A REGULAR AND CONTINUOUS BASIS.

THE BOARD CONCLUDES THAT THE AWARD OF 65 PER CENT LOSS OF USE OF THE LEG IS EXCESSIVE AND THAT CLAIMANT HAS BEEN ADEQUATELY COMPENSATED BY THE AWARD OF 35 PER CENT.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 2, 1975 IS REVERSED.

THE DETERMINATION ORDERS MAILED JULY 24, 1973 AND JUNE 30, 1975 ARE AFFIRMED.

SAIF CLAIM NO. A 691309 MAY 5, 1976

CLARENCE WAYNE CHRISTY, CLAIMANT

OWN MOTION ORDER

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS LEFT LEG ON SEPTEMBER 11, 1958. THE TORN LIGAMENTS WERE REPAIRED BY DR. MOLTER AND THE CLAIM WAS ULTIMATELY CLOSED WITH AN AWARD - HOWEVER, THE FILE HAS BEEN DESTROYED AND THERE IS NO EVIDENCE INDICATING THE AMOUNT OF THE AWARD RECEIVED BY CLAIMANT AT THAT TIME.

ON APRIL 4, 1974 DR. HOLBERT REPORTED THAT CLAIMANT WAS HAVING LEFT KNEE PROBLEMS WHICH MIGHT REQUIRE SURGERY AND THE BOARD ISSUED ITS OWN MOTION ORDER ON NOVEMBER 25, 1974 DIRECTING THE STATE ACCIDENT INSURANCE FUND TO REOPEN THE LEFT KNEE CLAIM FOR FURTHER MEDICAL CARE AND COMPENSATION.

ON DECEMBER 18, 1974 A POLYCENTRIC TOTAL KNEE REPLACEMENT WAS PERFORMED BY DR. HOLBERT AND IN HIS REPORT DATED JANUARY 27, 1976, DR. HOLBERT DECLARED CLAIMANT'S CONDITION TO BE STATIONARY. THE MATTER WAS SUBMITTED TO THE EVALUATION DIVISION OF THE BOARD FOR AN ADVISORY RATING.

BASED UPON THE RECOMMENDATION OF THE EVALUATION DIVISION, THE BOARD ENTERS THE FOLLOWING ORDER PURSUANT TO THE AUTHORITY VESTED IN IT UNDER THE PROVISIONS OF ORS 656.278.

ORDER

THE STATE ACCIDENT INSURANCE FUND SHALL PAY CLAIMANT COMPENSATION FOR TEMPORARY TOTAL DISABILITY INCLUSIVE FROM DECEMBER 16, 1974 THROUGH MAY 18, 1975.

CLAIMANT IS AWARDED 27.5 DEGREES OF A MAXIMUM OF 110 DEGREES FOR LOSS FUNCTION OF THE LEFT LEG.

WCB CASE NO. 74-4058 MAY 5, 1976
WCB CASE NO. 74-3318
WCB CASE NO. 75-1869

ROBERT E. EVANS, CLAIMANT

STIPULATION

THIS DISPOSITION OF THE CLAIMS OF ROBERT E. EVANS ARE HEREBY AGREED UPON BY STIPULATION OF THE PARTIES, CLAIMANT ACTING BY AND THROUGH ATTORNEY R. LADD LONNQUIST, THE EMPLOYER-CARRIER ACTING BY AND THROUGH ATTORNEY KENNETH KLEINSMITH, AND THE WORKMEN'S COMPENSATION BOARD ACTING BY AND THROUGH ATTORNEY NORMAN KELLEY, AND IT APPEARING THAT THIS MATTER CAN BE FULLY COMPROMISED AND SETTLED, AND IS, NOW SETTLED, PURSUANT TO THE FOLLOWING AGREEMENTS BY THE PARTIES =

1. CLAIMANT'S OCTOBER 28, 1973 INJURY PRODUCED AN UNSCHEDULED PERMANENT PARTIAL DISABILITY OF 10 PER CENT =

2. CLAIMANT'S MAY 30, 1974 INJURY WAS NON-DISABLING =

3. CLAIMANT'S AUGUST 5, 1974 INJURY WAS DISABLING, AND CAUSED CLAIMANT TO RECEIVE TIME LOSS FROM AUGUST 19, 1974 TO MARCH 25, 1975, WHEN CLAIMANT BECAME MEDICALLY STATIONARY. ANY TIME LOSS PAID TO CLAIMANT AFTER AUGUST 5, 1974, SHOULD BE CREDITED TO THE AUGUST 5, 1974 INJURY =

4. CLAIMANT IS CURRENTLY IN AN AUTHORIZED VOCATIONAL REHABILITATION PROGRAM ON ACCOUNT OF HIS BEING A VOCATIONALLY HANDICAPPED PERSON FROM THE DATE OF HIS AUGUST 5, 1974 INJURY. CLAIMANT IS ENTITLED TO CONTINUING TIME LOSS PAYMENTS WHILE HE IS ENROLLED IN SAID VOCATIONAL REHABILITATION PROGRAM =

5. THE STATE ACCIDENT INSURANCE FUND WILL PAY TIME LOSS BENEFITS ON A REIMBURSABLE BASIS TO CLAIMANT, PENDING COMPLETION OF THE VOCATIONAL REHABILITATION PROGRAM INVOLVED HEREIN =

6. THE STATE ACCIDENT INSURANCE FUND'S RESPONSIBILITY FOR TIME LOSS COMMENCED ON THIS BASIS ON MARCH 25, 1975 =

7. UPON COMPLETION OF THE VOCATIONAL REHABILITATION PROGRAM BY CLAIMANT, THE STATE ACCIDENT INSURANCE FUND WILL PROCESS THE CLAIM FOR THE AUGUST 5, 1974 INJURY, AS PROVIDED BY LAW =

8. CLAIMANT HEREBY VOLUNTARILY WITHDRAWS HIS REQUEST FOR REVIEW OF THE ORDER OF REFEREE PAGE PFERDNER DATED DECEMBER 31, 1975, AND THE SAME MAY BE DISMISSED =

9. ANY OVERPAYMENT MADE BY STATE ACCIDENT INSURANCE FUND PURSUANT TO PREVIOUS ORDERS IN THE CLAIMS INVOLVING CLAIMANT WILL BE OFFSET AGAINST ANY FUTURE AWARD FOR PERMANENT PARTIAL DISABILITY FOR THE AUGUST 5, 1974 INJURY =

10. REIMBURSABLE TIME LOSS PAYMENTS FROM MARCH 25, 1975 UNTIL FEBRUARY 1, 1976 CAN BE CONSIDERED AS PAID BY THE PERMANENT PARTIAL DISABILITY PAYMENTS OF THE STATE ACCIDENT INSURANCE FUND, AND THAT THE STATE ACCIDENT INSURANCE FUND MAY CLAIM REIMBURSEMENT FOR THEM =

11. CLAIMANT IS ENTITLED TO 2,240.00 DOLLARS, LESS ANY OFFSET FOR OVERPAYMENT, PAYABLE TO CLAIMANT IN A LUMP-SUM =

12. CLAIMANT'S ATTORNEY IS ENTITLED TO A REASONABLE FEE OF 500.00 DOLLARS, TO BE PAID FROM CLAIMANT'S REIMBURSABLE TIME-LOSS COMMENCING FROM THE DATE OF THIS STIPULATION ONWARD.

WCB CASE NO. 75-3111 MAY 5, 1976

LUTHER KESTERSON, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
ORDER ON MOTION

THE STATE ACCIDENT INSURANCE FUND HAS MOVED THE BOARD FOR AN ORDER 'STRIKING' BOTH THE CLAIMANT'S REQUEST FOR REVIEW AND THE CLAIMANT'S BRIEF ON REVIEW.

THE MOTION TO STRIKE THE REQUEST IS BASED ON SAIF'S CONTENTION THAT THE REFEREE HAD NO JURISDICTION OF THE CAUSE AND LIKEWISE NO JURISDICTION TO GRANT APPEAL RIGHTS.

THE MOTION TO STRIKE THE CLAIMANT'S BRIEF IS FOUNDED ON THE CLAIMANT'S FAILURE TO FILE WITHIN THE TIME REQUIRED BY THE BOARD. ON APRIL 27, 1976 THE FUND SUPPLEMENTED ITS MOTION BY A REQUEST FOR AN EXTENSION OF THE DEADLINE FOR FILING ITS ANSWERING BRIEF UNTIL MAY 13, 1976.

THE BOARD CONCLUDES THAT SAIF'S MOTION TO STRIKE THE CLAIMANT'S REQUEST FOR REVIEW SHOULD BE DENIED AT THIS TIME BUT THAT IT SHOULD BE FURTHER CONSIDERED AS A PART OF BOARD'S REVIEW OF THE CASE.

CLAIMANT'S BRIEF WILL NOT BE STRICKEN BUT THE STATE ACCIDENT INSURANCE FUND SHOULD BE GIVEN UNTIL MAY 13, 1976 TO FILE ITS ANSWERING BRIEF.

IT IS SO ORDERED.

WCB CASE NO. 75-2651 MAY 5, 1976

CHARLES R. MC CRACKEN, CLAIMANT

SCHLEGEL, MILBANK, WHEELER AND JARMAN,
CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
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 THE BOARD NOW HAVING RECEIVED CLAIMANT'S MOTION TO DISMISS SAID MATTER,

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. 75-2969 MAY 6, 1976

MARY E. THOMAS, CLAIMANT

JAY EDWARDS, CLAIMANT'S ATTY.
TOM P. PRICE, DEFENSE ATTY.
SUPPLEMENTAL ORDER ALLOWING ATTORNEY FEE

THE BOARD'S ORDER ON REVIEW ENTERED APRIL 26, 1976 FAILED TO INCLUDE AN AWARD OF A REASONABLE ATTORNEY'S FEE AND THE ORDER SHOULD BE SUPPLEMENTED WITH THE FOLLOWING -

ORDER

IT IS HEREBY ORDERED THAT CLAIMANT'S COUNSEL RECEIVE AS A REASONABLE ATTORNEY'S FEE, 25 PER CENT OF ALL TEMPORARY TOTAL DISABILITY ALLOWED BY THE BOARD'S ORDER ON REVIEW BUT IN NO EVENT SHALL THE ADDITIONAL FEE ALLOWED FROM HER TEMPORARY TOTAL DISABILITY, WHEN COMBINED WITH THE FEE ALLOWED BY THE REFEREE'S ORDER, EXCEED 500 DOLLARS.

IT IS HEREBY FURTHER ORDERED THAT CLAIMANT'S COUNSEL IS TO RECEIVE 25 PER CENT OF ANY PERMANENT PARTIAL DISABILITY COMPENSATION CLAIMANT IS AWARDED WHEN HER CLAIM IS AGAIN CLOSED BY THE EVALUATION DIVISION OF THE WORKMEN'S COMPENSATION BOARD AS A REASONABLE ATTORNEY'S FEE. IN NO EVENT, HOWEVER, SHALL THE FEE ALLOWED FROM THE PERMANENT PARTIAL DISABILITY AWARD, WHEN COMBINED WITH THE ATTORNEY FEE ALLOWED BY THE REFEREE FROM ADDITIONAL PERMANENT DISABILITY, EXCEED 1,500 DOLLARS.

IT IS SO ORDERED.

WCB CASE NO. 75-2177 MAY 6, 1976

DARRIS DUIT, CLAIMANT

STIPULATION AND ORDER OF DISMISSAL

THIS MATTER HAVING COME ON REGULARLY FOR HEARING BEFORE JAMES P. LEAHY, REFEREE, ON DECEMBER 23, 1975, AND AN OPINION AND ORDER HAVING BEEN PUBLISHED UNDER DATE OF JANUARY 27, 1976, AND CLAIMANT HAVING FILED HIS REQUEST FOR REVIEW BY THE WORKMEN'S COMPENSATION BOARD, CLAIMANT APPEARING PERSONALLY AND BY AND THROUGH HIS COUNSEL, GARY M. GALTON OF GALTON AND POPICK, AND THE EMPLOYER, AMERICAN BUILDING MAINTENANCE COMPANY, APPEARING BY R. KENNEY ROBERTS, COUNSEL FOR ITS INDUSTRIAL CARRIER, EBI COMPANIES, AND THE PARTIES HAVING FULLY COMPROMISED AND SETTLED ALL ISSUES RAISED BY VIRTUE OF THE REQUEST FOR HEARING AND REQUEST FOR BOARD REVIEW AS EVIDENCED BY THEIR RESPECTIVE SIGNATURES BELOW, AND THE BOARD BEING OTHERWISE FULLY ADVISED IN THE PREMISES, MAKES THE FOLLOWING ORDERS -

IT IS HEREBY ORDERED THAT THE DETERMINATION ORDER OF MARCH 20, 1975, IS MODIFIED TO GRANT CLAIMANT A TOTAL PERMANENT PARTIAL DISABILITY AWARD OF 112 DEGREES FOR 35 PER CENT UNSCHEDULED DISABILITY, THIS REPRESENTING AN INCREASE OF 15 PER CENT OR EQUAL TO 48 DEGREES -

IT IS FURTHER ORDERED THAT PURSUANT TO RETAINER AGREEMENT, DATED APRIL 8, 1975, CLAIMANT'S COUNSEL, GALTON AND POPICK, ARE AWARDED REASONABLE ATTORNEYS' FEES EQUIVALENT TO 25 PER CENT OF THE ADDITIONAL COMPENSATION MADE PAYABLE BY THIS ORDER -

IT IS FURTHER ORDERED THAT DUE TO OUTSTANDING FINANCIAL OBLIGATIONS,

THIS AWARD SHALL BE MADE PAYABLE IN ONE LUMP SUM INSTALLMENT -

IT IS FINALLY ORDERED THAT CLAIMANT'S REQUEST FOR REVIEW BE AND THE SAME IS HEREBY DISMISSED.

WCB CASE NO. 75-3801 MAY 11, 1976

RAYMOND L. SCHWACH, CLAIMANT

RICHARDSON, MURPHY AND NELSON,
CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
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. 75-5280 MAY 11, 1976

MOHAMMAD SALEM, CLAIMANT

SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
CLAIMANT'S ATTYS.
G. HOWARD CLIFF, 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 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.

CLAIM NO. 144-69-362 MAY 13, 1976

ROBERT INMAN, CLAIMANT

OWN MOTION ORDER

PURSUANT TO THE BOARD'S OWN MOTION ORDER, DATED NOVEMBER 12, 1975, THE ABOVE ENTITLED MATTER WAS REFERRED TO THE EMPLOYER WITH INSTRUCTIONS TO REOPEN CLAIMANT'S CLAIM OF NOVEMBER 6, 1969 FOR MEDICAL CARE AND TREATMENT AND ASSOCIATED TIME LOSS.

CLAIMANT WAS REFERRED TO HERBERT A. SPADY, M.D. AND, ON DECEMBER 10, 1975, UNDERWENT ARTHROTOMY OF THE LEFT KNEE WITH EXCISION OF MEDIAL MENISCUS. CLAIMANT WAS FOUND TO HAVE TRAUMATIC ARTHRITIS OF THE LEFT KNEE. DR. SPADY REPORTS CLAIMANT'S CONDITION IS NOW STATIONARY AND THE CLAIM WAS SUBMITTED TO THE EVALUATION DIVISION OF THE BOARD ON APRIL 2, 1972 FOR CLOSURE UNDER ORS 656.278.

IT IS ORDERED THAT CLAIMANT RECEIVE TEMPORARY TOTAL DISABILITY FROM DECEMBER 9, 1975 THROUGH FEBRUARY 15, 1976.

IT IS FURTHER ORDERED THAT CLAIMANT BE AWARDED PERMANENT PARTIAL DISABILITY EQUAL TO 15 PER CENT LOSS OF THE LEFT LEG.

CLAIM NO. 133 CB 2158736 MAY 13, 1976

SIDNEY JONES, CLAIMANT

GRANT, FERGUSON AND CARTER,
CLAIMANT'S ATTYS.
MERLIN L. MILLER, DEFENSE ATTY.
OWN MOTION ORDER

ON MARCH 26, 1976 THE CLAIMANT, THROUGH HIS ATTORNEY, REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND REOPEN HIS CLAIM. THE CLAIMANT SUBMITTED IN SUPPORT OF HIS REQUEST TWO MEDICAL REPORTS FROM DR. DUNN AND AN X-RAY REPORT.

THE BOARD, UPON FULL CONSIDERATION OF THE MEDICAL REPORTS, CONCLUDES THEY ARE NOT SUFFICIENT TO ESTABLISH CAUSAL RELATIONSHIP BETWEEN CLAIMANT'S PRESENT CONDITION AND HIS INDUSTRIAL INJURY WHICH OCCURRED ON FEBRUARY 25, 1969. THEREFORE, THE REQUEST TO REOPEN ON BOARD'S OWN MOTION IS HEREBY DENIED.

WCB CASE NO. 75-2684 MAY 14, 1976

JOHN C. MCDONALD, CLAIMANT

RICHARD HAMMERSLEY, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT
CROSS REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS BOARD REVIEW OF A REFEREE'S ORDER WHICH AWARDED CLAIMANT 48 DEGREES FOR 15 PER CENT UNSCHEDULED DISABILITY TO THE NECK AND BACK. CLAIMANT ALLEGES HE WAS NEITHER MEDICALLY NOR VOCATIONALLY STATIONARY AT THE TIME OF THIS THIRD CLAIM CLOSURE ON JUNE 12, 1975, OR, IN THE ALTERNATIVE, HE IS ENTITLED TO A GREATER AWARD FOR PERMANENT PARTIAL DISABILITY.

THE STATE ACCIDENT INSURANCE FUND CROSS APPEALED, ALLEGING CLAIMANT HAS NOT SUSTAINED HIS BURDEN OF PROVING EITHER PHYSICAL OR FUNCTIONAL IMPAIRMENT.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON OCTOBER 8, 1973 WHILE DRIVING A LOADER. THE LOADER WAS BEING DRIVEN BACKWARDS REQUIRING CLAIMANT TO HOLD THE STEERING WHEEL WITH HIS LEFT ARM WHILE HE LOOKED OVER HIS RIGHT SHOULDER TO SEE WHERE HE WAS GOING. WHILE IN THIS POSITION, HE WAS JOSTLED ABOUT AND SUSTAINED A NECK AND BACK INJURY.

AFTER THE FIRST CLAIM CLOSURE, CLAIMANT'S CLAIM WAS VOLUNTARILY REOPENED ON TWO OCCASIONS. NONE OF THE THREE DETERMINATION ORDERS ISSUED AWARDED COMPENSATION FOR PERMANENT PARTIAL DISABILITY.

CLAIMANT WAS SEEN BY DR. DIERDORFF, AN OSTEOPATHIC PHYSICIAN - DR. RALPH THOMPSON - DR. J. B. CHESTER, AN ORTHOPEDIST - DR. LENLY M. GEARHART, PSYCHIATRIST - ALSO BY DRS. WHITE, RAAF, COHEN AND TSAI. HE WAS EVALUATED AT THE BACK EVALUATION CLINIC AND ENTERED THE PAIN CLINIC. THEIR DIAGNOSES INCLUDE NO DISABILITY, NO OBJECTIVE FINDINGS, POSSIBLE MALINGERING, AND ALMOST ENTIRE FUNCTIONAL. DR. TSAI'S OPINION WAS THAT CLAIMANT WAS MEDICALLY STATIONARY, THAT NO NEUROSURGICAL, DIAGNOSTIC, OR THERAPEUTIC PROCEDURES WERE INDICATED, BUT THERE WAS A MILD DEGREE OF PERMANENT DISABILITY.

IN JUNE 1975 CLAIMANT INDICATED AN UNWILLINGNESS TO BECOME INVOLVED WITH VOCATIONAL REHABILITATION. BOTH CLAIMANT AND HIS WIFE TESTIFIED THEY FELT THAT THEY WERE VICTIMS OF ALLEGED FRAUD WITHIN THE COMPENSATION SYSTEM. THE CLAIMANT HAS APPARENTLY SOUGHT REEMPLOYMENT WITH SOME INDICATION HE WOULD NOT TAKE A LESSER PAYING JOB.

THE REFEREE FOUND THAT CLAIMANT'S CLAIM HAD NOT BEEN PREMATURELY CLOSED ON JUNE 12, 1975.

THE REFEREE FOUND THAT THE MEDICAL DOCTORS WERE SPLIT ON THE QUESTION OF WHETHER OR NOT CLAIMANT COULD RETURN TO HIS FORMER OCCUPATION BUT, GIVING CLAIMANT THE BENEFIT OF DOUBT, CONCLUDED CLAIMANT HAD SUFFERED A MINOR LOSS OF EARNING CAPACITY AND AWARDED CLAIMANT 48 DEGREES FOR 15 PER CENT UNSCHEDULED DISABILITY.

THE BOARD ON DE NOVO REVIEW CONCLUDES THAT THIS AWARD IS A FAIR ONE IN THE ABSENCE OF ANY MEDICAL FINDINGS THAT WOULD SUBSTANTIATE CLAIMANT'S COMPLAINTS.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 18, 1975 IS AFFIRMED.

WCB CASE NO. 75-4701 MAY 14, 1976

KAY BINETTE, CLAIMANT

BAILEY, DOBLIE AND BRUUN, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
ORDER

ON MAY 10, 1976 THE BOARD RECEIVED A REQUEST TO REMAND THE ABOVE ENTITLED MATTER TO THE REFEREE FOR TAKING OF NEW EVIDENCE ALLEGING THAT SUCH EVIDENCE COULD NOT HAVE BEEN PRODUCED AT THE ORIGINAL HEARING BECAUSE OF CLAIMANT'S BASIC MISUNDERSTANDING OF HER CLAIM, FAILURE OF COMMUNICATION BETWEEN CLAIMANT AND HER FORMER ATTORNEY AND A MISUNDERSTANDING BETWEEN CLAIMANT AND HER TREATING PHYSICIAN AS TO HER PRIOR MEDICAL HISTORY.

THE BOARD, AFTER DUE CONSIDERATION, CONCLUDES THAT THE GROUNDS SET FORTH IN SUPPORT OF THE REQUEST ARE NOT SUFFICIENT TO JUSTIFY A FINDING THAT SUCH EVIDENCE COULD NOT REASONABLY HAVE BEEN PRODUCED AT THE ORIGINAL HEARING.

THEREFORE, THE REQUEST IS DENIED.

THE BOARD, HAVING BEEN ADVISED THAT AT THE TIME CLAIMANT REQUESTED THE BOARD TO REVIEW THE REFEREE'S ORDER WHE WAS NOT REPRESENTED BY COUNSEL, HEREBY ALLOWS CLAIMANT'S COUNSEL 10 DAYS FROM THE DATE OF THIS ORDER WITHIN WHICH TO REPLY TO RESPONDENT'S BRIEF RECEIVED MAY 12, 1976.

SAIF CLAIM NO. EA 977474 MAY 14, 1976

MICHAEL T. RUGGIERO, CLAIMANT

WILLNER, BENNETT, RIGGS AND SKARSTAD,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER

PURSUANT TO THE PROVISIONS OF ORS 656.278, THE BOARD'S OWN MOTION ORDER, DATED JULY 2, 1975, REFERRED THIS MATTER TO THE HEARINGS DIVISION WITH INSTRUCTIONS TO CONVENE A HEARING AND TAKE EVIDENCE ON THE ISSUE OF THE EXTENT OF CLAIMANT'S PRESENT PERMANENT PARTIAL DISABILITY RESULTING FROM HIS INDUSTRIAL INJURY SUSTAINED ON FEBRUARY 15, 1963.

FOLLOWING LITIGATION, CLAIMANT HAS HERETOFORE RECEIVED A TOTAL AWARD OF 85 PER CENT LOSS FUNCTION OF THE RIGHT LEG, 75 PER CENT LOSS FUNCTION OF THE LEFT LEG AND 20 PER CENT LOSS FUNCTION OF AN ARM FOR UNSCHEDULED LOW BACK DISABILITY. CLAIMANT NOW SEEKS AN AWARD OF PERMANENT TOTAL DISABILITY.

CLAIMANT SUSTAINED A COMPENSABLE INJURY TO HIS RIGHT KNEE FEBRUARY 15, 1963 WHILE EMPLOYED AS A WAREHOUSEMAN AT GILMORE STEEL. SURGERY WAS PERFORMED AND DR. BEGG NOTED AT THAT TIME THERE WAS EXTENSIVE AND SEVERE CHONDROMALCIA OF THE WEIGHT BEARING ARTICULATE CARTILAGE OF THE KNEE JOINT. TO PROTECT THIS LEG, CLAIMANT BEGAN WEIGHT BEARING ON THE LEFT LEG WHICH RESULTED IN THE DEVELOPMENT OF CHONDROMALCIA OF THE LEFT KNEE ALSO. HE WAS THEN FITTED WITH A LONG LEG BRACE FOR EACH LEG EXTENDING FROM THE THIGH TO THE FOOT TO HOLD THE LEGS STRAIGHT.

ON AUGUST 16, 1971 CLAIMANT WAS SEEN BY DR. BEGG FOR INCREASED COMPLAINTS OF BOTH KNEES AND BACK PAIN. DR. BEGG THOUGHT CLAIMANT'S LOW BACK COMPLAINTS WERE THE RESULT OF STIFF-LEGGED WALKING WHICH PUT AN ADDED BURDEN ON THE LOW BACK REGION. HE FELT THE CLAIMANT WAS TOTALLY DISABLED AS FAR AS RETURNING TO WORK HE HAD PREVIOUSLY DONE.

CLAIMANT HAS NOT WORKED GAINFULLY SINCE 1965. WITH THE ASSISTANCE OF VOCATIONAL REHABILITATION HE BEGAN, IN 1967, A THREE YEAR COURSE AT PORTLAND COMMUNITY COLLEGE WHICH HE ULTIMATELY COMPLETED AND RECEIVED A DEGREE IN ASSOCIATE AND APPLIED SCIENCES INARCHITECTURAL AND TECHNICAL DRAFTING.

IN 1973 HE WAS EMPLOYED BY THE PORTLAND CITY PLANNING COMMISSION AS A DRAFTSMAN BUT TERMINATED AFTER TWO OR THREE WEEKS BECAUSE OF LEG AND BACK PAIN. CLAIMANT TESTIFIED HE HAD APPLIED FOR DRAFTING JOBS AT BONNEVILLE POWER COMMISSION AND PACIFIC NORTHWEST BELL. HE TESTIFIED HE IS UNABLE TO SIT FOR MORE THAN TWO OR THREE HOURS AND CANNOT WALK MORE THAN THREE OR FOUR BLOCKS. CLAIMANT DOES NOT THINK HE COULD GIVE ANY EMPLOYER A FIVE DAY WORK WEEK - HOWEVER, HE DOES DO VOLUNTARY MINISTERIAL WORK FOR HIS CHURCH WHICH INCLUDES TEACHING AND COUNSELING. HE DROVE A ROUND TRIP WITH HIS FAMILY TO VICTORIA, B.C. ON ONE OCCASION WITHOUT ANY DIFFICULTY.

OVER THE YEARS CLAIMANT HAS BEEN TREATED BY DR. BEGG WHO HAS ADMINISTERED CORTISONE INJECTIONS AND HAS SET UP A MONTHLY THERAPY PROGRAM INCLUDING WHIRLPOOL, HEAT AND MASSAGE. OTHER MEDICAL REPORTS INDICATE CLAIMANT HAS HAD GASTROINTESTINAL PROBLEMS NOT RELATED TO HIS INDUSTRIAL INJURY.

THE REFEREE FOUND THAT, AT MOST, CLAIMANT HAS MADE ONLY A

MINIMAL ATTEMPT TO WORK ALTHOUGH HE HAD BEEN RETRAINED AND HAD DONE WELL WITH THE APTITUDE TESTS ADMINISTERED BY DR. HICKMAN. HE FELT CLAIMANT WAS MORE HIGHLY MOTIVATED TO REMAIN AT HOME TO CARE FOR HIS FAMILY AND PARTICIPATE IN HIS CHURCH WORK THAN TO RETURN TO THE LABOR MARKET.

THE REFEREE FELT THAT THE TESTIMONY AND OPINIONS OF DR. BEGG MIGHT BE SOMEWHAT BIAS BECAUSE OF THE CLOSE RELATIONSHIP BETWEEN CLAIMANT AND DR. BEGG.

THE REFEREE CONCLUDED THAT THE TOTALITY OF THE EVIDENCE FELL SHORT OF REFLECTING ANY ACTUAL INCREASE IN CLAIMANT'S PERMANENT PARTIAL DISABILITY AND THAT CLAIMANT HAD RECEIVED AN AWARD COMMENSURATE WITH HIS PRESENT DISABILITY. HE RECOMMENDED THAT THE BOARD NOT EXERCISE ITS OWN MOTION JURISDICTION TO INCREASE CLAIMANT'S AWARD.

THE BOARD, AFTER DE NOVO REVIEW OF THE RECORD AND TAKING INTO CONSIDERATION THE REFEREE'S RECOMMENDATIONS, CONCLUDES THAT CLAIMANT'S REQUEST FOR OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 SHOULD BE DENIED.

IT IS SO ORDERED.

WCB CASE NO. 75-4688 MAY 14, 1976

SHIRLEY E. MALAR

ROGER A. LUEDTKE, CLAIMANT'S ATTY.
ORDER ON MOTION

ON MAY 6, 1976 CLAIMANT, BY AND THROUGH HER COUNSEL, REQUESTED THE BOARD TO REMAND HER CLAIM TO THE HEARINGS DIVISION FOR FURTHER EVIDENCE TAKING, CORRECTION AND OTHER NECESSARY ACTION, PURSUANT TO ORS 656.295(5) OR, IN THE ALTERNATIVE, TO REVIEW THE "STIPULATION AND ORDER OF DISMISSAL", DATED APRIL 19, 1976, AND SIGNED BY REFEREE JOHN F. BAKER.

THE BOARD, AFTER DUE CONSIDERATION, FINDS THAT THE ONLY ISSUE IN DISPUTE IS THE REDUCTION BY REFEREE BAKER OF THE ATTORNEY'S FEE SET FORTH IN THE "STIPULATION AND ORDER OF DISMISSAL".

ORS 656.388(1) PROVIDES -

> "NO CLAIM FOR LEGAL SERVICES... IN RESPECT TO ANY CLAIM OR AWARD FOR COMPENSATION... SHALL BE VALID UNLESS APPROVED BY THE REFEREE..."

INASMUCH AS CLAIMANT'S COUNSEL AND REFEREE BAKER ARE UNABLE TO AGREE UPON THE AMOUNT OF THE ATTORNEY FEE, APPLICATION MUST BE MADE TO THE PRESIDING JUDGE OF THE CIRCUIT COURT IN THE COUNTY IN WHICH CLAIMANT RESIDES FOR A DETERMINATION OF THE PROPER FEE TO BE AWARDED IN THIS CASE. ORS 656.388(2). THIS IS A MATTER NOT PROPERLY BEFORE THE BOARD.

THE MOTION FOR REMAND OR, ALTERNATIVELY, REQUEST FOR REVIEW RECEIVED BY THE BOARD ON MAY 6, 1976 IS HEREBY DENIED.

SAIF CLAIM NO. BB 100466 MAY 14, 1976

GENEVIEVE E. REYNOLDS, CLAIMANT

EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER

CLAIMANT SUSTAINED A COMPENSABLE INDUSTRIAL INJURY ON DECEMBER 26, 1964 WHICH RESULTED IN THE IMPAIRMENT OF HER RIGHT WRIST - SHE HAS BEEN GRANTED DISABILITY AWARDS TOTALLING 100 PER CENT LOSS FUNCTION OF HER RIGHT FOREARM. BASED UPON A MEDICAL OPINION EXPRESSED BY DR. HAMMOND, THE BOARD, ON DECEMBER 8, 1975, EXERCISED ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND DIRECTED THE STATE ACCIDENT INSURANCE FUND TO ARRANGE FOR CLAIMANT TO BE EXAMINED AND EVALUATED AT THE DISABILITY PREVENTION DIVISION IN PORTLAND AND TO HAVE A PSYCHIATRIC EXAMINATION AND EVALUATION WHILE THERE.

ON DECEMBER 29, 1975 THE BOARD WAS FURNISHED BY THE FUND COPIES OF REPORTS FROM DR. QUAN, DATED MAY 22, 1975, AND FROM DR. NATHAN, DATED JULY 22, 1975, TOGETHER WITH A REQUEST THAT THE BOARD RECONSIDER ITS OWN MOTION ORDER BASED UPON THESE REPORTS. THE BOARD ENTERED A RECONSIDERATION OF OWN MOTION ORDER ON JANUARY 15, 1975 WHICH SET ASIDE THE ORDER ENTERED DECEMBER 8, 1975. CLAIMANT WAS ADVISED BY THE BOARD THAT IT WOULD CONSIDER ANY ADDITIONAL EVIDENCE SUBMITTED AT ANY TIME IN SUPPORT OF HER REQUEST - THAT ITS ORDER ON RECONSIDERATION WAS BASED SOLELY ON THE RECORD BEFORE IT AT THAT TIME.

ON MAY 6, 1976 THE BOARD WAS FURNISHED TWO MEDICAL REPORTS FROM DR. PARVARESH, ONE DATED APRIL 14 AND THE OTHER APRIL 28, 1976, TOGETHER WITH A REQUEST THAT THE BOARD CONSIDER THESE MEDICAL REPORTS WITH THE PREVIOUS MEDICAL REPORTS SUBMITTED AND REOPEN CLAIMANT'S CLAIM UNDER ITS OWN MOTION JURISDICTION.

DIAMETRICALLY OPPOSED PSYCHIATRIC EVALUATIONS HAVE BEEN MADE BY DR. PARVARESH AND DR. QUAN AND, AT THE PRESENT TIME, IT IS IMPOSSIBLE, WITHOUT A HEARING ON THE MERITS, FOR THE BOARD TO DETERMINE WHETHER THE MEDICAL EVIDENCE IS SUFFICIENT TO JUSTIFY THE EXERCISE OF ITS OWN MOTION JURISDICTION AND REOPEN THIS CLAIM.

THEREFORE, THE MATTER IS REFERRED TO THE HEARINGS DIVISION WITH INSTRUCTIONS TO HOLD A HEARING AND TAKE EVIDENCE ON THE ISSUE OF WHETHER CLAIMANT'S PRESENT CONDITION IS CAUSALLY RELATED TO HER INDUSTRIAL INJURY OF DECEMBER 26, 1964, JUSTIFYING THE REOPENING OF THE CLAIM FOR THE PAYMENT OF BENEFITS AS PROVIDED BY THE WORKMEN'S COMPENSATION LAW. 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 RECOMMENDATIONS ON THIS ISSUE.

WCB CASE NO. 76—424 MAY 14, 1976

ALLEN C. WICKS, CLAIMANT

MERTEN AND SALTVEIT, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER

ON MARCH 25, 1976 CLAIMANT REQUESTED THE BOARD EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND REOPEN HIS CLAIM RELATING TO HIS INDUSTRIAL INJURY OF MAY 28, 1965 FOR PAYMENT OF TIME LOSS DURING THE PERIOD CLAIMANT RECEIVES FURTHER MEDICAL TREATMENT AS PRESCRIBED BY DR. LOGAN ON NOVEMBER 18, 1975.

THIS REQUEST WAS NOT RECEIVED BY THE BOARD UNTIL MAY 10, 1976, ALTHOUGH A HEARING ON THE MATTER HAD BEEN SET FOR MAY 7, 1976. THIS HEARING HAS BEEN POSTPONED.

THE BOARD, AFTER REVIEWING THE MEDICAL EVIDENCE, CONCLUDES THAT CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED BUT NOT AS THE RESULT OF HIS INDUSTRIAL INJURY. CLAIMANT'S PRESENT DISABILITY, AS A RESULT OF THE INDUSTRIAL INJURY, IS NO GREATER THAN THAT FOR WHICH HE HAS BEEN PREVIOUSLY AWARDED WORKMEN'S COMPENSATION BENEFITS. THEREFORE, THE BOARD WILL NOT EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND REOPEN CLAIMANT'S INDUSTRIAL INJURY CLAIM.

CLAIMANT IS ENTITLED TO FURTHER MEDICAL CARE AND TREATMENT UNDER THE PROVISIONS OF ORS 656.245 — HOWEVER, THE BOARD IS INFORMED THAT THE STATE ACCIDENT INSURANCE FUND HAS, AT THE PRESENT TIME, AUTHORIZED PAYMENT FOR SUCH MEDICAL CARE AND TREATMENT.

ORDER

THE CLAIMANT'S REQUEST THAT THE BOARD EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND REOPEN HIS MAY 28, 1965 CLAIM FOR PAYMENT OF TIME LOSS WHILE CLAIMANT RECEIVES FURTHER MEDICAL TREATMENT IS DENIED.

WCB CASE NO. 75—948 MAY 14, 1976

ELWIN E. RITZ, CLAIMANT

DYE AND OLSON, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW OF THAT PORTION OF THE REFEREE'S ORDER WHICH FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED FROM AND AFTER THE DATE OF HIS ORDER (NOVEMBER 5, 1975).

CLAIMANT, A 44 YEAR OLD FALLER AND BUCKER, SUSTAINED A COMPENSABLE INJURY TO HIS RIGHT KNEE ON DECEMBER 28, 1973. ON JANUARY 14, 1974 DR. MC HOLICK PERFORMED A MENISCECTOMY FOR A TORN MEDIAL MENISCUS. AFTER SIX WEEKS RECUPERATION CLAIMANT RETURNED TO WORK AND WORKED FOR APPROXIMATELY FOUR HOURS PER DAY FOR A PERIOD OF FIVE OR SIX DAYS AND THEN QUIT BECAUSE OF PAIN AND SWELLING IN BOTH KNEES AND BOTH FEET AS WELL AS IN HIS FINGERS AND WRISTS. CLAIMANT HAS NOT RETURNED TO WORK SINCE THAT DATE.

CLAIMANT HAS A NINTH GRADE EDUCATION AND HAS SUCCESSFULLY PASSED THE GED EQUIVALENCY TESTS. HIS WORK BACKGROUND IS PRIMARILY THAT OF A LOGGER WITH AN EARLIER BRIEF PERIOD OF MILL WORK. CLAIMANT HAD NEVER HAD DIFFICULTY WITH EITHER OF HIS LEGS PRIOR TO JANUARY 1973 WHEN HE SUFFERED A BLOW TO HIS RIGHT KNEE WHILE IN THE COURSE OF EMPLOYMENT. HE LOST NO TIME FROM WORK AS A RESULT OF THAT INJURY BUT CONTINUED TO HAVE PAIN IN THE RIGHT KNEE UP TO THE TIME HE REINJURED THE KNEE ON DECEMBER 28, 1973. PRIOR TO THE JANUARY 1973 INJURY, CLAIMANT HAD HAD NO PROBLEM WITH OTHER JOINTS TO SUGGEST THE PRESENCE OF RHEUMATOID ARTHRITIS, THE FIRST SPECIFIC REFERENCE TO WHICH WAS CONTAINED IN DR. MC HOLICK'S MAY 20, 1974 REPORT WHICH STATED THAT FOLLOWING THE ARTHROTOMY CLAIMANT HAD A FLAREUP OF BOTH KNEES AND WAS SUBSEQUENTLY REFERRED TO DR. RICHARD ANDERSON FOR TREATMENT OF THE RHEUMATOID ARTHRITIS WHICH WAS TOTALLY UNRELATED TO THE INDUSTRIAL INJURY.

IN A SUBSEQUENT REPORT TO THE FUND, DR. MC HOLICK STATED THAT CLAIMANT DID HAVE RESIDUAL PHYSICAL IMPAIRMENT BY VIRTUE OF A STRAINING INJURY TO AN ARTHRITIC RIGHT KNEE THAT RESULTED IN AN ARTHROTOMY AND MEDIAL MENISCECTOMY. HOWEVER, ACCORDING TO DR. MC HOLICK, CLAIMANT'S MAJOR DISABILITY AND PROBLEM IS RHEUMATOID ARTHRITIS WHICH IS NOT RELATED OR AGGRAVATED BY THE INDUSTRIAL INJURY.

AT THE REQUEST OF CLAIMANT'S COUNSEL, CLAIMANT WAS EXAMINED BY DR. RINEHART WHO WAS OF THE OPINION THAT CLAIMANT'S ARTHRITIS WAS INITIATED, WITHOUT DISABLING SYMPTOMS, BY THE JANUARY 1973 INJURY AND THAT IT BECAME AGGRAVATED AND DISABLING WITH HIS DECEMBER 28, 1973 INJURY. DR. RINEHART FELT THAT CLAIMANT WAS NOW TOTALLY DISABLED AND WOULD BE FOR A PROLONGED AND INDEFINITE PERIOD AND IN ALL PROBABILITY HIS PRESENT DISABILITY WAS LARGELY DUE TO THE DECEMBER 28, 1973 INJURY.

BASED UPON DR. MC HOLICK'S REPORT OF JULY 30, 1974, THE FUND REQUESTED A DETERMINATION AND ON SEPTEMBER 23, 1974 A DETERMINATION ORDER AWARDED CLAIMANT TIME LOSS AND 30 DEGREES FOR 20 PER CENT LOSS OF HIS RIGHT LEG.

THE REFEREE FOUND THAT CLAIMANT'S ENTIRE RHEUMATOID ARTHRITIS CONDITION WAS CAUSALLY RELATED TO THE DECEMBER 28, 1973 INDUSTRIAL INJURY AND AS A RESULT THEREOF THAT CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED. THE REFEREE RELIED STRONGLY UPON THE TESTIMONY OF DR. RINEHART THAT DURING THE PAST 20 YEARS THERE HAS BEEN CONSIDERABLE EVIDENCE THAT RHEUMATOID ARTHRITIS GENERALLY ARISES AS A RESULT OF STRESS, I.E., AS A REACTION OF THE BODY TO ANY NOXIOUS STIMULUS, WHETHER INFECTIOUS, MECHANICAL OR PAIN. HE WAS OF THE OPINION THAT WHEN THE STRESS IS CONTINUED OVER A LONG PERIOD OF TIME RHEUMATOID ARTHRITIS MAY RESULT AND THAT THE CHRONIC STRESS OVER A PERIOD OF ABOUT ONE YEAR FOLLOWING CLAIMANT'S FIRST KNEE INJURY WITH THE ACUTE STRESS OF THE SECOND KNEE INJURY WERE SUFFICIENTLY SIGNIFICANT TO RESULT IN RHEUMATOID ARTHRITIS IN CLAIMANT. HE FELT THAT THE PRESENCE OF STRESS DURING THAT PERIOD WAS BORNE OUT BY THE FACT THAT THE OPERATIVE REPORT REVEALED SIGNS OF AN EARLIER INFLAMMATION AS WELL AS THE PRESENCE OF ACUTE INFLAMMATION FROM THE SECOND KNEE INJURY.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT CLAIMANT FAILED TO MEET HIS BURDEN OF PROVING THAT THE INJURY TO HIS RIGHT KNEE WAS CAUSALLY RELATED TO THE RHEUMATOID ARTHRITIS THROUGHOUT THE REST OF HIS BODY. AN INJURY CONFINED TO THE PART OF THE BODY WITHOUT UNUSUAL OR UNEXPECTED COMPLICATIONS IS EVALUATED UPON THE PART INJURED. WALKER VS. SCD (UNDERSCORED), 248 OR 195. CLAIMANT CONTENDS THAT THE INJURY TO HIS RIGHT KNEE LED TO THE DEVELOPMENT OF RHEUMATOID ARTHRITIS THROUGHOUT THE REST OF HIS BODY BUT THE ONLY MEDICAL EVIDENCE SUPPORTING CLAIMANT'S CONTENTION IS THE OPINION OF DR. RINEHART.

A DIAMETRICALLY OPPOSED OPINION HAS BEEN EXPRESSED BY DR. MC HOLICK WHO WAS CLAIMANT'S TREATING PHYSICIAN. DR. MC HOLICK NOTED THAT CLAIMANT HAD HAD PREEXISTING ARTHRITIC SYMPTOMS, RHEUMATOID-TYPE, FOR A NUMBER OF YEARS WITH NO SPECIFIC TREATMENT AND HE FURTHER SPECIFICALLY STATED THAT CLAIMANT'S RHEUMATOID ARTHRITIS WAS TOTALLY UNRELATED TO THE INDUSTRIAL INJURY.

THE BOARD FINDS DR. MC HOLICK'S OPINION MORE PERSUASIVE. IT DISCOUNTS, TO A DEGREE, THE OPINION EXPRESSED BY DR. RINEHART FOR THE REASON THAT SUCH OPINION IS BASED UPON TWO ASSUMPTIONS WHICH ARE NOT SHOWN TO BE NECESSARILY TRUE IN THE PRESENT CASE - FURTHERMORE, HIS OPINION AS TO CAUSATION WAS CONTRADICTORY.

THE BOARD CONCLUDES THAT THE RHEUMATOID ARTHRITIS IS NOT CAUSALLY RELATED TO THE INDUSTRIAL INJURY AND THAT THE AWARD OF 20 PER CENT OF THE RIGHT LEG SUFFICIENTLY COMPENSATES CLAIMANT FOR HIS LOSS OF FUNCTION OF THAT SCHEDULED MEMBER.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 5, 1975 IS REVERSED.

THE DETERMINATION ORDER MAILED SEPTEMBER 23, 1974 IS AFFIRMED.

WCB CASE NO. 75-2942 MAY 14, 1976

WALTER L. O'NEAL, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
FREDRICKSON, TASSOCK, WEISENSEE, BARTON AND COX,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT
REQUEST FOR CROSS APPEAL BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THAT PORTION OF THE REFEREE'S ORDER WHICH APPROVED THE EMPLOYER'S DENIAL OF CLAIMANT'S CLAIM FOR AGGRAVATION. THE EMPLOYER CROSS REQUESTS BOARD REVIEW OF THAT PORTION OF THE REFEREE'S ORDER WHEREIN THE EMPLOYER AND ITS CARRIER WERE HELD LIABLE FOR TEMPORARY TOTAL DISABILITY BENEFITS FROM MARCH 31, 1975 TO JULY 2, 1975, LESS TIME WORKED, AND PENALTIES OF 25 PER CENT OF THE FOREGOING BENEFITS AND DIRECTED TO PAY CLAIMANT'S ATTORNEY A FEE OF 500 DOLLARS.

CLAIMANT SUSTAINED A COMPENSABLE INJURY TO HIS HEAD, NECK, LOW BACK AND RIGHT HIP ON NOVEMBER 21, 1971, THE CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED JULY 13, 1972 WHEREBY CLAIMANT WAS AWARDED TEMPORARY TOTAL DISABILITY ONLY. CLAIMANT REQUESTED A HEARING AND WAS AWARDED 64 DEGREES FOR UNSCHEDULED DISABILITY BY AN OPINION AND ORDER ENTERED OCTOBER 20, 1972. NO APPEAL WAS TAKEN FROM THIS OPINION AND ORDER AND IT IS NOW FINAL BY OPERATION OF LAW.

ON MARCH 31, 1975 CLAIMANT'S ATTORNEY MADE DEMAND UPON THE EMPLOYER FOR ACCEPTANCE OF AN AGGRAVATION CLAIM, ALLEGING THAT CLAIMANT'S CONDITION HAD BECOME WORSE SINCE OCTOBER 20, 1972. ON JULY 2, 1975 THE EMPLOYER DENIED THE CLAIM. CLAIMANT RELIED ON A REPORT OF DR. WISDOM DATED MARCH 26, 1975 TO SHOW THAT HIS CONDITION HAD BECOME AGGRAVATED SINCE THE LAST DATE OF AN AWARD OR ARRANGEMENT OF COMPENSATION. IN HIS REPORT DR. WISDOM COULD NOT SPECIFICALLY RELATE

CLAIMANT'S SYMPTOM COMPLEX TO HIS PREVIOUS INJURY OF NOVEMBER 23, 1970 AND THE REFEREE CONCLUDED THAT THIS REPORT DID NOT INDICATE A RELATIONSHIP BETWEEN CLAIMANT'S PRESENT PROBLEMS AND HIS COMPENSABLE INJURY.

THE REFEREE FURTHER FOUND THAT THE REPORT OF DRS. SNODGRASS, ABELE AND ROBINSON, ALL ORTHOPEDIC PHYSICIANS, DATED SEPTEMBER 24, 1975, AND BASED UPON AN EXAMINATION OF CLAIMANT ON SEPTEMBER 17, 1975, LIKEWISE FOUND NO AGGRAVATION.

THE REFEREE CONCLUDED THAT CLAIMANT HAD FAILED TO SUSTAIN THE BURDEN OF PROVING AN AGGRAVATION.

THE SECOND ISSUE IS WHETHER CLAIMANT IS ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS, PENALTIES AND ATTORNEY'S FEES FOR FAILURE OF THE EMPLOYER TO PAY TEMPORARY TOTAL DISABILITY BENEFITS WITHIN 14 DAYS OF THE AGGRAVATION DEMAND AND UNTIL THE DATE OF ITS DENIAL OF SAID DEMAND.

THE REFEREE RELIED ON THE HOLDING OF THE BOARD IN EDITH F. BARR (UNDERSCORED), WCB CASE NO. 74-4149, ENTERED ON SEPTEMBER 22, 1975, WHICH HELD, IN EFFECT, THAT NOTWITHSTANDING THE AFFIRMANCE OF THE DENIAL THE EMPLOYER IS LIABLE FOR TEMPORARY TOTAL DISABILITY, PENALTIES AND ATTORNEY'S FEES FOR FAILURE TO PAY DISABILITY BENEFITS IN THE INTERIM BETWEEN DEMAND AND DENIAL.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 20, 1975 IS AFFIRMED.

WCB CASE NO. 75-3667 MAY 14, 1976

JOHNNY TURNER, CLAIMANT

RICHARDSON AND MURPHY, CLAIMANT'S ATTYS.
GEARIN, CHENEY, LANDIS, AEBI AND KELLEY,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED AUGUST 29, 1975 AND SUSTAINED THE EMPLOYER'S DENIAL OF CLAIMANT'S CLAIM FOR AGGRAVATION.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON FEBRUARY 26, 1975 WHEN HE STRAINED HIS RIGHT SHOULDER WHILE LIFTING A TRANSMISSION CASE. THE INJURY WAS DIAGNOSED AS A RIGHT LUMBAR AND DORSAL STRAIN AND CONSERVATIVE TREATMENT WAS PRESCRIBED. ON MARCH 7, 1975 CLAIMANT WAS EXAMINED BY DR. MC NEILL WHO, ON MARCH 17, 1975, RELEASED HIM TO RETURN TO WORK. ON THE SAME DAY CLAIMANT CONSULTED DR. DAACK WHO DIAGNOSED AN ACUTE SUBDELTOID BURSITIS, RIGHT SHOULDER AND ACUTE LUMBAR MYOSITIS - HE FELT FURTHER CONSERVATIVE TREATMENT WAS NECESSARY AND THAT CLAIMANT WAS NOT MEDICALLY STATIONARY.

IN APRIL, 1975 DR. DAACK REFERRED CLAIMANT TO DR. HEUSCH WHO DIAGNOSED A STRAIN TYPE INJURY TO THE TRAPEZIUS MUSCLE, ON THE RIGHT - HE RECOMMENDED STRETCHING TYPE EXERCISES AND CONSERVATIVE TREATMENT.

AND ANTICIPATED CLAIMANT WOULD BE ABLE TO RETURN TO WORK WITHIN TWO TO FOUR WEEKS.

DR. PASQUESI, UPON THE RECOMMENDATION OF DR. DAACK, EXAMINED CLAIMANT IN JULY 1975 AND WAS OF THE OPINION THAT CLAIMANT'S CONDITION WAS MEDICALLY STATIONARY AND HE COULD RETURN TO WORK WHICH DID NOT REQUIRE STRENUOUS USE OF THE RIGHT ARM. DR. DAACK AGREED THAT CLAIMANT'S CLAIM COULD BE CLOSED AND CLAIMANT COULD RETURN TO LIGHT WORK ACTIVITY.

CLAIMANT DISCUSSED THE MATTER WITH HIS EMPLOYER AND, BASED UPON A REPRESENTATION THAT LIGHT WORK WAS AVAILABLE, HE OBTAINED A WRITTEN WORK RELEASE FROM DR. DAACK ON AUGUST 22, 1975 BUT WHEN HE ENDEAVORED TO RETURN TO WORK THE EMPLOYER INFORMED HIM THAT LIGHT WORK WOULD NOT BE AVAILABLE FOR APPROXIMATELY TWO WEEKS. THEREAFTER, CLAIMANT AGAIN CONSULTED DR. DAACK WHO EXAMINED CLAIMANT ON AUGUST 29, 1975 AND AT THAT TIME FOUND CLAIMANT TO BE PHYSICALLY DISQUALIFIED FOR ALL ACTIVITIES - HE RECOMMENDED THE CLAIM BE OPENED OR REMAIN OPEN. ON THIS SAME DATE A DETERMINATION ORDER WAS MAILED AWARDING CLAIMANT TIME LOSS THROUGH JULY 29, 1975 BUT NO AWARD FOR PERMANENT PARTIAL DISABILITY.

ON NOVEMBER 17, 1975 THE EMPLOYER DENIED CLAIMANT'S CLAIM FOR AGGRAVATION. ON OCTOBER 22, 1975 CLAIMANT HAD BEEN RELEASED TO RETURN TO WORK BY DR. FREISTAT AND ON NOVEMBER 25, 1975 DR. DAACK AGAIN FOUND CLAIMANT'S CONDITION TO BE MEDICALLY STATIONARY AND RECOMMENDED CLAIM CLOSURE. CLAIMANT HAS NOT WORKED SINCE FEBRUARY 26, 1975, THE DATE OF HIS INJURY.

THE REFEREE FOUND THAT CLAIMANT'S CONDITION WAS MEDICALLY STATIONARY BY JULY 30, 1975 AT THE LATEST AND FURTHER THAT THERE WAS NO BELIEVABLE EVIDENCE, MEDICAL OR OTHERWISE, TO SUPPORT CLAIMANT'S AGGRAVATION CLAIM. HE FOUND THAT CLAIMANT HAD BEEN AND STILL WAS ENTITLED TO SUCH PALLIATIVE CARE AND TREATMENT AS HE MIGHT REQUIRE FOR HIS COMPENSABLE INJURY AND THAT SUCH TREATMENT MUST BE FURNISHED BEFORE AND AFTER DETERMINATION OF THE PRESENT DISABILITY.

THE REFEREE FOUND THAT CLAIMANT'S FEBRUARY 26, 1975 INJURY DID NOT PERMANENTLY IMPAIR HIS EARNING CAPACITY AND AFFIRMED THE DETERMINATION ORDER.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT CLAIMANT IS ENTITLED TO COMPENSATION FOR TEMPORARY TOTAL DISABILITY THROUGH NOVEMBER 25, 1975 RATHER THAN JULY 29, 1975 BECAUSE CLAIMANT'S PRIOR RELEASE WAS FOR "LIGHT WORK ONLY" AND THE EMPLOYER DID NOT HAVE SUCH WORK AVAILABLE AT THE TIME OF THAT RELEASE. SUBSEQUENTLY DR. DAACK INDICATED, ON THE SAME DATE THE DETERMINATION ORDER WAS MAILED, THAT CLAIMANT WAS PHYSICALLY DISQUALIFIED FOR ALL WORK ACTIVITIES AT THAT TIME. IT WAS NOT UNTIL NOVEMBER 25, 1975 THAT DR. DAACK, THE TREATING PHYSICIAN, FOUND CLAIMANT'S CONDITION TO BE MEDICALLY STATIONARY AND RELEASED CLAIMANT TO RETURN TO REGULAR WORK.

THE BOARD CONCLUDES THAT THE DETERMINATION ORDER SHOULD BE MODIFIED ACCORDINGLY.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 16, 1975 IS MODIFIED.

CLAIMANT IS ENTITLED TO COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM FEBRUARY 26, 1975 THROUGH NOVEMBER 25, 1975, BOTH DATES INCLUSIVE. THIS IS IN ADDITION TO AND NOT IN LIEU OF THE COMPENSATION FOR TEMPORARY TOTAL DISABILITY AWARDED CLAIMANT BY THE DETERMINATION ORDER MAILED AUGUST 29, 1975, WHICH IS MODIFIED BY THIS ORDER.

IN ALL OTHER RESPECTS THE REFEREE'S ORDER IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW 25 PER CENT OF THE COMPENSATION AWARDED CLAIMANT BY THIS ORDER PAYABLE OUT OF SAID COMPENSATION AS PAID TO A MAXIMUM OF 150 DOLLARS.

WCB CASE NO. 75-2114 MAY 14, 1976

LESTER SAWYER, CLAIMANT

DYE AND OLSON, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH HELD THE EMPLOYER HAD NOT ACTED UNREASONABLY FOR DECLINING TO AUTHORIZE CHIROPRACTIC TREATMENTS AND WAS NOT SUBJECT TO PENALTIES AND ATTORNEY FEES, AND AFFIRMED THE DETERMINATION ORDER DATED MARCH 27, 1975 AWARDING CLAIMANT 80 DEGREES FOR 25 PER CENT UNSCHEDULED DISABILITY TO THE UPPER BACK, NECK AND RIGHT SHOULDER.

CLAIMANT, A 63 YEAR OLD MILL WORKER, WAS DOING PLANER CLEANUP WORK ON AUGUST 8, 1974 WHEN HE SUFFERED A COMPENSABLE BACK INJURY DIAGNOSED AS AN ACUTE MECHANICAL BACK STRAIN. X-RAYS REVEALED A MARKED OSTEOPOROSIS AT ALL SPINAL LEVELS AS WELL AS ARTHRITIS. ON NOVEMBER 6 CLAIMANT BEGAN A SERIES OF CHIROPRACTIC TREATMENTS BY DR. SCHEER THAT CONTINUED TO THE TIME OF HEARING.

CLAIMANT WAS EXAMINED BY THE ORTHOPAEDIC CONSULTANTS IN JANUARY 1974 WHO FELT THE OSTEOARTHRITIS AND OSTEOPOROSIS OF THE SPINE LEFT CLAIMANT WITH MODERATE IMPAIRMENT, THE IMPAIRMENT ATTRIBUTABLE TO THE INDUSTRIAL INJURY WAS CONSIDERED TO BE MILD AND CLAIMANT COULD NOT RETURN TO HIS FORMER OCCUPATION. DRS. BIDDLEMAN AND BALME AGREED. THE CLAIM WAS CLOSED IN MARCH, 1975, BASED UPON THE CONSENSUS OF THE MEDICAL DOCTORS THAT CLAIMANT'S CONDITION WAS STATIONARY AND HIS CLAIM COULD BE CLOSED.

DR. SCHEER AGREED GENERALLY, BUT FELT THAT CLAIMANT'S CONDITION WAS NOT MEDICALLY STATIONARY AND HE CONTINUED TO GIVE CLAIMANT CHIROPRACTIC TREATMENTS. WHEN HE ADVISED THE EMPLOYER ON JUNE 25 THAT CLAIMANT WAS RECEIVING TREATMENTS AND REQUESTED AUTHORIZATION, THE EMPLOYER REPLIED THAT THE CLAIM WAS IN LITIGATION (A HEARING HAD BEEN REQUESTED) AND REFUSED THE AUTHORIZATION. AT THE HEARING THE REFEREE AGREED THE TREATMENTS WERE UNNECESSARY AND THE EMPLOYER COULD NOT BE HELD UNREASONABLE FOR REFUSING TO AUTHORIZE SUCH TREATMENT.

WITH RESPECT TO THE EXTENT OF CLAIMANT'S PERMANENT PARTIAL DISABILITY, DR. BALME, ON JUNE 30, SUBMITTED A REPORT FOR SOCIAL SECURITY WHEREIN HE NOTED PHYSICAL FINDINGS CONSISTENT WITH FUNCTIONAL OVERLAY, OR MALINGERING. HE FELT CLAIMANT COULD NOT RETURN TO HEAVY LABOR BUT COULD PERFORM WORK WITH LIFTING LIMITS OF 10-20 POUNDS AND BEING ON AND OFF HIS FEET FOR INTERMITTENT PERIODS DURING THE DAY. HE DID NOT BELIEVE THAT CLAIMANT NEEDED CHIROPRACTIC TREATMENT.

A PSYCHIATRIC EXAMINATION OF CLAIMANT INDICATED POOR MOTIVATION TO RETURN TO WORK. CLAIMANT HAS NOT WORKED GAINFULLY SINCE THE DATE OF INJURY, NOR HAS HE CONTACTED THE EMPLOYER WHO OFFERED A SECURITY

TYPE JOB TO CLAIMANT. DR. HICKMAN, PSYCHOLOGIST, FELT CLAIMANT WAS PSYCHOLOGICALLY PREPARING HIMSELF TO QUIT THE WORK FORCE.

THE REFEREE WEIGHED THE FACTORS OF AGE, EXPERIENCE, EDUCATION, REHABILITATION POTENTIAL, PHYSICAL IMPAIRMENT AND LACK OF MOTIVATION AND DETERMINED THAT CLAIMANT HAD BEEN ADEQUATELY COMPENSATED FOR HIS PERMANENT DISABILITY BY THE AWARD OF 80 DEGREES = HE AFFIRMED THE DETERMINATION ORDER.

THE BOARD, ON DE NOVO REVIEW, CONCURS.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 24, 1975 IS AFFIRMED.

(NO NUMBER AVAILABLE) MAY 14, 1976

KEITH M. GILMORE, CLAIMANT

OWN MOTION ORDER

CLAIMANT SUFFERED AN INDUSTRIAL INJURY TO HIS BACK ON FEBRUARY 29, 1968 WHILE IN THE EMPLOY OF EQUITABLE SAVINGS AND LOAN ASSOCIATION WHOSE CARRIER AT THAT TIME WAS EMPLOYERS' GROUP OF INSURANCE COMPANIES OF PORTLAND (NOW CALLED COMMERCIAL UNION ASSURANCE COMPANIES). CLAIMANT'S CLAIM WAS CLOSED BY A DETERMINATION ORDER MAILED ON OCTOBER 30, 1968 WHICH AWARDED CLAIMANT TIME LOSS ONLY.

ON FEBRUARY 17, 1976 THE CLAIMANT REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND REOPEN HIS CLAIM, ALLEGING HE HAD SUFFERED A RECURRENCE OR AGGRAVATION OF HIS 1968 INJURY IN JULY 1974 AND AGAIN ON JANUARY 12, 1975 WHEN HE WAS REQUIRED TO BE HOSPITALIZED. CLAIMANT'S AGGRAVATION RIGHTS EXPIRED ON OCTOBER 31, 1973.

THE CLAIMANT SUBSEQUENTLY FURNISHED THE BOARD A MEDICAL REPORT FROM DR. WATKINS DATED APRIL 20, 1976. ON MAY 5, 1976 THE CARRIER WAS FURNISHED A COPY OF THIS REPORT AND ADVISED THAT THE BOARD WOULD CONSIDER THE APPLICATION FOR OWN MOTION RELIEF ON MAY 10, 1976 BUT WOULD RECEIVE ANY INFORMATION FROM THE CARRIER WHICH IT WISHED TO SUBMIT PRIOR TO THAT DATE. NO INFORMATION FROM THE CARRIER HAS BEEN RECEIVED.

BASED UPON DR. WATKINS' REPORT, THE BOARD CONCLUDES THAT CLAIMANT HAS A CHRONIC LUMBOSACRAL STRAIN WHICH PROBABLY IS DUE TO THE 1968 INJURY AND, THEREFORE, IS THE RESPONSIBILITY OF THE EMPLOYER AND ITS CARRIER.

ORDER

CLAIMANT'S CLAIM IS REMANDED TO THE EMPLOYER, EQUITABLE SAVINGS AND LOAN ASSOCIATION, AND ITS CARRIER, COMMERCIAL UNION ASSURANCE COMPANIES, FOR THE PAYMENT OF COMPENSATION, AS PROVIDED BY LAW, COMMENCING JANUARY 12, 1976 AND UNTIL THE CLAIM IS CLOSED PURSUANT TO ORS 656.278.

WCB CASE NO. 73-4035 MAY 17, 1976
WCB CASE NO. 75-2082

CLARENCE T. DENNIS, CLAIMANT

ORDER APPROVING STIPULATION, CLOSING CLAIM AND DISMISSING REQUEST FOR REVIEW

IT IS HEREBY ORDERED THAT -

1. THE STIPULATION OF THE PARTIES DATED MAY 10, 1976 IS HEREBY RATIFIED AND APPROVED -

2. CLAIMANT'S CLAIM IS HEREBY CLOSED EFFECTIVE THE DATE OF THIS ORDER -

3. CLAIMANT IS AWARDED 184 DEGREES UNSCHEDULED DISABILITY FOR LOW BACK AND PSYCHIATRIC DISABILITY -

4. CLAIMANT IS AWARDED TEMPORARY TOTAL DISABILITY FROM THE DATE OF OCTOBER 4, 1973 TO THE DATE OF THIS ORDER -

5. CLAIMANT'S ATTORNEY, ALLEN G. OWEN, IS HEREBY AWARDED AS AND FOR REASONABLE ATTORNEY FEES 25 PER CENT OF THE AWARD MADE PAYABLE BY THIS ORDER NOT TO EXCEED 2,000 DOLLARS THE SAID ATTORNEY FEE TO BE PAID OUT OF THE AWARD OF DISABILITY -

6. STATE ACCIDENT INSURANCE FUND'S REQUEST FOR REVIEW IS HEREBY DEEMED WITHDRAWN AND THE APPEAL IS HEREBY DISMISSED.

STIPULATION

THIS STIPULATION MADE BY AND BETWEEN CLARENCE T. DENNIS, CLAIMANT, APPEARING THROUGH ALLEN G. OWEN, ATTORNEY FOR THE CLAIMANT, AND MAYFAIR REALTY COMPANY, EMPLOYERS, AND THE STATE ACCIDENT INSURANCE FUND, THE EMPLOYER'S INSURER, APPEARING THROUGH ITS ATTORNEY, KENNETH L. KLEINSMITH, ASSISTANT ATTORNEY GENERAL AND

WHEREAS, THE CLAIMANT SUSTAINED A COMPENSABLE ON-THE-JOB INJURY ON MAY 5, 1972 WHILE IN THE COURSE AND SCOPE OF HIS EMPLOYMENT WITH MAYFAIR REALTY COMPANY, AND CLAIMANT DID RECEIVE COMPENSATION PURSUANT TO THE WORKMEN'S COMPENSATION ACT FOR OREGON UNTIL HIS CLAIM WAS FIRST CLOSED BY DETERMINATION ORDER DATED NOVEMBER 19, 1973 WHICH AWARDED CLAIMANT TEMPORARY TOTAL DISABILITY TO OCTOBER 4, 1973 AND NO PERMANENT PARTIAL DISABILITY -

WHEREAS, CLAIMANT DULY APPEALED THE SAID DETERMINATION ORDER AND BY OPINION AND ORDER OF A REFEREE OF THE HEARINGS DIVISION OF THE WORKMEN'S COMPENSATION BOARD DATED JANUARY 7, 1976, ORDERED AS FOLLOWS -

WCB CASE NO. 73-4035

"IT IS THEREFORE HEREBY ORDERED THAT THE DETERMINATION ORDER OF NOVEMBER 19, 1973 IS SET ASIDE AND VACATED AND THE CLAIM IS REMANDED TO THE STATE ACCIDENT INSURANCE FUND TO PROVIDE CLAIMANT MEDICAL CARE AND TREATMENT AND TEMPORARY DISABILITY BENEFITS COMMENCING AS OF OCTOBER 4, 1973 UNTIL THE CLAIM IS CLOSED PURSUANT TO ORS 656.268, SUBJECT TO THE STATE ACCIDENT INSURANCE FUND'S OFFSET AS EVIDENCED BY DEFENDANT'S EXHIBIT R-C-2 (THIRD PARTY SETTLEMENT DISTRIBUTION). FILING A REQUEST FOR REVIEW DOES NOT STAY PAYMENT OF COMPENSATION TO CLAIMANT.

IT IS ALSO ORDERED THAT COUNSEL FOR CLAIMANT BE PAID A REASONABLE ATTORNEY FEE EQUAL TO 25 PER CENT OF ADDITIONAL TEMPORARY TOTAL DISABILITY MADE PAYABLE TO THIS ORDER, PAYABLE THEREFROM AS PAID, NOT TO EXCEED 500 DOLLARS PLUS 25 PER CENT OF ANY PERMANENT DISABILITY AWARD EVENTUALLY GRANTED CLAIMANT, PAYABLE THEREFROM AS PAID, THE TOTAL FEE NOT TO EXCEED 2,000 DOLLARS.'

WCB CASE NO. 75-2082

'IT IS THEREFORE HEREBY ORDERED THAT, CONSISTENT WITH THE ABOVE OPINION, THE STATE ACCIDENT INSURANCE FUND'S DENIAL OF APRIL 10, 1975 IS SET ASIDE AND REVERSED.

IT IS ALSO ORDERED THAT THE STATE ACCIDENT INSURANCE FUND PAY COUNSEL FOR CLAIMANT A REASONABLE ATTORNEY FEE IN THE AMOUNT OF 500 DOLLARS.'

WHEREAS, THE EMPLOYER AND SAIF HAVE DULY APPEALED THE SAID OPINION AND ORDER TO THE WCB AND THE SAID APPEAL IS PRESENTLY PENDING BEFORE THE WCB - AND

WHEREAS, ALL THE PARTIES ARE DESIROUS OF SETTLING AND COMPROMISING CLAIMANT'S CLAIM AND THE DIFFERENCES BETWEEN THEM, THEY AND EACH OF THEM, DO HEREBY,

AGREE AND STIPULATE AS FOLLOWS -

1. CLAIMANT'S CONDITION ARISING OUT OF THE COMPENSABLE INJURY IS MEDICALLY STATIONARY -

2. CLAIMANT HAS BEEN OFFERED PSYCHIATRIC TREATMENT OR THERAPY AND THAT CLAIMANT REFUSES THE SAID TREATMENT AND BELIEVES THAT IT IS NOT NECESSARY AT THIS TIME -

3. CLAIMANT HAS RECEIVED FROM THE STATE ACCIDENT INSURANCE FUND ALL TEMPORARY TOTAL DISABILITY AND MEDICAL COMPENSATION AND IS CURRENTLY RECEIVING TEMPORARY TOTAL DISABILITY THAT IS REQUIRED TO BE PAID UNDER THE WORKMEN'S COMPENSATION ACT, SAVE AND EXCEPT MILEAGE FOR EXAMINATIONS AT THE STATE ACCIDENT INSURANCE FUND'S REQUEST BY DR. QUAN AND ORTHOPEDIC CONSULTANTS, WHICH CLAIMANT WAIVES IF THIS STIPULATION IS APPROVED BY THE WORKMEN'S COMPENSATION BOARD -

4. CLAIMANT'S CLAIM MAY BE CLOSED AND CLAIMANT SHALL BE AWARDED AND SAIF SHALL PAY TO THE CLAIMANT AN AWARD OF PERMANENT PARTIAL DISABILITY EQUIVALENT TO 184 DEGREES UNSCHEDULED DISABILITY TO THE LOW BACK AND PSYCHIATRIC DISABILITY, THE SAID AWARD TO BE MADE AND GRANTED UPON APPROVAL OF THIS STIPULATION BY THE WCB AND THE SAID APPROVAL SHALL BE EQUIVALENT TO OR IN LIEU OF THE PROCEDURES SET FORTH IN ORS 656.268 - THE EFFECTIVE DATE FOR CLOSURE OF THIS CLAIM SHALL BE THE DATE THIS STIPULATION IS APPROVED BY THE WCB -

5. CLAIMANT SHALL RECEIVE TEMPORARY TOTAL DISABILITY UNTIL THE DATE OF APPROVAL BY THE WCB OF THIS STIPULATION AND CLAIM CLOSURE -

6. CLAIMANT SHALL CONTINUE TO HAVE AVAILABLE TO HIM AND BY THIS STIPULATION DOES NOT WAIVE, THE RIGHTS UNDER ORS 656.245, 656.273, AND 656.278 EXCEPT AS HEREINAFTER SET FORTH -

7. CLAIMANT'S DATE OF FIRST DETERMINATION ORDER FOR THE PURPOSE OF ORS 656.273(3A) SHALL BE DEEMED NOVEMBER 19, 1973 -

8. CLAIMANT WHO CONTEMPLATED OUT-OF-STATE TRAVEL AND-OR MOVING OUT OF THE STATE OF OREGON, MAY, IF NECESSARY, RECEIVE UNDER

CLAIMANT'S CLAIM, MEDICAL TREATMENT, SUPPLIES, AND PRESCRIPTIONS FROM DOCTORS OR PHYSICIANS WHO ARE LICENSED TO PRACTICE AND ARE LOCATED IN STATES OTHER THAN THE STATE OF OREGON, PROVIDED THE PRACTITIONERS OF THE HEALING ARTS MEET ALL REQUIREMENTS AND FULFILL ALL PROCEDURES AS ARE REQUIRED OF ALL PRACTITIONERS OF THE HEALING ARTS WITHIN THE STATE OF OREGON UNDER THE OREGON WORKMEN'S COMPENSATION ACT.

9. CLAIMANT WILL APPLY TO THE WORKMEN'S COMPENSATION BOARD FOR A 100 PER CENT ADVANCE LUMP SUM PAYMENT OF THE FOREGOING AWARD OF DISABILITY AND SAIF SHALL COOPERATE AND ASSIST CLAIMANT IN OBTAINING THE SAID LUMP PAYMENT AND SAIF DOES NOT OBJECT TO SAID LUMP PAYMENT AND DOES ENCOURAGE THE WCB TO APPROVE CLAIMANT'S APPLICATION FOR LUMP SUM PAYMENT. SAIF WAIVES THEIR RIGHT TO THE APPROXIMATE 3 PER CENT ANNUITY INVOLVED WITH LUMP SUM PAYMENTS, IF APPLICABLE.

10. UPON APPROVAL OF THIS STIPULATION AND CONCURRENT THEREWITH, THE SAIF WITHDRAWS THEIR NOTICE OF APPEALS IN CASES NUMBER 73-4035 AND 75-2082, THAT ARE PRESENTLY PENDING BEFORE THE WORKMEN'S COMPENSATION BOARD.

11. CLAIMANT'S ATTORNEY, ALLEN G. OWEN, SHALL RECEIVE OUT OF THE AWARD OF DISABILITY SET FORTH IN THIS ORDER, 25 PER CENT THEREOF AS AND FOR A REASONABLE ATTORNEY FEE, NOT TO EXCEED 2,000 DOLLARS TOGETHER WITH AN ATTORNEY FEES AWARDED BY THE REFEREE IN OPINION AND ORDER DATED JANUARY 7, 1976 IN WORKMEN'S COMPENSATION BOARD CASE NUMBER 73-4035 OR 75-2082 THAT ARE YET UNPAID.

12. IN THE EVENT THAT THE WORKMEN'S COMPENSATION BOARD DOES NOT APPROVE THIS STIPULATION, FOR ANY REASON, NOTHING IN THIS STIPULATION OR A COPY THEREOF, WHETHER SIGNED BY THE CLAIMANT OR NOT, SHALL BE USED AGAINST THE CLAIMANT OR CLAIMANT'S INTEREST IN THE EVENT OF FUTURE LITIGATION, NEGOTIATIONS, HEARINGS OR APPEALS BY AND BETWEEN THE PARTIES.

WCB CASE NO. 75-2176 MAY 18, 1976

LEONARD FEDERICO, CLAIMANT

ERIC LINDAUER, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER AFFIRMING THE DETERMINATION ORDERS MAILED JUNE 19, 1974 AND MAY 9, 1975 WHICH AWARDED CLAIMANT 16 DEGREES FOR 5 PER CENT UNSCHEDULED NECK INJURY.

CLAIMANT FOR THE PAST NINE YEARS HAS BEEN PRINCIPAL OF CASCADE UNION HIGH SCHOOL, PREVIOUSLY HE WAS VICE PRINCIPAL FOR ONE YEAR. HE ALSO WAS THE FOOTBALL COACH UNTIL HE SUFFERED A COMPENSABLE INJURY ON APRIL 18, 1973. CLAIMANT SUSTAINED MULTIPLE BODY INJURIES AS A RESULT OF AN AUTOMOBILE ACCIDENT AND DURING THE COURSE OF HIS TREATMENT HE SUFFERED A FLAREUP OF A PREEXISTING PEPTIC ULCER CONDITION. THE EXACERBATION OF THE SYMPTOMS OF THIS CONDITION WAS CONSIDERED TO BE RELATED TO THE INDUSTRIAL INJURY. THE CLAIM WAS CLOSED ON JUNE 19, 1974 WITH AN AWARD OF 16 DEGREES FOR 5 PER CENT UNSCHEDULED NECK DISABILITY AND SOME TIME LOSS. AT THAT TIME THERE WAS NO PERMANENT RESIDUAL CONDITION OF THE ULCER PROBLEM ATTRIBUTABLE TO THE INDUSTRIAL INJURY RESIDUALS.

IN SEPTEMBER 1974 CLAIMANT HAD A RECURRENCE OF THE PEPTIC ULCER PROBLEM WHICH REQUIRED FURTHER MEDICAL TREATMENT. THIS WAS SUBSEQUENTLY ACCEPTED AS A RELATED CONSEQUENCE OF THE INDUSTRIAL INJURY PRUSUANT TO A STIPULATION BETWEEN THE PARTIES. THE CLAIM WAS REOPENED AND AGAIN CLOSED ON MAY 9, 1975 WITH ADDITIONAL TIME LOSS BUT NO ADDITIONAL PERMANENT PARTIAL DISABILITY AWARD.

CLAIMANT HAS CHRONIC CERVICAL STRAIN WITH CONTINUING NEUROMUSCULAR PROBLEMS MANIFESTED BY CONSTANT HEADACHES AND NECK AND BACK PAIN, ESPECIALLY THE UPPER BACK. THERE HAS BEEN DIMINUTION OF CLAIMANT'S PHYSICAL RESERVE STRENGTH AND MENTAL STAMINA - ALSO HIS PHYSICAL CONDITION LEADS TO OCCASIONAL FLAREUPS OF HIS PEPTIC ULCER. CLAIMANT HAS A MASTERS DEGREE IN EDUCATION, HE IS 46 YEARS OLD, HIS WORK BACKGROUND IS BASICALLY EDUCATION WITH EMPHASIS ON COACHING AND ADMINISTRATION.

THE REFEREE FOUND THAT ALTHOUGH CLAIMANT'S PHYSICAL TOLERANCE HAD BEEN AFFECTED AND HE HAD EXHIBITED SOME INDICATION OF THE MENTAL STRESS WHICH CAUSED SOME DETERIORATION OF THE PRINCIPAL-STUDENT AND PRINCIPAL-TEACHER RELATIONSHIPS, HE WAS STILL CONSIDERED BY HIS ASSOCIATES AS AN EFFECTIVE ADMINISTRATOR. FRED ARCHER, THE SUPERINTENDENT OF THE SCHOOL DISTRICT AND CLAIMANT'S SUPERVISOR, HOWEVER, WAS OF THE OPINION THAT PERSONALITY PROBLEMS WHICH HAD ARISEN RECENTLY BECAUSE OF CLAIMANT'S ATTITUDE CHANGE HAS LESSENED HIS EFFECTIVENESS AS AN ADMINISTRATOR.

THE REFEREE FOUND THAT CLAIMANT DID SUFFER A DEFINITE PERMANENT PHYSICAL DISABILITY - HOWEVER, THE SOLE TEST FOR DETERMINING UNSCHEDULED DISABILITY IS WHETHER THERE HAS BEEN ANY PERMANENT IMPAIRMENT OF THE INJURED WORKER'S FUTURE EARNING CAPACITY BY THE RESIDUAL CONSEQUENCE OF THAT INJURY. ACTUAL PHYSICAL PERMANENT IMPAIRMENT SUSTAINED FROM AN INDUSTRIAL INJURY IS NOT THE BASIS FOR COMPENSATION UNLESS IT WILL LEAD TO AN ACTUAL DIMINISHMENT OF THE PARTICULAR INJURED WORKER'S FUTURE ABILITY TO OBTAIN AND PERFORM WORK SUITABLE TO HIS QUALIFICATIONS AND TRAINING. THE BURDEN IS UPON CLAIMANT TO ESTABLISH THAT EFFECT ON HIS FUTURE CAPABILITY BOTH AS TO THE RESULT AND TO THE EXTENT THAT HE SEEKS.

AFTER CONSIDERING THE EVIDENCE PRESENTED, THE REFEREE CONCLUDED THAT CLAIMANT HAD FAILED TO ESTABLISH THAT HE WAS ENTITLED TO ANY GREATER AWARD OF PERMANENT DISABILITY FOR LOSS OF EARNING CAPACITY THAN THAT WHICH HAD BEEN GIVEN TO HIM. ALTHOUGH THERE WAS SOME EVIDENCE THAT HIS PHYSICAL ACTIVITIES HAD BEEN CURTAILED AND CLAIMANT HAD SOME MINOR PERSONALITY PROBLEMS WHICH AROSE AFTER HIS ACCIDENT, THERE WAS NO PERSUASIVE EVIDENCE THAT HIS EFFECTIVENESS AS AN ADMINISTRATOR HAD BEEN DIMINISHED BY SUCH CHANGES TO THE EXTENT THAT HIS JOB WAS PLACED IN JEOPARDY. THE REFEREE CONCLUDED THAT CLAIMANT HAD BEEN ADEQUATELY COMPENSATED BY THE PREVIOUS AWARD OF 16 DEGREES.

THE BOARD, ON DE NOVO REVIEW, CANNOT AGREE WITH THE CONCLUSION REACHED BY THE REFEREE. THE BOARD FINDS THAT THE INDUSTRIAL INJURY PROBABLY HAS PLACED A 'LID' UPON CLAIMANT'S UPWARD MOBILITY AT A VERY YOUNG AGE. CLAIMANT'S SUPERVISOR, MR. ARCHER, TESTIFIED THAT PROBLEMS HAD ARISEN SINCE CLAIMANT'S INJURY WHICH DID AFFECT HIS PERFORMANCE AS A HIGH SCHOOL PRINCIPAL AND THAT HE WOULD HAVE TO MAKE A NOTATION TO THAT EFFECT IN ANY FUTURE RECOMMENDATIONS RELATING TO CLAIMANT'S CAPABILITIES.

THE BOARD CONCLUDES THAT A 46 YEAR OLD EDUCATOR WITH A MASTERS DEGREE AND 9 YEARS EXPERIENCE AS A PRINCIPAL NORMALLY WOULD ADVANCE IN THE ADMINISTRATIVE LEVELS OF A SCHOOL SYSTEM BUT BECAUSE OF CLAIMANT'S PERSONALITY PROBLEMS WHICH ARE DIRECTLY TRACEABLE TO THE INDUSTRIAL ACCIDENT, HIS FUTURE ADVANCEMENT MAY BE QUESTIONABLE. THE BOARD CONCLUDES THAT CLAIMANT SHOULD RECEIVE AN AWARD EQUAL TO 64 DEGREES TO ADEQUATELY COMPENSATE HIM FOR HIS LOSS OF EARNING CAPACITY.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 19, 1975 IS REVERSED.

CLAIMANT IS AWARDED 64 DEGREES OF A MAXIMUM OF 320 DEGREES FOR UNSCHEDULED NECK DISABILITY. THIS IS IN LIEU OF AND NOT IN ADDITION TO THE AWARD OF PERMANENT PARTIAL DISABILITY MADE BY THE DETERMINATION ORDER MAILED JUNE 19, 1974.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, A SUM EQUAL TO 25 PER CENT OF THE COMPENSATION AWARDED CLAIMANT BY THIS ORDER, PAYABLE OUT OF SAID COMPENSATION AS PAID, NOT TO EXCEED 2,300 DOLLARS.

WCB CASE NO. 74-1544 MAY 18, 1976
WCB CASE NO. 74-4581

WILLIAM LANGLEY, CLAIMANT

FULOP AND GROSS, CLAIMANT'S ATTYS.
MERTEN AND SALTVEIT, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER
CROSS REQUEST BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

BOTH THE EMPLOYER AND CLAIMANT SEEK REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED MARCH 27, 1974 AS WELL AS THE SPECIAL DETERMINATION ORDER MAILED MARCH 29, 1974 AND ORDERED THE EMPLOYER TO PAY CLAIMANT'S COUNSEL A REASONABLE ATTORNEY'S FEE.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON DECEMBER 3, 1969 WHILE WORKING FOR THE EMPLOYER, WHICH WAS INSURED BY LUMBERMENS MUTUAL CASUALTY COMPANY. CLAIMANT HAD A HISTORY OF PREEXISTING BACK DISEASE AT THE TIME HE SUFFERED THIS LOW BACK INJURY. HE WAS ABLE TO RETURN TO WORK AND CONTINUED TO WORK UNTIL JANUARY 21, 1971 WHEN, BECAUSE OF THE INCREASING PAIN, HE WAS FORCED TO QUIT.

ON JANUARY 28, 1971, DR. LANGSTON PERFORMED A LAMINECTOMY AND DISC EXCISION AT L2-3 AND ON MAY 10, 1971 FURTHER SURGERY FOR SCAR TISSUE REMOVAL AND AN ADDITIONAL LAMINECTOMY AND FUSION OF THE L2-3 VERTEBRAL BODIES WAS PERFORMED. AFTER A PERIOD OF CONVALESCENCE AND AN UNSUCCESSFUL TRIAL OF LIGHT WORK AND ADDITIONAL TREATMENT FOR COMPLICATIONS, CLAIMANT WAS ENROLLED IN A VOCATIONAL REHABILITATION PROGRAM UNDER THE AUSPICES OF THE DIVISION OF VOCATIONAL REHABILITATION. PART OF THIS PROGRAM INVOLVED BEING PLACED IN A WORK EXPERIENCE AND EVALUATION PROGRAM CONSISTING OF ASSIGNMENT FOR ONE WEEK TO RIDE WITH A DRIVER OF A VAN TRANSPORTING NON-AMBULATORY RETARDED CHILDREN. ON DECEMBER 8, 1972, WHILE ENGAGED IN THIS PROGRAM, CLAIMANT SLIPPED AND REINJURED HIS BACK. HE WAS TREATED BY DR. MYERS FOR AN ACUTE LOW BACK STRAIN. THE RESPONSIBILITY FOR THE INJURY INCURRED WHILE CLAIMANT WAS ENGAGED IN THE VOCATIONAL REHABILITATION PROGRAM IS THAT OF THE STATE ACCIDENT INSURANCE FUND.

SHORTLY AFTER THE INJURY A CLAIM WAS FILED WITH LUMBERMENS MUTUAL, IT SUGGESTED THAT CLAIMANT FILE A CLAIM AGAINST THE FUND. CLAIMANT, ON FEBRUARY 27, 1973, DID FILE A CLAIM AGAINST THE FUND AND, AT THAT TIME, LUMBERMENS MUTUAL UNILATERALLY TERMINATED FURTHER BENEFITS TO CLAIMANT ON THE GROUND THAT HIS INJURY OF DECEMBER 8, 1972 WAS A NEW INJURY AND THE RESPONSIBILITY OF THE FUND RATHER THAN ITS

RESPONSIBILITY. THE FUND DENIED THE CLAIM ON THE GROUNDS THAT IT WAS AN AGGRAVATION OF THE DECEMBER 3, 1969 INJURY AND THE RESPONSIBILITY OF LUMBERMENS MUTUAL.

AT THE TIME OF THE DECEMBER 8, 1972 INJURY, CLAIMANT WAS PHYSICALLY UNABLE TO DO HEAVY OR MANUAL WORK AND WAS ALSO PSYCHOLOGICALLY DISABLED. CLAIMANT HAS A 9TH GRADE EDUCATION AND FUNCTIONS AT AN AVERAGE INTELLECTUAL LEVEL WITH NON-VERBAL MATERIALS AND AT A DULL NORMAL LEVEL WITH VERBAL MATERIALS. CLAIMANT HAS EXCELLENT INDUSTRIAL APTITUDES, HOWEVER, MOST OF HIS WORK LIFE HAS BEEN THAT OF A TRUCK DRIVER. HE DID WORK EARLIER AS A MECHANIC'S HELPER.

DR. GRITZKA, ORTHOPEDIC SURGEON, WAS OF THE OPINION THAT THE DECEMBER 8, 1972 ACCIDENT EXACERBATED AN UNDERLYING CONDITION (DEGENERATIVE AND POST-OPERATIVE LUMBAR SPINE AND LEFT LEG WEAKNESS) BUT THAT THE EFFECTS OF THIS EXACERBATION HAD WORN OFF BY FEBRUARY 6, 1973. HOWEVER, CLAIMANT'S FAMILY DOCTOR, DR. MYERS, WAS OF THE OPINION THAT THE DECEMBER 8, 1972 ACCIDENT CHANGED CLAIMANT'S CONDITION - THAT PRIOR THERETO CLAIMANT AND HIS DOCTOR THOUGHT CLAIMANT WOULD BE ABLE TO DO THE WORK TO WHICH HE WAS EXPOSED IN HIS WORK EVALUATION PROGRAM BUT SINCE THAT ACCIDENT CLAIMANT HAS BEEN UNABLE TO DO SO, PHYSICALLY OR PSYCHOLOGICALLY. AS OF MARCH 28, 1974 DR. MYERS FELT CLAIMANT WAS STABLE BUT UNEMPLOYABLE.

A DETERMINATION ORDER WAS MAILED MARCH 27, 1974, RELATING TO THE DECEMBER 8, 1972 INJURY, WHICH AWARDED TIME LOSS FROM DECEMBER 8, 1972 THROUGH FEBRUARY 5, 1973 - A SPECIAL DETERMINATION ORDER WAS MAILED MARCH 29, 1974 RELATING TO THE DECEMBER 3, 1969 INJURY, WHICH AWARDED TEMPORARY TOTAL DISABILITY FROM JANUARY 21, 1971 THROUGH DECEMBER 7, 1972 AND AGAIN FROM FEBRUARY 6, 1973 THROUGH FEBRUARY 29, 1974 AND MADE CLAIMANT PERMANENTLY AND TOTALLY DISABLED EFFECTIVE MARCH 30, 1974.

DR. GRITZKA, ON JULY 6, 1975, CONCEDED THAT IF CLAIMANT'S BACK PAIN PERSISTED AND WAS GREATER THAN IT HAD BEEN BEFORE THE DECEMBER 8, 1972 FALL IT WAS MEDICALLY PROBABLE THAT A PERMANENT WORSENING OCCURRED AS A RESULT OF THE 1972 FALL. HE ALSO AGREED WITH DR. MYERS THAT CLAIMANT WAS UNEMPLOYABLE.

THE REFEREE FOUND THAT CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED BUT ALSO FOUND THAT IN ATTEMPTING TO UNRAVEL THE PROBLEM OF WHICH INSURER WAS RESPONSIBLE THAT IT WOULD BE NECESSARY TO DEAL WITH A FURTHER COMPLICATION, I.E., THE CONTINUAL FLUCTUATION IN CLAIMANT'S SYMPTOMS. HE DID NOT GIVE MUCH WEIGHT TO DR. GRITZKA'S AGREEMENT WITH DR. MYERS THAT CLAIMANT BECAME PERMANENTLY WORSE AFTER DECEMBER 8, 1972 BECAUSE CLAIMANT'S SYMPTOMS AND THE FINDINGS MADE HAD BEEN TOO VARIABLE TO BE SUFFICIENTLY TRUSTWORTHY FOR HIM TO FIND WITH ANY DEGREE OF CONFIDENCE THAT THERE HAD BEEN ANY SIGNIFICANT PERMANENT WORSENING AFTER DECEMBER 8, 1972, ESPECIALLY IN A CLAIMANT WHO WAS, PROBABLY, PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF THE DECEMBER 3, 1969 INJURY WITHOUT REGARD TO THE SUBSEQUENT DECEMBER 1972 INJURY.

ON SEPTEMBER 26, 1975 DR. KEIST EXPRESSED HIS OPINION THAT CLAIMANT WAS TOTALLY AND PERMANENTLY DISABLED AT THAT TIME AND SUCH DISABILITY WAS PRIMARILY DUE TO PERSONALITY AND PSYCHOLOGICAL FACTORS AND HAD ACTUALLY LITTLE TO DO WITH ORGANIC BACK DISEASE.

THE REFEREE AGREED WITH THE OPINION EXPRESSED BY DR. KEIST AND FELT THAT ALTHOUGH THE 1972 INJURY POSSIBLY ADDED PERMANENT IMPAIRMENT CLAIMANT WAS ALREADY PERMANENTLY AND TOTALLY DISABLED BEFORE THIS INJURY. HE CONCLUDED THAT CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED AS THE RESULT OF THE DECEMBER 3, 1969 INJURY WHICH WAS THE

RESPONSIBILITY OF THE EMPLOYER, NESS PRODUCE COMPANY, AND ITS CARRIER, LUMBERMENS MUTUAL CASUALTY COMPANY. A REQUEST FOR APPORTIONMENT BETWEEN THE INSURERS WAS DENIED AS CONTRARY TO THE WORKMEN'S COMPENSATION LAW.

THE REFEREE FOUND THAT LUMBERMENS MUTUAL HAD FAILED TO AFFECT A REDUCTION OR DISALLOWANCE OF CLAIMANT'S AWARD OF COMPENSATION AND PURSUANT TO ORS 656.382(2) DIRECTED IT TO PAY CLAIMANT'S COUNSEL A REASONABLE ATTORNEY'S FEE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE OPINION OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 25, 1975, AS AFFIRMED, RATIFIED AND REPUBLISHED ON DECEMBER 31, 1975, IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, BASICALLY A DISPUTE BETWEEN TWO CARRIERS ON THE ISSUE OF RESPONSIBILITY, 250 DOLLARS PAYABLE BY THE EMPLOYER, NESS PRODUCE COMPANY.

WCB CASE NO. 75-315 MAY 18, 1976

CAROLYN HANSEN, CLAIMANT

NIKOLAUS ALBRECHT, CLAIMANT'S ATTY.
MC MURRY AND NICHOLS, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH DIRECTED THE CARRIER TO PAY ALL UNPAID MEDICAL BILLS RELATED TO CLAIMANT'S NOSE CONDITION = TO PAY TEMPORARY TOTAL DISABILITY FROM JANUARY 20 THROUGH MARCH 28, 1975 = AWARDED CLAIMANT'S ATTORNEY AN ATTORNEY'S FEE EQUAL TO 25 PER CENT OF THE TIME LOSS BENEFITS DUE CLAIMANT FROM JUNE 13, 1975 UNTIL CLAIM CLOSURE, NOT TO EXCEED 750 DOLLARS = AWARDED AN ADDITIONAL ATTORNEY'S FEE EQUAL TO 25 PER CENT OF ANY INCREASE IN PERMANENT PARTIAL DISABILITY WHICH MIGHT BE AWARDED BY A FUTURE DETERMINATION ORDER, NOT TO EXCEED THE SUM OF 500 DOLLARS = AND AFFIRMED THE CARRIER'S REOPENING OF THE CLAIM AS OF JUNE 12, 1975.

CLAIMANT CONTENDS SHE IS ENTITLED TO RECEIVE TEMPORARY TOTAL DISABILITY PAYMENTS BEGINNING AUGUST 15, 1975 UNTIL HER CASE IS CLOSED, LESS TIME ACTUALLY WORKED AND COMPENSATION ACTUALLY PAID, AND FURTHER THAT SHE IS ENTITLED TO AN AWARD OF PENALTIES AND STATUTORY ATTORNEY'S FEES ON THE GROUNDS OF UNREASONABLE REFUSAL TO PAY COMPENSATION AS REQUESTED IN HER APPEAL.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON JANUARY 15, 1974 WHEN SHE FELL ON THE STAIRS AT WORK AND DEVELOPED STIFFNESS IN HER NECK AND RIGHT SIDE OF HER FACE. SHE WAS FIRST SEEN BY DR. MUELLER WHO DIAGNOSED CONTUSION OF THE NECK AND LOW BACK. DR. MUELLER LAST EXAMINED CLAIMANT ON AUGUST 14, 1974 AND INDICATED THERE HAD BEEN NO CHANGE AND ON SEPTEMBER 5, 1974 DR. HARDER INDICATED NO FURTHER TREATMENT WAS NEEDED FOR CLAIMANT. THE CLAIM WAS CLOSED BY A DETERMINATION ORDER MAILED NOVEMBER 22, 1974 AWARDING CLAIMANT TIME LOSS FROM JANUARY 15, 1974 THROUGH AUGUST 15, 1974 AND 16 DEGREES FOR 5 PER CENT UNSCHEDULED LOW BACK DISABILITY. CLAIMANT RETURNED TO WORK

ON DECEMBER 23, 1974 AND WORKED TILL JANUARY 20, 1975. ON JANUARY 30, 1975, NASAL SEPTAL SURGERY WAS PERFORMED AND THE EMPLOYER PAID TEMPORARY TOTAL DISABILITY COMPENSATION FROM JANUARY 21, 1975 THROUGH THE END OF APRIL 1975, ON ACCOUNT OF THE NOSE CONDITION.

AT THE HEARING ON JUNE 13, 1975 CLAIMANT PRESENTED MEDICAL REPORTS WHICH INDICATED THE CLAIM SHOULD BE REOPENED FOR FURTHER TREATMENT, SHE REQUESTED THAT HER CLAIM BE REOPENED AS OF AUGUST 15, 1974, THE DATE HER TIME LOSS PAYMENTS WERE TERMINATED BY THE DETERMINATION ORDER.

THE REFEREE FOUND THAT CLAIMANT HAD NOT MET THE BURDEN OF PROOF THAT THE AUGUST 15, 1974 CLAIM CLOSURE WAS PREMATURE. THE REPORTS OF DRS. CRUICKSHANK, MUELLER, PASQUESI AND PERKINS ALL SUPPORTED THE SELECTION OF THAT DATE FOR CLAIM CLOSURE.

THE REFEREE FOUND THAT THE PHYSICIAN WHO PERFORMED THE NASAL SEPTAL SURGERY ON JANUARY 30, 1975 STATED THAT THE NASAL SEPTUM DID NOT PRECLUDE CLAIMANT FROM RETURNING TO HER REGULAR WORK AS A SECRETARY AFTER MARCH 28, 1975. ON JUNE 12, 1975 DR. LAHTI REPORTED X-RAYS WERE TAKEN OF THE CERVICAL SPINE WHICH REVEALED A LOSS OF THE NORMAL CERVICAL CURVE INDICATING PROBABLE CHRONIC SPASMS OF THE CERVICAL SPINE. BASED ON THIS REPORT, THE CARRIER REOPENED THE CLAIM VOLUNTARILY WITHIN THE 60 DAY PERIOD SET BY STATUTE.

THE REFEREE CONCLUDED THAT THE CARRIER HAD NOT FAILED TO EITHER ACCEPT OR DENY THE REQUEST FOR REOPENING OF CLAIMANT'S CLAIM WITHIN THE TIME SET BY STATUTE WHEN IT REOPENED CLAIMANT'S CLAIM AS OF JUNE 12, 1975 FOR THE TREATMENT OF HER ALLEGED BACK CONDITION.

THE BOARD AFFIRMS AND ADOPTS THE REFEREE'S OPINION AND ORDER IN ITS ENTIRETY.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 25, 1975 IS AFFIRMED.

WCB CASE NO. 75-3654 MAY 18, 1976

MARIE CLAUDEL, CLAIMANT

MAIZELS AND MARQUOIT, CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED JUNE 13, 1975 WHEREBY CLAIMANT WAS AWARDED 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT, A 33 YEAR OLD NURSE'S AIDE, SUFFERED A COMPENSABLE INJURY ON JANUARY 1, 1975 WHEN SHE SLIPPED ON A WET FLOOR TWISTING HER BACK. SHE WAS FIRST TREATED BY DR. STIGER, AN OSTEOPATHIC PHYSICIAN, WHO HOSPITALIZED HER FOR PHYSICAL THERAPY AND APPROPRIATE MEDICATION. THE INITIAL DIAGNOSIS WAS ACUTE TRAUMATIC LUMBAR STRAIN WITH CERVICAL DORSAL MYOSITIS. WHILE IN THE HOSPITAL CLAIMANT WAS EXAMINED BY DR. HEUSCH, AT THAT TIME CLAIMANT WAS COMPLAINING OF CONSTANT PAIN IN THE LUMBAR AREA, IN THE MID SCAPULAR AREA, WITH

NUMBNESS IN THE LOW RIGHT LOWER EXTREMITY FROM HIP TO KNEE AND NUMBNESS IN THE LEFT LOWER EXTREMITY FROM THE GROIN TO THE TOE. CLAIMANT ALSO COMPLAINED OF WEAKNESS IN HER LEFT ARM INVOLVING ALL FINGERS ON THE LEFT HAND, HEADACHES AND VARIOUS OTHER COMPLAINTS.

CLAIMANT WAS EXAMINED BY DR. BRODIE TO WHOM SHE COMPLAINED OF PAIN IN HER BACK AND DOWN INTO THE LEFT LEG AND ALSO A LACK OF CIRCULATION IN HER LEFT HAND. IN APRIL 1975 CLAIMANT WAS EXAMINED BY DR. PASQUESI WHO FELT THAT CLAIMANT'S CLAIM COULD BE CLOSED. DR. STIGER, THE TREATING PHYSICIAN, AGREED WITH DR. PASQUESI'S FINDINGS AND THE CLAIM WAS CLOSED AS STATED ABOVE.

IN JULY 1975 CLAIMANT COMMENCED WORK AS AN ASSISTANT MANAGER OF A PLAID PANTRY STORE AND AFTER THREE WEEKS BECAME THE MANAGER. SHE HELD THIS POSITION FOR THREE OR FOUR WEEKS BUT STATED SHE WAS UNABLE TO CONTINUE BECAUSE OF HER INABILITY TO HANDLE THE STOCK WORK AND WORK THE LONG HOURS. WITH THE EXCEPTION OF ONE DAY OF WORK FOR HOMEMAKERS UPJOHN, CLAIMANT HAS NOT WORKED SINCE.

ALL OF THE MEDICAL REPORTS INDICATE THAT CLAIMANT IS EXTREMELY OVERWEIGHT AND THE MEDICAL CONSENSUS IS THAT CLAIMANT WILL NOT BE ABLE TO RECOVER FROM HER LOW BACK STRAIN UNTIL AN EFFECTIVE WEIGHT REDUCTION PROGRAM IS INSTITUTED. CLAIMANT CONTENDS THAT SHE IS DEPRESSED BECAUSE OF HER INABILITY TO WORK AND THAT HER DEPRESSION AND BOREDOM ARE ALLEVIATED BY EATING. SHE FURTHER CONTENDS THAT HER OVEREATING CAUSES A CONTINUATION OF HER SYMPTOMS THEREBY CREATING A VICIOUS CIRCLE FROM WHICH SHE IS UNABLE TO ESCAPE.

CLAIMANT'S HEIGHT IS BETWEEN 5 FEET, 1 AND ONE-HALF INCHES AND 5 FEET, 3 INCHES, UNTIL 1972 SHE WEIGHED BETWEEN 140 AND 160 POUNDS, HOWEVER, AT THE TIME SHE SUFFERED THE INDUSTRIAL INJURY SHE WEIGHED 267 POUNDS.

THE REFEREE FOUND A TOTAL ABSENCE OF MEDICAL EVIDENCE CAUSALLY RELATING CLAIMANT'S DIFFUSE SYMPTOMS TO HER DISCRETE INJURY AND HE WAS NOT PERSUADED THAT CLAIMANT'S HEADACHES, SCAPULAR COMPLAINTS, BILATERAL ARM NUMBNESS OR BLUE HAND AND FOOT SYMPTOMS WERE CAUSED BY HER INJURY. HE WAS ALSO VERY SKEPTICAL OF CLAIMANT'S LOWER EXTREMITY COMPLAINTS. THE MEDICAL EVIDENCE DOES NOT INDICATE CLAIMANT'S CONDITION IS PERMANENT, IT ALLEGES THAT CLAIMANT IS NOT LIKELY TO BE ABLE TO RETURN TO WORK TILL SHE LOSES A LARGE AMOUNT OF WEIGHT.

THE REFEREE CONCLUDED THAT BECAUSE CLAIMANT IS ONLY 33 YEARS OLD AND HER INDUSTRIAL INJURY MINOR IN NATURE SHE WAS NOT PRECLUDED FROM DOING SOME TYPES OF WORK ALTHOUGH CLAIMANT CONTENDS THAT SHE IS PERMANENTLY AND TOTALLY DISABLED BECAUSE OF HER INDUSTRIAL INJURY. CLAIMANT HAS REFUSED TO REMAIN ON A DIET, HAS DISCONTINUED PRESCRIBED EXERCISES AND CONSTANTLY RATIONALIZES TO JUSTIFY HER LACK OF COOPERATION. THE REFEREE CONCLUDED THAT CLAIMANT HAD BEEN ADEQUATELY COMPENSATED FOR HER LOSS OF EARNING CAPACITY BY THE AWARD OF 32 DEGREES AND HE AFFIRMED THE DETERMINATION ORDER.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE. THE BOARD FEELS THAT CLAIMANT'S OBESITY IS DUE TO HER PREVIOUS AND PRESENT MARITAL PROBLEMS RATHER THAN TO HER INDUSTRIAL INJURY. ALTHOUGH SHE MAY HAVE SOME LIMITATION WITH RESPECT TO LIFTING, IT IS IMPOSSIBLE TO DETERMINE WHETHER THIS LIMITATION IS THE RESULT OF THE INDUSTRIAL INJURY OR HER OBESITY, THEREFORE, IF CLAIMANT HAS SUFFERED A GREATER LOSS OF EARNING CAPACITY THAN THE AWARD OF 32 DEGREES REPRESENTS IT IS NOT BECAUSE OF HER INDUSTRIAL INJURY.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 31, 1975 IS AFFIRMED.

WCB CASE NO. 75-1873 MAY 18, 1976

WOODRENE BABBEL, CLAIMANT

EVOHL MALAGON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE STATE ACCIDENT INSURANCE FUND'S DENIAL OF CLAIMANT'S CLAIM FOR BACK, RIGHT AND LEFT KNEE CONDITIONS.

CLAIMANT HAS BEEN A TILE LAYER FOR A PERIOD OF 15 YEARS, HIS DUTIES REQUIRE SETTING TILE ON WALLS, FLOORS AND SLATE ROCK ON ENTRY WAYS - CLAIMANT MUST CRAWL ON HIS HANDS AND KNEES 75 TO 85 PER CENT OF THE TIME. CLAIMANT WORKED 8 TO 10 HOURS A DAY, FIVE DAYS A WEEK. APPROXIMATELY SEVEN MONTHS PRIOR TO THE HEARING CLAIMANT CHANGED JOBS FOR REASONS UNRELATED TO HIS CLAIM FOR COMPENSATION AND HIS PRESENT DUTIES ARE THE SAME AS THEY WERE FOR HIS FORMER EMPLOYER.

CLAIMANT WAS FIRST TREATED BY DR. BIRSKOVICH IN 1969, THEREAFTER, HE RECEIVED PERIODIC TREATMENT FROM DR. BIRSKOVISH FOR THE PROBLEM WITH HIS KNEES NECESSITATED BY THE WORK ACTIVITY IN WHICH CLAIMANT WAS ENGAGED. DURING AUGUST 1974 CLAIMANT'S KNEE CONDITION WORSENED AND HE WAS REFERRED TO DR. JAMES, AN ORTHOPEDIC SPECIALIST. DR. JAMES, IN HIS REPORT OF AUGUST 2, 1974, DIAGNOSED EARLY CHONDROMALACIA, PATELLAE BILATERALLY, MILD WITH A HINT OF POSSIBLE DEGENERATIVE MENISCAL CHANGE ON THE RIGHT MEDIAL SIDE. HE THOUGHT THE CHONDROMALACIA PATELLAE SEEMED TO BE RELATED TO CLAIMANT'S JOB BECAUSE OF ABNORMAL AMOUNT OF KNEELING REQUIRED BY SUCH WORK. HE RECOMMENDED NO SURGICAL TREATMENT AT THAT TIME BUT SUGGESTED CLAIMANT DO ACTIVE QUADRICEPS EXERCISES IN FULL EXTENSION TO OBTAIN ADEQUATE MUSCLE FUNCTION TO BALANCE THE JOINT.

CLAIMANT HAS NEVER BEEN INVOLVED IN ANY ACCIDENTS OR RECEIVED ANY OTHER INJURIES NOR DID HE EXPERIENCE ANY PHYSICAL DIFFICULTY REGARDING HIS BACK, RIGHT OR LEFT KNEE PRIOR TO EMPLOYMENT WITH THE EMPLOYER. CLAIMANT HAS NOT MISSED ANY WORK BECAUSE OF HIS PHYSICAL CONDITION. NO DOCTOR HAS EVER ADVISED HIM THAT HIS KNEE CONDITION CONSTITUTES AN OCCUPATIONAL DISEASE OR DISABILITY, ACTUALLY, CLAIMANT WAS FIRST ADVISED BY HIS ATTORNEY THAT HE MIGHT BE SUFFERING AN OCCUPATIONAL DISEASE. THIS ADVISE WAS RECEIVED AT THE TIME HE CONSULTED THE ATTORNEY REGARDING THE DENIAL OF HIS CLAIM BY THE FUND ON APRIL 29, 1975.

THE REFEREE FOUND THE EVIDENCE UNDISPUTED THAT CLAIMANT FIRST EXPERIENCED PHYSICAL DIFFICULTY WITH HIS KNEES WHILE WORKING FOR THE EMPLOYER.

THE REFEREE FOUND NO MEDICAL REPORT IN EVIDENCE REGARDING CLAIMANT'S BACK COMPLAINTS.

THE FUND HAD DENIED THE CLAIM ON THE GROUNDS THAT THE INFORMATION OBTAINED INDICATED THAT THE CONDITION FOR WHICH CLAIMANT FILED HIS CLAIM FOR BENEFITS, PAIN IN BOTH KNEES AND LOW BACK, WAS NOT THE RESULT OF CLAIMANT'S WORK ACTIVITIES FOR THE EMPLOYER ON APPROXIMATELY AUGUST 28, 1974.

THE REFEREE CONCLUDED THAT CLAIMANT HAD FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HIS BACK CONDITION WAS THE RESULT OF HIS WORK CONNECTED ACTIVITIES WHILE IN THE EMPLOYMENT OF THE EMPLOYER. HE FURTHER CONCLUDED THAT CLAIMANT HAD FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HIS RIGHT AND LEFT KNEE COMPLAINTS WERE CAUSALLY RELATED TO HIS WORK CONNECTED ACTIVITIES. THE ONLY REPORT AVAILABLE WAS THAT FROM DR. JAMES WHO REPORTED THAT CLAIMANT'S KNEE CONDITION 'SEEMED TO BE RELATED TO HIS JOB, IN VIEW OF THE FACT THAT THE AMOUNT OF KNEELING IS ABNORMAL FOR THE KNEES.' THE CLAIMANT'S TESTIMONY WAS GIVEN VERY LITTLE WEIGHT BECAUSE OF HIS INABILITY TO RECALL AND RECOLLECT PAST EVENTS.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

THE BOARD FINDS THAT ON THE DATE OF THE HEARING, CLAIMANT WAS NOT DISABLED TO THE EXTENT THAT HE COULD NOT CONTINUE TO WORK AS A TILE LAYER NOR HAD HE BEEN INFORMED BY A PHYSICIAN THAT HE WAS SUFFERING FROM AN OCCUPATIONAL DISEASE, THEREFORE, THE BOARD CONCLUDES THAT ALTHOUGH CLAIMANT HAS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HIS PRESENT COMPLAINTS ARE CAUSALLY RELATED TO HIS WORK ACTIVITIES, HE IS NOT PRECLUDED, IF IN THE FUTURE HE SHOULD BECOME DISABLED OR ADVISED BY A DOCTOR THAT HE IS SUFFERING FROM AN OCCUPATIONAL DISEASE, FROM FILING A CLAIM UNDER THE PROVISIONS OF ORS 656.807(1).

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 12, 1975, IS AFFIRMED.

CLAIM NO. 05-X007938 MAY 18, 1976

DUANE GRASSL, CLAIMANT

BODIE, MINTURN, VANVOORHEES, LARSON AND DIXON,
CLAIMANT'S ATTYS.
R. KENNEY ROBERTS, DEFENSE ATTY.
OWN MOTION PROCEEDING REFERRED FOR HEARING

ON MAY 10, 1976 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 OCTOBER 28, 1968 WHILE EMPLOYED BY CONSOLIDATED PINE, INC.

CLAIMANT HAS REQUESTED A HEARING ON A DENIED CLAIM FOR AGGRAVATION PENDING BEFORE THE HEARINGS DIVISION (WCB CASE NO. 76-1163). A HEARING IS CURRENTLY SCHEDULED TO BE HELD IN PRINEVILLE ON MAY 27, 1976.

THE BOARD DOES NOT HAVE SUFFICIENT EVIDENCE BEFORE IT TO DETERMINE THE MERITS OF THE REQUEST TO REOPEN THE 1968 CLAIM, THEREFORE, THE MATTER IS REFERRED TO THE HEARINGS DIVISION WITH INSTRUCTIONS TO HOLD A HEARING IN CONJUNCTION WITH THE HEARING ON WCB CASE NO. 76-1163 AND TAKE EVIDENCE ON THE ISSUE OF WHETHER CLAIMANT HAS AGGRAVATED HIS 1968 INJURY.

UPON CONCLUSION OF THIS HEARING, THE REFEREE, IF HE FINDS THAT HE HAS NO JURISDICTION BECAUSE THE EXPIRATION OF CLAIMANT'S AGGRAVATION RIGHTS, SHALL CAUSE A TRANSCRIPT OF THE PROCEEDINGS TO BE PREPARED AND SUBMITTED TO THE BOARD WITH HIS RECOMMENDATION WITH RESPECT TO THE REQUEST TO REOPEN THE CLAIM UNDER THE BOARD'S OWN MOTION JURISDICTION. IF THE REFEREE FINDS THAT HE HAS JURISDICTION TO HEAR THE MERITS OF CLAIMANT'S CLAIM FOR AGGRAVATION IN WCB CASE NO 76-1163, HE SHALL PROCEED IN NORMAL FASHION TO DISPOSE OF THE MATTER BY AN OPINION AND ORDER.

WCB CASE NO. 75—3677 MAY 19, 1976

DONALD A. MC INTOSH, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
EARL M. PRESTON, DEFENSE ATTY.
ORDER DENYING CROSS APPEAL

ON MARCH 30, 1976 A REFEREE'S ORDER WAS ISSUED IN THE ABOVE ENTITLED MATTER.

ON APRIL 20, 1976 A REQUEST FOR REVIEW WAS RECEIVED FROM THE STATE ACCIDENT INSURANCE FUND.

ON MAY 12, 1976 A CROSS REQUEST FOR REVIEW WAS RECEIVED FROM THE CLAIMANT. THE CROSS REQUEST FOR REVIEW WAS NOT FILED WITHIN THE PERIOD OF TIME ALLOWED BY ORS 656.289(3).

THEREFORE, THE CROSS REQUEST FOR REVIEW FILED BY THE CLAIMANT IS DENIED.

WCB CASE NO. 74—654 MAY 19, 1976

BETTY C. LINGAFELTER, CLAIMANT

MULDER, MORROW AND MC CREA,
CLAIMANT'S ATTYS.
MC MURRY AND NICHOLS, DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED SEPTEMBER 20, 1973 AWARDING CLAIMANT COMPENSATION FOR TEMPORARY TOTAL DISABILITY ONLY. CLAIMANT ALSO FILED A MOTION REQUESTING THE BOARD TO REMAND THE MATTER TO THE REFEREE FOR THE ADMISSION INTO EVIDENCE OF MEDICAL REPORTS SUBMITTED WITH CLAIMANT'S BRIEF TO THE BOARD.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON SEPTEMBER 13, 1971. INITIALLY, SHE RECEIVED CHIROPRACTIC TREATMENT FOR BACK AND HIP AILMENTS BUT CONTINUED TO WORK. CLAIMANT WAS LATER REFERRED TO DR. GOLDEN AND A MYELOGRAM WAS TAKEN WHICH RULED OUT ANY LUMBAR DISC HERNIATION. CLAIMANT WAS HOSPITALIZED FOR BED REST AND PHYSICAL THERAPY IN JUNE 1972 AND UPON RELEASE FROM THE HOSPITAL DID NOT RETURN TO GAINFUL EMPLOYMENT.

CLAIMANT CONTINUED TO COMPLAIN OF LOW BACK PAIN AND SHE WAS REFERRED TO THE DISABILITY PREVENTION DIVISION WHERE AN EXAMINING DOCTOR DIAGNOSED A STRAIN 'QUESTIONABLE IN DEGREE' OR 'DOUBTFUL' IN ALL THREE MAJOR SPINAL AREAS. A DEFINITE EMOTIONAL OVERLAY WITH EXAGERATION WAS ALSO NOTED AS WELL AS OBESITY, NOT RELATED TO THE INJURY. CLAIMANT WAS EXAMINED AT THE BACK EVALUATION CLINIC, THE CONSENSUS WAS THAT CLAIMANT COULD RETURN TO HER FORMER OCCUPATION AND LOSS OF FUNCTION WAS ESTIMATED AS MILD.

ON JANUARY 8, 1973 DR. GOLDEN CONCURRED IN THE OPINION OF THE BACK EVALUATION CLINIC THAT CLAIMANT'S CONDITION WAS STABLE AND THAT CLAIM CLOSURE WAS INDICATED — HOWEVER, ON FEBRUARY 14, 1973, DR. WATTLEWORTH, A BEND ORTHOPEDIST, FELT THE CLAIM SHOULD REMAIN OPEN

FOR FURTHER TREATMENT. HE BELIEVED THAT CLAIMANT WAS, AT THAT TIME, UNABLE TO WORK. CLAIMANT WAS AGAIN REFERRED TO THE DISABILITY PREVENTION DIVISION. DR. MASON, AFTER EXAMINATION, FELT CLAIMANT COULD RETURN TO HER FORMER WORK IF PROPERLY MOTIVATED. HE FELT SHE HAD BEEN OVERTREATED AND THAT HER CLAIM SHOULD BE CLOSED. CLAIMANT WAS SEEN AGAIN BY THE BACK EVALUATION CLINIC, AT THIS TIME COMPOSED OF THREE DIFFERENT DOCTORS THAN THOSE WHO HAD PREVIOUSLY EXAMINED CLAIMANT. THEY NOTED A PSYCHOPHYSIOLOGICAL MUSCULOSKELETAL REACTION WITH CONVERSION, FOUND HER CONDITION TO BE STATIONARY AND WERE OF THE BELIEF THAT SHE PROBABLY COULD RETURN TO HER PREVIOUS OCCUPATION. TOTAL LOSS OF FUNCTION DUE TO THE INDUSTRIAL INJURY WAS MINIMAL. DR. WATTLEWORTH THEN AGREED THAT THE CLAIM BE CLOSED BUT HE RECOMMENDED CLAIMANT CONTINUE WITH THE PHYSIO-THERAPY PROGRAM AND OCCASIONAL PAIN MEDICATION. THE CLAIM WAS CLOSED WITH AN AWARD FOR TIME LOSS ONLY.

CLAIMANT APPLIED FOR BUT WAS DENIED SOCIAL SECURITY DISABILITY BENEFITS, ACCOMPANYING HER APPLICATION WAS AN EXAMINATION REPORT FROM DR. WATTLEWORTH STATING CLAIMANT HAD CHRONIC LUMBOSACRAL STRAIN AND SUGGESTING SHE WAS UNABLE TO DO ANY WORK INVOLVING PROLONGED SITTING, STANDING, STOOPING OR LIFTING GREATER THAN FIVE POUNDS. THIS EXAMINATION WAS PERFORMED IN MAY 1974. ON JANUARY 9, 1975, DR. DAVIS, WHO HAD SEEN CLAIMANT PREVIOUSLY AS A MEMBER OF THE BACK EVALUATION CLINIC, EXAMINED CLAIMANT - ALL OF CLAIMANT'S PHYSICAL FINDINGS WERE SUBJECTIVE IN NATURE AND MANY WERE PROVEN TO THE DOCTOR'S SATISFACTION TO BE NON-EXISTENT.

ONLY DR. WATTLEWORTH OF ALL OF THE MANY DOCTORS WHO HAD EXAMINED AND-OR TREATED CLAIMANT, WAS OF THE OPINION THAT CLAIMANT COULD NOT RETURN TO HER FORMER TYPE OF WORK. THE OTHER DOCTORS FELT CLAIMANT'S LOSS OF FUNCTION OF THE BACK WAS MINIMAL, THEY NOTED A SEVERE FUNCTIONAL INTERFERENCE AND CONTRAST TO HER ORGANIC ABNORMALITIES. AFTER A PSYCHOLOGICAL EVALUATION, DR. PERKINS FELT CLAIMANT COULD RETURN TO HER FORMER WORK.

CLAIMANT'S EDUCATIONAL BACKGROUND INCLUDED HIGH SCHOOL AND BUSINESS COURSE TRAINING, SHE HAS DONE COMMERCIAL PHOTOGRAPHY WORK ON A FREE LANCE BASIS BUT HAD TO TERMINATE BECAUSE OF AN INJURY TO HER RIGHT EYE. CLAIMANT HAS DONE RETAIL SELLING AND MANAGED ANOTHER RETAIL STORE BESIDES THE ONE IN WHICH SHE WAS WORKING AT THE TIME OF HER INJURY. CLAIMANT STATED THAT HER EMPLOYER HAD OFFERED HER A JOB AS A SUPERVISOR, HOWEVER, IT WOULD INVOLVE CONSIDERABLE TRAVELING.

THE REFEREE FELT THAT DR. WATTLEWORTH'S OPINION WAS SO DRASTICALLY DIFFERENT FROM THE OPINIONS OF THE OTHER DOCTORS THAT IT WAS NOT ENTITLED TO MUCH WEIGHT - ALSO, CLAIMANT HAS NOT MADE ANY ATTEMPT TO RETURN TO WORK ALTHOUGH THERE WAS NO CONVINCING TESTIMONY OF INABILITY TO RETURN TO WORK. AFTER CONSIDERING ALL THE TESTIMONY, MEDICAL AND LAY, THE REFEREE CONCLUDED THAT THERE WAS NO EVIDENCE THAT CLAIMANT HAD SUFFERED A DIMINUTION OF EARNING CAPACITY AS A RESULT OF HER INDUSTRIAL INJURY AND HE AFFIRMED THE DETERMINATION ORDER.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

THE BOARD, AFTER GIVING DUE CONSIDERATION TO CLAIMANT'S MOTION FOR REMAND, CONCLUDES THAT THE FACTS SUBMITTED IN SUPPORT THEREOF ARE NOT SUFFICIENT TO JUSTIFY GRANTING THE MOTION.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 13, 1975 IS AFFIRMED.

CLAIMANT'S MOTION FOR REMAND, SUBMITTED IN CONJUNCTION WITH HER BRIEF TO THE BOARD, IS DENIED.

SAIF CLAIM NO. RC 103161 MAY 19, 1976

LARRY HACKETT, CLAIMANT

OWN MOTION DETERMINATION

CLAIMANT SUFFERED AN INDUSTRIAL INJURY TO HIS LEFT FOREARM AND HAND ON APRIL 6, 1966 WHILE EMPLOYED BY MC GREW BROS. SAWMILL. MULTIPLE SURGICAL PROCEDURES AND EXTENSIVE MEDICAL TREATMENT WERE REQUIRED AND EVENTUALLY CLAIMANT RETURNED TO WORK AS A PART TIME CARPENTER. THE CLAIM WAS CLOSED ON NOVEMBER 19, 1968 WITH AN AWARD OF PERMANENT PARTIAL DISABILITY EQUAL TO 70 PER CENT LOSS USE OF THE LEFT FOREARM.

SUBSEQUENT TO THE EXPIRATION OF THE FIVE YEAR PERIOD OF AGGRAVATION, CLAIMANT REQUIRED FURTHER MEDICAL TREATMENT AND THE STATE ACCIDENT INSURANCE FUND VOLUNTARILY REOPENED THE CLAIM BASED UPON A MEDICAL REPORT FROM DR. N. J. WILSON DATED DECEMBER 18, 1973. ARRANGEMENTS WERE MADE FOR CLAIMANT TO BE EXAMINED BY DR. CORSON AND, ULTIMATELY, THE FOLLOWING SURGICAL PROCEDURES WERE PERFORMED TO PROVIDE CLAIMANT WITH A MORE FUNCTIONAL LEFT HAND =

1. BONE GRAFT - LEFT 4TH METACARPAL, PERFORMED JANUARY 11, 1974.

2. RE-ARRANGEMENT OF PEDICLE FLAP AND SPLIT THICKNESS SKIN GRAFT, DORSAL LEFT HAND, PERFORMED ON JUNE 25, 1974.

3. OSTEOTOMY AND REPLACEMENT ARTHROPLASTY USING SWANSON SILASTIC PROSTHESIS, METACARPOPHALANGEAL JOINTS OF THE LEFT RING AND LITTLE FINGERS, ALSO CAPSULOTOMY AND TENDON LENGTHENING OF THE INDEX AND MIDDLE FINGERS, PERFORMED ON AUGUST 23, 1974.

4. TENOLYSIS OF EXTENSOR TENDONS AND CAPSULOTOMY OF THE METACARPOPHALANGEAL JOINTS OF THE INDEX AND MIDDLE FINGERS, ALONG WITH DEFATTING OF THE PEDICLE FLAP, PERFORMED ON APRIL 8, 1975.

CLAIMANT SHOWED GRADUAL IMPROVEMENT AND WAS ABLE TO PARTICIPATE IN AN ON-THE-JOB PROGRAM COMMENCING DECEMBER 4, 1975. DR. CORSON EXAMINED CLAIMANT ON APRIL 12, 1976 AND FOUND THAT HE HAD BEEN WORKING REGULARLY AND THAT THE FUNCTION OF THE HAND WAS QUITE GOOD, ALTHOUGH THERE WAS CONSIDERABLE DEFORMITY. IT WAS HIS OPINION THAT THE ADDITIONAL SURGICAL PROCEDURES RESULTED IN A DEFINITE IMPROVEMENT.

THE CLAIM WAS SUBMITTED TO THE EVALUATION DIVISION OF THE BOARD WHICH RECOMMENDED THAT CLAIMANT BE AWARDED ADDITIONAL COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM DECEMBER 19, 1973 THROUGH DECEMBER 3, 1975 AND TEMPORARY PARTIAL DISABILITY FROM DECEMBER 4, 1975 THROUGH APRIL 12, 1976. NO INCREASE IN COMPENSATION FOR PERMANENT PARTIAL DISABILITY WAS RECOMMENDED.

IT IS SO ORDERED.

WCB CASE NO. 75-2450 MAY 19, 1976

CHARLES GOERES, CLAIMANT

A. C. ROLL, CLAIMANT'S ATTY.
JAQUA AND WHEATLEY, DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH ORDERED IT TO PAY THE RINEHART CLINIC'S BILLING FOR TREATMENT BETWEEN DECEMBER 6, 1974 AND JANUARY 24, 1975, PAY TEMPORARY TOTAL DISABILITY BENEFITS TO CLAIMANT FOR THE PERIOD MARCH 24 THROUGH MAY 9, 1975, AWARDED CLAIMANT 64 DEGREES FOR 20 PER CENT LOW BACK DISABILITY, AND AWARDED CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY FEE.

CLAIMANT HAD BEEN EMPLOYED AS A MILL WORKER FOR 17 YEARS. NO SPECIFIC TRAUMA OCCURRED, HOWEVER, ON SEPTEMBER 3, 1974 CLAIMANT EXPERIENCED AN ONSET OF BACK PAIN WHEN HE WAS TRANSFERRED FROM HIS REGULAR JOB AS A PANEL PATCHER TO OFF-BEARING ON A VENEER DRYER. DR. KEIZER NOTED DEGENERATIVE OSTEOARTHRITIS AND DISC NARROWING AT L2-3 AND CHRONIC LUMBAR SPINE SPRAIN. HE PRESCRIBED PAIN MEDICATION, AN ORTHOPEDIC BELT AND RELEASED CLAIMANT FOR WORK AS OF OCTOBER 28, 1974.

THE CLAIM WAS CLOSED DECEMBER 13, 1974 WITH TEMPORARY TOTAL DISABILITY FROM SEPTEMBER 4, 1974 TO OCTOBER 27, 1975 BUT NO AWARD OF PERMANENT PARTIAL DISABILITY.

CLAIMANT RETURNED TO WORK BUT NOTED WORSENING BACK PAIN AND SOUGHT MEDICAL TREATMENT FROM THE RINEHART CLINIC FROM DECEMBER 6, 1974 TO JANUARY 24, 1975. HE STATED THESE TREATMENTS DID HELP HIS BACK CONDITION.

CLAIMANT TESTIFIED HIS BACK CONTINUED TO BOTHER HIM AND HE LEFT WORK AGAIN ON MARCH 24 AND CONSULTED DR. KEIZER. ACCORDING TO CLAIMANT, DR. KEIZER VERBALLY AUTHORIZED TIME LOSS FOR A PERIOD OF TWO WEEKS, HOWEVER, THE DOCTOR'S REPORT PERTAINING TO HIS EXAMINATION STATED CLAIMANT WAS 'FIT FOR GAINFUL EMPLOYMENT.'

BY A LETTER DATED APRIL 8, CLAIMANT ADVISED THE EMPLOYER HIS BACK WAS WORSE AND REQUESTED HIS CLAIM BE 'REACTIVATED'. THE EMPLOYER DENIED ON GROUND OF INSUFFICIENT EVIDENCE.

CLAIMANT WAS EXAMINED MAY 19 BY DR. SHORT WHO FELT THE COMPLAINTS AT THAT TIME WERE THE RESULT OF A SPRAIN SUPERIMPOSED ON THE PREEXISTING DEGENERATIVE DISEASE OF THE LUMBAR SPINE. HE RECOMMENDED THE WEARING OF A BACK SUPPORT AND ALSO A PSYCHOLOGICAL EXAMINATION FOR POSSIBLE DEPARTMENT OF VOCATIONAL REHABILITATION REFERRAL. ON MAY 9, CLAIMANT HAD UNDERGONE VARICOSE VEIN SURGERY AND HAD RECEIVED OFF-THE-JOB BENEFITS FROM MAY 9 TO JUNE 9.

CLAIMANT RETURNED TO WORK JUNE 9 AND WORKED UNTIL NOVEMBER 10, WHEN LIFTING CAUSED INCREASED PAIN AND HE WAS UNABLE TO CONTINUE. DR. SHORT SENT CLAIMANT FOR A PSYCHOLOGICAL EVALUATION. ON NOVEMBER 24, CLAIMANT RETURNED TO HIS JOB AND HAS WORKED SUCCESSFULLY AT A LIGHT-TYPE JOB REQUIRING NO LIFTING.

THE REFEREE FOUND THAT CLAIMANT HAD SOUGHT TREATMENT FROM DR. RINEHART AND, ALTHOUGH IT WAS NOT OF GREAT BENEFIT, IT HAD BEEN OCCASIONED BY THE ON-THE-JOB AGGRAVATION OF CLAIMANT'S BACK CONDITION AND THEREBY THE EMPLOYER WAS RESPONSIBLE FOR THE PAYMENT OF THIS BILL.

HE DID NOT ALLOW PENALTIES OR ATTORNEY FEES SINCE THE EMPLOYER HAD NEVER BEEN BILLED FOR SUCH SERVICES.

THE REFEREE, BASED ON CLAIMANT'S CREDIBLE TESTIMONY, FOUND THAT ALTHOUGH TIME LOSS AFTER MAY 9 WAS CHARGEABLE TO THE VEIN SURGERY CLAIMANT WAS ENTITLED TO TEMPORARY TOTAL DISABILITY FROM MARCH 24 UNTIL MAY 9 AS A RESULT OF HIS INDUSTRIAL INJURY. HE FOUND THE EMPLOYER HAD NOT BEEN UNREASONABLE IN NOT HAVING PAID TEMPORARY TOTAL DISABILITY IN VIEW OF DR. KEIZER'S NOTATION ON A MEDICAL REPORT THAT CLAIMANT WAS THEN FIT FOR GAINFUL EMPLOYMENT.

ON THE ISSUE OF EXTENT OF DISABILITY, THE REFEREE FOUND THAT ALTHOUGH CLAIMANT WAS PERFORMING HIS PRESENT JOB SUCCESSFULLY HE WOULD BE LIMITED OR EVEN FORECLOSED FROM OTHER JOBS REQUIRING A GREATER USE OF HIS BACK AND AWARDED CLAIMANT 64 DEGREES FOR 20 PER CENT LOW BACK DISABILITY.

ON DE NOVO REVIEW, THE BOARD CONCURS.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 12, 1975 IS AFFIRMED.

COUNSEL FOR CLAIMANT IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 350 DOLLARS PAYABLE BY THE EMPLOYER.

CLAIM NO. B53—125153 MAY 19, 1976

EUGENE ANISZEWSKI, CLAIMANT

GARY L. CASE, CLAIMANT'S ATTY.
ROGER WARREN, DEFENSE ATTY.
OWN MOTION ORDER REMANDING FOR HEARING

CLAIMANT SUSTAINED AN INDUSTRIAL INJURY ON JANUARY 4, 1968 WHILE WORKING AT STEINFIELD'S PRODUCTS CO. HIS CLAIM WAS CLOSED ON AUGUST 19, 1969 WITH AN AWARD OF 19.2 DEGREES FOR LEFT ARM DISABILITY AND NO AWARD FOR UNSCHEDULED DISABILITY. ON JULY 31, 1969 CLAIMANT WAS AGAIN INJURED WHILE WORKING FOR THE SAME EMPLOYER. THIS TIME THE INJURY WAS TO HIS LEFT SHOULDER AND WAS CLOSED AS A 'MEDICAL ONLY.'

ON NOVEMBER 16, 1971, AFTER A HEARING, CLAIMANT WAS AWARDED 57.6 DEGREES FOR 30 PER CENT DISABILITY OF THE LEFT ARM AND 19.2 DEGREES FOR 10 PER CENT DISABILITY OF THE RIGHT ARM AND NO AWARD FOR UNSCHEDULED DISABILITY. ON MAY 17, 1972 THE BOARD, ON DE NOVO REVIEW AFTER AN APPEAL, ELIMINATED THE AWARD FOR THE RIGHT ARM - THIS WAS APPEALED AND, ON OCTOBER 18, 1972 THE CIRCUIT COURT OF MULTNOMAH COUNTY, AWARDED CLAIMANT 57.6 DEGREES FOR 30 PER CENT LOSS OF LEFT ARM AND 40 DEGREES FOR 12.5 PER CENT UNSCHEDULED PERMANENT DISABILITY.

ON MARCH 17, 1976 CLAIMANT REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND REOPEN HIS CLAIM. THE MEDICAL REPORTS AND EXHIBITS MENTIONED IN THE AFFIDAVIT FILED BY CLAIMANT IN SUPPORT OF THIS REQUEST WERE NOT ATTACHED THERETO. THE CLAIMANT WAS SO ADVISED BY THE BOARD ON MARCH 18, 1976 AND ALSO ADVISED THAT UNDER THE BOARD'S RULES OF PRACTICE AND PROCEDURE, A COPY OF CLAIMANT'S REQUEST WITH THE SUPPORTING DOCUMENTS HAD TO BE FURNISHED TO THE CARRIER, EMPLOYERS INSURANCE OF WAUSAU, WHICH WOULD BE GIVEN 20 DAYS AFTER RECEIPT OF SAME IN WHICH TO ADVISE THE BOARD OF ITS POSITION. OAR 436-83-810.

ON MARCH 29, 1976 THE MEDICAL REPORTS MENTIONED IN THE AFFIDAVIT WERE FURNISHED TO THE BOARD AND, ON APRIL 20, 1976, ADDITIONAL MEDICAL DOCUMENTS WERE FURNISHED TO THE BOARD BY CLAIMANT'S COUNSEL WHO ADVISED THAT COPIES OF SAID MEDICAL INFORMATION WAS BEING FURNISHED TO THE CARRIER.

THE CARRIER HAS NOT ADVISED THE BOARD WITH RESPECT TO ITS POSITION ON THIS MATTER AND, AT THE PRESENT TIME, THE BOARD DOES NOT HAVE SUFFICIENT EVIDENCE TO DETERMINE WHETHER CLAIMANT'S CLAIM SHOULD BE REOPENED.

THEREFORE, THE MATTER IS REFERRED TO THE HEARINGS DIVISION WITH INSTRUCTIONS TO HOLD A HEARING AND TAKE EVIDENCE ON THE ISSUE OF WHETHER CLAIMANT'S PRESENT CONDITION IS CAUSALLY RELATED TO THE INDUSTRIAL INJURY OF JANUARY 4, 1968 AND JUSTIFIES A REOPENING OF THE CLAIM FOR PAYMENT OF BENEFITS AS PROVIDED BY LAW. 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 RECOMMENDATIONS ON THIS ISSUE.

WCB CASE NO. 74-3894 MAY 20, 1976

THE BENEFICIARIES OF
ALVIN W. MINOR, DECEASED
HARVEY KARLIN, CLAIMANT'S ATTY.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY BENEFICIARIES

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE BENEFICIARIES OF ALVIN W. MINOR, DECEASED, HEREINAFTER REFERRED TO AS CLAIMANT, REQUEST BOARD REVIEW OF THE REFEREE'S ORDER WHICH SUSTAINED THE EMPLOYER'S DENIAL OF CLAIMANT'S CLAIM THAT THE DECEDENT'S ILLNESS AND EVENTUAL DEATH FROM PNEUMONIA WAS MATERIALLY CONTRIBUTED TO BY HIS EMPLOYMENT.

THE DECEDENT WORKMAN WAS 63 YEARS OLD AND HAD WORKED FOR A NUMBER OF YEARS IN FOUNDRIES. HE CEASED DOING THAT TYPE OF WORK IN JULY 1973 AND THE ONLY WORK HE DID THEREAFTER WAS AT THE REQUEST OF A FRIEND TO WORK A 'VACATION RELIEF SHIFT' OF ABOUT TWO WEEKS. THE DECEDENT HAD HAD EMPHYSEMA AND HAD BEEN OPERATED ON FOR STOMACH ULCER A FEW YEARS PRIOR TO HIS DEATH, HOWEVER HIS PHYSICAL CONDITION HAD BEEN ASSUMED TO BE GOOD AND HE HAD HAD NO PHYSICAL COMPLAINTS.

THE DECEDENT'S TREATING PHYSICIAN EXPRESSED HIS OPINION THAT THE DECEDENT'S WORK WAS A MATERIAL CONTRIBUTING FACTOR IN BRINGING ON HIS ILLNESS AND ULTIMATE DEATH. THIS OPINION WAS BASED ON A HYPOTHETICAL QUESTION WHICH ASSUMED THAT THE DECEDENT FOR, AT LEAST, SEVERAL DAYS LIFTED HEAVY BAGS OF MATERIAL AND CARRIED THEM FOR DISTANCES UP TO 30 FEET AND FOR SEVERAL DAYS WAS REQUIRED TO CLIMB UP AND DOWN LADDERS RANGING FROM 15 TO 20 FEET HIGH, TO PERIODICALLY WORK ON A CONVEYOR BELT IN A WORK AREA WHICH WAS EXTREMELY HOT. THE HYPOTHETICAL QUESTION ALSO REQUIRED THE DOCTOR TO ASSUME THAT THE DECEDENT WAS IN THE PATHWAY OF A FAN AND DURING THE TWO WEEKS HE WORKED HE COMPLAINED OF INCREASING PHYSICAL TIREDNESS AND FATIGUE.

THE REFEREE FOUND THAT THE PREPONDERANCE OF THE EVIDENCE DID NOT SUPPORT THE HYPOTHETICAL FACTS ASSUMED BY THE TREATING PHYSICIAN TO SUPPORT HIS OPINION. DR. BRADY, THE STATE MEDICAL EXAMINER,

EXPRESSED HIS OPINION THAT THE WORK ACTIVITY OF THE DECEDENT, WHOM HE HAD NEVER SEEN, WAS NOT A CONTRIBUTING FACTOR – THAT DECEDENT'S LONGSTANDING PULMONARY EMPHYSEMA HAD MADE HIM MORE SUSCEPTIBLE TO PNEUMONIA THAN A NORMAL PERSON. HE DID NOT BELIEVE THAT THE STAPH INFECTION DECEDENT HAD HAD WAS LIKELY TO HAVE BEEN ACQUIRED IN THE HOSPITAL. THE AUTOPSY INDICATED THE OBVIOUS CAUSE OF DEATH WAS THE SEVERE CONFLUENT BRONCHOPNEUMONIA.

BASED UPON THE ABOVE FINDINGS THE REFEREE CONCLUDED THAT THE DECEDENT'S WORK WAS NOT A MATERIAL CONTRIBUTING FACTOR TO HIS ILLNESS AND EVENTUAL DEATH FROM PNEUMONIA AND THAT THE EMPLOYER PROPERLY DENIED THE CLAIM MADE BY THE CLAIMANT.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 31, 1975 IS AFFIRMED.

WCB CASE NO. 75–3296 MAY 20, 1976

LAWRENCE P. MILLER, CLAIMANT

KAFOURY AND HAGEN, CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THAT PORTION OF THE REFEREE'S ORDER WHICH SUSTAINED THE EMPLOYER'S DENIAL OF CLAIMANT'S LOW BACK SYMPTOMS.

CLAIMANT, A 57 YEAR OLD WELDER–MECHANIC, WAS INJURED ON JULY 3, 1974 WHILE ATTEMPTING TO REMOVE THE BOLTS FROM A TORQUE CONVERTER ON A CAT. THE CLAIM WAS ACCEPTED AND BENEFITS WERE PAID UNTIL JULY 28, 1975 WHEN THE EMPLOYER ISSUED A TOTAL DENIAL. AT THE HEARING THE EMPLOYER ADMITTED THAT THIS DENIAL WAS ERRONEOUS AS CLAIMANT'S CERVICAL STRAIN WAS ITS RESPONSIBILITY BUT IT SHOULD HAVE ISSUED A PARTIAL DENIAL OF RESPONSIBILITY FOR CLAIMANT'S LOW BACK SYMPTOMS.

THE ISSUE IS WHETHER CLAIMANT'S LOW BACK SYMPTOMS WERE CAUSALLY RELATED TO HIS COMPENSABLE INJURY OF JULY 3, 1974 AND WHETHER THE DENIAL CONSTITUTED UNREASONABLE REJECTION OF CLAIMANT'S CLAIM WHICH WOULD ENTITLE HIM TO PENALTIES AND ATTORNEY'S FEES.

SHORTLY AFTER THE INTERVENING 4TH OF JULY HOLIDAY, CLAIMANT CONSULTED HIS FAMILY PHYSICIAN, DR. MYERS, COMPLAINING OF STIFF NECK AND PAINS IN HIS RIGHT ARM. THE DIAGNOSIS WAS NEURITIS DUE TO STRAIN AND ARTHRITIS – DISC. ON JULY 22, 1974 CLAIMANT WAS RELEASED TO RETURN TO WORK AND DID SO, ALTHOUGH HE STILL HAD SYMPTOMS IN HIS NECK, SHOULDER, RIGHT ARM AND HAND. HE CONTINUED TO RECEIVE TREATMENT FROM DR. MYERS PERIODICALLY BECAUSE OF PERSISTING SYMPTOMS BUT, ON OCTOBER 11, 1974, TOLD DR. MYERS HE WAS MUCH IMPROVED.

CLAIMANT COMPLETED THE CONSTRUCTION JOB ON WHICH HE HAD BEEN WORKING ON NOVEMBER 7, 1974 AND ON NOVEMBER 15, 1974 CONSULTED DR. MYERS, STATING HE HAD HAD TEN DAYS OF LOW BACK PAIN AND HE HAD PAIN THAT RADIATED INTO HIS RIGHT LEG. ON JANUARY 2, 1975 CLAIMANT WAS

ADMITTED TO THE HOSPITAL FOR ACUTE LOW BACK PAIN AND DISCHARGED 18 DAYS LATER. DR. MYERS PRESUMED CLAIMANT'S LOW BACK PAIN WAS RELATED TO THE INJURY OF JULY 3, 1974 ALTHOUGH HE RECOGNIZED THE QUESTION IS DEBATABLE BECAUSE CLAIMANT DID NOT COMPLAIN OF ANY LOW BACK PAIN UNTIL NOVEMBER 15, 1974.

THE REFEREE CONCLUDED THAT CLAIMANT'S LOW BACK SYMPTOMS WERE NOT CAUSED BY HIS COMPENSABLE INJURY. IT IS SIGNIFICANT THAT CLAIMANT DID NOT REPORT ANY LOW BACK SYMPTOMS UNTIL NOVEMBER 15, 1974, MORE THAN FOUR MONTHS AFTER THE INJURY, ALTHOUGH HE HAD BEEN SEEING HIS PHYSICIAN PERIODICALLY DURING THAT TIME. ALSO CLAIMANT TESTIFIED THAT WHEN THE BOLT BROKE HE WAS FLUNG FORWARD STRIKING HIS BACK ON AN ANGLE IRON FLANGE WHICH CAUSED A BRUISE IN THE CENTER OF THE BACK AT THE BELT LINE. IF THIS WAS TRUE THE BRUISE WOULD HAVE BEEN NOTED BY DR. MYERS ON JULY 8, 1974 AND HIS OPINION AS TO CAUSATION MIGHT NOT HAVE BEEN EQUIVOCAL.

WHEN CLAIMANT WAS HOSPITALIZED IN JANUARY 2, 1975 BECAUSE OF HIS BACK SYMPTOMS THEY WERE SO SEVERE IT WAS NECESSARY TO USE A WHEELCHAIR TO GET CLAIMANT INTO THE HOSPITAL.

THE REFEREE CONCLUDED THAT BECAUSE CLAIMANT WORKED FROM JULY 22 TO NOVEMBER 7, 1974 AND WAS NOT WORKING WHEN HE FIRST REPORTED HIS LOW BACK SYMPTOMS THAT THE COURSE OF NATURE WOULD HAVE HAD TO BE REVERSED IN ORDER TO SUPPORT CLAIMANT'S CONTENTION = IN THE NORMAL COURSE INJURIES TEND TO HEAL.

THE REFEREE CONCLUDED THAT CLAIMANT'S EXPLANATIONS WERE NOT ACCEPTABLE AND THAT HE HAD FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HIS LOW BACK SYMPTOMS WERE CAUSALLY RELATED TO THE INDUSTRIAL INJURY SUFFERED ON JULY 3, 1974.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE WITH RESPECT TO CLAIMANT'S LOW BACK SYMPTOMS. THE BOARD AGREES WITH THE REFEREE THAT CLAIMANT WAS NOT A CREDIBLE WITNESS.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 13, 1975 IS AFFIRMED.

WCB CASE NO. 74-3410 MAY 20, 1976

EUGENE KING, CLAIMANT

GRANT, FERGUSON AND CARTER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF
CROSS REQUEST BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

ON JANUARY 29, 1976 THE BOARD, AFTER DE NOVO REVIEW OF THE RECORD ON APPEAL, REMANDED THE ABOVE MATTER TO REFEREE JOHN F. DRAKE WITH INSTRUCTIONS TO ARRANGE FOR CLAIMANT TO BE ENROLLED AT THE DISABILITY PREVENTION DIVISION IN PORTLAND FOR A PHYSICAL AND PSYCHOLOGICAL EXAMINATION AND EVALUATION AND FOR SUCH APPROPRIATE RECOMMENDATIONS FOR THE TREATMENT OF CLAIMANT'S CONDITION AS MAY BE FORTHCOMING AS THE RESULT OF SAID EXAMINATION AND EVALUATION.

IT HAS NOW COME TO THE ATTENTION OF THE BOARD THAT CLAIMANT'S EMPLOYER, OREGON STATE HIGHWAY DIVISION, TERMINATED CLAIMANT AS OF MARCH 8, 1976, THEREFORE, THE BOARD FEELS IT IS APPROPRIATE TO SUPPLEMENT ITS ORDER OF REMAND WITH A FURTHER INSTRUCTION TO REFEREE DRAKE TO ARRANGE FOR CLAIMANT TO RECEIVE A VOCATIONAL EVALUATION AT DISABILITY PREVENTION DIVISION TO DETERMINE WHETHER A USEFUL RETRAINING PROGRAM CAN BE PROVIDED CLAIMANT UNDER THE AUSPICES OF THE DEPARTMENT OF VOCATIONAL REHABILITATION.

CLAIMANT IS ENTITLED TO RECEIVE TEMPORARY TOTAL DISABILITY COMPENSATION DURING HIS STAY AT THE DISABILITY PREVENTION DIVISION WHILE UNDERGOING THE VOCATIONAL EVALUATION - THE PERMANENT PARTIAL DISABILITY COMPENSATION AWARDED BY THE REFEREE'S ORDER DATED AUGUST 21, 1975 SHALL BE SUSPENDED ON THE DATE CLAIMANT ARRIVES AT THE CENTER FOR SUCH EVALUATION AND REINSTATED WHEN HE LEAVES. THE EXPENSES FOR THIS PROCEDURE SHALL BE PAID BY THE FUND.

THE REPORTS OBTAINED AFTER THE VOCATIONAL EVALUATION SHALL BE CONSIDERED BY THE REFEREE TOGETHER WITH THE REPORTS OF THE PHYSICAL AND PSYCHOLOGICAL EXAMINATION AND EVALUATION FOR RECONSIDERATION OF HIS OPINION AND ORDER DATED AUGUST 21, 1975.

CLAIMANT'S COUNSEL WAS AWARDED 25 PER CENT OF THE TEMPORARY TOTAL DISABILITY COMPENSATION PAYABLE PURSUANT TO THE ORDER ON REMAND, PAYABLE FROM SAID COMPENSATION AS PAID TO A MAXIMUM OF 400 DOLLARS BY THE ORDER DATED JANUARY 29, 1976. THE BOARD FEELS THIS IS SUFFICIENT.

WCB CASE NO. 74-2912 MAY 20, 1976

ROBERT JONES, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED MAY 10, 1974 AWARDING CLAIMANT COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM SEPTEMBER 22 THROUGH NOVEMBER 15, 1973 AND TEMPORARY PARTIAL DISABILITY FROM NOVEMBER 16, 1973 THROUGH MARCH 11, 1974. CLAIMANT ALSO SEEKS REVIEW OF THE REFEREE'S AFFIRMANCE OF THE EMPLOYER'S DENIAL OF HIS REQUEST FOR REOPENING OF THE CLAIM.

CLAIMANT SIGNED A CLAIM FOR OCCUPATIONAL DISEASE ON OCTOBER 25, 1973, CONTENDING HE HAD A BRONCHITIS CONDITION POSSIBLY RELATED TO HIS EMPLOYMENT WHERE HE WAS ALLEGEDLY EXPOSED TO PAPER DUST. THE PHYSICIAN'S INITIAL REPORT INDICATED IT WAS UNDETERMINED WHETHER THE CONDITION REQUIRING TREATMENT WAS THE RESULT OF AN INDUSTRIAL EXPOSURE. CLAIMANT WAS THEN SEEN BY DR. METTLER WHO, ON JANUARY 23, 1974, STATED THAT ALTHOUGH HE REALIZED CLAIMANT WAS BLAMING HIS PLACE OF EMPLOYMENT FOR HIS COUGH, HE FOUND NO REASON IN HIS EAR, NOSE AND THROAT SYSTEM FOR THE COUGH.

CLAIMANT WAS NEXT EXAMINED BY DR. TUHY, WHO ON MARCH 1, 1974, STATED THAT, BY HISTORY, CLAIMANT HAD CHRONIC BRONCHITIS OF AN UNDETERMINED CAUSE - THAT CLAIMANT MIGHT WELL HAVE DEVELOPED AN ALLERGIC BRONCHITIS BEGINNING IN MAY 1973 ALTHOUGH MOST YOUNG PEOPLE WITH THIS CONDITION HAVE A FAMILY HISTORY OF ALLERGY SUCH AS HAY FEVER, ETC. DR. TUHY STATED THAT HAD CLAIMANT DEVELOPED AN ALLERGY TO PAPER DUST

AT HIS EMPLOYMENT IT COULD HAVE BEEN EXPECTED THAT THE SYMPTOMS WOULD HAVE DISAPPEARED OR AT LEAST IMPROVED CONSIDERABLY WITHIN A WEEK OR TWO AFTER HE HAD QUIT WORK, HOWEVER, THIS WAS NOT THE CASE. IN A LATER REPORT DATED MARCH 11, 1974 DR. TUHY STATED HE DID NOT SEE HOW CLAIMANT'S SIX MONTHS OF WORK COULD BE RESPONSIBLE FOR HIS CONTINUING COUGH. CLAIMANT'S CLAIM WAS THEN CLOSED BY THE AFORESAID DETERMINATION ORDER WHICH AWARDED SOME TIME LOSS.

CLAIMANT WAS AGAIN SEEN BY DR. TUHY ON JULY 8, 1974 - HE WAS STILL OFF WORK AND STILL HAVING DIFFICULTY WITH COUGHING. DR. TUHY BELIEVED CLAIMANT'S CONDITION HAD WORSENED SOMEWHAT SINCE FEBRUARY 1974, BUT RESTATED HIS OPINION THAT THERE WAS PROBABLY ABSENCE OF ANY POSSIBLE RELATIONSHIP BETWEEN HIS WORK AND HIS PRESENT CONDITION. THE EMPLOYER THEN DENIED CLAIMANT'S REQUEST TO REOPEN HIS CLAIM.

ON SEPTEMBER 26, 1975 DR. TUHY, AFTER REVIEWING REPORTS FROM THE OUT-PATIENT CLINIC OF THE UNIVERSITY OF OREGON MEDICAL SCHOOL, INCLUDING THE ALLERGY TESTS AND PHYSICAL EXAMINATION, STATED IT WAS UNLIKELY THAT CLAIMANT WAS AN ALLERGIC INDIVIDUAL OR THAT HE HAD 'INTRINSIC ASTHMA'. CLAIMANT HAD BEEN OFF WORK FOR MORE THAN TWO YEARS BECAUSE OF WHAT HE THOUGHT WAS A WORK RELATED CONDITION, HOWEVER, DR. TUHY FELT THAT THE DUST EXPOSURE AT WORK WHICH CLAIMANT DESCRIBED HAD NO PROBABLE CAUSAL RELATION TO HIS LONG CONTINUED SYMPTOMS.

THE REFEREE CONCLUDED THAT CLAIMANT HAD FAILED TO MEET HIS BURDEN OF PROOF, PRIMARILY A MEDICAL ONE, THAT HE HAD ANY RESIDUAL DISABILITY AS A CONSEQUENCE OF HIS ALLEGED EXPOSURE TO DUST AT HIS PLACE OF EMPLOYMENT. THE REFEREE FURTHER CONCLUDED THAT CLAIMANT FAILED TO MEET HIS BURDEN OF PROOF THAT HIS CLAIM OUGHT TO BE REOPENED.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 28, 1975 IS AFFIRMED.

WCB CASE NO. 75-1842 MAY 20, 1976

WALTER L. EDMISON, CLAIMANT

S. DAVID EVES, CLAIMANT'S ATTY.
KEITH D. SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH DIRECTED CLAIMANT'S CLAIM BE REOPENED IN ORDER TO PROVIDE A FEASIBLE PROGRAM OF VOCATIONAL REHABILITATION TO HIM AND REFERRED CLAIMANT TO THE DISABILITY PREVENTION DIVISION FOR REFERRAL TO THE DEPARTMENT OF VOCATIONAL REHABILITATION FOR PREPARATION OF A PROGRAM AND, IF NECESSARY, REFERRAL TO AN APPROPRIATE AGENCY OUTSIDE THE STATE OF OREGON OF A SIMILAR NATURE. THE REFEREE REMANDED CLAIMANT'S CLAIM TO THE EMPLOYER AND ITS CARRIER FOR PAYMENT OF TEMPORARY TOTAL DISABILITY BENEFITS COMMENCING AUGUST 5, 1975 TO CONTINUE UNTIL THE CLAIM WAS AGAIN CLOSED PURSUANT TO THE APPROPRIATE STATUTORY PROVISIONS AND AGENCY REGULATIONS - HE DETERMINED CLAIMANT'S CONDITION TO HAVE BEEN MEDICALLY STATIONARY AS ESTABLISHED BY THE DETERMINATION ORDER MAILED JANUARY 7, 1975 AND HELD THAT CLAIMANT CONTINUED TO BE MEDICALLY STATIONARY.

CLAIMANT WAS A 47 YEAR OLD GENERAL UTILITY AND CLEANUP MAN WHEN HE SUFFERED A COMPENSABLE INJURY TO HIS LOW BACK AND LEFT FLANK ON FEBRUARY 4, 1974. HIS CLAIM WAS ACCEPTED AND CLOSED ON JANUARY 7, 1975 BY A DETERMINATION ORDER WHICH GRANTED CLAIMANT COMPENSATION FOR A TEMPORARY DISABILITY AND 48 DEGREES FOR 15 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT HAD A PREEXISTING SPONDYLOSIS AT L4-5 ON THE LEFT. ALTHOUGH HE HAD NOT MANIFESTED PRIOR BACK PROBLEMS OR HAD ANY PRIOR BACK INJURIES THE FEBRUARY 4, 1974 INJURY AGGRAVATED THIS SPINAL CONDITION AND ALSO INFLICTED SOFT TISSUE INJURY WHICH ULTIMATELY REQUIRED SURGICAL INTERVENTION. THE INJURY AND SUBSEQUENT TREATMENT RESULTED IN PERMANENT PHYSICAL IMPAIRMENT TO A MILDLY MODERATE DEGREE.

CLAIMANT HAD BEEN A PHARMACIST FOR MANY YEARS BUT WAS NO LONGER ABLE TO PRACTICE THAT PROFESSION. HE IS WELL EDUCATED AND IN ADDITION TO WORK EXPERIENCE INVOLVING HEAVY PHYSICAL LABOR HAS ALSO BEEN MANAGER OF A REST HOME AND DEVELOPED SOME MANAGEMENT SKILLS. HIS PRESENT PHYSICAL DISABILITY PRECLUDES HIS RETURN TO HIS FORMER OCCUPATION OR ANY WORK WHICH REQUIRES HEAVY LIFTING OR MUCH PHYSICAL EXERCISE OF THE BACK. A JOB CHANGE AND RETRAINING WAS RECOMMENDED BY THE EXAMINING AND-OR TREATING PHYSICIANS, HOWEVER, CLAIMANT INDICATED HE DESIRED TO ATTEMPT TO FIND REEMPLOYMENT ON HIS OWN AND WAS NOT INTERESTED IN VOCATIONAL COUNSELING. THEREFORE, THE DISABILITY PREVENTION DIVISION CONCLUDED THAT CLAIMANT DID NOT HAVE A VOCATIONAL HANDICAP.

CLAIMANT HAS NOT BEEN SUCCESSFUL IN FINDING REEMPLOYMENT AND HAD INDICATED, THROUGH HIS ATTORNEY, THAT HE IS NOW DESIROUS OF A REFERRAL AND EVALUATION FOR VOCATIONAL RETRAINING.

THE REFEREE FOUND THAT ALTHOUGH CLAIMANT HAS A GOOD EDUCATION AND HAS MANAGEMENT SKILLS SUCH EDUCATION AND THE SKILLS THAT HE HAS DEVELOPED DO NOT SEEM TO BE IN DEMAND. THE REFEREE CONCLUDED THAT, BASED UPON THE EVIDENCE, CLAIMANT DOES NOT HAVE SUCH OUTSIDE SKILLS THAT MAKE HIM READILY REEMPLOYABLE IN THE COMPETITIVE LABOR MARKET IN LIGHT WORK TYPE JOBS AND, THEREFORE, HE DOES NEED RETRAINING TO FIND SUITABLE EMPLOYMENT.

THERE WAS SOME INDICATION THAT CLAIMANT COULD HAVE PUT FORTH GREATER EFFORT TO SEEK EMPLOYMENT, NEVERTHELESS, HE NOW DESIRES TO SEEK VOCATIONAL COUNSELING AND THE REFEREE CONCLUDED THAT HE SHOULD BE GIVEN THE BENEFIT OF THE DOUBT IN THIS INSTANCE AND PROVIDED WITH, AT LEAST, THE ASSISTANCE AND EVALUATION OF TRAINED PERSONNEL TO SEE WHETHER HE CAN BE HELPED.

THE REFEREE, HAVING DECIDED THAT CLAIMANT SHOULD BE PROVIDED WITH VOCATIONAL REHABILITATION AND TRAINING, DECLINED TO MAKE ANY ASSESSMENT OF ANY ADDITIONAL PERMANENT DISABILITY. HE CONCLUDED THAT IF CLAIMANT DID EXHIBIT THE NECESSARY MOTIVATION TO COMPLETE VOCATIONAL REHABILITATION THEN HIS PERMANENT DISABILITY, INSOFAR AS LOSS OF EARNING CAPACITY IS CONCERNED WILL BE DIFFERENT FROM THE PRESENT TIME AND AT THAT TIME A PROPER ASSESSMENT CAN BE MADE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 26, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS AN ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW THE SUM OF 300 DOLLARS PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75—3409 MAY 20, 1976

THOMAS BIONDOLILLO, CLAIMANT
HAROLD W. ADAMS, CLAIMANT'S ATTY.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER AWARDING CLAIMANT TIME LOSS TO JULY 18, 1975 BUT MAKING NO AWARD FOR PERMANENT PARTIAL DISABILITY. CLAIMANT CONTENDS HE IS ENTITLED TO TIME LOSS FROM JULY 18 TO OCTOBER 1, 1975 AND ALSO AN AWARD OF PERMANENT DISABILITY.

CLAIMANT IS A 26 YEAR OLD TRUCK DRIVER WHO WENT TO WORK IN THE LATTER PART OF AUGUST 1974 FOR THE EMPLOYER. FOR SEVERAL MONTHS THEREAFTER CLAIMANT NOTED LOW BACK PAIN AND INABILITY TO RELAX AND, ON MARCH 14, 1975, HE WENT TO THE EMERGENCY ROOM OF THE SALEM HOSPITAL WHERE HE WAS SEEN BY DR. SPADY. THE DIAGNOSIS WAS ACUTE LUMBO-SACRAL SPRAIN AND PHYSICAL THERAPY TREATMENTS WERE PRESCRIBED. DR. SPADY ALSO DISCUSSED WITH CLAIMANT A POSSIBILITY OF REHABILITATION TO ENABLE CLAIMANT TO OBTAIN EMPLOYMENT WHICH DID NOT INVOLVE BENDING AND LIFTING ACTIVITY.

DR. SPADY EXAMINED CLAIMANT ON JULY 18, 1975 FOR A CLOSING REPORT AND, AT THAT TIME, STATED HE COULD NOT FIND ANY OBJECTIVE EVIDENCE OF LOW BACK TROUBLE WHICH WOULD JUSTIFY CONTINUED TIME LOSS. HE RECOMMENDED THAT THE CLAIMANT COULD RETURN TO WORK AND THE CLAIM COULD BE CLOSED AS OF THAT DATE. A DETERMINATION ORDER WAS MAILED AUGUST 5, 1975 WHEREBY CLAIMANT WAS AWARDED COMPENSATION TO TEMPORARY TOTAL DISABILITY FROM MARCH 14, 1975 THROUGH JULY 18, 1975.

AT THE REQUEST OF HIS ATTORNEY, CLAIMANT WAS SEEN BY DARALD E. BOLIN, A CHIROPRACTIC PHYSICIAN, ON AUGUST 1, 1975 - AT THAT TIME CLAIMANT WAS COMPLAINING OF SEVERE LOW BACK PAIN WHICH WAS WORSENED BY AN ACTIVITY CAUSING SUSTAINED POSTURE, COUGHING, SNEEZING OR STRAINING. DR. BOLIN DIAGNOSED "A BI-LATERAL ILIO-LUMBAR SPRAIN WITH 5TH LUMBAR MOTOR UNIT SWELLING AND A PROBABLY GRADE 1 NEUROPATHY INVOLVING THE RIGHT 5TH LUMBAR NERVE ROOT." HE RECOMMENDED CHIROPRACTIC TREATMENT AND STATED THAT CLAIMANT COULD NOT RETURN TO HIS ORIGINAL TYPE OF EMPLOYMENT AT THAT TIME. CLAIMANT, AT THE TIME OF THE HEARING WAS CONTINUING TO UNDERGO THE CHIROPRACTIC, ALTHOUGH ON OCTOBER 1, 1975 DR. BOLIN HAD RELEASED CLAIMANT TO A MODIFIED WORK OF A SEDENTARY NATURE LIMITING HIS LIFTING TO 35 POUNDS AND NOT SUSTAINED.

CLAIMANT WAS REEXAMINED BY DR. SPADY WHO AGAIN NOTED LITTLE IN THE WAY OF OBJECTIVE EVIDENCE TO REVEAL SIGNIFICANT LOW BACK PAIN.

CLAIMANT IS NOT PRESENTLY WORKING AND HAS NOT WORKED SINCE MARCH 1975 ALTHOUGH THE EMPLOYER HAD OFFERED HIM A PACKING JOB. HE DID NOT LOOK INTO THIS JOB AS HE FELT IT WOULD INVOLVE SOME BENDING, AND SOME LIFTING OF DISHES, LAMPS, PICTURES, ETC. CLAIMANT HAS A HIGH SCHOOL DIPLOMA AND HAS COMPLETED ONE AND ONE HALF YEARS IN THE MILITARY SERVICE WHERE HE HAD LIMITED EXPERIENCE AS A RADIO OPERATOR. HE HAS ALSO HAD SOME EXPERIENCE OPERATING A SERVICE STATION.

THE REFEREE FOUND THAT WHEN DR. SPADY, ON JULY 18, 1975, DECLARED, CLAIMANT'S CONDITION STATIONARY AND RECOMMENDED THAT HE COULD RETURN TO WORK ALTHOUGH HE DID NOT SPECIFY THAT THIS WOULD BE REGULAR WORK HE DID KNOW THE NATURE OF CLAIMANT'S REGULAR WORK. HE ALSO STATED THAT HE WAS UNABLE TO FIND OBJECTIVE EVIDENCE JUSTIFYING

CONTINUED TIME LOSS. THE REFEREE CONCLUDED THAT DR. SPADY CLEARLY MEANT THAT CLAIMANT COULD RETURN TO HIS REGULAR WORK AND THEREFORE CLAIMANT WAS NOT ENTITLED TO ANY TIME LOSS BEYOND JULY 18, 1975.

FILMS WERE TAKEN OF CERTAIN ACTIVITIES INDULGED IN BY CLAIMANT AND, AFTER VIEWING THE FILM, THE REFEREE FELT THAT THEY SUPPORTED DR. SPADY'S CONCLUSION THAT CLAIMANT COULD RETURN TO REGULAR WORK.

ON THE CONTENTION THAT CLAIMANT WAS ENTITLED TO AN AWARD OF PERMANENT DISABILITY, THE REFEREE, BASED UPON DR. SPADY'S REPORTS THAT CLAIMANT HAS LITTLE, IF ANY, LOW BACK PROBLEM FROM A MEDICAL POINT OF VIEW, AND ALSO UPON THE MOVIE FILM VIEWED AT THE HEARING WHICH SHOWED CLAIMANT PERFORMING MANY ACTIVITIES, INCLUDING BENDING, STOOPING, KNEELING AND LIFTING, ALL PERFORMED SEVERAL WEEKS PRIOR TO CLAIM CLOSURE AND NONE OF WHICH APPARENTLY CAUSED CLAIMANT ANY DIFFICULTY, CONCLUDED THAT CLAIMANT HAD SUFFERED NO PERMANENT PARTIAL DISABILITY AND THAT THE DETERMINATION ORDER SHOULD BE AFFIRMED.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

CLAIMANT'S COUNSEL IN HIS OPENING BRIEF STATES THAT FROM A LEGAL STANDPOINT HE RESPECTFULLY PROTESTS THE PROCEDURE WHICH WOULD ALLOW THE INSURANCE COMPANY TO SHOW THE TREATING PHYSICIAN MOTION PICTURES WITHOUT GIVING THE CLAIMANT AN OPPORTUNITY TO RESPOND AT THE CRUCIAL TIME. THE BOARD FINDS NOTHING IMPROPER ABOUT SHOWING FILM TO A TREATING PHYSICIAN, IN THIS CASE DR. SPADY, WITHOUT ALLOWING CLAIMANT AN OPPORTUNITY TO RESPOND.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 22, 1975 IS AFFIRMED.

WCB CASE NO. 75-1908 MAY 24, 1976

MITCHELL L. WATSON, CLAIMANT

BROWN, BURT AND SWANSON, CLAIMANT'S ATTYS.

SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE, DEFENSE ATTYS.

REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 96 DEGREES FOR 30 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT IS A 27 YEAR OLD WORKMAN WHO SUSTAINED A COMPENSABLE INDUSTRIAL INJURY TO HIS LOW BACK ON NOVEMBER 5, 1973. CLAIMANT WAS REFERRED BY HIS FAMILY DOCTOR TO DR. SPADY, AN ORTHOPEDIC SURGEON, ON NOVEMBER 21, 1973. ON DECEMBER 5, 1973 DR. SPADY, AFTER EXAMINING CLAIMANT, STATED CLAIMANT HAD SUSTAINED A SPRAIN OF THE LUMBOSACRAL SPINE - HE RELEASED HIM THAT DAY FOR LIGHT DUTY, AFTER PRESCRIBING DIMINUTION OF ACTIVITY AND THE USE OF PHYSICAL THERAPY.

CLAIMANT WAS OFF WORK UNTIL FEBRUARY 25, 1974 WHEN HE WAS RELEASED BY DR. SPADY TO RETURN TO REGULAR WORK. ON DECEMBER 3, 1974 CLAIMANT WAS FOUND TO BE MEDICALLY STATIONARY BY DR. SPADY. DR. SPADY'S REPORT INDICATED THAT THERE WERE NO PHYSICAL FINDINGS OF INJURY

BUT HE NOTED CONTINUED SUBJECTIVE SYMPTOMATOLOGY INCLUDING BACK PAIN WHEN CLAIMANT DROVE LONG DISTANCES OR SAT FOR A PROLONGED PERIOD OF TIME AND ALSO DISCOMFORT WHEN HE ASSUMED A FORWARD BENT POSITION OR ATTEMPTED TO DO ANY LIFTING. THE CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED OCTOBER 22, 1974 WHICH AWARDED CLAIMANT TIME LOSS FROM DECEMBER 7, 1973 THROUGH FEBRUARY 24, 1974 BUT AWARDED NO COMPENSATION FOR PERMANENT PARTIAL DISABILITY.

CLAIMANT CONTINUED TO WORK FROM FEBRUARY 24, 1974 UNTIL JANUARY 15, 1975 AT THE SAME JOB HE HAD AT THE TIME HE WAS INJURED. THIS JOB REQUIRED CLAIMANT TO STAND ON HIS FEET FOR AN 8 HOUR PERIOD. CLAIMANT TESTIFIED THAT HIS BACK CONTINUOUSLY WORSENED DURING THAT PERIOD OF TIME UNTIL ON JANUARY 15, 1975 IT WAS SO BAD THAT HE COULD NO LONGER CONTINUE TO WORK. DURING THIS PERIOD CLAIMANT MISSED ONLY A FEW DAYS FROM WORK - HE TESTIFIED THAT HE TRIED TO STAY ON THE JOB AS MUCH AS POSSIBLE AND PERHAPS WORKED SOMETIMES WHEN HE SHOULD NOT HAVE DONE SO.

ON SEPTEMBER 16, 1974 CLAIMANT HAD BEEN EXAMINED BY HIS FAMILY PHYSICIAN FOR THE PURPOSE OF PARTICIPATING IN AN AAU BOXING TOURNAMENT. DR. REID REPORTED THAT CLAIMANT'S ORTHOPEDIC STATUS WAS NORMAL BUT FOR DEFORMITY OF THE RIGHT FOOT AND HE APPROVED CLAIMANT FOR PARTICIPATION IN SUCH SPORTS AS BASEBALL, BASKETBALL, CROSS COUNTRY, FOOTBALL, GOLF, GYMNASTICS, SWIMMING, SOCCER, TENNIS, TRACK AND FIELD, WRESTLING AND BOXING. CLAIMANT PARTICIPATED IN THE AAU BOXING TOURNAMENT WHERE HE BOXED TWO MATCHES.

ON JANUARY 15, 1975 CLAIMANT HURT HIS BACK WHILE MOVING SOME FURNITURE AT HOME - HE IMMEDIATELY REPORTED THIS TO HIS FAMILY PHYSICIAN, DR. REID AND, ON JANUARY 31, 1975, FILED A NON-OCCUPATIONAL CLAIM WITH JOHN HANCOCK INSURANCE WHEREIN HE DESCRIBED HIS DISABILITY AS OCCURRING AS HE WAS 'LIFTING FURNITURE AT HOME.' HE INDICATED ON THAT CLAIM THAT HE DID NOT INTEND TO PRESENT A CLAIM FOR WORKMEN'S COMPENSATION. DR. SPADY EXAMINED CLAIMANT TWICE IN JANUARY 1975 AND NOTED THAT THE INJURY DID NOT ARISE OUT OF CLAIMANT'S EMPLOYMENT, HE ESTIMATED CLAIMANT WOULD BE ABLE TO RETURN TO WORK ABOUT ONE WEEK FROM THE LAST EXAMINATION (JANUARY 31, 1975). IN FEBRUARY 1975 CLAIMANT MADE A TEN DAY AUTOMOBILE TRIP TO LOS ANGELES, DOING ALL OF THE DRIVING HIMSELF.

ON MAY 7, 1975 CLAIMANT REQUESTED A HEARING ON THE DETERMINATION ORDER AND WAS EXAMINED BY DR. CHERRY ON JULY 24, 1975 FOR THE PURPOSE OF PURSUING HIS CLAIM. IN A REPORT DATED JULY 30, 1975, DR. CHERRY COMMENTED ON THE MEDICAL HISTORY TAKEN FROM CLAIMANT AND CONCLUDED SIMPLY THAT CLAIMANT HAD SUFFERED A LOW BACK STRAIN DUE TO AN INDUSTRIAL INJURY AND INFERRED THAT THE CLAIMANT COULD NOT RETURN TO HIS FORMER OCCUPATION BUT THAT HE COULD DO LIGHT WORK IF IT COULD BE MADE AVAILABLE TO HIM. DR. CHERRY ADMITTED ON CROSS EXAMINATION BY THE EMPLOYER THAT THE ONLY BASIS HE HAD FOR THE COMMENTS WHICH HE HAD MADE FOLLOWING HIS EXAMINATION OF CLAIMANT ON JULY 24, 1975 WAS THE HISTORY RELATED TO HIM BY THE CLAIMANT - HE ALSO INDICATED THAT HE WAS NOT AWARE OF THE FURNITURE LIFTING INCIDENT OF JANUARY 15, 1975.

THE REFEREE FOUND THAT THE RECORD REVEALED ANOMALIES WHICH RAISED SERIOUS QUESTIONS AS TO CLAIMANT'S CREDIBILITY AND AS TO THE BONA FIDES OF HIS CLAIM, HOWEVER, HE WAS NOT PERSUADED THAT THE CLAIM WAS MERITLESS OR THAT CLAIMANT WAS NOT A CREDIBLE WITNESS. HE FELT THE RECORD SUPPORTED A CONCLUSION THAT CLAIMANT'S PRESENT DISABILITY WAS A CAUSAL RESULT OF THE INDUSTRIAL INJURY AND THAT THE FURNITURE MOVING INCIDENT WAS NOT A NEW INTERVENING CAUSE OF DISABILITY.

THE REFEREE FURTHER CONCLUDED THAT CLAIMANT HAD SUSTAINED A

LOSS OF WAGE EARNING CAPACITY AS A RESULT OF HIS PERMANENT DISABILITY AND WAS ENTITLED TO AN AWARD OF 96 DEGREES TO COMPENSATE HIM FOR SUCH LOSS.

THE BOARD, ON DE NOVO REVIEW, FINDS NO EVIDENCE EITHER MEDICAL OR LAY, WHICH WOULD SUPPORT CLAIMANT'S CLAIM. TO THE CONTRARY, THIS EVIDENCE INDICATES THAT CLAIMANT WAS RETURNED TO A MEDICALLY STATIONARY, NON-DISABLED STATE AS OF FEBRUARY 25, 1974 AND THAT CLAIMANT'S CONDITION CONTINUED IN THIS STATE UNINTERRUPTED UNTIL HE SUSTAINED AN OFF-THE-JOB INJURY WHILE LIFTING FURNITURE AT HOME ON JANUARY 15, 1975. THE PHYSICIAN MOST CLOSELY CONNECTED WITH CLAIMANT'S BACK CONDITION WAS DR. SPADY WHO RELEASED CLAIMANT TO RETURN TO REGULAR WORK ON FEBRUARY 25, 1974 AND DID NOT SEE CLAIMANT AGAIN UNTIL, AT THE REQUEST OF THE EMPLOYER IN SEPTEMBER OF THAT YEAR, HE PERFORMED A CLOSING EXAMINATION. AT NO TIME BETWEEN FEBRUARY 25, 1974 AND JANUARY 17, 1975 DID CLAIMANT SEE DR. SPADY OR ANY OTHER DOCTOR FOR BACK SYMPTOMS. DR. SPADY'S CLOSING EXAMINATION SHOWED NO VERIFIABLE PHYSICAL IMPAIRMENT. THE BOARD CONCLUDES THAT CLAIMANT HAS FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE HAS SUFFERED ANY DISABILITY FROM HIS INDUSTRIAL INJURY OF NOVEMBER 5, 1973, THAT HE HAS SUSTAINED NO LOSS IN HIS EARNING CAPACITY AS A RESULT OF SUCH INJURY AND, THEREFORE, THE DETERMINATION ORDER WHICH AWARDED CLAIMANT COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM DECEMBER 7, 1973 THROUGH FEBRUARY 24, 1974 SHOULD BE AFFIRMED.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 13, 1975 IS REVERSED.

THE DETERMINATION ORDER MAILED OCTOBER 22, 1974 IS AFFIRMED.

WCB CASE NO. 75-1120 MAY 24, 1976

ARTHUR MATHERLY, CLAIMANT

EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDERS MAILED MARCH 11, 1975 AWARDING CLAIMANT NO ADDITIONAL PERMANENT PARTIAL DISABILITY COMPENSATION IN EXCESS OF THAT GRANTED BY PREVIOUS DETERMINATION ORDERS WHICH TOTALED 40 PER CENT LOSS RIGHT LEG AND TEMPORARY TOTAL DISABILITY FROM OCTOBER 9, 1973 THROUGH FEBRUARY 10, 1975.

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS RIGHT KNEE ON FEBRUARY 4, 1975. DR. BROWN, WHO EXAMINED CLAIMANT ON FEBRUARY 16, 1970 WAS OF THE OPINION THAT CLAIMANT HAD A DUAL PROBLEM INVOLVING HIS RIGHT LEG - (1) THE INJURY TO THE LIGAMENTOUS STRUCTURES OF THE RIGHT KNEE AND (2) THE VASCULAR PROBLEM OF THE RIGHT LEG. THERE WAS NO COMMON TRAUMATIC ETIOLOGICAL FACTOR. ON JUNE 12, 1970 CLAIMANT WAS SEEN BY DR. PALUSKA, AN ORTHOPEDIC SURGEON - X-RAYS SHOWED NO EVIDENCE OF RECENT FRACTURE OR TRAUMA BUT DID REVEAL DIFFUSED AND MODERATE DEGENERATIVE ARTHRITIS OF BOTH KNEE JOINT AND THE PATELLA. DR. PALUSKA CONSIDERED CLAIMANT MEDICALLY STATIONARY AS OF AUGUST 28, 1970 - HE FOUND NO RELATIONSHIP BETWEEN THE PERIPHERAL VASCULAR DISEASE AND THE INDUSTRIAL INJURY AND CONCLUDED THERE WOULD NOT BE ANY

LOSS OF MOTION DUE TO THE LIGAMENTOUS STRAIN OF THE KNEE. DR. GAISER, VASCULAR SURGEON, AGREED WITH DR. PALUSKA.

A KNEE ARTHROTOMY PERFORMED ON OCTOBER 7, 1972 REVEALED A TEAR OF THE LATERAL MENISCUS. DR. PALUSKA RECOMMENDED A VIGOROUS EXERCISE PROGRAM, HOWEVER, BY NOVEMBER 1972 CLAIMANT'S CONDITION HAD NOT SIGNIFICANTLY IMPROVED AND DR. PALUSKA CONCLUDED THAT CLAIMANT WOULD CONTINUE TO HAVE DEGENERATIVE ARTHRITIS IN HIS KNEE WHICH WOULD BECOME MORE SYMPTOMATIC WITH AGE.

DR. BROWN REFERRED CLAIMANT TO DR. RINEHART, RHEUMATOLOGIST, ON APRIL 10, 1973. DR. RINEHART FELT CLAIMANT'S CONDITION WAS CAUSED OR AGGRAVATED BY HIS INDUSTRIAL INJURY, AT LEAST IN PART, AS THE PICTURE PRESENTED WAS A CHRONOLOGICAL CONTINUOUS MUSCULOSKELETAL DISORDER BEGINNING WITH A TRAUMATIC JOINT DAMAGE PROGRESSING TO AUTOIMMUNIZATION AND THE RHEUMATOID STATE.

ON DECEMBER 11, 1973 DR. PALUSKA AGAIN SAW CLAIMANT WHOSE GENERAL CONDITION HAD DETERIORATED AND DR. PALUSKA'S IMPRESSION WAS THAT CLAIMANT HAD DEGENERATIVE OSTEOARTHRITIS OF THE LEFT KNEE WITH ASSOCIATED ADVANCE RHEUMATOID DISEASE, THAT CLAIMANT'S CONDITION HAD BEEN WORSENED BY THE PRESENCE OF THE GENERALIZED RHEUMATOID DISEASE. HE CONSIDERED CLAIMANT PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF THE RHEUMATOID ARTHRITIS.

CLAIMANT FILED A CLAIM FOR AGGRAVATION, RELYING UPON DR. RINEHART'S REPORTS. THE CLAIM WAS REMANDED, AFTER A HEARING, TO BE ACCEPTED FOR COMPENSATION AS PROVIDED BY LAW AND FOR ANY TREATMENT GIVEN OR RECOMMENDED BY DR. RINEHART WHICH HE DETERMINED IS MEDICALLY CAUSED OR AGGRAVATED BY THE FEBRUARY 4, 1970 INJURY. ON OCTOBER 7, 1974 THE BOARD MODIFIED THE REFEREE'S ORDER TO LIMIT THE FUND'S LIABILITY ON REMAND TO COMPENSATION AND TREATMENT WHICH WAS NECESSITATED BY REASON OF THE COMPENSABLE AGGRAVATION OF CLAIMANT'S RIGHT KNEE INJURY OF FEBRUARY 4, 1970.

CLAIMANT WAS EXAMINED ON DECEMBER 19, 1974 BY DR. PASQUESI. AT THAT TIME CLAIMANT WAS DISABLED ON THE BASIS OF RHEUMATOID ARTHRITIS RATHER THAN TRAUMA AND DR. PASQUESI FELT THAT FROM AN ORTHOPEDIC STANDPOINT RELATED TO CLAIMANT'S INDUSTRIAL INJURY CLAIMANT WAS MEDICALLY STATIONARY AND PROBABLY HAD BEEN SO FOR SEVERAL YEARS. ON JULY 24, 1975 DR. ROSENBAUM EXAMINED CLAIMANT WHOSE HANDS SHOWED SIGNS OF CHARACTERISTIC RHEUMATOID ARTHRITIS WITH INVOLVEMENT OF THE ELBOWS, WRIST, KNEE, FEET AND ANKLES. DR. ROSENBAUM AGREED WITH DR. RINEHART THAT THE DIAGNOSIS WAS RHEUMATOID ARTHRITIS. RHEUMATOID ARTHRITIS IS A DISEASE, NOT AN INDUSTRIAL ACCIDENT AND IT CANNOT BE CAUSED BY AN ACCIDENT. RHEUMATOID ARTHRITIS CAN BE CAUSALLY RELATED TO STRESS, EMOTIONAL TENSION AND-OR STRAIN, HOWEVER, IF THE ACCIDENT IN ITSELF WERE TO BE A PRECIPITATING OR AGGRAVATING CAUSE THE ACCIDENT WOULD HAVE HAD TO HAVE OCCURRED WITHIN A VERY SHORT TIME AFTER THE STRESS, STRAIN OR EMOTIONAL TENSION IN ORDER TO INDICATE A CAUSAL RELATIONSHIP.

CLAIMANT CONTENDS HE IS PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF HIS INDUSTRIAL INJURY OR, IN THE ALTERNATIVE, THAT HE IS ENTITLED TO A GREATER AWARD FOR HIS PERMANENT PARTIAL DISABILITY. HE BASED HIS CONTENTION PRIMARILY ON THE FACT THAT THE RHEUMATOID ARTHRITIS IN HIS RIGHT KNEE WHICH WAS ORDERED ACCEPTED BY THE BOARD HAS SPREAD THROUGHOUT HIS BODY AND FURTHER THAT IT IS THE STRESS, STRAIN AND EMOTIONAL TENSION WHICH FOLLOWED HIS INDUSTRIAL INJURY THAT IS THE BASIC CAUSAL FACTOR.

BOTH DR. PASQUESI AND DR. PALUSKA WERE OF THE OPINION THAT CLAIMANT'S CONDITION WAS DUE SOLELY TO HIS RHEUMATOID DISEASE AND NOT TO THE INDUSTRIAL INJURY - NEITHER DISPUTES THE FACT THAT CLAIMANT HAS RHEUMATOID ARTHRITIS.

THE REFEREE CORRECTLY STATED THAT COMPENSATION CANNOT BE AWARDED UNLESS THERE IS COMPETENT EVIDENCE THAT A MEDICAL-CAUSAL RELATIONSHIP EXISTS BETWEEN THE EMPLOYMENT AND THE ALLEGED DISABILITY - THE POSSIBILITY THAT THERE IS A RELATIONSHIP IS NOT ENOUGH. MEDICAL EVIDENCE MUST SHOW WITH REASONABLE CERTAINTY THAT THEY ARE RELATED. RELIANCE ON LAY TESTIMONY AND ADMINISTRATIVE EXPERTISE IS NOT JUSTIFIED WHEN THE MEDICAL QUESTION IS A COMPLICATED ONE AS IT IS IN THE PRESENT CASE IT MUST BE PLACED ON THE OPINION EXPRESSED BY MEDICAL EXPERTS. NEITHER DR. PALUSKA NOR DR. PASQUESI COULD FIND THE MEDICAL-CAUSAL RELATIONSHIP BETWEEN THE RHEUMATOID ARTHRITIS AND THE INDUSTRIAL INJURY AND DR. ROSENBAUM, AFTER CONSIDERING THE STRESS-STRAIN AND EMOTIONAL TENSION FACTORS, COULD NOT, IN THIS PARTICULAR CASE, FIND A MEDICAL-CAUSAL RELATIONSHIP. BASED UPON THE ENTIRE RECORD, THE REFEREE CONCLUDED THE CLAIMANT HAD FAILED TO ESTABLISH MEDICAL CAUSATION BY A PREPONDERANCE OF THE EVIDENCE.

WITH RESPECT TO CLAIMANT'S CONTENTION THAT HE WAS ENTITLED TO A LARGER AWARD FOR THE PERMANENT PARTIAL DISABILITY TO THE RIGHT LEG, THE REFEREE FOUND THAT THIS WAS A SCHEDULED INJURY AND THE DETERMINATION OF IMPAIRMENT WAS PRIMARILY A MEDICAL QUESTION. CLAIMANT HAD ALREADY RECEIVED 40 PER CENT LOSS OF HIS RIGHT LEG. THERE WAS CONCORD BETWEEN THE DOCTORS THAT CLAIMANT DID HAVE A DUAL PROBLEM INVOLVING HIS RIGHT LEG - AN INJURY TO THE LIGAMENTOUS STRUCTURES OF THE RIGHT KNEE AND VASCULAR PROBLEMS OF THE RIGHT LEG WITH NO COMMON ETIOLOGICAL FACTOR. WITH RESPECT TO THE LATTER, DR. PALUSKA FOUND NO RELATIONSHIP BETWEEN IT AND THE INDUSTRIAL INJURY AND FOLLOWING THE ARTHROGRAM OF CLAIMANT'S RIGHT KNEE, SYMPTOMS HAD ALL BUT DISAPPEARED EXCEPT FOR COMPLAINTS DUE TO THE ARTERIAL INSUFFICIENCY IN THE LEGS AND A CONTINUATION OF DEGENERATIVE ARTHRITIS IN THE KNEE WHICH WOULD BECOME MORE SYMPTOMATIC WITH AGE.

THE REFEREE CONCLUDED THAT THE PREPONDERANCE OF THE EVIDENCE WOULD NOT SUPPORT A FINDING THAT CLAIMANT HAD SUFFERED PERMANENT PARTIAL DISABILITY TO HIS RIGHT LEG DUE TO HIS INDUSTRIAL INJURY WHICH WAS GREATER THAN THAT WHICH HE HAD PREVIOUSLY RECEIVED AWARDS.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE WELL WRITTEN OPINION AND ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 5, 1975 IS AFFIRMED.

WCB CASE NO. 74-3505 MAY 26, 1976

HELEN HELGESON, CLAIMANT

WILLIAM G. PURDY, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH GRANTED CLAIMANT COMPENSATION FOR PERMANENT TOTAL DISABILITY, AS PROVIDED BY STATUTE, PAYABLE FROM THE DATE OF TERMINATION OF TEMPORARY TOTAL DISABILITY WITH CREDIT ALLOWED FOR PAYMENTS MADE ON THE AWARD OF PERMANENT PARTIAL DISABILITY BY THE DETERMINATION ORDER MAILED JUNE 26, 1974 WHEREBY CLAIMANT WAS AWARDED 128 DEGREES FOR 40 PER CENT UNSCHEDULED DISABILITY.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON JANUARY 11, 1973 WHILE DRIVING A 15 PASSENGER BUS WHICH WAS STRUCK IN THE REAR BY AN AUTOMOBILE. CLAIMANT HAD BEEN EMPLOYED AS A BUS DRIVER SINCE MARCH 1969. CLAIMANT WAS EXAMINED BY DR. WELCH ON THE DAY OF THE INJURY AND A DIAGNOSIS OF NECK STRAIN WAS MADE AND CLAIMANT WAS GIVEN CONSERVATIVE TREATMENT. CLAIMANT WAS NEXT SEEN BY DR. TENNYSON ON APRIL 11, 1973 WHO DIAGNOSED POST-TRAUMATIC AGGRAVATION OF CERVICAL SPONDYLOSIS WITH CERVICAL CEPHALGIA.

CLAIMANT RETURNED TO WORK DRIVING A BUS ON A PART TIME BASIS IN APRIL 1973 AND CONTINUED UNTIL JUNE 20, 1973 WHEN SHE WAS HOSPITALIZED FOR TRACTION AND PHYSICAL THERAPY. A MYELOGRAM INDICATED GENERALIZED CERVICAL SPONDYLOSIS WITH SLIGHT EXTRADURAL DEFECT NOTED AT THE C6-7 LEVEL ON THE RIGHT. AGAIN CLAIMANT WAS TREATED CONSERVATIVELY AND ON OCTOBER 1, 1973, SHE RETURNED TO WORK DRIVING THE BUS ON A PART TIME BASIS UNTIL JANUARY 1974 WHEN SHE QUIT DUE TO CERVICAL AND LEFT ARM PAIN. SHE RETURNED AGAIN TOWARD THE END OF MARCH 1974 AND WORKED ABOUT ONE MONTH.

AFTER CLAIMANT QUIT IN APRIL 1974 SHE WAS SEEN BY DR. MATTHEWS FOR LEFT KNEE PAIN - HE DIAGNOSED CHRONIC SYNOVITIS OF THE LEFT KNEE OF UNCERTAIN ETIOLOGY. ON MAY 20, 1974 DR. TENNYSON INDICATED CLAIMANT'S CONDITION WAS STATIONARY WITH REGARD TO HER CERVICAL SPINE AND RECOMMENDED CLAIM CLOSURE, STATING THERE WERE MODERATE SUBJECTIVE AND OBJECTIVE EVIDENCE OF PERMANENT PARTIAL DISABILITY INVOLVING THE CERVICAL SPINE WHICH WAS DIRECTLY RELATED TO HER INDUSTRIAL INJURY. ON JUNE 26, 1974 CLAIMANT WAS AWARDED 40 PER CENT OF THE MAXIMUM ALLOWABLE FOR UNSCHEDULED PERMANENT PARTIAL DISABILITY.

IN MAY 1975 CLAIMANT WAS REFERRED BY THE FUND TO THE DISABILITY PREVENTION DIVISION FOR A PSYCHOLOGICAL EVALUATION. DR. PERKINS FOUND CLAIMANT'S PSYCHOPATHOLOGY WAS, TO A MODERATE DEGREE, RELATED TO HER ACCIDENT IN THAT SINCE THE INJURY, CLAIMANT HAD EXPERIENCED ANXIETY AND TENSION PERIODICALLY DUE TO PAIN AND CONCERN REGARDING BILLS AND EMPLOYMENT. DR. PERKINS' OPINION WAS THAT CLAIMANT WOULD PROBABLY NEVER WORK AGAIN PRIMARILY DUE TO HER AGE AND TO A LESSER DEGREE TO HER PHYSICAL PROBLEMS, HOWEVER, SHE FOUND CLAIMANT MOTIVATED TO RETURN TO WORK ALTHOUGH RECOGNIZING THAT IT WOULD BE VERY DIFFICULT FOR HER TO DO SO.

CLAIMANT WAS EXAMINED ON JANUARY 27, 1975 BY THE BACK EVALUATION CLINIC WHICH FELT THAT CLAIMANT COULD DO SOME LIGHT WORK NOT NECESSITATING STRESS, STRAIN OR UNDUE TENSION. THERE WAS LOSS OF FUNCTION OF THE NECK WHICH WAS MILDLY MODERATE AND LOSS OF FUNCTION OF THE SHOULDER WHICH WAS MINIMAL. DR. VAN OSDEL STATED THAT A JOB CHANGE WAS INDICATED WITH NO LIFTING OVER 50 POUNDS, NO REPETITIVE LIFTING OVERHEAD OF MORE THAN 20 POUNDS OR ANY STRENUOUS USE OF THE UPPER EXTREMITIES OR REPETITIVE BENDING, STOOPING OR TWISTING OF THE BACK.

CLAIMANT IS 67 YEARS OLD AND HAS A HIGH SCHOOL EDUCATION AND ALSO ONE YEAR IN BUSINESS SCHOOL IMMEDIATELY FOLLOWING HER GRADUATION. SHE HAS WORKED AS A BEAUTY OPERATOR IN MINNESOTA PRIOR TO 1946 - SHE ALSO WORKED AS A WAITRESS AND IN THE SHIPYARDS AS AN ELECTRICIAN DURING WORLD WAR II. FOR 20 YEARS, BETWEEN 1946 AND 1966, CLAIMANT WAS PRIMARILY A HOUSEWIFE AND DID NOT WORK OUTSIDE THE HOME BUT TOOK A COURSE IN BUSINESS COLLEGE IN PAYROLL AND CALCULATORS. SHE LOOKED FOR WORK FOR APPROXIMATELY TWO YEARS BEFORE SHE WAS FINALLY HIRED BY THE EMPLOYER AS A BUS DRIVER, FIRST ON A PART TIME BASIS AND THEREAFTER FULL TIME.

CLAIMANT LIVES BY HERSELF AND IS ABLE TO DO HER HOUSEWORK AND GROCERY SHOPPING. SHE TESTIFIED SHE INTENDED TO CONTINUE WORKING AS

A BUS DRIVER AND NOW THAT SHE IS UNABLE TO DO THAT TYPE OF WORK SHE DOESN'T KNOW OF ANY WORK WHICH SHE IS CAPABLE OF DOING. AT THE PRESENT TIME CLAIMANT'S INCOME CONSISTS OF 126 DOLLARS FROM SOCIAL SECURITY AND 241 DOLLARS A MONTH WORKMEN'S COMPENSATION BENEFITS. AT THE TIME OF HER INJURY CLAIMANT WAS EARNING APPROXIMATELY 2.45 DOLLARS AN HOUR.

THE REFEREE, AFTER DISCUSSING VARIOUS HOLDINGS BY THE OREGON COURTS RELATING TO PERMANENT TOTAL DISABILITY, FOUND THAT THE MEDICAL EVIDENCE INDICATED, UNANIMOUSLY, THAT CLAIMANT COULD NOT RETURN TO HER FORMER OCCUPATION OF BUS DRIVING AND THAT HER ONLY OTHER WORK EXPERIENCE FOR WAGES WAS OBTAINED NEARLY 30 YEARS PREVIOUSLY. THE REFEREE FOUND THAT WHEN IT HAD BECOME NECESSARY FOR CLAIMANT TO ENTER THE LABOR MARKET IN 1967, IT TOOK HER TWO YEARS OF CONSTANT AND DILIGENT JOB HUNTING TO OBTAIN HER JOB AS A BUS DRIVER, THAT SHE IS NOW 8 YEARS OLDER AND HAS GAINED NO NEW SKILLS WHICH WOULD ASSIST HER IN GAINING EMPLOYMENT OTHER THAN AS A BUS DRIVER, AN OCCUPATION IN WHICH SHE CAN NO LONGER ENGAGE.

THE REFEREE CONCLUDED THAT DUE TO HER AGE, EDUCATION, SKILL, TRAINING, MENTAL CAPACITY AND PSYCHOLOGICAL PROBLEMS, COMBINED WITH HER PHYSICAL IMPAIRMENT CLAIMANT FELL WITHIN THE 'ODD-LOT' CATEGORY OF THE WORK FORCE.

WHEN CLAIMANT ESTABLISHED PRIMA FACIE THAT SHE WAS AN ODD-LOT EMPLOYE, THE BURDEN SHIFTED TO THE FUND TO SHOW SOME KIND OF SUITABLE WORK WHICH WAS REGULARLY AND CONTINUOUSLY AVAILABLE TO CLAIMANT. THE REFEREE FOUND THAT THE FUND FAILED TO DO SO, AND CONCLUDED THAT CLAIMANT WAS PERMANENTLY INCAPACITATED FROM REGULARLY PERFORMING ANY WORK AT A GAINFUL AND SUITABLE OCCUPATION.

THE BOARD, ON DE NOVO REVIEW, WHILE CONCEDING THAT THIS IS A VERY CLOSE CASE, DISAGREES WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE. DR. TENNYSON, CLAIMANT'S TREATING PHYSICIAN, IN HIS CLOSING EVALUATION OF MAY 20, 1974 STATED THERE WAS MODERATE SUBJECTIVE AND OBJECTIVE EVIDENCE OF PERMANENT PARTIAL DISABILITY INVOLVING THE CERVICAL SPINE WHICH WAS DIRECTLY RELATED TO HER INDUSTRIAL INJURY OF JANUARY 11, 1973. AT THE HEARING ON OCTOBER 1, 1975 CLAIMANT TESTIFIED SHE HAD NOT SEEN ANY PHYSICIAN FOR A YEAR EXCEPT FOR THE DOCTORS AT DISABILITY PREVENTION DIVISION, PURSUANT TO A REFERRAL BY THE FUND. THE EVIDENCE INDICATES THAT BASICALLY CLAIMANT HAS BEEN A HOUSEWIFE FOR MOST OF HER ADULT LIFE - SHE DID NOT ENTER THE LABOR MARKET UNTIL 1966, EXCEPT FOR SOME WORK IN THE SHIPYARDS DURING THE WAR.

CLAIMANT HAS HAD SOME TRAINING AS A BEAUTY OPERATOR YET SHE HAS NOT ENDEAVORED TO LOOK INTO THE POSSIBILITY OF SECURING WORK AS A BEAUTY OPERATOR EITHER ON A PART TIME BASIS OR A TEMPORARY BASIS NOR INTO THE POSSIBILITY OF BEING RETRAINED TO DO SUCH WORK. CLAIMANT SPENT ONE YEAR AT BUSINESS COLLEGE LEARNING THE OPERATION OF CALCULATORS AND TYPING BUT SHE HAS NOT ATTEMPTED TO UTILIZE THIS EDUCATION, STATING THAT SHE DIDN'T FEEL SHE COULD DO BOOKKEEPING AT THE PRESENT TIME BECAUSE OF THE LAPSE OF YEARS SINCE SHE HAD GONE TO SCHOOL AND SHE WASN'T SURE SHE COULD SIT FOR PROLONGED PERIODS OF TIME WHILE BOOKKEEPING.

THE BOARD FINDS THAT THE MEDICAL EVIDENCE INDICATES CLAIMANT DOES NOT HAVE TREMENDOUSLY SIGNIFICANT PHYSICAL FINDINGS AND THE LAY EVIDENCE DOES NOT INDICATE SHE HAS A GREAT DEAL OF MOTIVATION TO RETURN TO THE LABOR MARKET. THE REFEREE FELT BECAUSE CLAIMANT HAD HAD DIFFICULTY OBTAINING A JOB WHEN SHE FIRST ENTERED THE LABOR MARKET IN 1967 AND WAS NOT ANY BETTER QUALIFIED AT THE PRESENT TIME THAT JUSTIFIED CLAIMANT IN NOT REALLY LOOKING FOR ANY TYPE OF WORK AFTER HER INJURY. THE BOARD CANNOT AGREE WITH THIS RATIONALE.

THE BOARD FINDS THAT CLAIMANT FAILED TO ESTABLISH PRIMA FACIE THAT SHE IS AN ODD-LOT EMPLOYEE - SHE HAS NOT SHOWN MOTIVATION AND HER PHYSICAL FINDINGS ARE NOT SIGNIFICANT. IT WOULD APPEAR THAT CLAIMANT'S GREATEST HANDICAP IS HER AGE - INABILITY TO RETAIN OR GAIN EMPLOYMENT IS MORE RELATED TO HER ADVANCED YEARS THAN TO HER PHYSICAL DISABILITY.

HAVING FAILED TO PROVE HER PRIMA FACIE CASE, THE BURDEN REMAINS WITH THE CLAIMANT TO SHOW THAT THERE IS NO SUITABLE REGULAR EMPLOYMENT AVAILABLE TO HER AND CLAIMANT HAS FAILED TO DO THIS AND, THEREFORE, CANNOT BE CONSIDERED AS PERMANENTLY AND TOTALLY DISABLED.

THE BOARD CONCLUDES THAT CLAIMANT WAS ADEQUATELY COMPENSATED FOR HER LOSS OF EARNING CAPACITY BY THE AWARD OF 128 DEGREES WHICH REPRESENTS 40 PER CENT OF THE MAXIMUM ALLOWABLE FOR AN UNSCHEDULED DISABILITY.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 23, 1975 IS REVERSED.

THE DETERMINATION ORDER MAILED JUNE 26, 1974 IS AFFIRMED.

WCB CASE NO. 75-2327 MAY 26, 1976

ED TARBELL, CLAIMANT

FENNER AND BARNHISEL, CLAIMANT'S ATTYS.
MERLIN MILLER, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED MARCH 21, 1975 WHEREBY CLAIMANT WAS AWARDED 32 DEGREES FOR 10 PER CENT UNSCHEDULED NECK DISABILITY.

CLAIMANT IS APPROXIMATELY 32 YEARS OLD, HE HAS A BACHELOR OF SCIENCE DEGREE IN SOCIOLOGY FROM THE UNIVERSITY OF OREGON. AFTER GRADUATION HE WORKED, INITIALLY, FOR MEIER AND FRANK'S IN A MANAGER TRAINING PROGRAM AND THEN FOR PENNEY'S IN A SIMILAR PROGRAM. CLAIMANT SPENT THE NEXT NINE YEARS IN PORTLAND AND IN NAMPA, IDAHO WORKING FOR PENNEY'S.

ON NOVEMBER 20, 1972 WHILE CLAIMANT WAS WORKING AS MANAGER OF THE BOY'S, GIRLS AND INFANTS DEPARTMENT, HE SUFFERED A COMPENSABLE INJURY. HE LOST NO TIME FROM WORK BUT DID SEEK MEDICAL ADVICE AND COMPLETED A CLAIM WHICH WAS PROCESSED AND A DETERMINATION ORDER MAILED AUGUST 1973 AWARDED NO PERMANENT PARTIAL DISABILITY. THE CLAIM WAS SUBSEQUENTLY REOPENED AND CLOSED BY A SECOND DETERMINATION ORDER MAILED MARCH 21, 1975 WHICH GRANTED CLAIMANT 32 DEGREES UNSCHEDULED NECK DISABILITY.

CLAIMANT TESTIFIED THAT AFTER THE ISSUANCE OF THE FIRST DETERMINATION ORDER HE WAS IN A VERY COMPETITIVE SITUATION IN THE TRAINING PROGRAM, THAT HE WAS APPARENTLY A TOP CONTENDER FOR TRANSFER AND WAS, ACTUALLY, PROMOTED AND TRANSFERRED TO NAMPA AND IT WAS FOR THIS REASON HE DID NOT GO TO A HOSPITAL BUT CONTINUED TO WORK WITH PAIN IN HIS NECK AND SHOULDERS.

ALTHOUGH THE MOVE TO NAMPA DID RESULT IN A PROMOTION FOR CLAIMANT, NEVERTHELESS, HE FELT THE JOB WAS NOT DESIRABLE BECAUSE IT WOULD REQUIRE HIM TO REMAIN A NUMBER OF YEARS IN HIS PRESENT POSITION BEFORE HE WOULD BE ELIGIBLE TO BECOME A STORE MANAGER. FOR THIS AND OTHER REASONS HE DECIDED TO CHANGE JOBS IN 1975. HE TOOK A TRAINING COURSE IN THE BROKERAGE FIRM OF E. F. HUTTON AND COMPANY IN PORTLAND, A BETTER JOB WHICH PAID A HIGHER SALARY THAN THAT WHICH CLAIMANT WAS PREVIOUSLY RECEIVING. THE JOB REQUIRES TRAVELING BUT DOES NOT REQUIRE CLAIMANT TO SIT ALL DAY LONG. CLAIMANT IS ABLE TO SPEND MUCH OF THE TIME WALKING AROUND THE OFFICE WHICH AFFORDS HIM RELIEF FROM HIS NECK AND SHOULDER PAIN.

THE REFEREE FOUND THAT CLAIMANT WAS WELL EDUCATED AND THERE WAS NO DOUBT THAT HE WOULD BE ABLE TO MAKE A GOOD LIVING IN MANY FIELDS - HE HAD NOT SUFFERED ANY LOSS OF INCOME. THE REFEREE CONCLUDED THAT, ALTHOUGH LOSS OF INCOME WAS ONLY ONE OF THE CRITERIA TO BE CONSIDERED IN LOSS OF EARNING CAPACITY, IT WAS DIFFICULT TO, WITH THE MEDICAL EVIDENCE IN THE RECORD, GRANT CLAIMANT A DISABILITY AWARD GREATER THAN THAT WHICH HE HAD ALREADY RECEIVED.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 14, 1975 IS AFFIRMED.

WCB CASE NO. 75-1280-NC MAY 27, 1976

GEORGE SCHMELTZER, CLAIMANT

RALF H. ERLANDSON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE STATE ACCIDENT INSURANCE FUND'S DENIAL OF CLAIMANT'S CLAIM. IT WAS STIPULATED THAT DURING THE TIME IN QUESTION THE EMPLOYER WAS A NON-COMPLYING EMPLOYER, AS DEFINED BY THE WORKMEN'S COMPENSATION ACT.

CLAIMANT ALLEGES THAT ON OR ABOUT OCTOBER 25, 1974 HE REPORTED TO A TRAILER WHICH HE CONTENDED WAS UNDER THE CONTROL OF THE EMPLOYER AND USED AS BUSINESS OFFICE AND WAS WAITING TO RECEIVE HIS PAYCHECK WHEN HE WAS ASSAULTED BY A FELLOW EMPLOYE RESULTING IN DISABLING INJURY, THAT SINCE HE INCURRED THIS INJURY WHILE WAITING TO RECEIVE HIS PAYCHECK, IT WAS INCURRED IN THE SCOPE OF HIS EMPLOYMENT.

CLAIMANT'S FOREMAN TESTIFIED THAT THE CREW OF WHICH CLAIMANT WAS A MEMBER WAS PICKED UP AND GENERALLY DROPPED OFF AT THE END OF A WORKDAY AT A PLACE CALLED THE HOOK AND EYE CAFE - THAT ON THE DAY IN QUESTION THE FOREMAN HAD THE PAYCHECKS AND INFORMED THE EMPLOYES TO MEET HIM AT THE CAFE IN ORDER TO GET PAID. WHEN THE FOREMAN WENT TO THE CAFE, NO EMPLOYES WERE PRESENT SO HE WENT OVER TO THE TRAILER COURT WHERE HE HAD A TRAILER AND FOUND THE CREW HAVING A BIG PARTY. THE FOREMAN TESTIFIED HE HAD NEVER DISPERSED CHECKS AT THE TRAILER ON A CUSTOM BASIS BUT THAT ONCE IN AWHILE AN EMPLOYE WOULD TELL HIM TO KEEP HIS CHECK AND HE WOULD COME BY THE TRAILER LATER AND PICK IT UP.

THE REFEREE FOUND THAT THE TRAILER HAD NEVER BEEN USED AS AN OFFICE – ONE WITNESS TESTIFIED SHE WENT TO THE TRAILER NOT TO GET PAID BUT BECAUSE EVERYONE HAD DECIDED TO HAVE A PARTY.

THE REFEREE FOUND FROM THE TOTALITY OF THE EVIDENCE THAT SEVERAL PEOPLE HAD BEEN DRINKING HEAVILY AND, AS A RESULT OF THE PARTY AT THE TRAILER, CLAIMANT SUFFERED AN INJURY WHILE ENGAGED IN A NOT SO FRIENDLY WRESTLING MATCH WITH A FELLOW EMPLOYE. HE CONCLUDED THAT THE INJURY DID NOT ARISE OUT OF AND IN THE COURSE OF CLAIMANT'S EMPLOYMENT AND THAT THE DENIAL OF CLAIMANT'S CLAIM BY THE FUND WAS PROPER.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 3, 1975 IS AFFIRMED.

WCB CASE NO. 75–3221 MAY 27, 1976

MIKE PALODICHUK, CLAIMANT

NICKOLAUS ALBRECHT, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH GRANTED THE STATE ACCIDENT INSURANCE FUND'S MOTION TO DISMISS THE MATTER.

ON AUGUST 6, 1975 CLAIMANT'S COUNSEL REQUESTED A HEARING TO DETERMINE IF HE WAS ENTITLED TO PENALTIES BECAUSE OF THE FUND'S REFUSAL TO PAY ATTORNEY'S FEES ORDERED BY THE CIRCUIT COURT AND BY THE WORKMEN'S COMPENSATION BOARD. AT THE HEARING CLAIMANT'S COUNSEL AMENDED HIS ISSUE TO INCLUDE, ALTERNATIVELY, WHETHER CLAIMANT WAS ENTITLED TO PENALTIES ON THE SAME GROUNDS.

THE FUND MOVED TO DISMISS THE REQUEST FOR HEARING BECAUSE THERE WAS NO STATUTORY PROVISIONS FOR IMPOSITION OF PENALTIES FOR UNREASONABLE REFUSAL TO PAY ATTORNEY'S FEES.

THE REFEREE FOUND THAT IF THE REQUEST FOR HEARING WAS VIEWED AS A REQUEST BY COUNSEL (UNDERSCORED) HE WAS NOT ENTITLED TO A HEARING BECAUSE HE WAS NOT A 'PARTY' AS DEFINED BY ORS 656.002(17). IF THE REQUEST WAS VIEWED AS A REQUEST ON BEHALF OF THE CLAIMANT (UNDERSCORED) THEN CLAIMANT WAS ENTITLED TO A HEARING ON ANY QUESTION CONCERNING A CLAIM. ORS 656.283(1).

ORS 656.262(8) PROVIDES FOR THE IMPOSITION OF PENALTIES AGAINST INSURERS, MEASURED AGAINST COMPENSATION 'THEN DUE', FOR UNREASONABLE REFUSAL TO PAY COMPENSATION OR UNREASONABLE DELAY IN PAYING COMPENSATION. ORS 656.002(8) DEFINES COMPENSATION TO INCLUDE ALL BENEFITS, INCLUDING MEDICAL SERVICES, PROVIDED FOR A COMPENSABLE INJURY BY AN INSURER.

THE REFEREE TOOK ADMINISTRATIVE NOTICE OF THE BOARD'S ORDER ENTERED ON OCTOBER 30, 1974 IN THE ABOVE ENTITLED MATTER AND ALSO THE JUDGMENT ENTERED APRIL 15, 1975 BY THE CIRCUIT COURT FOR THE COUNTY OF MARION AND CONCLUDED THAT THE ATTORNEY'S FEES IN QUESTION WERE

AWARDED BY BOTH THE BOARD AND THE COURT BECAUSE OF THE INSURER'S FAILURE TO OBTAIN DISALLOWANCE OR REDUCTION OF AWARD. ORS 656.382(2).

THE REFEREE STATED THAT HAD THE ATTORNEY'S FEE IN QUESTION BEEN AWARDED PAYABLE OUT OF CLAIMANT'S COMPENSATION, THEN IT WOULD NOT HAVE LOST ITS IDENTITY AS COMPENSATION EVEN THOUGH PAID TO THE ATTORNEY AND, UNDER THOSE CIRCUMSTANCES, A PENALTY WOULD BE ASSESSABLE. HOWEVER, THAT WAS NOT THE SITUATION IN THIS CASE AND THE REFEREE CONCLUDED THAT THE MOTION WAS WELL TAKEN AND SHOULD BE GRANTED.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE OPINION AND ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 16, 1975 IS AFFIRMED.

WCB CASE NO. 74-3485 MAY 27, 1976

GUS KOSMOS, CLAIMANT

FABRE AND EHLERS, CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED SEPTEMBER 5, 1974 WHEREBY CLAIMANT WAS AWARDED 22.5 DEGREES FOR 15 PER CENT DISABILITY OF HIS LEFT LEG. CLAIMANT CONTENDS THAT HE IS PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF PHYSICAL AND (UNDERSCORED) PSYCHOLOGICAL CONDITIONS.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON FEBRUARY 7, 1972 WHEN HE SUFFERED AN OBLIQUE FRACTURE OF THE DISTAL FIBULA EXTENDING INTO THE ARTICULAR MARGIN OF THE LATERAL MALLEOLUS. CLAIMANT WAS FIRST SEEN BY DR. RASMUSSEN WHO CONTINUED TO TREAT HIM UNTIL JUNE 13, 1972 WHEN HE RELEASED HIM TO RETURN TO WORK.

ON AUGUST 16, 1972 CLAIMANT CAME UNDER THE CARE OF DR. BITTNER WHO REFERRED HIM TO DR. DONALD D. SMITH. DR. SMITH RELEASED CLAIMANT TO RETURN TO WORK ON DECEMBER 4, 1972 AND CLAIMANT RETURNED TO THE CARE OF DR. BITTNER. IN NOVEMBER, 1973 CLAIMANT WAS EXAMINED BY DR. PASQUESI AND IN APRIL 1974 REFERRED TO THE DISABILITY PREVENTION DIVISION BY THE EVALUATION DIVISION OF THE BOARD. AT DISABILITY PREVENTION DIVISION CLAIMANT WAS EXAMINED BY DR. GANTENBEIN AND ALSO BY DR. HICKMAN, A CLINICAL PSYCHOLOGIST.

IN AUGUST 1974 DR. BITTNER WAS OF THE OPINION THAT CLAIMANT'S CONDITION WAS MEDICALLY STATIONARY AND THE CLAIM WAS CLOSED ON SEPTEMBER 5, 1974 WITH THE AWARD OF 15 PER CENT LEFT LEG DISABILITY.

IT WAS SUGGESTED THAT CLAIMANT, WHO HAD DIFFICULTY SPEAKING ENGLISH, BE EXAMINED BY A DOCTOR WHO SPOKE GREEK - DR. LAHIRI WAS RECOMMENDED. HE EXAMINED CLAIMANT AFTER THE HEARING AS DID DR. BLACHLY, A PSYCHIATRIST, REPORTS WERE RECEIVED FROM BOTH DOCTORS PRIOR TO THE CLOSING OF THE HEARING.

CLAIMANT CONTENDS HE IS PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF THE ACCIDENT AND THE PSYCHOLOGICAL CONDITIONS WHICH WERE

AGGRAVATED BY THE ACCIDENT. THE EMPLOYER CONTENDS THAT CLAIMANT HAS A CHRONIC BRAIN SYNDROME OF UNKNOWN CAUSE AND THAT HE HAS FAILED TO SUBSTANTIATE A PSYCHOLOGICAL DISORDER WHICH WAS MATERIALLY RELATED TO HIS INDUSTRIAL ACCIDENT WHICH WOULD WARRANT A FINDING OF PERMANENT TOTAL DISABILITY.

CLAIMANT'S COMPLAINTS WERE NUMEROUS BUT THE REFEREE FOUND THAT THE ONLY MEDICAL EVIDENCE RELATING TO THE AREA OF INJURY INDICATED A FRACTURE OF THE LEFT ANKLE WHICH OCCURRED ON FEBRUARY 7, 1972. DR. BITTNER HAD REFERRED CLAIMANT TO DR. SMITH BECAUSE OF LOW BACK COMPLAINTS, HOWEVER, DR. SMITH DID NOT REPORT ANY OBJECTIVE MEDICAL FINDINGS RELATING THERETO. HE RELEASED CLAIMANT TO RETURN TO WORK IN DECEMBER 1972. DR. SMITH, DR. PASQUESI AND DR. GANTENBEIN ALL AGREED THAT CLAIMANT'S RIGHT SHOULDER COMPLAINTS WERE NOT RELATED TO HIS COMPENSABLE INJURY. DR. BITTNER AGREED THAT CLAIMANT HAS A MAXIMUM OF SYMPTOMS AND A MINIMUM OF FINDINGS.

THE REFEREE CONCLUDED THAT CLAIMANT'S ONLY PHYSICAL PROBLEMS WERE THE CONSEQUENCES OF THE LEFT ANKLE FRACTURE AND HYPERTENSION AND THE LATTER WAS NOT RELATED TO THE COMPENSABLE INJURY.

THERE WAS CONSIDERABLE EVIDENCE THAT CLAIMANT HAS EITHER A PSYCHOLOGICAL OR PSYCHIATRIC DYSFUNCTION WHICH IS NOT ORGANIC. MOST OF THE EXAMINERS HAD DIFFICULTY IN COMMUNICATING WITH CLAIMANT AND SOME OF THE TESTS TAKEN SHOWED INCOMPLETE RESULTS. DR. BLACHLY CONCLUDED THAT THE CAUSE OF CLAIMANT'S CHRONIC BRAIN SYNDROME WAS UNKNOWN AND COULD NOT BE ATTRIBUTED TO THE INJURY OF FEBRUARY 7, 1972. BOTH HE AND DR. HICKMAN FOUND CLAIMANT WAS A BORDERLINE INTELLECT, HOWEVER, DR. BITTNER DISAGREED, BASING HIS JUDGMENT ON THE FACT THAT CLAIMANT HAD BEEN A SUCCESSFUL BUSINESSMAN, HAVING OWNED AND OPERATED SUCCESSFUL RESTAURANTS IN BROOKLYN, NEW YORK AND LA GRANDE, OREGON. MANY OF THE PHYSICIANS FELT CLAIMANT WOULD NEVER RETURN TO WORK BECAUSE OF HIS DEPRESSION - DR. BITTNER FELT THIS DEPRESSION WAS THE RESULT OF THE DEATH OF CLAIMANT'S WIFE WHICH OCCURRED SOME TIME BETWEEN NOVEMBER 1973 AND MAY 1974.

THE REFEREE CONCLUDED THAT THE EVIDENCE INDICATED THAT CLAIMANT'S ONLY INJURY ON FEBRUARY 17, 1972 WAS TO HIS LEFT ANKLE AND THERE WAS NO REASON TO BELIEVE THAT CLAIMANT'S 'CHRONIC BRAIN SYNDROME' WAS CAUSALLY RELATED THERETO. HE AFFIRMED THE DETERMINATION ORDER WITH A REMARK THAT IT SHOULD BE FOR LEFT FOOT DISABILITY RATHER THAN LEFT LEG DISABILITY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE ORDER OF THE REFEREE. DR. LAHIRI, A GREEK-SPEAKING NEUROLOGIST, WAS OF THE OPINION, AFTER EXAMINING CLAIMANT, THAT THERE WAS VERY LITTLE IN THE WAY OF OBJECTIVE CLINICAL FINDINGS TO SUBSTANTIATE HIS MULTIPLE COMPLAINTS. HE FELT CLAIMANT'S SYMPTOMS WERE LARGELY OF A PSYCHOLOGICAL NATURE. DR. BLACHLY, A PSYCHIATRIST AT THE UNIVERSITY OF OREGON MEDICAL SCHOOL, CONCLUDED THAT THE CAUSE OF CLAIMANT'S CHRONIC BRAIN SYNDROME, WHICH IS ADMITTED, WAS UNKNOWN AND WAS NOT ATTRIBUTABLE TO THE INDUSTRIAL INJURY. APPARENTLY THE UNDERLYING PSYCHOLOGICAL OR NEUROTIC PROBLEM THAT CLAIMANT HAD WAS NOT AGGRAVATED BY HIS INDUSTRIAL INJURY, THEREFORE, THE SITUATION DIFFERS FROM THAT IN PATITTUCI V. BOISE CASCADE CORPORATION (UNDERSCORED), 8 OR APP 503.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 10, 1975 IS AFFIRMED.

WCB CASE NO. 74-4627 MAY 27, 1976

THE BENEFICIARIES OF
ELTON GALBREATH, DECEASED
PETERSON, SUSAK AND PETERSON,
CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER
CROSS REQUEST FOR REVIEW BY BENEFICIARIES

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH FOUND THAT THE DECEDENT WORKMAN, IMMEDIATELY PRIOR TO HIS DEATH, WAS PERMANENTLY AND TOTALLY DISABLED AND THAT THE BENEFICIARIES OF THE DECEDENT WORKMAN WERE ENTITLED TO BENEFITS BASED UPON THE PERMANENT TOTAL DISABILITY OF THE DECEDENT WORKMAN AS OF THE DATE OF HIS DEATH.

THE BENEFICIARIES OF THE DECEASED WORKMAN CROSS REQUESTED REVIEW BY THE BOARD OF THAT PORTION OF THE REFEREE'S ORDER WHICH AWARDED THEIR ATTORNEY 25 PER CENT OF THE COMPENSATION DUE AND PAYABLE UNDER THE TERMS OF THE REFEREE'S ORDER PAYABLE OUT OF SAID COMPENSATION AS PAID, NOT TO EXCEED 2,000 DOLLARS, CONTENDING THAT SINCE THIS WAS A REJECTED CASE THE ATTORNEY'S FEE SHOULD BE PAID BY THE EMPLOYER.

THE DECEDENT WORKMAN, WHO WAS APPROXIMATELY 57 YEARS OLD AT THE TIME OF HIS DEATH ON SEPTEMBER 27, 1974, HAD WORKED MOST OF HIS LIFE AS A LONG HAUL TRUCK DRIVER. HIS DEATH WAS NEITHER CAUSED BY NOR RELATED TO THE ACCIDENTAL INJURIES WHICH HE SUFFERED ON AUGUST 14, 1969 AND ON APRIL 25, 1972, INJURIES WHICH WERE INCURRED WHILE IN THE SERVICE OF THE SAME EMPLOYER WHICH WAS COVERED AT BOTH TIMES BY THE SAME INSURANCE CARRIER. SUBSEQUENT TO THE WORKMAN'S DEATH, DETERMINATION ORDERS WERE ENTERED FOR BOTH INJURIES. THE FIRST, RELATING THE INJURY INCURRED ON APRIL 25, 1972, WAS MAILED DECEMBER 13, 1974 - THE SECOND, RELATING TO THE INJURY OF AUGUST 14, 1969, WAS MAILED DECEMBER 30, 1974. NEITHER AWARDED CLAIMANT ANY COMPENSATION FOR PERMANENT PARTIAL DISABILITY AND EACH STATED IT WAS A DETERMINATION OF THE WORKER'S CLAIM ONLY AND THAT THE APPEAL RIGHTS SET FORTH BELOW PERTAINED ONLY TO THAT INJURY AND DID NOT PRECLUDE FILING OF A CLAIM FOR POSSIBLE FATAL BENEFITS.

THE EMPLOYER CONTENDS THAT THE DECEDENT WORKMAN'S CONDITION WAS NOT STATIONARY, THEREFORE, NO AWARD OF PERMANENT TOTAL DISABILITY COULD HAVE BEEN ENTERED AS A MATTER OF LAW. THE MEDICAL EVIDENCE INDICATES THAT NO FURTHER TREATMENT HAD BEEN RENDERED OR RECOMMENDED FOR THE DECEDENT WORKMAN FOR SEVERAL MONTHS PRIOR TO HIS DEATH EXCEPT A RECOMMENDATION THAT HE SEEK PSYCHIATRIC OR PSYCHOLOGICAL COUNSELING FOR A STATE OF DEPRESSION.

THE REFEREE FOUND IT WAS NOT NECESSARY THAT THE DECEDENT WORKMAN'S CONDITION BE STATIONARY BEFORE A FINDING COULD BE MADE OF PERMANENT AND TOTAL DISABILITY, CITING MIKOLICH V. SIAC (UNDERSCORED), 212 OR 36, 57, 58, WHEREIN THE COURT STATED THAT IT WAS EXPLICIT POLICY OF THE OREGON ACT THAT THE COMMISSION SHOULD WITHHOLD FINAL SETTLEMENT UNTIL EVERYTHING POSSIBLE HAS BEEN DONE TO RESTORE THE WORKMAN TO HEALTH. BECAUSE THE TEMPORARY TOTAL DISABILITY BENEFITS ARE, ROUGHLY, COMPARABLE TO THE PERMANENT TOTAL DISABILITY BENEFITS, THERE IS NO INCENTIVE FOR AN INJURED WORKMAN TO SEEK A QUICK DECISION ON THE QUESTION OF WHETHER OR NOT HE IS TEMPORARILY TOTALLY DISABLED OR PERMANENTLY TOTALLY DISABLED. A HOLDING THAT THE 'PERIOD OF PERMANENT TOTAL DISABILITY' MUST BE DETERMINED BY THE COMMISSION BEFORE

DEATH WOULD HAMPER THIS POLICY BY CREATING AN URGENT NECESSITY FOR AN EARLY DECISION. THE COURT CONCLUDED THAT THE WIDOW MAY SHOW THAT HER HUSBAND WAS, IN FACT, PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF HIS INJURY IN THE PERIOD IMMEDIATELY BEFORE HIS DEATH.

THE REFEREE THEN PROCEEDED TO DETERMINE WHETHER OR NOT THE DECEDENT WORKMAN WAS, IN FACT, PERMANENTLY AND TOTALLY DISABLED IMMEDIATELY PRIOR TO HIS DEATH. HE FOUND THAT THE MEDICAL RECORDS INDICATED A LONG-STANDING CONTRIBUTORY MEDICAL HISTORY, E.G., EARLY MORNING BACK STIFFNESS DATING FROM 1962, AT WHICH TIME CLAIMANT WAS DIAGNOSED AS HAVING BILATERAL RADICULOPATHY, MORE MARKED ON THE LEFT THAN ON THE RIGHT - SURGICAL INTERVENTIONS CONSISTING OF A LAMINECTOMY AND DISKECTOMY AT THE LUMBOSACRAL JOINT IN OCTOBER 1973, AND THE SURGICAL INTERVENTIONS NECESSITATED BY THE INJURIES OF 1969 AND 1972 WHICH INCLUDED A LAMINECTOMY, DISKECTOMY AT THE L4-5 LEVEL AND A FUSION FROM L4 TO S1. ALSO GIVEN CONSIDERATION BY THE REFEREE WERE THE MANY HOSPITALIZATIONS FOR TRACTION, WHIRLPOOL, PHYSICAL THERAPY, HEAT AND MASSAGE AND THE EXISTENCE OF A SEVERE ALCOHOL PROBLEM OF LONG-STANDING PRIOR TO THE INJURY WHICH HAD BEEN A CONTRIBUTING FACTOR UPON THE DECEDENT WORKMAN'S MEDICAL CONDITION AND, TOGETHER WITH THE MEDICATION HE HAD BEEN REQUIRED TO TAKE, FURTHER COMPLICATED HIS PROBLEM.

DR. VAN OSDEL, INITIALLY, FELT THAT THE DECEDENT WORKMAN WOULD HAVE BEEN ABLE TO RETURN TO HIS REGULAR EMPLOYMENT BUT IN HIS CLOSING REPORT FELT THAT THE PROGNOSIS WAS POOR DUE TO AGE AND THE FOUR BACK INJURIES WHICH HAD BEEN SUFFERED BY THE DECEASED WORKMAN - HE FELT, AT THAT TIME, THAT IT WAS HIGHLY UNLIKELY THAT THE WORKMAN WOULD BE EMPLOYABLE.

DR. CHERRY, WHO WAS THE DECEDENT WORKMAN'S BASIC TREATING PHYSICIAN FROM 1969 UNTIL THE TIME OF HIS DEATH, ALSO FELT THERE WAS VERY LITTLE LIKELIHOOD THAT THE DECEDENT WOULD HAVE BEEN ABLE TO RETURN TO ANY TYPE OF GAINFUL EMPLOYMENT. HE FELT THAT FROM AUGUST 1969 UNTIL THE WORKMAN'S DEATH ON SEPTEMBER 27, 1974, HE HAD BEEN IN ALMOST CONSTANT PAIN AND WAS TOTALLY DISABLED FROM JULY 1973 UNTIL THE DATE OF HIS DEATH.

THE REFEREE FOUND THAT DECEDENT WORKMAN HAD HAD AN EXCELLENT WORK HISTORY, WORKING FOR A SHORT PERIOD AT FARM LABOR AND ENGAGING DURING THE REST OF HIS ADULT WORKING LIFE IN DIFFERENT TYPES OF TRUCK DRIVING - THAT HE HAD ALSO BETWEEN HIS 1969 INJURY AND HIS 1972 INJURY STUDIED AND OBTAINED A REAL ESTATE LICENSE AND HAD TRIED FOR A SHORT PERIOD OF TIME TO SELL REAL ESTATE. HE GAVE THIS UP, HOWEVER, AND RETURNED TO DRIVING TRUCKS IN 1972.

THE EMPLOYER ALSO CONTENDS THAT IF THE ODD-LOT DOCTRINE IS APPLICABLE TO THE FACTS IN THIS CASE, THE REFEREE SHOULD CONSIDER THE FACT THAT THE DECEASED WORKMAN AND HIS BENEFICIARIES WERE RECEIVING NET INCOME EQUIVALENT TO HIS TAKE HOME PAY AND THAT THERE WAS REALLY NO MOTIVE FOR THE DECEASED WORKMAN TO ATTEMPT TO RETURN TO WORK.

THE REFEREE, ASSUMING FOR THE PURPOSE OF DISCUSSION ONLY THAT THE DECEASED WORKMAN CAME WITHIN THE ODD-LOT DOCTRINE, FELT THAT THE EVIDENCE OF CLAIMANT'S STEADY WORK HISTORY OVER A PERIOD OF 38 YEARS INDICATED GOOD MOTIVATION AND, FURTHERMORE, TAKING INTO CONSIDERATION THE ENTIRE MEDICAL RECORDS AND ALL THE TESTIMONY, THAT SUCH EVIDENCE INDICATES THAT THE DECEASED WORKMAN WAS SO INCAPACITATED AND DEVASTATED, BOTH PHYSICALLY AND MENTALLY, FROM THE COMBINED EFFECTS OF THE LAST TWO INJURIES THAT THE FACTOR OF MOTIVATION NEED NOT BE CONSIDERED IN THE DETERMINATION OF WHETHER THE DECEASED WORKMAN WOULD HAVE FALLEN WITHIN THE ODD-LOT DOCTRINE.

HE CONCLUDED THAT THE BENEFICIARIES HAD PROVEN A PRIMA FACIE CASE AND, THEREFORE, THE BURDEN OF SHOWING THE AVAILABILITY OF REGULAR AND GAINFUL EMPLOYMENT IN WHICH THE DECEASED COULD HAVE ENGAGED SHIFTED TO THE EMPLOYER. ALTHOUGH THE DECEDENT WORKMAN HAD BEEN ABLE TO SECURE A REAL ESTATE LICENSE AND HAD MADE SOME REAL ESTATE SALES, THE MEDICAL EVIDENCE CLEARLY INDICATED THAT BECAUSE OF CLAIMANT'S INABILITY TO RIDE IN AN AUTOMOBILE OR TO WALK ANY DISTANCE THAT IT WAS EXTREMELY DOUBTFUL THAT HE WOULD HAVE HAD ANY SUCCESS HAD HE PURSUED HIS REAL ESTATE ENDEAVOR. HE CONCLUDED THAT THE EMPLOYER HAD FAILED TO MEET THE BURDEN OF SHOWING THE AVAILABILITY OF SUITABLE AND GAINFUL EMPLOYMENT.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE WELL WRITTEN OPINION OF THE REFEREE IN ALL RESPECTS EXCEPT AS IT RELATES TO THE AWARD OF ATTORNEY'S FEES PAYABLE OUT OF THE COMPENSATION PAYABLE TO THE BENEFICIARIES. THE BOARD FINDS THAT THIS CLAIM FILED BY THE BENEFICIARIES OF THE DECEASED WORKMAN WAS REJECTED BY THE EMPLOYER AND, THEREFORE, UNDER THE PROVISIONS OF ORS 656.381(1) THE COUNSEL FOR THE BENEFICIARIES SHOULD BE AWARDED A SEPARATE ATTORNEY FEE FOR PREVAILING AT THE HEARING BEFORE THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 29, 1975 IS MODIFIED.

COUNSEL FOR THE BENEFICIARIES OF THE DECEASED WORKMAN, ELTON GALBREATH, IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES BEFORE THE REFEREE, THE SUM OF 2,000 DOLLARS PAYABLE BY THE EMPLOYER.

IN ALL OTHER RESPECTS THE ORDER OF THE REFEREE DATED DECEMBER 29, 1975 IS AFFIRMED.

COUNSEL FOR THE BENEFICIARIES OF THE DECEASED WORKMAN, ELTON GALBREATH, IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 500 DOLLARS PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-4408 JUNE 1, 1976

PAUL A. SNYDER, CLAIMANT

POZZI, WILSON AND ATCHISON, CLAIMANT'S ATTYS.
KENNETH KLEINSMITH, DEFENSE ATTY.
ORDER ON MOTION

ON MAY 21, 1976 CLAIMANT, THROUGH HIS COUNSEL, FILED A MOTION REQUESTING THE BOARD, PURSUANT TO ORS 656.295(5), TO REMAND THE ABOVE ENTITLED MATTER TO THE REFEREE FOR THE TAKING OF FURTHER EVIDENCE TO-WIT - THE REPORT OF DR. ARTHUR L. ECKHARDT, DATED MARCH 4, 1976, WHICH REPORT ALLEGEDLY WAS UNAVAILABLE TO CLAIMANT AT THE TIME OF THE HEARING.

THE BOARD, AFTER DUE CONSIDERATION OF THIS MATTER, FINDS THAT DR. ECKHARDT HAD BEEN CLAIMANT'S TREATING PHYSICIAN SINCE THE DATE OF HIS INJURY AND THAT THE INFORMATION CONTAINED IN HIS REPORT OF MARCH 4, 1976 UNDOUBTEDLY COULD HAVE BEEN OBTAINED AND PRESENTED AT THE TIME OF THE HEARING.

AT THE PRESENT TIME THERE IS BEFORE THE BOARD A REQUEST FOR REVIEW OF THE REFEREE'S ORDER ENTERED FEBRUARY 5, 1976 IN THE ABOVE

ENTITLED MATTER. ALL PARTIES HAVE PREVIOUSLY BEEN NOTIFIED OF THE TIME WITHIN WHICH EACH MAY FILE ITS BRIEF AND THE BOARD WILL PROCEED WITH CLAIMANT'S REQUEST FOR REVIEW UPON RECEIPT OF THE BRIEFS.

ORDER

THE MOTION TO REMAND RECEIVED ON MAY 21, 1976 IS DENIED.

(NO NUMBER AVAILABLE) JUNE 1, 1976

KEITH M. GILMORE, CLAIMANT

HERSHISER, MITCHELL AND WARREN,
DEFENSE ATTYS.
ORDER ON MOTION

ON MAY 21, 1976 THE BOARD RECEIVED FROM THE ATTORNEYS FOR THE EMPLOYER-CARRIER A MOTION FOR RECONSIDERATION OF THE BOARD'S OWN MOTION ORDER ENTERED MAY 14, 1976 IN THE ABOVE ENTITLED MATTER.

THE ORDER ENTERED MAY 14, 1976 REMANDED CLAIMANT'S CLAIM TO THE EMPLOYER AND ITS CARRIER FOR THE PAYMENT OF COMPENSATION AS PROVIDED BY LAW COMMENCING JANUARY 12, 1976 AND UNTIL THE CLAIM IS CLOSED PURSUANT TO ORS 656.278. THE ORDER RECITED THAT CLAIMANT HAD FURNISHED THE BOARD A MEDICAL REPORT FROM DR. WATKINS, DATED APRIL 20, 1976, AND ON MAY 5, 1976, THE CARRIER HAD BEEN FURNISHED A COPY OF DR. WATKINS' REPORT AND ADVISED THAT THE BOARD WOULD CONSIDER THE APPLICATION FOR OWN MOTION RELIEF ON MAY 10, 1976, BUT WOULD RECEIVE ANY INFORMATION FROM THE CARRIER WHICH IT WISHED TO SUBMIT PRIOR TO THAT DATE. NO INFORMATION FROM THE CARRIER WAS RECEIVED.

THE BOARD, AFTER GIVING DUE CONSIDERATION TO THE GROUNDS SET FORTH IN THE MOTION FOR RECONSIDERATION, CONCLUDES THAT THEY ARE NOT SUFFICIENT.

ORDER

THE MOTION FOR RECONSIDERATION OF THE BOARD'S OWN MOTION ORDER ENTERED IN THE ABOVE ENTITLED MATTER ON MAY 14, 1976 IS HEREBY DENIED.

WCB CASE NO. 74-4578 JUNE 1, 1976

CHARLES BARNES, CLAIMANT

EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
G. HOWARD CLIFF, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 96 DEGREES FOR 30 PER CENT UNSCHEDULED DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS BACK ON SEPTEMBER 10, 1973. DR. ANDERSON, AN ORTHOPEDIC SURGEON, SUSPECTED A RUPTURE DISC AND ON DECEMBER 3, 1973, A LAMINECTOMY AND DISC REMOVAL WAS PERFORMED. CLAIMANT WAS RELEASED TO RETURN TO REGULAR WORK ON

FEBRUARY 18, 1974, HOWEVER, BECAUSE OF CONTINUING SYMPTOMS, CLAIMANT WAS REFERRED TO DR. POULSON, AN ORTHOPEDIST, WHO PLACED CLAIMANT ON A 'LIGHT WORK' STATUS IN MAY 1974.

IN JULY 1974 CLAIMANT WAS REFERRED TO THE DISABILITY PREVENTION DIVISION WHERE THE INITIAL OBJECTIVE FINDINGS WERE 'PRACTICALLY NIL'. THE PSYCHOLOGICAL EVALUATION REVEALED ABOVE AVERAGE INTELLIGENCE, THE PSYCHOPATHOLOGY WAS MODERATE LARGELY ATTRIBUTABLE TO THE INDUSTRIAL INJURY. THE PSYCHOLOGIST FELT THE PROGNOSIS WAS HOPEFUL AND FOUND NO EVIDENCE OF MALINGERING. IT WAS FELT THAT CLAIMANT WAS WELL ENOUGH TO RETURN TO SCHOOL AND THAT IT WAS INADVISABLE FOR HIM TO RETURN TO CONSTRUCTION WORK.

IN A CLOSING REPORT, DATED SEPTEMBER 10, 1974, DR. ANDERSON INDICATED THAT CLAIMANT'S CONDITION WAS STATIONARY AND THAT HE COULD CARRY OUT GAINFUL OCCUPATION IF HIS MOTIVATION WAS SUFFICIENT. THEREAFTER, ON OCTOBER 18, 1974, A DETERMINATION ORDER AWARDED CLAIMANT TIME LOSS AND 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY.

IN MARCH 1975 DR. STEELE, AN ORTHOPEDIST, EXAMINED CLAIMANT WHO WAS COMPLAINING OF HEADACHES. DR. STEELE COULD NOT FIND ANY DIRECT RELATIONSHIP BETWEEN THESE HEADACHES AND THE BACK SURGERY AND SUSPECTED THAT THEY WERE RELATED TO ANXIETY AND TENSION RESULTING BOTH FROM THE SURGERY AND FROM CLAIMANT'S SCHOOLING AND HIS CONCERN ABOUT RETURNING TO WORK. A NEUROLOGICAL EVALUATION WAS SUGGESTED.

IN APRIL 1974, DR. PARSONS, A NEUROSURGEON, EXAMINED CLAIMANT AND DIAGNOSED A POSSIBLE RECURRENT LUMBOSACRAL DISC PROTRUSION TOGETHER WITH HEADACHE SECONDARY TO CERVICAL MUSCLE TENSION. IT WAS HIS OPINION THAT THE HEADACHE PROBLEM HAD BEEN INDIRECTLY CONTRIBUTED TO BY THE CLAIMANT'S INJURY AND THAT THE HEADACHES WERE A MAJOR DETERRENT FOR CLAIMANT'S CONTINUING SCHOOL WORK. A REPEAT MYELOGRAM WAS NORMAL. DR. PARSONS INDICATED CLAIMANT COULD PROBABLY REENTER SCHOOL USING MEDICATION TO CONTROL HIS TENSION HEADACHES, THAT WITH HIS LOW BACK PAIN CLAIMANT WAS MORE SUSCEPTIBLE TO CERVICAL TENSION HEADACHES. DR. PARSONS AGREED WITH THE DISABILITY RATING AND STATED CLAIMANT SHOULD NOT REPETITIVELY LIFT MORE THAN 40 TO 50 POUNDS AND SHOULD LIMIT HIS BENDING BUT HE COULD PROBABLY DO BENCH WORK - HE FELT CLAIMANT WAS MOTIVATED TO RETURN TO GAINFUL EMPLOYMENT AND THAT HIS HEADACHE PROBLEM WOULD BECOME LESS SEVERE IN THE FUTURE.

CLAIMANT ATTEMPTED AT TWO DIFFERENT TIMES TO RETURN TO WORK AT THE CANNERY BUT WAS UNSUCCESSFUL EACH TIME. CLAIMANT WAS ENROLLED AT CHEMEKETA COMMUNITY COLLEGE WHERE HE STAYED FOR APPROXIMATELY A MONTH AND A HALF BUT DISCONTINUED BECAUSE OF HIS SEVERE HEADACHES.

CLAIMANT HAS A HIGH SCHOOL EDUCATION AND PRIOR TO HIS INJURY HAD COMPLETED TWO YEARS AT THE UNIVERSITY OF OREGON, FIRST MAJORING IN ARCHITECTURE AND THEN SWITCHING TO BUSINESS ADMINISTRATION. CLAIMANT HAS NO OTHER SPECIAL TRAINING AND HAS NOT RECEIVED A DEGREE.

AT THE TIME OF THE HEARING CLAIMANT WAS STILL EXPERIENCING THE SAME TYPE OF BACK PAIN AND DISCOMFORT THAT HE HAD HAD WHEN HE ATTEMPTED TO RETURN TO WORK - HE ALSO WAS STILL BOTHERED BY HEADACHES. BENDING, LIFTING, CAUSED HIM PROBLEMS, ESPECIALLY LIFTING, AND HIS MOBILITY HAS BEEN SUBSTANTIALLY REDUCED - TWISTING AGGRAVATES HIS CONDITION AND HE IS UNABLE TO SIT, STAND OR WALK FOR LONG PERIODS OF TIME. THESE COMPLAINTS AND LIMITATIONS WERE CORROBORATED BY TESTIMONY OF OTHER WITNESSES.

THE REFEREE CONCLUDED, AFTER TAKING INTO ACCOUNT CLAIMANT'S

AGE, EDUCATION, TRAINING POTENTIAL, AND THE RESIDUALS OF HIS INDUSTRIAL INJURY, THAT CLAIMANT HAD SUFFERED A PERMANENT LOSS OF WAGE EARNING CAPACITY OF APPROXIMATELY 30 PER CENT. THE CLAIMANT APPEALS, CONTENDING THAT HIS DISABILITY IS FAR IN EXCESS OF THAT AWARDED BY THE REFEREE.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE. THE CLAIMANT IN HIS BRIEF STATES THAT THE REFEREE FAILED TO TAKE INTO CONSIDERATION THE HEADACHE PROBLEM WHICH COMPLICATED CLAIMANT'S VOCATIONAL REHABILITATION PROSPECTS - HOWEVER, THE BOARD NOTES THAT, TO THE CONTRARY, THE REFEREE CLEARLY STATES THAT HE CONSIDERED VARIOUS FACTORS INCLUDING THE RESIDUALS OF THE INJURY IN QUESTION, WITH EMPHASIS ON THE LOW BACK AND (UNDERSCORED) THE HEADACHES.

AFTER THE SURGERY, FROM WHICH CLAIMANT HAD A SUCCESSFUL RECOVERY, HE WAS RELEASED TO RETURN TO REGULAR WORK ON FEBRUARY 18, 1974. DR. POULSON INDICATED IN A REPORT OF JULY 25, 1974 THAT HE FELT CLAIMANT WAS CAPABLE OF WORK AND THAT CLAIMANT WAS AVOIDING IT AND IT COULD BE A CASE OF MALINGERING. DR. CARLSON RATED CLAIMANT'S PRESENT DISABILITY AS 'MILD'. DR. ANDERSON INDICATED ON SEPTEMBER 10, 1974 THAT CLAIMANT WAS ABLE TO CARRY OUT GAINFUL OCCUPATION AT THAT TIME IF HIS MOTIVATION INDICATED THAT HE WOULD CARE TO DO SO. DR. PARSONS, AFTER A NEUROLOGICAL EXAMINATION OF CLAIMANT, FELT THAT THE INITIAL AWARD OF 32 DEGREES ADEQUATELY COMPENSATED CLAIMANT FOR HIS DISABILITY AND HE INDICATED THAT CLAIMANT SHOULD ATTEMPT TO GET BACK INTO GAINFUL ACTIVITY - HE AGREED WITH DR. ANDERSON THAT CLAIMANT WAS CAPABLE OF CARRYING OUT A GAINFUL OCCUPATION.

IT APPEARS THAT CLAIMANT'S TREATING PHYSICIAN, DR. ANDERSON, AS WELL AS THE OTHER PHYSICIANS, WERE RATHER CRITICAL OF CLAIMANT'S MOTIVATION AND CLAIMANT'S OWN TESTIMONY AT THE HEARING DOES LITTLE TO SUPPORT A FINDING THAT HE WAS MOTIVATED TO RETURN TO WORK.

THE BOARD CONCLUDES THAT THE REFEREE MADE AN ADEQUATE AND ACCURATE ASSESSMENT OF CLAIMANT'S PERMANENT LOSS OF WAGE EARNING CAPACITY AND AFFIRMS HIS ORDER.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 20, 1975 IS AFFIRMED.

SAIF CLAIM NO. OD 14644 JUNE 1, 1976

GEORGE DILLON, CLAIMANT

FRANKLIN, BENNETT, OFELT AND JOLLES,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER

ON OCTOBER 14, 1965 CLAIMANT WAS AWARDED PERMANENT TOTAL DISABILITY. ON OCTOBER 14, 1974 THE STATE ACCIDENT INSURANCE FUND REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND GIVE CONSIDERATION TO THE CANCELLATION OF THE PERMANENT TOTAL DISABILITY AWARD - THE REQUEST WAS SUPPORTED BY FINDINGS AND OPINIONS EXPRESSED BY DR. MALINER IN A REPORT DATED SEPTEMBER 18, 1975.

THE BOARD REMANDED THE MATTER TO THE HEARINGS DIVISION TO SET FOR A HEARING, AFTER DUE NOTICE GIVEN TO ALL PARTIES CONCERNED, FOR THE TAKING OF EVIDENCE WITH RESPECT TO CLAIMANT'S PRESENT CONDITION.

UPON THE CONCLUSION OF THE HEARING, THE REFEREE WAS DIRECTED TO SUBMIT HIS FINDINGS AND RECOMMENDATIONS TO THE BOARD WITH COPIES OF SAME FURNISHED TO ALL PARTIES PRESENT AND-OR REPRESENTED AT THE HEARING.

A HEARING WAS HELD ON SEPTEMBER 16, 1976, A TRANSCRIPT WAS FURNISHED TO THE BOARD TOGETHER WITH A RECOMMENDATION BY REFEREE WILLIAM J. FOSTER AND THE DEPOSITION OF DR. PARVARESH AND THE DEPOSITION OF DR. MALINER WHICH WERE RECEIVED IN EVIDENCE BY REFEREE FOSTER.

THE BOARD, ON DE NOVO REVIEW OF THE TRANSCRIPT AND THE EVIDENCE, AND AFTER CONSIDERATION OF THE RECOMMENDATION OF REFEREE FOSTER, A COPY OF WHICH IS ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF, ACCEPTS THE RECOMMENDATION.

ORDER

THE REQUEST MADE BY THE STATE ACCIDENT INSURANCE FUND ON OCTOBER 14, 1974 THAT THE BOARD EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND GIVE CONSIDERATION TO THE CANCELLATION OF THE PERMANENT TOTAL DISABILITY AWARD GIVEN CLAIMANT ON OCTOBER 14, 1965 IS HEREBY DENIED.

THE REQUEST BY THE STATE ACCIDENT INSURANCE FUND THAT THE BOARD EXERCISE ITS OWN MOTION JURISDICTION NECESSITATED THE HEARING - THE FUND WAS NOT SUCCESSFUL IN EITHER DIMINISHING OR TERMINATING THE AWARD OF PERMANENT TOTAL DISABILITY, THEREFORE, CLAIMANT'S ATTORNEY IS AWARDED AS A REASONABLE ATTORNEY'S FEE, THE SUM OF 600 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

SAIF CLAIM NO. HB 163064 JUNE 1, 1976

DANNIE L. JONES, CLAIMANT

BRYANT, EDMONDS AND ERICKSON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION DETERMINATION

THE CLAIMANT SUFFERED A COMPENSABLE INJURY ON DECEMBER 7, 1965, SUFFERING FACIAL LACERATIONS. HE LATER DEVELOPED HEADACHES AND BACK PROBLEMS. THE CLAIM WAS INITIALLY CLOSED ON JULY 18, 1966 WITH AN AWARD OF 15 PER CENT UNSCHEDULED DISABILITY - IT WAS REOPENED IN SEPTEMBER FOR FURTHER TREATMENT BY DR. GILL. A LAMINECTOMY WAS PERFORMED IN JANUARY 1967 AND CLAIMANT WAS AWARDED AN ADDITIONAL 25 PER CENT UNSCHEDULED DISABILITY FOR A TOTAL OF 40 PER CENT OF THE MAXIMUM.

ON MAY 21, 1968 A CIRCUIT COURT STIPULATION JUDGMENT GRANTED AN ADDITIONAL 20 PER CENT, INCREASING HIS TOTAL AWARD TO 60 PER CENT.

ON OCTOBER 22, 1973 THE BOARD ENTERED ITS OWN MOTION ORDER DIRECTING THE CLAIM TO BE REOPENED FOR FURTHER TREATMENT. SURGERY WAS PERFORMED BY DR. GILL ON JANUARY 21, 1974, A HEMILAMINECTOMY AT L4-5 LEVEL. THE CLAIM WAS CLOSED ON NOVEMBER 18, 1974, PURSUANT TO ORS 656.278 WITH NO ADDITIONAL AWARD FOR PERMANENT PARTIAL DISABILITY.

CLAIMANT HAD BEEN UNSUCCESSFULLY INVOLVED IN A VOCATIONAL REHABILITATION PROGRAM AND DURING THE ENTIRE PERIOD IN WHICH THE CLAIM HAS BEEN CONSIDERED, THE MAJORITY OF THE DOCTORS HAVE FOUND THE SUBJECTIVE COMPLAINTS TO OUTWEIGH THE PHYSICAL FINDINGS - HOWEVER, ON AUGUST 28, 1975 THE CLAIM WAS REOPENED FOR A THIRD TIME BY A BOARD'S OWN MOTION ORDER AND FURTHER SURGERY, CONSISTING OF A FUSION PERFORMED

BY DR. WATTLEWORTH ON OCTOBER 29, 1975. ON APRIL 16, 1976 DR. WATTLEWORTH STATED THAT CLAIMANT'S CONDITION WAS MEDICALLY STATIONARY WITH A SOLID FUSION AND HE RELEASED HIM TO RETURN TO LIGHT WORK.

BASED UPON THE PHYSICAL FINDINGS, AGE, INTELLIGENCE AND POTENTIAL FOR RETRAINING, TOGETHER WITH MOTIVATIONAL FACTORS, IT WAS THE RECOMMENDATION OF THE EVALUATION DIVISION OF THE BOARD THAT CLAIMANT BE AWARDED NO ADDITIONAL COMPENSATION FOR PERMANENT PARTIAL DISABILITY BECAUSE HE HAD NOT SUFFERED A LOSS OF EARNING CAPACITY GREATER THAN THAT FOR WHICH HE HAD PREVIOUSLY BEEN AWARDED, BUT THAT HE WOULD BE AWARDED COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM OCTOBER 29, 1975 THROUGH APRIL 16, 1976, BOTH DATES INCLUSIVE.

IT IS SO ORDERED.

WCB CASE NO. 75-4945 JUNE 1, 1976
WCB CASE NO. 73-4017

BRINGFRIED RATTAY, CLAIMANT

MARTIN, BISCHOFF, TEMPLETON AND BIGGS,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
ORDER ON MOTION

ON APRIL 27, 1976 THE CLAIMANT, PURSUANT TO ORS 656.278, REQUESTED THE BOARD TO MODIFY, CHANGE OR TERMINATE ITS ORDER ON REVIEW ENTERED IN THE ABOVE ENTITLED MATTER ON APRIL 29, 1975. CLAIMANT, IN SUPPORT OF HIS MOTION, STATED THAT THERE WAS NEWLY DISCOVERED EVIDENCE RECENTLY ACQUIRED WHICH CLEARLY ESTABLISHED THAT HIS BACK PROBLEMS WERE CAUSED BY HIS INDUSTRIAL INJURY.

CLAIMANT SUFFERED AN INDUSTRIAL INJURY ON NOVEMBER 22, 1971, HIS CLAIM WAS CLOSED INITIALLY BY A DETERMINATION ORDER MAILED APRIL 16, 1973 WHICH AWARDED CLAIMANT 5 PER CENT LOSS OF HIS RIGHT LEG - CLAIMANT'S AGGRAVATION RIGHTS WILL NOT EXPIRE UNTIL APRIL 15, 1978.

THE BOARD IS OF THE OPINION THAT IT WOULD NOT BE PROPER FOR IT TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 DURING THE TIME WITHIN WHICH THE CLAIMANT HAS THE RIGHT TO REQUEST A HEARING ON AGGRAVATION UNDER THE PROVISIONS OF ORS 656.273.

AFTER A HEARING, A REFEREE IN HIS ORDER, DATED OCTOBER 9, 1974, AWARDED CLAIMANT 22.5 DEGREES FOR 15 PER CENT LOSS OF THE RIGHT LEG BUT FOUND CLAIMANT HAD NOT MET HIS BURDEN OF PROOF THAT HIS ALLEGED BACK PROBLEMS WERE PRECIPITATED BY THE INDUSTRIAL INJURY SUFFERED NOVEMBER 22, 1971. ON APRIL 29, 1975 THIS ORDER WAS AFFIRMED BY THE BOARD. IF CLAIMANT HAS MEDICAL EVIDENCE WHICH WOULD SUPPORT A CLAIM FOR AGGRAVATION HE IS AFFORDED THE OPPORTUNITY OF FILING SUCH CLAIM UNDER THE PROVISIONS OF ORS 656.273.

ORDER

THE MOTION REQUESTING THE BOARD, PURSUANT TO ITS OWN MOTION JURISDICTION GRANTED BY ORS 656.278, TO MODIFY, CHANGE OR TERMINATE ITS ORDER ON REVIEW ENTERED IN THE ABOVE ENTITLED MATTER ON APRIL 29, 1975 IS HEREBY DENIED.

CLAIM NO. 52D—862588 JUNE 1, 1976

TRENTON J. WANN, CLAIMANT

EVOHL F. MALAGON, CLAIMANT'S ATTY.
TWING, ATHERLY AND BUTLER,
DEFENSE ATTYS.
OWN MOTION ORDER

ON APRIL 14, 1976, THE CLAIMANT, THROUGH HIS ATTORNEY, FILED AN AMENDED REQUEST FOR THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND REOPEN HIS CLAIM RELATING TO HIS INDUSTRIAL ACCIDENT OF JUNE 21, 1966.

ON JANUARY 9, 1976, DR. GOLDEN STATED THAT HE HAD EVALUATED CLAIMANT FOR HEADACHES WHICH APPEARED, ON THE BASIS OF THE HISTORY, TO BE CAUSALLY RELATED TO CLAIMANT'S 1966 INDUSTRIAL INJURY - HOWEVER, HE STATED, ADDITIONALLY, THAT UNTIL HE WAS ABLE TO COMPLETE SOME ADDITIONAL LABORATORY EXAMINATIONS AND EVALUATIONS, HE WOULD BE UNABLE TO DETERMINE WHETHER OR NOT IT WAS RELATED TO THE INDUSTRIAL INJURY. DR. GOLDEN SAID THE REOPENING OF CLAIMANT'S CASE WAS JUSTIFIED AT THAT TIME IN ORDER TO ESTABLISH THIS RELATIONSHIP.

THE EMPLOYER AND ITS CARRIER RESPONDED PURSUANT TO THE RULES AND REGULATIONS OF THE BOARD STATING THAT THE PRESENCE OF THE INJURIES AND THE ILLNESSES WHICH EXISTED BEFORE AND AFTER THE INDUSTRIAL INJURY, PLUS DR. GOLDEN'S REPORT THAT HE WAS UNABLE TO DETERMINE WHETHER OR NOT CLAIMANT'S PROBLEMS WERE RELATED TO THE INDUSTRIAL INJURY, JUSTIFIED RESISTANCE TO A REOPENING UNDER OWN MOTION JURISDICTION.

THE BOARD, AFTER CONSIDERING THE MEDICAL EVIDENCE PRESENTLY BEFORE IT, CONCLUDES THAT IT IS NOT SUFFICIENT TO JUSTIFY REOPENING THIS CLAIM AT THIS TIME - HOWEVER, CLAIMANT IS NOT PRECLUDED FROM FURNISHING ADDITIONAL MEDICAL EVIDENCE TO THE BOARD WITH COPIES TO THE EMPLOYER AND ITS CARRIER, AND THE BOARD WILL, AT THAT TIME, AGAIN GIVE CONSIDERATION TO CLAIMANT'S MOTION.

ORDER

THE MOTION TO REOPEN CLAIMANT'S CLAIM, PURSUANT TO ORS 656.278, IS HEREBY DENIED.

CLAIM NO. B53—108389 JUNE 1, 1976

STANLEY R. EDWARDS, CLAIMANT

OWN MOTION DETERMINATION

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS LOWER BACK ON JANUARY 19, 1966. DR. CHERRY PERFORMED A FUSION AT THE L-4, L-5 AND S-1 INTERSPACES AND THE CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED NOVEMBER 7, 1967 WHEREBY CLAIMANT WAS AWARDED 25 PER CENT LOSS OF AN ARM BY SEPARATION FOR HIS UNSCHEDULED LOW BACK DISABILITY.

THE CLAIM WAS REOPENED IN SEPTEMBER 1970 FOR A LAMINECTOMY PERFORMED AT L-4 AND L-5 LEVEL INTERSPACE - THE FUSION AT THAT TIME WAS SOLID. THE CLAIM WAS AGAIN CLOSED BY A DETERMINATION ORDER MAILED AUGUST 18, 1971 WHICH GRANTED CLAIMANT AN ADDITIONAL 15 PER CENT LOSS OF AN ARM BY SEPARATION FOR HIS UNSCHEDULED LOW BACK DISABILITY.

IN SEPTEMBER 1975, DR. CHERRY REQUESTED THE CARRIER, EMPLOYERS INSURANCE OF WAUSAU, TO REOPEN CLAIMANT'S CLAIM AND THE CARRIER DID SO. CLAIMANT WAS TREATED BY DR. CHERRY AT ST. VINCENT'S HOSPITAL FROM NOVEMBER 5 TO NOVEMBER 18, 1975 AND WAS SEEN IN CONSULTATION BY DR. KLOOS AND DR. PEACOCK. DR. CHERRY RELEASED CLAIMANT TO RETURN TO LIGHT WORK ON DECEMBER 1, 1975 AND TO REGULAR WORK ON DECEMBER 15, 1975.

ON MARCH 22, 1976, DR. CHERRY MADE A CLOSING EXAMINATION OF CLAIMANT AND REPORTED THAT CLAIMANT APPEARED BETTER THAN HE HAD FOR A LONG PERIOD OF TIME, HE FELT CLAIMANT'S CLAIM COULD BE CLOSED AND THAT CLAIMANT DID NOT HAVE ANY INCREASED DISABILITY SINCE HIS PREVIOUS CLOSURE.

ON MARCH 25, 1976 THE EMPLOYER, TEKTRONIX, INC., REQUESTED A DETERMINATION BASED UPON DR. CHERRY'S CLOSING EXAMINATION.

ORDER

CLAIMANT IS AWARDED COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM NOVEMBER 4 THROUGH NOVEMBER 30, 1975, AND FOR TEMPORARY PARTIAL DISABILITY FROM DECEMBER 1, 1975 THROUGH DECEMBER 14, 1975. CLAIMANT IS NOT ENTITLED TO ANY ADDITIONAL AWARD OF COMPENSATION FOR PERMANENT PARTIAL DISABILITY.

SAIF CLAIM NO. A 569585 JUNE 1, 1976

JAMES E. NATIONS, CLAIMANT

ALLEN G. OWEN, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER

CLAIMANT, THROUGH HIS COUNSEL, REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 TO DETERMINE WHETHER CLAIMANT IS ENTITLED TO FURTHER BENEFITS AS A RESULT OF HIS INDUSTRIAL INJURY SUFFERED ON OCTOBER 17, 1956.

CLAIMANT'S CLAIM HAD BEEN INITIALLY CLOSED ON FEBRUARY 4, 1957. ON APRIL 23, 1973 A LUMBAR MYELOGRAM WAS PERFORMED AND SUBSEQUENTLY A LUMBAR LAMINECTOMY AT L4-5.

THE QUESTION IS WHETHER THERE IS A MATERIAL CAUSAL CONNECTION BETWEEN CLAIMANT'S OCTOBER 17, 1956 INJURY AND THE 1973 SURGERY. THE BOARD DID NOT HAVE SUFFICIENT EVIDENCE TO MAKE AN INFORMED JUDGMENT AND CONCLUDED THAT 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.

ON APRIL 21, 1976 A HEARING WAS HELD BEFORE REFEREE WILLIAM J. FOSTER AND ON MAY 20, 1976, THE BOARD WAS FURNISHED A TRANSCRIPT OF THIS HEARING AND THE RECOMMENDATION OF THE REFEREE.

THE BOARD, AFTER REVIEWING THE TRANSCRIPT OF THE HEARING AND GIVING DUE CONSIDERATION TO THE RECOMMENDATION, ADOPTS THE REFEREE'S RECOMMENDATION, A COPY OF WHICH IS INCORPORATED HEREIN AND BY THIS REFERENCE MADE A PART HEREOF.

ORDER

CLAIMANT'S CLAIM IS REMANDED TO THE STATE ACCIDENT INSURANCE FUND TO BE ACCEPTED FOR THE PAYMENT OF COMPENSATION AS PROVIDED BY

LAW, COMMENCING MARCH 27, 1973 AND UNTIL THE CLAIM CLOSURE IS AUTHORIZED PURSUANT TO ORS 656.278.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE, 25 PER CENT OF THE TEMPORARY TOTAL DISABILITY COMPENSATION PAYABLE OUT OF SAID COMPENSATION AS PAID TO A MAXIMUM OF 250 DOLLARS.

WCB CASE NO. 75-2965 JUNE 3, 1976

MARGARET O' NEAL, CLAIMANT

MERTEN AND SALTVEIT, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY COMMISSIONERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED JUNE 13, 1975, AWARDING CLAIMANT NO COMPENSATION FOR PERMANENT PARTIAL DISABILITY AS A RESULT OF HER COMPENSABLE OCCUPATIONAL DISEASE OF LEG MUSCLE SPASMS.

CLAIMANT, WHO WAS 52 AT THE TIME OF THE HEARING, WAS EMPLOYED AS A MAID BY ST. VINCENT'S HOSPITAL FROM DECEMBER 19, 1970 TO FEBRUARY 1974. AS A RESULT OF HER JOB ACTIVITIES, WHICH INCLUDED EXTENSIVE PUSHING AND PULLING OF A LARGE MAID'S CART, CLAIMANT SUFFERED LEG MUSCLE SPASMS. HER CLAIM FOR AN OCCUPATIONAL DISEASE WAS INITIALLY DENIED, HOWEVER, AFTER EXTENDED LITIGATION, THE COURT OF APPEALS ISSUED ITS OPINION THAT CLAIMANT'S MUSCLE SPASM CONSTITUTED AN OCCUPATIONAL DISEASE. O'NEAL V. SISTERS OF PROVIDENCE, (UNDERSCORED) 250 OAS 246.

THE CLAIM WAS REMANDED TO THE EMPLOYER FOR THE PAYMENT OF BENEFITS FROM THE DATE CLAIMANT WAS ADVISED BY HER DOCTOR IN FEBRUARY 1974 TO CEASE WORKING AND WAS CLOSED BY THE DETERMINATION ORDER MENTIONED ABOVE, WHICH AWARDED CLAIMANT COMPENSATION FOR TEMPORARY TOTAL DISABILITY INCLUSIVELY FROM FEBRUARY 13, 1975 THROUGH MAY 14, 1975.

CLAIMANT HAD TERMINATED HER WORK IN FEBRUARY 1974 UPON THE ADVICE OF DR. RINEHART AND SHE HAS NOT WORKED NOR MADE ANY ATTEMPT TO SEEK EMPLOYMENT SINCE THAT DATE. SHE HAS CONTINUED THERAPY WITH DR. RINEHART - HER SCHEDULE, INITIALLY, WAS THREE TIMES A WEEK AND HAS NOW BEEN REDUCED TO TWICE A WEEK. IT CONSISTS OF MASSAGE, RUB DOWNS, ULTRA SOUND MACHINE AND A NEW TYPE OF PUMP MACHINE, THE FUNCTION OF WHICH WAS NOT MADE COMPLETELY CLEAR. CLAIMANT ALSO EXERCISES ON A STATIONARY BICYCLE AT THE EUROPEAN HEALTH SPA WHICH SHE ATTENDS THREE TIMES A WEEK AND ALSO WHERE SHE USES THE HYDRO POOL AND DOES SOME SWIMMING.

CLAIMANT CONTENDS THAT HER CASE WAS PREMATURELY CLOSED, THAT DR. RINEHART'S REPORT, DATED NOVEMBER 24, 1975, SPECIFICALLY STATED CLAIMANT WAS NOT MEDICALLY STATIONARY. DR. KIEST AND DR. GRIPEKOVEN, BOTH ORTHOPEDIC PHYSICIANS, FOUND CLAIMANT'S CONDITION TO BE MEDICALLY STATIONARY WITH NO OBJECTIVE FINDINGS TO EXPLAIN HER LEG COMPLAINTS WHICH EACH ASCRIBED TO A STRONG FUNCTIONAL COMPONENT. BOTH CONCLUDED CLAIMANT COULD BE EMPLOYED ON A FULL TIME BASIS. DR. RINEHART'S CONCLUSIONS ARE DIAMETRICALLY OPPOSED TO THOSE OF DR. KIEST AND DR. GRIPEKOVEN. DR. GRIPEKOVEN, IN HIS LATEST REPORT, STATED HE WAS UNFAMILIAR WITH THE TYPE OF TREATMENT CLAIMANT HAS BEEN RECEIVING FROM

DR. RINEHART AND WAS ALSO UNAWARE OF ITS ACCEPTANCE AS A STANDARD MEDICAL PRACTICE - THAT APPARENTLY CLAIMANT WAS NOT BEING TREATED FOR A SPECIFIC ORGANIC PROBLEM. DR. KIEST'S COMMENTS WERE EVEN MORE CAUSTIC WITH RESPECT TO THE TREATMENT CLAIMANT WAS PRESENTLY RECEIVING. NEITHER DR. KIEST NOR DR. GRIPEKOVEN BELIEVED FURTHER TREATMENT WAS NEEDED. CLAIMANT TESTIFIED THAT DR. RINEHART HAD BEEN TREATING HER WITH THERAPY FOR OVER ONE AND A HALF YEARS BY GIVING HER GENERAL BODY MASSAGE.

THE REFEREE CONCLUDED THAT THE TREATMENT RECEIVED BY DR. RINEHART MUST BE CHARACTERIZED AS PALLIATIVE OR SUPPORTIVE AND FOUND THAT CLAIMANT'S CONDITION WAS MEDICALLY STATIONARY AND HAD BEEN AT THE TIME OF HER CLAIM CLOSURE.

ON THE ISSUE OF THE EXTENT OF PERMANENT DISABILITY, IF ANY, SUSTAINED BY CLAIMANT AS A RESULT OF HER OCCUPATIONAL DISEASE, DR. KIEST IN A REPORT, DATED OCTOBER 10, 1975, STATED THAT CLAIMANT HAD NO COMPLAINTS REFERRABLE TO HER LEG, THAT SHE HAD NO COMPLAINTS EXCEPT FOR HER RIGHT SHOULDER GIRDLE AREA AND SOME LOW BACK PAIN. HE FOUND CLAIMANT HAD NO OVERT PAIN ON NORMAL APPARENT MOTION OF HER MUSCULOSKELETAL SYSTEM, THAT SHE USED HER ARMS AND LEGS IN A NORMAL FASHION AND WALKED WITH A NORMAL GAIT. DR. GRIPEKOVEN, WHO EXAMINED CLAIMANT ABOUT ONE WEEK LATER, STATED THAT CLAIMANT'S COMPLAINTS AT THAT TIME HAD SHIFTED SOMEWHAT AND IT WAS HER LEFT SHOULDER GIRDLE, NECK AND ARM WHICH GAVE HER THE GREATEST DISCOMFORT. HIS DIAGNOSIS WAS NECK AND BACK PAIN WITH NO OBJECTIVE ORGANIC ETIOLOGY ALTHOUGH CLAIMANT WAS CLAIMING PERMANENT DISABILITY AS A RESULT OF LEG MUSCLE SPASMS.

THE REFEREE CONCLUDED THAT CLAIMANT'S PROBLEMS WHICH PREVENTED HER FROM WORKING APPARENTLY WERE LARGELY OF AN EMOTIONAL NATURE. HE ACCORDED MORE WEIGHT TO THE OPINIONS EXPRESSED BY DR. KIEST AND DR. GRIPEKOVEN, BOTH OF WHOM ARE ORTHOPEDIC PHYSICIANS, THAN TO THE OPINION OF DR. RINEHART, A RHEUMATOLOGIST. HE FURTHER CONCLUDED THAT THERE WAS NO CREDIBLE EVIDENCE THAT CLAIMANT HAD ANY NEED FOR FURTHER MEDICAL TREATMENT OR HAD SUSTAINED ANY PERMANENT DISABILITY AS A RESULT OF HER INDUSTRIAL INJURY. HE AFFIRMED THE DETERMINATION ORDER.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 31, 1975 IS AFFIRMED.

WCB CASE NO. 75-953 JUNE 3, 1976
WCB CASE NO. 75-954

DOUGLAS J. MC CLEAN, CLAIMANT
MOORE, WURTZ AND LOGAN, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDERS MAILED MARCH 25, 1974 AND JUNE 17, 1975.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON SEPTEMBER 5, 1973 TO HIS RIGHT LEG AND FOOT. AN OPERATION WAS PERFORMED ON THE RIGHT

KNEE IN OCTOBER 1973 AND CLAIMANT RETURNED TO WORK IN JANUARY 1974. HE WAS RECOVERING REASONABLY WELL FROM THE RESIDUAL CONSEQUENCE OF THE FIRST INJURY WHEN HIS RIGHT KNEE WAS REINJURED ON FEBRUARY 4, 1974. AFTER THE REINJURY BUT BEFORE A DETERMINATION COULD BE MADE WITH RESPECT TO ANY FURTHER PERMANENT RESIDUALS, THE CLAIM ON THE ORIGINAL INJURY WAS CLOSED BY A DETERMINATION ORDER MAILED MARCH 25, 1974 WHICH GRANTED CLAIMANT TIME LOSS AND 7.5 DEGREES FOR 5 PER CENT LOSS OF THE RIGHT LEG.

FOLLOWING THE REINJURY CLAIMANT CONTINUED TO HAVE DIFFICULTY WITH HIS RIGHT KNEE AND SOUGHT FURTHER TREATMENT. IT WAS DETERMINED THAT AN ADDITIONAL OPERATION WOULD BE NECESSARY. THE FUND REOPENED THE CLAIM ON THE ORIGINAL INJURY, CONTINUING THE PROCESSING OF THE CLAIM TO THE RIGHT KNEE AS ONE INJURY INVOLVING BOTH THE ORIGINAL INJURY OF SEPTEMBER 1973 AND THE REINJURY OF FEBRUARY 1974. THE SECOND SURGERY WAS PERFORMED IN JUNE 1974 AND THE CLAIM WAS RECLOSED ON JUNE 17, 1975 BY A SECOND DETERMINATION ORDER WHICH GRANTED CLAIMANT ADDITIONAL TIME LOSS AND AN ADDITIONAL AWARD OF 22.5 DEGREES FOR 15 PER CENT LOSS OF THE RIGHT LEG, GIVING CLAIMANT A TOTAL AWARD OF 30 DEGREES OF A MAXIMUM OF 150 DEGREES.

CLAIMANT FILED SEPARATE REQUESTS FOR HEARING SETTING FORTH THE SPECIFIC DATES OF THE ORIGINAL INJURY AND THE REINJURY.

THE REFEREE FOUND THAT CLAIMANT DID HAVE MODERATE PERMANENT IMPAIRMENT OF THE RIGHT KNEE. HE CONTINUES TO HAVE LOCKING OF THE JOINTS ON OCCASION, SWELLING AND IN THE MORNINGS A STIFF LEG. ALSO THERE IS A LIMITATION OF WEIGHT BEARING AND OCCASIONAL PAIN WHICH CAUSES CLAIMANT TO GUARD HIS MOVEMENTS AND ACTIVITIES AS HE IS FEARFUL OF REINJURING THE RIGHT KNEE AGAIN. CLAIMANT IS ON AN EXERCISE PROGRAM ATTEMPTING TO STRENGTHEN THE LEG BUT THE REFEREE FELT CLAIMANT HAD NOT REALLY TESTED HIS LEG WITH MUCH ACTIVITY SINCE RECOVERY FROM THE REINJURY.

THE REFEREE CONCLUDED THAT THE EVIDENCE INDICATED THAT CLAIMANT HAD NOT LOST MORE THAN 20 PER CENT OF THE FUNCTIONAL USE OF HIS RIGHT LEG FOR MOST NORMAL PURPOSES. PART OF THE RESTRICTION OF USE IS VOLUNTARY BECAUSE CLAIMANT IS AFRAID TO TEST THE LEG ALTHOUGH THE MEDICAL EVIDENCE DOES NOT JUSTIFY SUCH FEAR. HE FURTHER CONCLUDED THAT CLAIMANT HAD BEEN PROPERLY COMPENSATED FOR THE LOSS OF FUNCTIONAL USE OF HIS RIGHT LEG.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 24, 1975 IS AFFIRMED.

WCB CASE NO. 75-755 JUNE 3, 1976

MARLENE KRAGER, CLAIMANT

FULOP AND GROSS, CLAIMANT'S ATTYS.
G. HOWARD CLIFF, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED HER CLAIM TO THE EMPLOYER FOR PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION FROM SEPTEMBER 16 THROUGH SEPTEMBER 20,

1974 AND DIRECTED IT TO SUBMIT THE CLAIM TO THE EVALUATION DIVISION OF THE BOARD FOR A DETERMINATION PURSUANT TO ORS 656.268.

CLAIMANT WAS A 32 YEAR OLD NURSE'S AIDE WHO SLIPPED AND FELL ON HER BUTTOCKS WHILE WORKING ON SEPTEMBER 12, 1974. THE CLAIM APPARENTLY WAS ACCEPTED ON THE BASIS OF FORM MEDICAL REPORTS AND HANDLED AS A NON-DISABLING INJURY ALTHOUGH THE RECORD IS SILENT AS TO WHETHER OR NOT THE CARRIER MAILED CLAIMANT A NOTICE OF ACCEPTANCE ADVISING HER OF HER RIGHT TO OBJECT TO THE DECISION THAT THE INJURY WAS NOT DISABLING AND HER RIGHT TO REQUEST A HEARING AS REQUIRED BY ORS 656.262(5).

CLAIMANT'S INJURY INVOLVED A LOW BACK STRAIN AND SHE MISSED WORK AS A RESULT OF THIS INJURY FROM SEPTEMBER 16 THROUGH SEPTEMBER 20, 1974 ACCORDING TO HER TREATING DOCTOR, DR. CHAPMAN. CLAIMANT RETURNED TO WORK ON SEPTEMBER 23 AND WORKED FOR THE EMPLOYER UNTIL OCTOBER 4 WHEN SHE COMMENCED WORK AS A NURSE'S AIDE FOR A DIFFERENT EMPLOYER. SHE CONTINUED IN THIS EMPLOYMENT UNTIL OCTOBER 30, 1974 AND ON THE FOLLOWING DAY WAS SEEN BY DR. CHAPMAN FOR TREATMENT OF RESPIRATORY CONDITION. AT THAT TIME HE NOTED CLAIMANT WAS SYMPTOM-FREE AND NOT TAKING MEDICATION FOR HER BACK. LATER CLAIMANT TOLD DR. CHAPMAN THAT HER BACK PAIN HAD STARTED AGAIN SUDDENLY ON NOVEMBER 1, 1974, THIS RECURRENCE OF BACK PAIN LED TO HOSPITALIZATION, FURTHER MEDICAL TREATMENT AND TIME LOSS AND IS THE BASIS FOR THE DISPUTE BEFORE THE REFEREE.

DR. CHAPMAN APPARENTLY FELT THE NOVEMBER SYMPTOMS WERE RELATED TO THE COMPENSABLE INJURY OF SEPTEMBER 19, 1974 BUT WHEN HE WAS LATER MORE FULLY INFORMED AS TO CLAIMANT'S MEDICAL HISTORY, WHICH INCLUDED AT LEAST TWO PRIOR INCIDENTS INVOLVING SIMILAR LOW BACK DIFFICULTIES, HE CHANGED HIS BELIEF AND SAID HER PROBLEM WAS CHRONIC AND EPISODIC IN NATURE, ASSOCIATED WITH LIFTING OR ACCIDENT. HE DID NOT FEEL THAT THE HOSPITALIZATION IN NOVEMBER 1974 WAS RELATED TO THE SEPTEMBER INJURY.

DR. STRUCKMAN, AN ORTHOPEDIC SURGEON WHO EXAMINED CLAIMANT ON SEPTEMBER 15, 1973, WAS OF THE IMPRESSION, AT THAT TIME, THAT CLAIMANT HAD A CHRONIC LOW BACK STRAIN. HE FELT THAT THE ACCIDENT OCCURRED AND THAT HER PAIN CONTINUED AS A DIRECT RESULT OF HER INJURY OF SEPTEMBER 13, 1974. THIS OPINION WAS BASED UPON A HISTORY WHICH INDICATED CLAIMANT WAS ASYMPTOMATIC UNTIL SEPTEMBER 13 WHEN SHE SLIPPED, THEREAFTER SHE DEVELOPED AN ACUTE ONSET OF SEVERE LOW BACK PAIN, CONSULTED DR. CHAPMAN AND WAS HOSPITALIZED FOR FOUR OR FIVE DAYS IN TRACTION - HER CONDITION IMPROVED TO THE POINT THAT AFTER ABOUT A WEEK SHE WAS ABLE TO RETURN TO WORK BUT STILL HAD A DULL ACHING PAIN WHICH WAS CONSTANT AND BECAME SEVERE WHENEVER SHE ATTEMPTED TO LIFT. AFTER SEVERAL WEEKS IT WAS OBVIOUS TO CLAIMANT SHE COULD NOT CONTINUE AND SHE QUIT WORKING FOR THE EMPLOYER AND TOOK A LIGHTER TYPE JOB WITH ANOTHER NURSING HOME.

THE REFEREE FOUND THAT DR. STRUCKMAN'S OPINION WAS BASED UPON A HISTORY WHICH DID NOT RECONCILE WITH THE ACTUAL FACTS. AFTER THE COMPENSABLE INJURY CLAIMANT WAS IMMEDIATELY TREATED AT THE HOSPITAL BRIEFLY BUT ONLY AS AN OUT-PATIENT AND HER TREATING DOCTOR, DR. CHAPMAN, REPORTED ON OCTOBER 31, 1974 THAT CLAIMANT WAS ASYMPTOMATIC. AFTER BEING GIVEN THE OPPORTUNITY OF READING DR. CHAPMAN'S DEPOSITION, DR. STRUCKMAN STATED, RATHER AMBIGUOUSLY, THAT CLAIMANT HAD HAD NO TREATMENT FOR BACK SYMPTOMS SINCE 1970 BUT MANY PEOPLE HAVE SEVERAL TOTALLY SEPARATE OCCASIONS OF LOW BACK PAIN IN A LIFETIME.

THE REFEREE CONCLUDED THAT DR. CHAPMAN'S OPINION WAS MORE PERSUASIVE THAN DR. STRUCKMAN'S AND THAT CLAIMANT HAD FAILED TO PROVE CAUSAL RELATIONSHIP BETWEEN HER LOW BACK DIFFICULTY ARISING ON OR ABOUT NOVEMBER 1, 1974 AND HER COMPENSABLE INJURY.

THE REFEREE DID FIND THAT CLAIMANT WAS ENTITLED TO COMPENSATION FOR THE PERIOD SHE WAS OFF WORK FROM SEPTEMBER 16 THROUGH SEPTEMBER 20 AND THIS WOULD TAKE CLAIMANT'S CLAIM OUT OF THE NON-DISABLING CATEGORY AND ENTITLE HER TO A DETERMINATION PURSUANT TO ORS 656.268.

THE REFEREE FOUND THE RECORD FAILED TO PROVE THAT THE CARRIER HAD FAILED TO MEET ITS STATUTORY OBLIGATIONS REGARDING THE PROCESSING OF THIS CLAIM IN CERTAIN RESPECTS, THEREFORE, HE ASSESSED NO PENALTIES NOR DID HE AWARD CLAIMANT'S ATTORNEY AN ATTORNEY'S FEE TO BE PAID BY THE EMPLOYER BUT HE DID ALLOW A REASONABLE ATTORNEY'S FEE IN THE AMOUNT OF 25 PER CENT OF THE COMPENSATION AWARDED CLAIMANT PAYABLE OUT OF SUCH COMPENSATION AS PAID.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 12, 1975, AS MODIFIED BY THE ORDER ON MOTION FOR RECONSIDERATION, DATED DECEMBER 31, 1975, IS AFFIRMED.

WCB CASE NO. 75-3410 JUNE 3, 1976

EVELYN HINER, CLAIMANT

BURNS AND LOCK, CLAIMANT'S ATTYS.
SOUTHER, SPAULDING, KINSEY, WILLIAMSON AND SCHWABE,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED AUGUST 7, 1975.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON DECEMBER 22, 1970 AND A SUBSEQUENT REINJURY DURING SEPTEMBER 1971. CLAIMANT HAS NOT WORKED SINCE THE DATE OF THE REINJURY. THE CLAIM WAS FIRST CLOSED BY A DETERMINATION ORDER MAILED JUNE 29, 1972 WHICH GRANTED CLAIMANT 96 DEGREES FOR 30 PER CENT UNSCHEDULED LOW BACK DISABILITY. LATER CLAIMANT FILED A CLAIM FOR AGGRAVATION WHICH WAS DENIED BUT, AFTER A HEARING ON THE REQUEST MADE BY CLAIMANT, WAS REMANDED TO THE EMPLOYER FOR ACCEPTANCE AND PAYMENT OF BENEFITS AS PROVIDED BY LAW. ON AUGUST 7, A SECOND DETERMINATION ORDER AWARDED CLAIMANT SOME ADDITIONAL TIME LOSS BUT NO ADDITIONAL COMPENSATION FOR PERMANENT PARTIAL DISABILITY.

PRIOR TO THE SECOND CLOSURE CLAIMANT HAD BEEN EXAMINED BY DR. ROBINSON ON MAY 15, 1975 WHO DESCRIBED HIS FINDINGS AS BEING THE SAME AS THEY WERE WHEN HE EXAMINED HER IN FEBRUARY 1974 - HE RECOMMENDED EVALUATION BY THE ORTHOPAEDIC CONSULTANTS. SUCH EVALUATION WAS PERFORMED ON JULY 17, 1975 AND THE DOCTORS CONCLUDED THAT CLAIMANT COULD RETURN TO HER FORMER OCCUPATION IF LIFTING COULD BE AVOIDED, AND THEY JUDGED HER TOTAL LOSS OF FUNCTION TO BE MILDLY MODERATE AND HER TOTAL LOSS OF FUNCTION DUE TO THE INJURY TO BE MILD.

CLAIMANT CONTENDS THERE IS A MEDICAL PATTERN WHICH LEAVES NO DOUBT THAT THE NATURAL PROGRESSION OF OSTEOMYELITIS AND DISC DISEASE HAS BEEN HASTENED BY THE INJURY SUPERIMPOSED UPON HER UNSTABLE BACK

AND FURTHER THAT THERE HAS BEEN NO CLEAR CUT PROGRAM OFFERED TO HER BY THE DIVISION OF VOCATIONAL REHABILITATION THAT SHE COULD REFUSE, SO THEREFORE, SHE HAD NOT ACTUALLY REFUSED ITS HELP. SHE STATES THAT HER CASE WAS AN IMPOSSIBLE ONE FOR THE COUNSELOR AND HE SUGGESTED THAT SHE BE DISENROLLED. SHE DENIES SHE TOLD ANY DOCTOR OR PSYCHOLOGIST THAT SHE WISHED TO RETIRE AND CONTENDS SHE IS WELL MOTIVATED TO RETURN TO WORK BUT THERE IS NO JOB, CONSIDERING HER AGE, EDUCATION, PRIOR TRAINING, AND PHYSICAL CONDITION THAT SHE CAN POSSIBLY DO AT THE PRESENT TIME.

DR. ROBINSON REEXAMINED CLAIMANT ON OCTOBER 21, 1975 AND STATED THAT CLAIMANT WAS PRESENTLY ON SOCIAL SECURITY AND OBVIOUSLY HAD NO MOTIVATION TO RETURN TO WORK - HE FELT THAT HAD SHE THE PROPER MOTIVATION SHE COULD DO SEDENTARY OR LIGHT CLERICAL WORK REQUIRING NO BACK STRESSES. THE DEGENERATIVE CHANGES AND OSTEOPOROSIS IN HER SPINE WOULD BE PROGRESSIVE AND IT WAS TO BE EXPECTED THAT WITH THE PASSAGE OF A YEAR SHE WOULD HAVE MORE PROBLEMS BUT THESE PROBLEMS WERE NOT DIRECTLY RELATED TO HER INDUSTRIAL INJURY. THE PRESENT PROGRESSION OF OSTEOPOROSIS AND THE DEGENERATIVE CHANGES IS NOT NOW AFFECTED BY HER ORIGINAL INJURY BUT RATHER BY TIME.

THE REFEREE FOUND THAT CLAIMANT'S CONTENTION THAT SHE WAS PERMANENTLY AND TOTALLY DISABLED WAS NOT SUSTAINED BY THE EVIDENCE. IN ORDER FOR CLAIMANT TO BE WITHIN THE ODD-LOT DOCTRINE, AS SHE ALLEGES, MOTIVATION IS A FACTOR - UNLESS CLAIMANT HAS SUSTAINED A SEVERE SUBSTANTIAL INJURY THE BURDEN OF PROVING AVAILABILITY OF EMPLOYMENT IS UPON THE CLAIMANT.

HE CONCLUDED THE MEDICAL EVIDENCE DID NOT SUPPORT A FINDING THAT CLAIMANT SUFFERED A SEVERE SUBSTANTIAL INJURY AND, FURTHER, THAT CLAIMANT FAILED TO PROVE THAT SHE WAS NOT PRESENTLY EMPLOYABLE.

THE REFEREE CONCLUDED THAT THE PREVIOUS AWARD OF 96 DEGREES WAS GENEROUS AT THE TIME IT WAS MADE AND APPEARS, AT THE PRESENT TIME, TO BE REASONABLE.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 9, 1975 IS AFFIRMED.

WCB CASE NO. 75-562 JUNE 3, 1976

DOROTHEA PIPER, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH DIRECTED IT TO PAY CLAIMANT THE BALANCE DUE HER ON ALL TEMPORARY TOTAL DISABILITY PAYMENTS HERETOFORE MADE, ADJUSTING THE RATE TO THE PROPER ONE BASED UPON EARNINGS OF 560 DOLLARS RATHER THAN 300 DOLLARS A MONTH, AND FURTHER DIRECTING IT TO PAY CLAIMANT AS A PENALTY FOR UNREASONABLE DELAY AND UNREASONABLE RESISTANCE, 25 PER CENT OF THE FOREGOING INCREASE.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON MAY 20, 1968 FOR WHICH SHE RECEIVED COMPENSATION BENEFITS COMPUTED ON CLAIMANT'S CASH WAGES OF 300 DOLLARS A MONTH. CLAIMANT ALLEGES THAT IN ADDITION TO

HER CASH WAGES, SHE RECEIVED A THREE ROOM FURNISHED APARTMENT WITH ALL UTILITIES PAID EXCEPT TELEPHONE, VALUED AT 150 DOLLARS PER MONTH AND TWO MEALS A DAY, FIVE DAYS A WEEK, WITH A REASONABLE VALUE OF 110 DOLLARS A MONTH, THEREFORE, HER TEMPORARY TOTAL DISABILITY PAYMENTS SHOULD HAVE BEEN COMPUTED ON A WAGE OF 560 DOLLARS A MONTH RATHER THAN 300 DOLLARS.

THE FUND CONTENDS THAT CLAIMANT HAS ACCEPTED THE FOREGOING TEMPORARY TOTAL DISABILITY PAYMENTS AND THEREFORE IS ESTOPPED FROM NOW RAISING THE ISSUE, THAT CLAIMANT HAD A HEARING ON JANUARY 17, 1974 AND AT THAT TIME FAILED TO RAISE THIS ISSUE, THEREFORE THE OPINION AND ORDER RESULTING FROM THAT HEARING IS RES JUDICATA AND, FINALLY, THAT CLAIMANT IS SPLITTING CAUSE OF ACTION.

CLAIMANT TESTIFIED AS TO THE CHARACTER OF HER APARTMENT AND THE OTHER AMENITIES WHICH SHE RECEIVED AND THE REFEREE FOUND HER TESTIMONY INHERENTLY PROBABLE AND INASMUCH AS NO CONTRARY EVIDENCE WAS PRESENTED, HE ACCEPTED HER TESTIMONY IN FULL. THIS WAS LIKEWISE TRUE WITH RESPECT TO THE MEALS WHICH WERE PREPARED BY THE EMPLOYER AND FURNISHED TO CLAIMANT.

THE REFEREE FOUND THAT THE FUND'S CONTENTION THAT THE EMPLOYER NOW BEING OUT OF BUSINESS AND HAVING NO FURTHER INTEREST IN HIS EXPERIENCE RATING WAS CONSPIRING WITH CLAIMANT TO CONCOCT A FICTITIOUS SALARY LEVEL WAS BOTH FRIVOLOUS AND DEFAMATORY. THE EMPLOYER'S STATEMENT ON THE FORM 801 INDICATED THAT THE WAGES PAID CLAIMANT WERE 300 DOLLARS A MONTH, HOWEVER, THE REFEREE FELT THAT THAT FORM WAS NOT PARTICULARLY ADAPTABLE TO THIS TYPE OF SITUATION AND AT MOST RAISED A REBUTTAL INFERENCE.

WITH RESPECT TO THE FUND'S ASSERTIONS OF RES JUDICATA, ESTOPPEL AND SPLITTING CAUSE OF ACTION, THE REFEREE FOUND IT WOULD BE NECESSARY FOR THE FUND TO SHOW THAT CLAIMANT HAD BEEN AWARE AT RELEVANT TIMES OF THE CIRCUMSTANCES THAT HER RATE WAS INCORRECT. THE EVIDENCE INDICATED THAT THE FIRST TIME CLAIMANT BECAME AWARE OF THE ERRONEOUS RATE WAS WHEN SHE DISCUSSED IT WITH HER PRESENT ATTORNEY WHO THEN MADE A FORMAL INQUIRY TO THE FUND ON NOVEMBER 1, 1974. ON JANUARY 16, 1975 THE FUND, BY LETTER, APOLOGIZED FOR ITS DELAY IN ABSOLVING (SIC) THE ISSUE OF SALARY OR WAGE AT THE TIME OF HER INJURY IN 1968, STATING THAT THE LETTER MR. RIGGS (BIGGS) SAID HE SENT TWO YEARS AGO ON THIS SUBJECT WAS LOST OR MISPLACED AND NEVER RECEIVED IN THE CLAIM FILE.

THE REFEREE CONCLUDED THAT THE FUND HAD UNREASONABLY RESISTED AND UNREASONABLY DELAYED PAYMENT OF THE FOREGOING ADDITIONAL COMPENSATION WHICH JUSTIFIED AN AWARD OF PENALTIES AND ATTORNEY FEES. HE ALSO DIRECTED THE FUND TO PAY CLAIMANT THE BALANCE DUE HER ON ALL TEMPORARY TOTAL DISABILITY PAYMENTS USING THE PROPER BASIS OF 560 DOLLARS A MONTH.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE ORDER OF THE REFEREE. ORS 656.005(27) PROVIDES IN PART, THAT WAGES MEANS THE MONEY RATE AT WHICH THE SERVICE RENDERED IS RECOMPENSED UNDER THE CONTRACT OF HIRING IN FORCE AT THE TIME OF THE ACCIDENT, INCLUDING THE REASONABLE VALUE OF BOARD, RENT, HOUSING, LODGING, OR SIMILAR ADVANTAGE RECEIVED FROM THE EMPLOYER. CLAIMANT HAD ORIGINALLY BEEN OFFERED 300 DOLLARS A MONTH BY HER EMPLOYER. SHE TOLD HIM SHE COULD NOT LIVE ON THAT SUM AND HE SAID SHE COULD HAVE A ROOM ON THE SECOND FLOOR WHICH WOULD BE PART OF HER COMPENSATION, THIS PARTICULAR ROOM WAS NOT SATISFACTORY TO CLAIMANT AND, ULTIMATELY, SHE RECEIVED A COMPLETELY FURNISHED APARTMENT ON THE THIRD FLOOR. CLAIMANT TESTIFIED FROM HER KNOWLEDGE OF RENTALS IN PORTLAND AND VISITING APARTMENTS IN THE COURSE OF HER EMPLOYMENT IN THE INTERIOR DECORATING BUSINESS THAT THE APARTMENT WOULD RENT FOR AT LEAST 150 DOLLARS A MONTH. THE EMPLOYER ALSO

AGREED TO PROVIDE CLAIMANT TWO MEALS A DAY DURING THE FIVE DAY WORK WEEK. THIS WAS THE CONTRACT OF HIRING IN FORCE AT THE TIME CLAIMANT WAS INJURED.

THE EVIDENCE INDICATES THAT CLAIMANT WAS INFORMED BY THE FUND THAT THE LIVING COST ASPECTS OF HER SALARY DID NOT APPLY IN COMPUTING THE AMOUNT OF COMPENSATION WHICH SHE WAS TO RECEIVE AND CLAIMANT RELIED UPON THIS UNTIL SHE DISCUSSED THE MATTER WITH HER PRESENT ATTORNEY WHO INFORMED HER TO THE CONTRARY.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 21, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75—986 JUNE 3, 1976

ROSELLA ODOM, CLAIMANT

EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE STATE ACCIDENT INSURANCE FUND'S DENIAL OF CLAIMANT'S CLAIM.

CLAIMANT TESTIFIED SHE COMMENCED WORKING FOR THE EMPLOYER IN MARCH 1974, THE OWNERS WERE PLANNING TO TAKE A VACATION TRIP AND WANTED HER TO ASSUME THE DUTIES OF MANAGER WHICH INCLUDED COOKING, WAITRESS WORK AND OTHER MISCELLANEOUS ACTIVITIES, SUCH AS DISHWASHING, CLEANING THE REST ROOMS AND PUMPING GAS.

CLAIMANT TESTIFIED THAT ON JUNE 23, 1974 SHE PICKED UP AN EMPTY GLASS AND IT FELL OUT OF HER LEFT HAND AS SHE HAD NO GRIPPING ABILITY, SHE FURTHER TESTIFIED THAT THE LEFT WRIST BECAME QUITE PAINFUL THAT EVENING AND SHE WAS EXAMINED BY DR. TEAL THE FOLLOWING DAY. CLAIMANT ALLEGES THAT SHE HAD BEEN HAVING DIFFICULTY FOR TWO OR THREE DAYS PRIOR TO THIS INCIDENT AND THAT HER GRIP WOULD FAIL HER AND SHE COULDN'T GRASP ITEMS AND THAT SHE HAD NOTICED PAIN AND SWELLING. SHE FURTHER ALLEGED THAT THIS DIFFICULTY WAS BROUGHT ABOUT SOLELY BY HER ACTIVITIES AT THE EMPLOYER'S PLACE OF BUSINESS, PARTICULARLY BY PUMPING GAS. CLAIMANT IS RIGHT HANDED, HOWEVER, SHE STATED SHE OFTEN USED HER LEFT HAND ON THE GAS NOZZLE.

INITIALLY, DR. TEAL IMMOBILIZED THE WRIST BY USE OF A PLASTER CAST AND CLAIMANT WAS ABLE TO WORK FROM JUNE 25, 1974 THROUGH JULY 10, 1974. ULTIMATELY, SURGERY WAS PERFORMED ON FEBRUARY 18, 1975.

CLAIMANT TESTIFIED SHE HAD HAD NO PREVIOUS DIFFICULTY WITH HER LEFT WRIST AND NO PREVIOUS ACCIDENT INVOLVING IT. THE EMPLOYER TESTIFIED THAT UP TO THE TIME OF TERMINATION BY CLAIMANT ON JULY 4, 1974, SAID TERMINATION BEING THE RESULT OF DISSENSION BETWEEN THE EMPLOYER AND CLAIMANT'S HUSBAND, CLAIMANT HAD MADE NO ALLEGATION OF AN INJURY OCCURRING ON THE JOB AND THAT HIS FIRST KNOWLEDGE OF THE ALLEGED INJURY WAS NOT RECEIVED UNTIL FEBRUARY, 1975. THE EMPLOYER ALSO TESTIFIED

THE CLAIMANT HAD WORN A WRIST BAND TO WORK ON NUMEROUS OCCASIONS PRIOR TO JUNE 25, 1974 ALTHOUGH CLAIMANT TESTIFIED THAT SHE HAD NEVER WORN A WRIST BAND PRIOR TO SEEING DR. TEAL ON JUNE 25, 1974. THE EMPLOYER STATED THAT CLAIMANT HAD MADE THE COMMENT THAT SHE HAD HAD PROBLEMS WITH HER LEFT WRIST FOR YEARS AS A RESULT OF MANY YEARS OF WAITING ON TABLES AND THAT SUCH COMMENTS WERE ALL MADE PRIOR TO JUNE 25, 1974.

THE REFEREE FOUND NOTHING IN ANY OF THE CHART NOTES OR REPORTS WHICH INDICATED CLAIMANT ALLEGED TO HAVE SUFFERED AN ON-THE-JOB INJURY UNTIL DR. NATHAN'S REPORT, DATED JANUARY 10, 1975, WHICH CONTAINED A HISTORY OF THE GLASS DROPPING INCIDENT AT WORK. AT THAT TIME, ACCORDING TO DR. NATHAN, ALL MEDICAL REPORTS AND BILLINGS WERE BEING SUBMITTED TO BLUE CROSS, CLAIMANT'S PRIVATE INSURANCE CARRIER. IN DR. NATHAN'S REPORT OF FEBRUARY 28, 1975 HE INDICATES ONLY THE POSSIBILITY OF A RELATIONSHIP BETWEEN CLAIMANT'S CONDITION AND HER WORK.

DR. TEAL'S REPORTS INDICATE A DEFINITE CAUSAL CONNECTION BETWEEN CLAIMANT'S CONDITION, TENOSYNOVITIS, WHICH REQUIRED SURGERY AND CLAIMANT'S WORK ACTIVITY BUT HE LATER ADMITTED THAT HIS RECORDS WERE NOT CONSISTENT IN DETERMINING THE EXACT ETIOLOGY.

THE REFEREE FOUND CLAIMANT TO BE COMPLETELY LACKING IN CREDIBILITY - SHE CONTRADICTED HERSELF CONSTANTLY AND HE FOUND HER TESTIMONY, TAKEN AS A WHOLE, A MASS OF CONFUSION. CLAIMANT TESTIFIED SHE HAD NEVER HAD ANY PROBLEM WITH HER WRIST PRIOR TO WORKING FOR THE EMPLOYER NOR HAD SHE EVER MADE ANY COMPLAINTS TO ANYONE ABOUT HER WRIST, YET DR. TEAL'S INITIAL REPORT INDICATES THAT CLAIMANT HAD HAD A HISTORY OF PAIN IN THE DORSAL ASPECT OF THE LEFT WRIST FOR FIVE YEARS. HE CLEARLY IDENTIFIED THE PRESENT ONSET OF SYMPTOMS WITH A PARTICULAR STRENUOUS ACTIVITY INVOLVING CLAIMANT AND A HORSE BASED UPON CLAIMANT'S ADMISSION TO HIM THAT SHE POSSIBLY STRAINED HER WRIST WHILE PULLING A HORSE ABOUT.

THE REFEREE CONCLUDED THAT, IN ADDITION TO CLAIMANT'S POOR CREDIBILITY, SHE HAD NOT SUSTAINED THE REQUIRED BURDEN OF PROOF THAT AN ACCIDENTAL INJURY OCCURRED. BY CLAIMANT'S OWN ADMISSION, NOTHING OCCURRED AT WORK OTHER THAN THAT SHE APPARENTLY HAD A LOSS OF GRIPPING SENSATION IN HER LEFT HAND AND DROPPED A GLASS. HE UPHELD THE FUND'S DENIAL.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE REFEREE'S ORDER.

THE REFEREE IS IN THE BEST POSITION TO OBSERVE THE DEMEANOR OF CLAIMANT AS SHE TESTIFIED AND IT IS OBVIOUS THAT, IN THIS CASE, THE REFEREE WAS NOT IMPRESSED WITH HER CREDIBILITY.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 28, 1975 IS AFFIRMED.

WCB CASE NO. 74-2792 JUNE 3, 1976

JESSE HURST, CLAIMANT
GALBREATH AND POPE, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S REINSTATING ORDER, DATED DECEMBER 8, 1975.

ON JANUARY 9, 1975 REFEREE JAMES P. LEAHY, AFTER A HEARING, GRANTED CLAIMANT 35 DEGREES FOR LOSS OF THE LEFT FOOT. INITIALLY, A DETERMINATION ORDER MAILED MARCH 6, 1974 AND SUBSEQUENT AMENDMENTS THERETO, HAD GRANTED CLAIMANT AN AWARD EQUAL TO 13 DEGREES. THE FUND FILED A CROSS REQUEST FOR REVIEW, CONTENDING CLAIMANT WAS ONLY ENTITLED TO THE AWARD OF 13 DEGREES.

THE BOARD, AFTER DE NOVO REVIEW, FOUND THERE WAS NO ADEQUATE EXPERT MEDICAL TESTIMONY TO EITHER PROVE OR DISPROVE MEDICAL CAUSATION AND, PURSUANT TO ORS 656.295(5), CONCLUDED THAT THE MATTER WAS INCOMPLETELY HEARD AND REMANDED IT TO THE REFEREE FOR THE PURPOSE OF REFERRING CLAIMANT TO THE DISABILITY PREVENTION DIVISION FOR A COMPLETE WORKUP, DIRECTING THAT THE REPORT BASED UPON THE AFORESAID WORKUP BE SUBMITTED TO THE REFEREE AND TO ALL PARTIES FOR POSSIBLE CROSS EXAMINATION AND, ULTIMATELY, FOR A RECONSIDERATION OF THE REFEREE'S PREVIOUS ORDER. THIS ORDER OF REMAND WAS ENTERED JUNE 17, 1975.

ON JUNE 27, 1975, REFEREE LEAHY ISSUED AN INTERIM ORDER DIRECTING THAT THE MATTER BE REMANDED TO THE STATE ACCIDENT INSURANCE FUND AND THAT CLAIMANT BE REFERRED TO THE DISABILITY PREVENTION DIVISION FOR A COMPLETE WORKUP AND FURTHER ORDERED THE FUND TO PAY CLAIMANT TIME LOSS COMPENSATION AND ENROLLMENT EXPENSES WHILE HE WAS ENROLLED AT THE CENTER.

ON DECEMBER 8, 1975 REFEREE LEAHY ENTERED HIS REINSTATING ORDER WHICH RECITED THAT THE FUND HAD COMPLIED WITH THE INTERIM ORDER BUT THAT THE CLAIMANT HAD NOT, THAT AN ORDER TO SHOW CAUSE WAS ISSUED ON NOVEMBER 5, 1975 AND MORE THAN 30 DAYS HAD ELAPSED SINCE SUCH ISSUANCE WITH NO RESPONSE FROM THE CLAIMANT.

THE REFEREE CONCLUDED THAT THERE BEING NO ADDITIONAL EVIDENCE TO ENABLE HIM TO RECONSIDER HIS ORDER OF JANUARY 9, 1975, SAID ORDER SHOULD BE REINSTATED IN ITS ENTIRETY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE REINSTATING ORDER - THE BOARD DOES NOT FEEL THAT THE EXPLANATIONS OFFERED BY CLAIMANT'S COUNSEL WITH RESPECT TO CLAIMANT'S FAILURE TO KEEP HIS APPOINTMENT AT THE DISABILITY PREVENTION DIVISION ARE SUFFICIENT TO JUSTIFY A FURTHER REMAND TO THE HEARINGS DIVISION FOR FURTHER MEDICAL STUDIES AT THE DISABILITY PREVENTION DIVISION.

ORDER

THE REINSTATING ORDER DATED DECEMBER 8, 1975 IS AFFIRMED.

WCB CASE NO. 75-1035 JUNE 7, 1976

FRED REEVES, CLAIMANT

BUMP, YOUNG AND WALKER,
CLAIMANT'S ATTYS.
ROGER WARREN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH DIRECTED IT TO ACCEPT CLAIMANT'S CLAIM FOR AGGRAVATION, PAY CLAIMANT THE BENEFITS TO WHICH HE IS ENTITLED BY LAW AND AWARDED CLAIMANT'S ATTORNEY A FEE OF 1,100 DOLLARS.

CLAIMANT, A WELDER, SUFFERED A COMPENSABLE INJURY ON DECEMBER 17, 1971 WHEN HE SUSTAINED SEVERE ELECTRIC SHOCK CAUSING A PERMANENT PARTIAL DISABILITY IN HIS LEFT ARM FOR WHICH HE WAS AWARDED 28.8 DEGREES FOR 15 PER CENT LOSS OF THE LEFT ARM BY THE DETERMINATION ORDER MAILED APRIL 3, 1973.

ON NOVEMBER 24, 1974, A SUNDAY, CLAIMANT WAS WORKING AT HOME AND ABOUT MID-AFTERNOON HE SUFFERED CHEST PAINS WHICH BECAME WORSE AFTER SUPPER AND ULTIMATELY REQUIRED CLAIMANT TO BE HOSPITALIZED IN THE TUALITY COMMUNITY HOSPITAL AT HILLSBORO. CLAIMANT WAS IN THE HOSPITAL UNTIL NOVEMBER 29, 1974 AND WAS DISCHARGED WITH THE DIAGNOSIS OF 'ACUTE NEURALGIA, LEFT CHEST, POST ELECTRICAL SHOCK SEQUELA'. THE QUESTION BEFORE THE REFEREE WAS WHETHER THE INCIDENT OF NOVEMBER 24, 1974 CONSTITUTED A NEW INJURY WHICH WOULD NOT BE COMPENSABLE OR CONSTITUTED AN AGGRAVATION OF THE 1971 COMPENSABLE INJURY.

THE PARTIES STIPULATED THAT CLAIMANT HAD BEEN IN RELATIVELY GOOD HEALTH BETWEEN 1971 AND 1974.

DR. PASQUESI, AN ORTHOPEDIST, WHO EXAMINED CLAIMANT AT THE REQUEST OF THE DEFENDANT, FELT THAT CLAIMANT HAD SUFFERED A NEW INJURY - HOWEVER, CLAIMANT'S TREATING PHYSICIAN, DR. NOYES, AS WELL AS DR. EILERS, AN ORTHOPEDIST AND DR. NASH, A NEUROLOGIST, FELT THAT THERE WAS A RELATIONSHIP BETWEEN THE 1974 SYMPTOMS AND THE 1971 INDUSTRIAL INJURY.

THE REFEREE FOUND THAT THE HISTORY GIVEN, PARTICULARLY TO DR. NOYES, AND OBSERVATIONS AND OTHER MEDICAL REPORTS WOULD INDICATE THAT CLAIMANT HAD NOT BEEN IN RELATIVELY GOOD HEALTH BETWEEN 1971 AND 1974, CONTRARY TO THE STIPULATION.

THE REFEREE GAVE THE GREATEST WEIGHT TO THE DIAGNOSIS AND REASONING OF DR. NASH. THE REFEREE ALSO GAVE CONSIDERABLE WEIGHT TO THE FACT THAT CLAIMANT'S ACTIVITIES ON NOVEMBER 24, 1974 WERE OF A CASUAL AND LEISURELY NATURE AND COULD NOT BE CHARACTERIZED AS UNUSUAL OR STRENUOUS. HE CONCLUDED THAT FROM A LAY POINT OF VIEW ASCRIBING CLAIMANT'S CONDITION TO THOSE ACTIVITIES ON NOVEMBER 24, 1974 WOULD NOT ACCORD WITH COMMON EXPERIENCE AND THEREFORE CLAIMANT HAD SUSTAINED THE BURDEN OF PROVING AN AGGRAVATION OF HIS 1971 INDUSTRIAL INJURY.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT THE WEIGHT OF THE MEDICAL REPORTS SUPPORT THE REFEREE'S CONCLUSION THAT CLAIMANT HAD SUFFERED AN AGGRAVATION OF HIS 1971 COMPENSABLE INJURY AND AFFIRMS THE REFEREE'S ORDER.

ORDER

THE ORDER OF THE REFEREE DATED SEPTEMBER 29, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 350 DOLLARS PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-2990 JUNE 7, 1976

A.C. GREEN, CLAIMANT

MC MENAMIN, JOSEPH AND HERRELL,
CLAIMANT'S ATTYS.
SCHOUBOE AND CAVANAUGH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT
CROSS REQUEST BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE PORTION OF REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED JANUARY 15, 1975 = DENIED CLAIMANT'S MOTION TO SET ASIDE THE LUMP SUM SETTLEMENT AGREEMENT APPROVED JANUARY 29, 1975 AND DENIED CLAIMANT'S CLAIM FOR AGGRAVATION.

THE EMPLOYER CROSS-REQUESTS REVIEW BY THE BOARD OF THAT PORTION OF THE ORDER WHICH DIRECTED IT TO PAY PENALTIES AND ATTORNEY'S FEES.

CLAIMANT WENT TO WORK FOR THE EMPLOYER IN 1961 AS A JANITOR AND SUBSEQUENTLY WORKED IN THE AUTO DETAIL DEPARTMENT WHERE HE SUFFERED AN INJURY IN 1972. WITH THE EXCEPTION OF ONE DAY, CLAIMANT HAS NOT WORKED SINCE THAT INJURY.

CLAIMANT CONTENDS THAT HE HAD NO PREVIOUS BACK TROUBLE AND HAD WORKED 10 TO 11 HOURS A DAY PRIOR TO HIS INJURY = THAT AS A RESULT OF HIS INJURY HE IS NOW A PERMANENT TOTAL AND THAT THE ODD-LOT DOCTRINE SHOULD APPLY.

THE REFEREE FOUND THAT CLAIMANT HAD NOT SUSTAINED A SEVERE SUBSTANTIAL INJURY THAT WOULD REQUIRE THE EMPLOYER TO COME FORTH AND CARRY THE BURDEN OF PROOF OF EMPLOYABILITY AND CLAIMANT HAS NOT SHOWN MOTIVATION. THE REFEREE FOUND NO EVIDENCE THAT CLAIMANT HAD APPLIED FOR WORK OR THAT HE HAD EVEN INQUIRED INTO THE POSSIBILITY OF GOING BACK TO WORK. THE TESTIMONY RECEIVED FROM CLAIMANT THAT HE FELT THERE WAS NO JOB HE COULD DO WAS TOO CLOSELY TIED IN WITH THE EVIDENCE OF A PSYCHOLOGICAL PROBLEM TO BE PERSUASIVE.

THE REFEREE REFUSED TO SET ASIDE THE LUMP SUM SETTLEMENT AGREEMENT APPROVED JANUARY 29, 1975, FINDING THAT CLAIMANT INITIATED THE REQUEST AND IGNORED HIS ATTORNEY WHO HAD ADVISED HIM NOT SIGN IT. FURTHERMORE, THE EVIDENCE INDICATED THAT CLAIMANT WAS TOLD IN PLAIN ENGLISH THAT HE COULD NOT DISPUTE THE DOLLAR AMOUNT OF THE AWARD SHOWN ON THE REQUEST FOR LUMP SUM PAYMENT IF HE CHOSE TO TAKE IT = ALSO FOR OTHER REASONS SPECIFICALLY SET FORTH IN THE REFEREE'S ORDER.

THE REFEREE FOUND THAT CLAIMANT DID FILE AN AGGRAVATION CLAIM ON OR ABOUT JULY 21, 1975 WHICH WAS IN NO WAY ACKNOWLEDGED AND THAT SUCH AGGRAVATION CLAIM HAS THE DIGNITY OF A CLAIM IN THE FIRST INSTANCE

WHICH REQUIRES THE CARRIER, AFTER RECEIVING NOTICE THEREOF, TO EITHER ACCEPT OR DENY WITHIN 60 DAYS. THE REFEREE FOUND THAT IN THIS CASE NO ACTION WAS TAKEN ON THE PART OF THE CARRIER, THEREFORE, A 'DE FACTO' DENIAL OF THE CLAIM WAS MADE. THE REFEREE CONCLUDED THAT IN SUCH A CASE WHERE THERE WAS NO COMMUNICATION WHATSOEVER MADE BY THE CARRIER THAT TEMPORARY TOTAL DISABILITY SHOULD BE PAID CLAIMANT FROM THE DATE OF NOTIFICATION UNTIL THE DATE OF HIS ORDER TOGETHER WITH PENALTIES AND ATTORNEY'S FEES. ALL THE CARRIER HAD TO DO IN THIS INSTANCE TO PROTECT ITSELF WAS TO SEND A TIMELY DENIAL LETTER, IT DID NOT, THEREFORE, IT IS SUBJECT TO PAYING TEMPORARY TOTAL DISABILITY COMPENSATION BEYOND THE 60 DAYS.

WITH RESPECT TO THE AGGRAVATION CLAIM, THE REFEREE FOUND NO MEDICAL EVIDENCE TO SUPPORT A FINDING OF AGGRAVATION. TO THE CONTRARY, THE EVIDENCE INDICATED THAT CLAIMANT'S CONDITION WAS THE RESULT OF NORMAL PROGRESSION OF DEGENERATIVE CHANGES IN THE LOWER LUMBAR SPINE.

THE REFEREE FURTHER FOUND EVIDENCE THAT PREVIOUS ATTEMPTS AT PSYCHOLOGICAL COUNSELING HAD MET WITH NO RESPONSE BUT THAT CLAIMANT SHOULD BE GIVEN AN OPPORTUNITY TO COOPERATE. HE FOUND, BASED UPON DR. PASQUESI'S OPINION, THAT CLAIMANT'S ANXIETY TENSION STATE WAS PROBABLY MORE RESPONSIBLE FOR HIS DISABILITY THAN HIS PHYSICAL COMPLAINTS.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 2, 1975, AS CORRECTED BY THE ORDER DATED DECEMBER 19, 1975, IS AFFIRMED.

WCB CASE NO. 75-4571 JUNE 7, 1976

ROGER S. HARRIS, CLAIMANT
EMMONS, KYLE, KROPP AND KRYGER,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED TO IT CLAIMANT'S CLAIM TO BE ACCEPTED FOR PAYMENT OF COMPENSATION, PAYABLE FROM THE DATE OF THE INJURY UNTIL TERMINATION IS AUTHORIZED PURSUANT TO ORS 656.268.

CLAIMANT SUFFERED AN ACCIDENTAL INJURY ON SEPTEMBER 2, 1975 WHILE PUSHING A STALLED VEHICLE OFF THE PUBLIC HIGHWAY. THERE IS NO DISPUTE ABOUT THE INJURY, THE MAIN QUESTION IS WHETHER THE ACTIVITY WHICH CAUSED IT AROSE OUT OF AND IN THE COURSE AND SCOPE OF CLAIMANT'S EMPLOYMENT.

CLAIMANT HAD BEEN HIRED AS A SERVICE STATION ATTENDANT, HIS GENERAL DUTIES INCLUDED PUMPING GAS, CLEANING WINDSHIELDS AND ASSISTING IN THE SHOP WHEN NECESSARY. THERE WAS NO SPECIFIC LIST OF DUTIES WHICH WERE DESCRIBED TO CLAIMANT AT THE TIME HE WAS HIRED OR SUBSEQUENT THERETO.

THE INJURY OCCURRED ON CLAIMANT'S DAY OFF. CLAIMANT DID NOT MADE ANY APPEARANCE AT THE EMPLOYER'S PREMISES, A UNION SERVICE

STATION, UNTIL 9.30 P.M. WHEN HE DROPPED BY TO VISIT WITH THE EMPLOYE ON DUTY THAT EVENING. THERE WERE TWO OTHER PEOPLE, NOT EMPLOYES, AT THE STATION AT THE SAME TIME ALSO VISITING. CLAIMANT DID NO WORK WHILE HE WAS VISITING WITH THE NIGHT ATTENDANT BUT WHILE HE WAS THERE THE EMPLOYER'S DAUGHTER CAME TO THE STATION SEEKING ASSISTANCE BECAUSE HER CAR WAS STALLED DOWN THE STREET FROM THE STATION. IT WAS AGAINST THE RULES FOR AN EMPLOYE TO LEAVE THE SERVICE STATION UNATTENDED AT NIGHT, THEREFORE, HE WAS UNABLE TO GIVE ANY ASSISTANCE, HOWEVER, CLAIMANT AND THE OTHER TWO PERSONS LEFT THE STATION AND PUSHED THE CAR TO A STANDARD SERVICE STATION WHICH WAS CLOSER TO THE SPOT WHERE THE CAR WAS STALLED AND COULD BE REACHED WITHOUT REVERSING THE DIRECTION OF THE CAR. IT WAS WHILE THE CAR WAS BEING PUSHED THAT CLAIMANT SUFFERED HIS INJURY.

THE REFEREE FOUND THAT THE EMPLOYER DID NOT DIRECT THE CLAIMANT TO PUSH THE CAR NOR DID THE EMPLOYE WHO WAS ON DUTY AT THE TIME DIRECT THE CLAIMANT TO DO SO. THERE WAS NO EVIDENCE THAT CLAIMANT WAS CALLED UPON TO WORK IN EMERGENCIES OR IF HE HAPPENED TO COME UPON AN EMERGENCY, THAT HE WAS EXPECTED TO TAKE CARE OF IT. THERE WAS NO EVIDENCE THAT CLAIMANT WAS PAID FOR PUSHING THE CAR.

THE REFEREE FOUND THAT CLAIMANT'S REASON FOR PUSHING THE CAR DID NOT HAVE ANY BUSINESS PURPOSE AS CLAIMANT TESTIFIED HE GAVE NO THOUGHT TO WHETHER OR NOT THE EMPLOYER WOULD HAVE EXPECTED HIM, AS AN EMPLOYE, TO DO SO NOR DID HE GIVE ANY THOUGHT TO THE CONSEQUENCES IF HE HAD FAILED TO DO SO. THERE WAS NO EVIDENCE THAT CLAIMANT DID ANYTHING, IN RELATION TO THE CAR, AFTER PUSHING IT INTO THE STANDARD STATION THAT SERVED AS A BUSINESS PURPOSE FOR THE EMPLOYER.

THE REFEREE FOUND NO INDICATION THAT THE EMPLOYER RECEIVED A BUSINESS BENEFIT FROM THE ACTIVITY IN THE FORM OF INCOME FOR PUSHING THE CAR OR FOR SUBSEQUENT SERVICES PROVIDED NOR WAS THERE ANY GOOD WILL GENERATED SINCE THERE WAS NO EVIDENCE THAT THE EMPLOYER'S DAUGHTER DEALT WITH HER FATHER'S SERVICE STATION AS WOULD A MEMBER OF THE GENERAL PUBLIC.

HOWEVER, THE REFEREE THEN MADE CERTAIN ASSUMPTIONS, NAMELY - (1) IF THE PERSON OPERATING THE VEHICLE HAD NOT BEEN THE EMPLOYER'S DAUGHTER BUT A MEMBER OF THE GENERAL PUBLIC, THEN THE CLAIMANT WOULD HAVE BEEN ENGAGED IN AN ACTIVITY WHICH CLEARLY WOULD HAVE BENEFITED THE EMPLOYER. (2) HAD CLAIMANT NOT PERFORMED THE SERVICE IT WOULD HAVE NOT BEEN PERFORMED AT ALL, OR IF IT HAD BEEN, IT WOULD HAVE HAD TO BE DONE AFTER, OR IN CONJUNCTION WITH, CLOSING THE STATION OR WITH THE STATION LEFT UNATTENDED WHICH WOULD BE CONTRARY TO THE RULES. (3) IF THE EMPLOYE ON DUTY RATHER THAN THE CLAIMANT HAD PUSHED THE CAR WHILE CLAIMANT VOLUNTEERED TO REMAIN AND WATCH THE STATION AND THE EMPLOYE SUSTAINED THE INJURY IT WOULD HAVE BEEN COMPENSABLE. (4) IF CLAIMANT HAD SUFFERED INJURY WHILE PUMPING GAS WHILE THE ATTENDANT WAS AWAY FROM THE STATION HELPING PUSH THE CAR THEN THERE WOULD HAVE BEEN SUBSTANTIAL BENEFIT TO THE EMPLOYER RESULTING FROM CLAIMANT'S PRESENCE AND KEEPING THE STATION OPEN FOR BUSINESS.

THE REFEREE CONCLUDED THAT CLAIMANT, WHEN HE LEFT THE PREMISES TO PERFORM A SERVICE, ACCORDED THE EMPLOYER A BENEFIT IN THAT BY DOING SO THE ATTENDANT WAS ABLE TO REMAIN AT THE STATION AND KEEP IT OPEN. HE FELT THAT THE FACT THAT THE BENEFICIARY OF THE SERVICE WAS NOT A MEMBER OF THE GENERAL PUBLIC DID NOT DISTINGUISH THE SERVICE RENDERED FROM THAT OFFERED TO THE GENERAL PUBLIC.

HE FURTHER CONCLUDED THAT PUSHING VEHICLES WHICH WERE STALLED OFF THE EMPLOYER'S PREMISES WAS A SERVICE PROVIDED BY THE EMPLOYER IN EMERGENCY SITUATIONS AND, THEREFORE, THE EMPLOYER GENERALLY ACQUIESCED IN AND CONTEMPLATED THE PERFORMANCE OF SUCH ACTIVITY BY HIS

EMPLOYES – THAT ALTHOUGH CLAIMANT DID NOT NECESSARILY CONTEMPLATE PUSHING STALLED CARS AS A PART OF HIS JOB DUTIES THE FACT THAT HIS JOB DUTIES WERE NOT SPECIFICALLY DESCRIBED DID NOT EXCLUDE SUCH ACTIVITY FROM HIS JOB DUTIES.

THE REFEREE FURTHER CONCLUDED THAT THE FACT THE INJURY OCCURRED OFF THE EMPLOYER'S PREMISES WAS NOT DETERMINATIVE NOR WAS THE ABSENCE OF ANY DIRECT COMMAND FROM THE EMPLOYER TO PERFORM THE PARTICULAR ACTIVITY NECESSARY IN DETERMINING WHETHER OR NOT THE ACTIVITY AROSE OUT OF AND WAS IN THE COURSE AND SCOPE OF CLAIMANT'S EMPLOYMENT.

THE REFEREE FINALLY CONCLUDED THAT IF ALL THE FACTS HAD BEEN THE SAME EXCEPT THAT CLAIMANT HAD BEEN ON DUTY RATHER THAN OFF DUTY THERE WAS NO EVIDENCE INDICATING THAT THIS SPECIFIC ACTIVITY WOULD NOT HAVE BEEN CONTEMPLATED AS A REASONABLE PART OF HIS DUTIES AND THE FACT THAT CLAIMANT PERFORMED SUCH ACTIVITY FOR HIS EMPLOYER'S DAUGHTER WITHOUT FIRST BEING SPECIFICALLY DIRECTED TO DO SO AND WITHOUT FIRST PUNCHING A TIME CLOCK DID NOT CHANGE THAT ASSESSMENT. HE HELD THE CLAIM TO BE COMPENSABLE.

THE BOARD, ON DE NOVO REVIEW, DISAGREES WITH THE CONCLUSIONS OF THE REFEREE, PRIMARILY, BECAUSE THE ASSUMPTIONS MADE BY THE REFEREE ARE NOT IN ACCORDANCE WITH THE FACTS. THE INJURY MIGHT VERY WELL HAVE BEEN HELD TO BE COMPENSABLE HAD THE FACTS ASSUMED BY THE REFEREE ACTUALLY EXISTED – HOWEVER, THEY DID NOT. THE PERSON REQUESTING HELP WAS THE EMPLOYER'S DAUGHTER AND NOT A MEMBER OF THE GENERAL PUBLIC. CLAIMANT WAS NOT ON DUTY PUMPING GAS AT THE TIME HE WAS INJURED BUT WAS ON HIS DAY OFF AND HAD MERELY STOPPED AT THE STATION FOR SOCIAL PURPOSES. THE CAR WHICH THE EMPLOYER'S DAUGHTER WAS DRIVING WAS A SMALL CORVETTE, IT IS NOT NECESSARILY A TRUE ASSUMPTION THAT HAD CLAIMANT FAILED TO PUSH THE CAR THAT IT WOULD NEVER HAVE BEEN PUSHED INTO THE STATION. IT IS ALSO NOTED THAT THE EVIDENCE INDICATES THE POINT AT WHICH THE CAR WAS STALLED WAS CLOSER TO A COMPETITOR'S STATION AND THERE IS NO REASON TO BELIEVE THAT ITS EMPLOYE COULD NOT HAVE PUSHED THE CAR INTO THEIR OWN LOT HAD THE CLAIMANT OR ANYONE ELSE REFUSED TO PUSH IT.

THE ONLY BENEFIT TO BE FOUND IN THIS CASE IS THE PERSONAL BENEFIT TO A MEMBER OF THE EMPLOYER'S FAMILY, IT IS NOT A BUSINESS BENEFIT OF EITHER ECONOMIC NATURE OR A BUSINESS GOOD WILL. FURTHERMORE, AS THE REFEREE NOTED, CLAIMANT GAVE NO THOUGHT TO WHAT THE EMPLOYER'S REACTION WOULD HAVE BEEN HAD HE DECLINED TO ASSIST THE EMPLOYER'S DAUGHTER. THERE WAS NO EVIDENCE THAT CLAIMANT PERFORMED THIS ACTIVITY OR SERVICE STRICTLY OUT OF THE FEAR THAT HIS JOB MIGHT BE PLACED IN JEOPARDY HAD HE FAILED TO DO SO.

CLAIMANT WAS HIRED TO PUMP GAS AND WASH WINDOWS, THERE IS NO EVIDENCE THAT THE EMPLOYER CONTEMPLATED THAT HE WOULD PUSH CARS NOR WAS IT EVER SPECIFICALLY AUTHORIZED. THEREFORE, PUSHING THIS PARTICULAR VEHICLE WAS NOT AN ORDINARY RISK OF, NOR WAS IT INCIDENTAL TO, CLAIMANT'S EMPLOYMENT. CLAIMANT WAS NOT PAID FOR THE ACTIVITY OBVIOUSLY BECAUSE HE WAS NOT WORKING, THE ACTIVITY WAS NOT ON THE EMPLOYER'S PREMISES BUT WAS STALLED AT THE INTERSECTION AT THE OPPOSITE END OF THE BLOCK. THE EVIDENCE INDICATES THAT THE ACTUAL INJURY OCCURRED ON THE PREMISES OF THE STANDARD SERVICE STATION.

THE BOARD CONCLUDES THAT THE CLAIMANT HAD VOLUNTEERED, TOGETHER WITH TWO OTHER PERSONS WHO WERE NOT EMPLOYES OF THE EMPLOYER, TO ASSIST THE EMPLOYER'S DAUGHTER IN PUSHING HER CAR INTO ANOTHER SERVICE STATION WHERE IT COULD BE REPAIRED. HAD ONE OF THE TWO NON-EMPLOYES SUFFERED THE INJURY THERE WOULD BE NO QUESTION WITH RESPECT TO COMPENSABILITY. THE BOARD FINDS NOTHING IN THE EVIDENCE TO INDICATE THAT CLAIMANT HAD REENTERED HIS REGULAR EMPLOYMENT STATUS AT

THE TIME HE HELPED PUSH THE CAR AND THEREFORE HIS STATUS WAS NO DIFFERENT THAN THAT OF THE OTHER TWO INDIVIDUALS, I.E., BYSTANDERS WHO VOLUNTARILY CONSENTED TO HELP THE OWNER OF THE STALLED VEHICLE.

THE BOARD CONCLUDES THAT CLAIMANT'S INJURY NEITHER AROSE OUT OF NOR WAS IN THE COURSE AND SCOPE OF HIS EMPLOYMENT, THEREFORE, IT IS NOT COMPENSABLE.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 31, 1975 IS REVERSED.

WCB CASE NO. 75-2937 JUNE 7, 1976

MICHAEL C. HOWLAND, CLAIMANT
POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH GRANTED CLAIMANT 80 DEGREES FOR 25 PER CENT UNSCHEDULED LOW BACK DISABILITY, CONTENDING HE IS ENTITLED TO A LARGER AWARD FOR HIS PERMANENT PARTIAL DISABILITY.

CLAIMANT IS 29 YEARS OLD AND HAS COMPLETED HIGH SCHOOL AND ALSO A DIESEL MECHANICS COURSE SPONSORED BY CUMMINGS AND DETROIT DIESEL COMPANIES. CLAIMANT WENT TO WORK FOR THE EMPLOYER IN 1969, PART OF HIS DUTIES AS A TRAVELING SALESMAN WAS SELLING INDUSTRIAL PARTS. HE SUFFERED AN INJURY WHEN REAR-ENDED DURING A SALES TRIP ON FEBRUARY 5, 1971. CLAIMANT DID NOT RETURN TO THAT JOB BUT IN MAY 1971 WENT TO WORK FOR BEST MIX CONCRETE COMPANY DRIVING A TRANSIT MIX TRUCK. CLAIMANT'S WAGE FOR THE EMPLOYER WAS APPROXIMATELY 2.90 DOLLARS AN HOUR. HE NOW RECEIVES 7 DOLLARS AN HOUR AND WORKS FROM 5 TO 7 DAYS A WEEK AND FROM 8 TO 12 HOURS A DAY - HE ESTIMATES AN AVERAGE 50 HOUR WEEK THROUGHOUT THE YEAR.

AT THE PRESENT TIME CLAIMANT DRIVES A TRUCK ONLY ON RARE OCCASIONS - SINCE HE COMPLETED THE DIESEL MECHANICS SCHOOL IN 1973 HE HAS BEEN PRIMARILY ENGAGED IN ENGINE REBUILDING AND REPAIRING OF TRANSIT MIX TRUCKS. THIS INVOLVES STOOPING, BENDING, TORQUEING UP TO 400 FOOT-POUNDS AND LIFTING UP TO A HUNDRED POUNDS, HOWEVER, HE CAN USUALLY GET HELP WHEN NEEDED. CLAIMANT TESTIFIED HIS NECK AND SHOULDERS BECAME STIFF AND HIS HEAD ACHES IF HE STANDS OR SITS TOO LONG, HIS LEGS AND FEET TINGLE. CLAIMANT IS ABLE TO DRIVE AN AUTOMOBILE BUT AFTER ABOUT AN HOUR OF DRIVING HIS BACK WILL BEGIN TO TIGHTEN UP. HE HAS NO OTHER PAIN EXCEPT FOR THE HEADACHES AND HE HAS NO MORE TROUBLE DRIVING A TRANSIT MIX TRUCK THAN DRIVING A REGULAR AUTOMOBILE.

CLAIMANT AND HIS BROTHER-IN-LAW ATTENDED DIESEL SCHOOL TOGETHER AND HAD HOPED TO OPEN THEIR OWN SHOP, HOWEVER, CLAIMANT SUBSEQUENTLY DISCOVERED THAT HE COULD NOT DO THE NECESSARY CONTINUOUS BENDING, ETC., AND HE FEELS HE IS UNABLE TO OWN HIS OWN SHOP BECAUSE OF HIS INDUSTRIAL INJURY.

THE MEDICAL EVIDENCE INDICATES THAT CLAIMANT SUFFERED A CERVICAL AND LUMBAR STRAIN FOR WHICH HE UNDERWENT CONSERVATIVE TREATMENT. THE CLAIM WAS CLOSED ON MAY 24, 1972 BY DETERMINATION ORDER WHICH

GRANTED TIME LOSS ONLY. IT WAS RE-OPENED FOR ADDITIONAL TREATMENT. IN DECEMBER 1974 THE CLAIM WAS AGAIN CLOSED AND A DETERMINATION ORDER, MAILED APRIL 21, 1975, GRANTED CLAIMANT 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY.

THE REFEREE FOUND THAT ALTHOUGH CLAIMANT HAD NOT UNDERGONE ANY SURGERY OR EVER BEEN HOSPITALIZED AND THAT THE DOCTORS WHO HAD TREATED HIM HAD ONLY RECOMMENDED MEDICATION AND PHYSICAL THERAPY, NEVERTHELESS, FIVE YEARS AFTER THE INDUSTRIAL ACCIDENT CLAIMANT WAS STILL HAVING PAIN. DR. CLARK HAD EXPECTED CLAIMANT WOULD BE ASYMPTOMATIC A COUPLE OF MONTHS AFTER THE INJURY. NO FURTHER TREATMENT WAS INDICATED BY THE DOCTORS AND CLAIMANT HAS NOT SEEN DR. CLARK FOR ONE AND A HALF YEARS BUT DR. CLARK DID FIND PERMANENT RESIDUALS FROM THE INJURY AND THE PERSISTANCE OF A LOW GRADE BACK PROBLEM WHICH HAD BEEN CONSTANT.

BASED UPON DR. CLARK'S FINDINGS, THE REFEREE CONCLUDED THAT CLAIMANT WAS ENTITLED TO AN INCREASE IN THE AWARD FOR HIS LOW BACK DISABILITY AND, ACCORDINGLY, INCREASED IT TO 80 DEGREES FOR 25 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE REFEREE'S ORDER. THE MEDICAL EVIDENCE DOES NOT SUPPORT ANY JUSTIFICATION FOR AWARDING CLAIMANT MORE THAN 25 PER CENT OF THE MAXIMUM FOR UNSCHEDULED DISABILITY. ALTHOUGH CLAIMANT MAY NOT BE ABLE TO OWN HIS OWN SHOP, NEVERTHELESS, THERE IS NO EVIDENCE TO INDICATE THAT HE HAS SUFFERED MORE THAN 25 PER CENT LOSS OF HIS POTENTIAL EARNING CAPACITY AS A RESULT OF THE INDUSTRIAL INJURY.

ORDER

THE ORDER OF THE REFEREE DATED JANUARY 5, 1976 IS AFFIRMED.

SAIF CLAIM NO. FC 88580 JUNE 7, 1976

AMELIA JOY, CLAIMANT

DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION DETERMINATION

CLAIMANT SUFFERED A COMPENSABLE INJURY ON JULY 21, 1967. HER CLAIM WAS CLOSED ON NOVEMBER 13, 1968 WITH AN AWARD EQUAL TO 35 PER CENT LOSS OF HER RIGHT LEG. BETWEEN THE DATE OF THE CLOSURE AND AUGUST 1, 1975 THERE WAS SUBSTANTIAL LITIGATION NONE OF WHICH IS MATERIAL TO THIS ORDER.

ON AUGUST 1, 1975 CLAIMANT WAS HOSPITALIZED FOR AN ULCERATION ON THE MEDIAL ASPECT OF HER RIGHT LEG, SHE WAS DISCHARGED ON AUGUST 20, 1975 WITH INSTRUCTIONS FOR CONTINUED BED REST AND ELEVATION OF THE RIGHT LEG. ON AUGUST 25, 1975 THE STATE ACCIDENT INSURANCE FUND VOLUNTARILY REOPENED THE CLAIM TO ALLOW THE REQUIRED MEDICAL TREATMENT.

ON APRIL 13, 1976, CLAIMANT'S TREATING PHYSICIAN PROVIDED THE FUND WITH A REPORT INDICATING CLAIMANT HAD BEEN EXAMINED BY HIM ON APRIL 8, 1976 AT WHICH TIME SHE WAS COMPLAINING THAT SHE HAD MUSCLE SPASMS IN HER LEG PARTICULARLY AT NIGHT BUT THERE WAS NO EVIDENCE OF ULCERATION. CLAIMANT HAD VERY LIMITED MOTION OF THE ANKLE ON FLEXION AND EXTENSION - SHE WAS USING A BRACE AS SUPPORT AND WAS ABLE TO WALK WITH ASSISTANCE. THE CLAIMANT'S TREATING PHYSICIAN FELT SHE WOULD NOT BE ABLE TO PERFORM ANY SERVICE WHICH WOULD REQUIRE STANDING OR

MOVING ABOUT – HE ALSO INDICATED HE DID NOT ANTICIPATE ANY IMPROVEMENT IN CLAIMANT'S CONDITION.

ON MAY 4, 1976 THE FUND PROVIDED THE BOARD WITH THE ADDITIONAL MEDICAL REPORTS AND ASKED FOR A DETERMINATION UNDER THE PROVISIONS OF ORS 656.278. THE EVALUATION COMMITTEE RECOMMENDED THE BOARD AWARD CLAIMANT ADDITIONAL COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM AUGUST 1, 1975 THROUGH APRIL 8, 1976 AND ADDITIONAL COMPENSATION FOR PERMANENT PARTIAL DISABILITY EQUAL TO 20 PER CENT LOSS OF RIGHT LEG, GIVING CLAIMANT A TOTAL AWARD EQUAL TO 55 PER CENT OF THE MAXIMUM ALLOWABLE FOR HER SCHEDULED DISABILITY.

IT IS SO ORDERED.

WCB CASE NO. 75-941 JUNE 7, 1976

LOWELL A. BLEYHL, CLAIMANT

GILDEA AND MC GAVIC, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH REMANDED TO IT CLAIMANT'S CLAIM FOR PAYMENT OF COMPENSATION AS PROVIDED BY LAW AND AWARDED AN ATTORNEY'S FEE OF 800 DOLLARS.

CLAIMANT, ON JANUARY 10, 1975, ENGAGED IN A SCUFFLE WITH HIS SUPERVISOR, JIM BOLING. THE FOLLOWING DAY HE RECEIVED EMERGENCY ROOM MEDICAL ATTENTION FOR PAIN IN HIS NECK AND SHOULDER.

CLAIMANT WAS AN EMPLOYE IN THE CITY'S PARK MAINTENANCE DEPARTMENT AND, ALONG WITH TEN FELLOW EMPLOYES IN THAT DEPARTMENT, JOINED A UNION SOME TIME IN JANUARY 1974. THIS CAUSED TENSION BETWEEN THE EMPLOYES AND THE REPRESENTATIVES OF THE CITY, INCLUDING BOLING WHO WAS THE CITY PARKS' SUPERVISOR. ALL 11 WERE 'FIRED' ON NOVEMBER 14, 1974 BUT, FOLLOWING AN ARBITRATION HEARING, WERE REHIRED ON DECEMBER 23, 1974 – HOWEVER, THERE WAS CONTINUOUS TENSION AND THE EMPLOYES WERE FEARFUL THAT THEY MIGHT AGAIN BE DISCHARGED.

THE REFEREE FOUND THAT FOR A FEW WEEKS PRIOR TO THE SCUFFLE CLAIMANT HAD HAD A TAPE RECORDER IN THE SHOP WHERE HE WAS WORKING AND WAS TAPING CONVERSATIONS IN BOLING'S OFFICE FOR THE PURPOSE OF AFFORDING HIMSELF AND HIS FELLOW EMPLOYES SOME FOREWARNING OF INTENTIONS OF THE SUPERVISOR AND THE CITY TOWARD THEM.

ON JANUARY 10, BOLING NOTICED A HOLE IN THE WALL WHERE THE 'MIKE' HAD BEEN INSTALLED BY THE CLAIMANT AND BECAME SUSPICIOUS. LATER WHEN HE SAW CLAIMANT APPARENTLY REMOVING TAPE FROM THE TAPE RECORDER, HE ORDERED HIM TO LEAVE IT ALONE AND WHEN CLAIMANT DID NOT, HE GRABBED HIM, THEY SCUFFLED AND FELL OVER A LAWN MOWER. PRIOR TO THIS INCIDENT, BOLING HAD PLACED A CALL TO THE PERSONNEL DIRECTOR'S OFFICE AND THE LATTER HAD REQUESTED THAT THE POLICE COME TO THE PREMISES. IN THE COURSE OF THE SCUFFLE BOLING TOLD A FELLOW SUPERVISOR THAT THEY HAD A MAN UNDER ARREST HERE ALTHOUGH AT THE TIME HE DID NOT KNOW THE POLICE WERE COMING. BOLING TESTIFIED HE DIDN'T KNOW WHETHER HE CONCEIVED OF THE ARREST AS BEING MADE BY HIM AS A SUPERVISOR OR WHETHER HE WAS ACTING IN THE CAPACITY OF A CITIZEN MAKING AN ARREST, ALL HE REALLY WANTED TO DO WAS PREVENT CLAIMANT FROM REMOVING THE TAPE. ALL OF THIS HAPPENED WITHIN NORMAL WORKING HOURS.

CLAIMANT TESTIFIED THAT AT THE TIME OF THE SCUFFLE HE DID NOT NOTICE ANY INJURY BUT THE FOLLOWING DAY HE HAD STIFFNESS IN HIS NECK AND WAS SEEN BY DR. FREEMAN AT THE HOSPITAL EMERGENCY ROOM.

THE REFEREE CONCLUDED THAT CLAIMANT, IN FACT, WAS ATTEMPTING TO BUG THE SUPERVISOR'S OFFICE BECAUSE OF THE TENSIONAL SITUATION IN THE SHOP RESULTING FROM LABOR RELATIONS PROBLEMS BETWEEN THE CITY AND ITS EMPLOYES.

CLAIMANT'S COUNSEL CITED, IN PART, A COMMENT MADE BY JUSTICE RUTLEDGE IN HARTFORD ACCIDENT AND INDEMNITY CO. V. CARDILLO (UNDERSCORED), 112 F. 2ND 11, AT 17, WHICH THE REFEREE FOUND VERY PERSUASIVE AND IN ACCORD WITH THE PRINCIPLE SET FORTH IN STARK V. SIAC (UNDERSCORED), 103 OR 80 AND IN THE MATTER OF THE COMPENSATION OF YVONNE WRIGHTSMAN, (UNDERSCORED) WCB CASE NO. 75-769, 1 VAN NATTA 154. IN THE LAST CASE THE BOARD STATED THAT IT SHOULD BE IMMATERIAL WHETHER THE EMPLOYMENT ASSOCIATION GENERATED FRIVOLITY OR ANIMOSITY. THE LAW ONLY REQUIRES THAT THE INJURY ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

THE REFEREE CONCLUDED THAT IN THE PRESENT CASE CLAIMANT'S INJURY DID ARISE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT BUT BECAUSE OF THE FACTUAL SITUATION AND THE LEGAL QUESTION INVOLVED THE DENIAL OF THE LIABILITY WAS NOT UNREASONABLE AND WOULD NOT JUSTIFY PENALTIES.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 17, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 74-4290 JUNE 9, 1976

JACK JOHNSON, CLAIMANT

NICK CHAIVOE, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED AUGUST 7, 1974 AWARDING CLAIMANT NO COMPENSATION FOR PERMANENT PARTIAL DISABILITY. CLAIMANT ALLEGES HE HAS SUFFERED SOME PERSONAL DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON JULY 23, 1973. TO ENABLE THE PHYSICIANS TO MAKE A DETERMINATION WITH RESPECT TO CLAIMANT'S DISABILITY, A MYELOGRAM WAS RECOMMENDED - HOWEVER, CLAIMANT REFUSED TO UNDERGO THIS MYELOGRAM.

THE EMPLOYER CONTENDS THAT SUCH REFUSAL CONSTITUTES "UNREASONABLE REFUSAL TO SUBMIT TO SUCH MEDICAL OR SURGICAL TREATMENT AS IS REASONABLY ESSENTIAL" TO PROMOTE THE WORKMAN'S RECOVERY UNDER ORS 656.325(2). CLAIMANT CONTENDS THAT A MYELOGRAM IS AN IMPERFECT DIAGNOSTIC PROCEDURE INASMUCH AS A NEGATIVE MYELOGRAM DOES NOT DEFINITELY

RULE OUT THE EXISTENCE OF A HERNIATED DISC AND THAT, IN ANY EVENT, HE WOULD REFUSE A LAMINECTOMY OR ANY SURGICAL PROCEDURE, EVEN IF THE DOCTOR INDICATED THE DESIRABILITY OF SUCH AN OPERATION.

THE REFEREE, RELYING UPON THE BOARD'S POSITION CLEARLY SET FORTH IN THE CASES OF SALLY KATE WALDROUP (UNDERSCORED), WCB CASE NO. 71-2600, DECIDED JANUARY 12, 1973 AND EDWARD PRUITT (UNDERSCORED), WCB CASE NO. 74-2275, DECIDED MARCH 27, 1975, CONCLUDED THAT A REFUSAL TO SUBMIT TO A MYELOGRAM DID CONSTITUTE UNREASONABLE REFUSAL TO SUBMIT TO SURGICAL TREATMENT WITHIN THE MEANING OF THE STATUTE. HE CONCLUDED THAT THE CLAIMANT DID HAVE THE RIGHT TO 'TOUGH OUT', THE PAIN, HOWEVER, THIS DID NOT GIVE HIM THE RIGHT TO A FINDING OF PERMANENT DISABILITY WHEN HIS REFUSAL TO UNDERGO MEDICAL TREATMENT RENDERS SUCH FINDING DIFFICULT, IF NOT IMPOSSIBLE, TO MAKE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE OPINION OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED JANUARY 12, 1975 IS AFFIRMED.

WCB CASE NO. 73-2735 JUNE 9, 1976
WCB CASE NO. 74-2804
WCB CASE NO. 72-2335

CLIFFORD L. NOLLEN, CLAIMANT
J. DAVID KRYGER, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
LYLE VELURE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH DIRECTED IT TO ACCEPT CLAIMANT'S CLAIM FOR AGGRAVATION, PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY'S FEE OF 700 DOLLARS AND REIMBURSE INDUSTRIAL INDEMNITY FOR ANY EXPENDITURES IT HAD MADE AS THE PAYING AGENCY UNDER THE PROVISIONS OF ORS 656.307. THE REFEREE DENIED CLAIMANT'S CLAIM AGAINST INDUSTRIAL INDEMNITY.

THE QUESTION IS WHETHER CLAIMANT SUFFERED AN AGGRAVATION OF A 1969 INJURY WHILE EMPLOYED BY HELMS BROS., WHOSE WORKMAN'S COMPENSATION WAS PROVIDED BY THE FUND, OR HAD SUFFERED A NEW INJURY WHILE EMPLOYED BY ALBANY FROZEN FOODS, WHOSE WORKMEN'S COMPENSATION CARRIER WAS INDUSTRIAL INDEMNITY.

PURSUANT TO ORS 656.307, INDUSTRIAL INDEMNITY HAD BEEN DESIGNATED AS THE PAYING AGENCY PENDING A DETERMINATION OF THE RESPONSIBILITY FOR THE INJURY.

CLAIMANT SUFFERED A COMPENSABLE SPRAIN OF HIS LEFT ARM AND ELBOW ON MAY 28, 1969. HE WAS SEEN BY DR. ELLISON AND LATER REFERRED TO DR. TSAI WHO PERFORMED A C5-6, C6-7 DISCOIDECTOMY WITH FUSION. CLAIMANT'S CONDITION WAS FOUND TO BE STATIONARY BY DR. TSAI ON JUNE 29, 1972 - HE STATED THAT THERE WAS SOME RESIDUAL MUSCLE SPASM AND HE PRESCRIBED PHYSICAL THERAPY, DRUGS AND INDICATED THAT CLAIMANT'S LIFTING SHOULD BE LIMITED TO 50 POUNDS BELOW THE SHOULDER LEVEL. THE CLAIM WAS CLOSED ON JULY 14, 1972 WITH AN AWARD OF 20 PER CENT FOR UNSCHEDULED NECK DISABILITY.

ON OCTOBER 11, 1972 WHILE CLAIMANT WAS EMPLOYED BY ALBANY FROZEN FOODS HE WAS HOSPITALIZED WITH A CERVICAL SPINE SPRAIN. DR. TSAI FELT IT WAS HYPEREXTENSION AND HYPER-FLEXION INJURY TO THE CERVICAL SPINE AND A TRACTION INJURY TO C7 ON THE LEFT SIDE WHICH WERE RELATED TO AN INDUSTRIAL INJURY WHICH CLAIMANT HAD SUFFERED ON SEPTEMBER 4, 1972. CLAIMANT FILED A CLAIM AND, AFTER BEING EXAMINED AT THE DISABILITY PREVENTION DIVISION IN MAY, 1973 AND BY THE BACK EVALUATION CLINIC ON JUNE 14, 1973, HIS CLAIM WAS CLOSED BY A DETERMINATION ORDER MAILED AUGUST 14, 1973 WHICH AWARDED CLAIMANT TIME LOSS ONLY.

IN NOVEMBER, 1973 CLAIMANT WAS REFERRED TO DR. ELLISON FOR AN ORTHOPEDIC EVALUATION BECAUSE OF HIS CONTINUED PAIN AND DISABILITY. DR. ELLISON SUSPECTED A NON-UNION AT THE FUSION SITE AND THAT THE RECURRENCE OF THE SYMPTOMS WERE RELATED TO THE 1969 INJURY. A REFUSION WAS PERFORMED ON DECEMBER 13, 1973 AND, ON APRIL 23, 1974, DR. ELLISON INDICATED THAT THE C6-7 FUSION WAS NEVER SOLID - THAT NO RE-INJURY OCCURRED BREAKING DOWN A PREVIOUSLY SOLID FUSION. HE DID NOT THINK THE FORKLIFT INCIDENT OF SEPTEMBER 4, 1972 CAUSED THE NON-UNION - THE NON-UNION WAS DEVELOPING AND A SUBSTANTIAL INJURY WOULD HAVE BEEN NECESSARY TO EFFECT IT IN ANY WAY. LATER, IN HIS DEPOSITION, DR. ELLISON INDICATED THAT EVEN WITHOUT THE FORKLIFT INCIDENT CLAIMANT COULD HAVE BECOME SYMPTOMATIC AND ALTHOUGH THE 1972 INCIDENT WAS SUBSTANTIAL ENOUGH TO HAVE CAUSED THE SYMPTOMS CLAIMED, NEVERTHELESS, HE DID NOT BELIEVE THAT IT CAUSED THE NON-UNION.

INDUSTRIAL INDEMNITY FILED A MOTION TO DISMISS FOR LACK OF JURISDICTION, CONTENDING THE CLAIMANT'S PETITION WAS NOT SUPPORTED BY MEDICAL EVIDENCE. THE REFEREE DENIED THE MOTION.

THE REFEREE FOUND THAT THE PREPONDERANCE OF THE EVIDENCE REVEALED THAT CLAIMANT SUFFERED A COMPENSABLE AGGRAVATION OF HIS 1969 INJURY AND THAT THE TREATMENT HE RECEIVED FOLLOWING SEPTEMBER 4, 1972 WAS RELATED TO SUCH AGGRAVATION. HE BASED THIS FINDING, PRIMARILY, ON DR. ELLISON'S OPINION AND THE CREDIBLE EVIDENCE RECEIVED AT THE HEARING WHICH ESTABLISHED THAT THE FORKLIFT INCIDENT WAS NOT NEARLY AS DRAMATIC, OR TRAUMATIC AS WAS BELIEVED.

HE FURTHER FOUND THAT CLAIMANT'S CREDIBILITY WAS SUBSTANTIALLY ERODED AT THE HEARING AND THAT HIS RECOUNTING OF THE SEPTEMBER 4, 1972 INCIDENT WAS GROSSLY EXAGGERATED. HE CONCLUDED THAT THERE WAS NO NEW INJURY SUFFERED BY THE CLAIMANT ON SEPTEMBER 4, 1972, THEREFORE, THE SOLE RESPONSIBILITY FOR CLAIMANT'S PRESENT PHYSICAL CONDITION WAS THAT OF THE STATE ACCIDENT INSURANCE FUND, EVEN THOUGH THE FUND HAD CONTENDED THAT INDUSTRIAL INDEMNITY BY ACCEPTING THE CLAIM INITIALLY WAS LIABLE FOR THE CONSEQUENCES.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 20, 1974 IS AFFIRMED IN ITS ENTIRETY.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE, FOR SERVICES IN CONNECTION WITH BOARD REVIEW, THE SUM OF 400 DOLLARS PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-3220 JUNE 9, 1976

HELEN GOLLYHORN, CLAIMANT

STIPULATION AND ORDER OF DISMISSAL

THIS MATTER HAVING COME ON REGULARLY BEFORE KEITH WILSON, CHAIRMAN OF THE WORKMEN'S COMPENSATION BOARD, CLAIMANT ACTING BY AND THROUGH HER ATTORNEY, GARY PETERSON AND THE EMPLOYER ACTING BY AND THROUGH THEIR COUNSEL, JAMES D. HUEGLI, AND IT APPEARING THAT THE MATTER HAVING BEEN FULLY COMPROMISED BETWEEN THE PARTIES, AND THAT THIS ORDER MAY NOW BE ENTERED,

NOW, THEREFORE, IT IS HEREBY ORDERED THAT CLAIMANT BE AND IS HEREBY AWARDED AN ADDITIONAL 10 PERCENT UNSCHEDULED DISABILITY IN ADDITION TO THE UNSCHEDULED DISABILITY AWARDED BY DETERMINATION ORDER OF JULY 18, 1975, SAID INCREASE AMOUNTING TO TWO THOUSAND, TWO HUNDRED FORTY DOLLARS (2,240 DOLLARS).

IT IS FURTHER ORDERED THAT CLAIMANT'S COUNSEL BE AND IS HEREBY AWARDED 25 PERCENT OF THE INCREASE IN COMPENSATION MADE PAYABLE BY THIS ORDER.

IT IS FURTHER ORDERED THAT CLAIMANT'S REQUEST FOR BOARD REVIEW OF THE REFEREE'S ORDER AND OPINION OF FEBRUARY 6, 1976 BE AND IS HEREBY DISMISSED.

IT IS SO STIPULATED.

SAIF CLAIM NO. RC 165155 JUNE 9, 1976

WILBUR J. CHRISTIANI, CLAIMANT

C.H. SEAGRAVES, JR., CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER REMANDING FOR HEARING

ON MAY 24, 1976 CLAIMANT REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND REOPEN HIS CLAIM FOR AN INDUSTRIAL INJURY SUFFERED ON APRIL 11, 1968.

CLAIMANT'S FIRST DETERMINATION UNDER ORS 656.268 WAS MADE ON AUGUST 15, 1969, MORE THAN FIVE YEARS HAVE EXPIRED SINCE THAT DATE AND CLAIMANT'S STATUTORY RIGHTS FOR AGGRAVATION HAVE EXPIRED. CLAIMANT NOW CONTENDS THAT HE IS ENTITLED TO ADDITIONAL MEDICAL CARE AND TREATMENT AND TIME LOSS BENEFITS BASED UPON TWO REPORTS FROM DR. CAMPAGNA, A NEUROLOGICAL SURGEON, ONE DATED JANUARY 29, 1976 AND THE OTHER DATED APRIL 26, 1976 WHEREIN DR. CAMPAGNA EXPRESSES HIS OPINION THAT THERE IS MEDICAL CONNECTION BETWEEN THE INITIAL INDUSTRIAL INJURY AND CLAIMANT'S PRESENT CONDITION. CLAIMANT REQUESTED THE STATE ACCIDENT INSURANCE FUND TO VOLUNTARILY ACCEPT HIS CLAIM BUT IT REFUSED TO DO SO.

THE FUND WAS FURNISHED A COPY OF CLAIMANT'S REQUEST, TOGETHER WITH THE MEDICAL INFORMATION ATTACHED THERETO, AND, ON MAY 27, 1976 THE FUND RESPONDED THAT IT WOULD NOT CONSIDER REOPENING CLAIMANT'S CLAIM ON OWN MOTION AS IT DID NOT FEEL THAT HIS PRESENT CONDITION FOR WHICH HE IS BEING TREATED IS THE RESULT OF THE INDUSTRIAL INJURY SUFFERED ON APRIL 11, 1968.

THE EVIDENCE BEFORE THE BOARD, AT THE PRESENT TIME, IS NOT

SUFFICIENT FOR IT TO DETERMINE THE MERITS OF THE REQUEST TO REOPEN THE 1968 CLAIM. THEREFORE, THE MATTER IS REFERRED TO THE HEARINGS DIVISION, WITH INSTRUCTIONS TO HOLD A HEARING AND TAKE EVIDENCE ON THE ISSUE OF WHETHER CLAIMANT HAS AGGRAVATED HIS 1968 INJURY AND IS ENTITLED TO FURTHER MEDICAL CARE AND TREATMENT, AND TIME LOSS BENEFITS AS A RESULT THEREOF. UPON CONCLUSION OF THE HEARING, THE REFEREE SHALL CAUSE THE TRANSCRIPT OF THE PROCEEDINGS TO BE PREPARED AND SUBMITTED TO THE BOARD WITH HIS RECOMMENDATIONS.

WCB CASE NO. 69-394 JUNE 11, 1976

BURTON A. ELLIOTT, CLAIMANT

KEITH SKELTON, CLAIMANT'S ATTY.
BOB JOSEPH, DEFENSE ATTY.
OWN MOTION ORDER

ON FEBRUARY 19, 1975 CLAIMANT, THROUGH HIS ATTORNEY, REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND REOPEN HIS CLAIM.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON JULY 16, 1967 WHILE WORKING FOR WEYERHAEUSER COMPANY, HIS CLAIM WAS CLOSED ON NOVEMBER 27, 1967 AND HIS FIVE YEAR AGGRAVATION PERIOD HAS EXPIRED.

CLAIMANT'S REQUEST WAS SUPPORTED BY FOUR MEDICAL REPORTS, THE MOST RECENT WAS DR. BERNHOFT'S, BASED ON HIS EXAMINATION OF CLAIMANT ON JULY 19, 1974. WEYERHAEUSER COMPANY, IN OPPOSITION TO THE REQUEST, FURNISHED MEDICAL REPORTS FROM DR. SCHULER AND DR. BEERS, THE LATTER HAD EXAMINED CLAIMANT ON APRIL 25, 1975.

THE BOARD, AFTER CONSIDERING THE MEDICAL EVIDENCE SUBMITTED BY BOTH PARTIES, CONCLUDES THAT THE MOST RECENT MEDICAL DOCUMENTATION DOES NOT JUSTIFY A REOPENING OF CLAIMANT'S CLAIM AT THIS TIME.

ORDER

THE MOTION TO REOPEN CLAIMANT'S CLAIM UNDER THE PROVISIONS OF ORS 656.278 IS HEREBY DENIED.

WCB CASE NO. 74-4606 JUNE 11, 1976

ALFREIDA JOHNSON, CLAIMANT

WILLARD K. CAREY, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

THE CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE STATE ACCIDENT INSURANCE FUND'S DENIAL OF HER CLAIM. PRIOR TO THE HEARING THE FUND RAISED THE ISSUE OF TIMELINESS AND CLAIMANT WAS ALLOWED TO RESPOND THERETO BY BRIEF.

CLAIMANT, WHO WAS 63 YEARS OLD AT THE TIME OF THE HEARING, WAS EMPLOYED AS AN ELEVATOR OPERATOR AT THE SACAJAWEA ANNEX IN LA GRANDE FROM OCTOBER, 1968 UNTIL MARCH, 1973. THE ELEVATOR HAD TWO SLIDING DOORS, AN INSIDE CAGE TYPE AND AN OUTSIDE SOLID PANEL, BOTH WERE OPERATED MANUALLY WITH THE LEFT HAND - THE ELEVATOR WAS OPERATED BY PUSH BUTTONS. THE PANEL DOOR WAS DIFFICULT TO OPERATE. CLAIMANT'S DUTIES

INCLUDED DELIVERING THE MAIL TWICE A DAY, SHE HAD TO STOOP OVER TO PUT THE MAIL UNDER EACH TENANT'S DOOR. SOON AFTER SHE WAS EMPLOYED CLAIMANT BEGAN GETTING HEADACHES EACH DAY, FIRST, AFTER THE MAIL DELIVERY IN THE MORNING AND AGAIN FOLLOWING THE AFTERNOON DELIVERY. IN THE BEGINNING THEY WERE NOT SEVERE, BUT BY 1970 SHE SOUGHT TREATMENT FROM HER FAMILY DOCTOR AND THE PAIN BECAME SO INTENSE THAT SHE FINALLY QUIT IN MARCH, 1973.

CLAIMANT'S FAMILY DOCTOR, DR. ALLEN, THOUGHT CLAIMANT HAD ARTHRITIS - HOWEVER, IN NOVEMBER, 1973 HE SENT HER TO BOISE TO BE EXAMINED BY DR. O'BRIEN WHO, IN A LETTER DATED NOVEMBER 13, 1973, ADVISED DR. ALLEN THAT HIS DIAGNOSIS WOULD BE - 'GREATER OCCIPITAL NEURITIS CAUSED BY AT LEAST IN PART SPASMS OF THAT TRAPEZIUS MUSCLE. THIS WOULD BE AN OCCUPATIONAL ILLNESS SINCE MRS. JOHNSON WAS EMPLOYED AS AN ELEVATOR OPERATION (SIC) AND CONSTANTLY USED THAT TRAPEZIUS OPENING AND CLOSING THAT ELEVATOR DOOR.'

THE RECORD IS SOMEWHAT COMPLICATED BY THE PRESENCE OF THREE FORM 801'S - ONE HAS THE TOP PORTION COMPLETED IN THE CLAIMANT'S HANDWRITING BUT DOES NOT HAVE A DATE AFFIXED THERETO. ONE HAS THE BOTTOM PORTION SIGNED BY THE EMPLOYER WITH A DATE OF OCTOBER 4, 1974. ONE IS FULLY COMPLETED WITH A SIGNATURE OF CLAIMANT, THE DATE AFTER HER SIGNATURE IS DECEMBER 14, 1974, THE BOTTOM PART IS SIGNED BY THE EMPLOYER AND THE DATE OF HIS SIGNATURE IS DECEMBER 16, 1974. THIS LAST REPORT INDICATES THEREON THAT EMPLOYEE QUIT ON DOCTOR'S ADVICE THAT HER JOB WAS IRRITATING HER CONDITION WHICH WAS PAIN IN THE BACK AND LEGS. THE FIRST REPORT CONTAINS THIS STATEMENT IN THE CLAIMANT'S HANDWRITING - 'WHILE I WAS EMPLOYED TO OPERATE ELEVATOR BY PULLING HEAVY DOOR WITH LEFT ARM PERIOD OF OVER FOUR YEARS PLUS FIVE MONTHS PLEASE SEE ATTACHED DOCTORS REPORT'. NO DOCTOR'S REPORT WAS ATTACHED AND IT IS IMPOSSIBLE TO DETERMINE TO WHICH, IF ANY, DOCTOR'S REPORT CLAIMANT WAS REFERRING, AT THAT TIME, INASMUCH AS THE 801 WAS UNDATED, ALTHOUGH THE ORIGINAL INDICATES THAT IT WAS RECEIVED BY THE FUND SEPTEMBER 25, 1974.

THE FUND CONTENDS THAT CLAIMANT HAD KNOWLEDGE AND UNDERSTOOD THAT HER JOB WAS THE BASIS OF HER DISABLING CONDITION WHEN SHE QUIT IN MARCH, 1973 AND SHE DID NOT FILE HER CLAIM UNTIL SOME ONE AND A HALF YEARS THEREAFTER AND, THEREFORE, HER CLAIM WAS NOT TIMELY UNDER THE PROVISIONS OF ORS 656.807.

CLAIMANT TESTIFIED THAT SHE THOUGHT HER WORK MUST HAVE CAUSED HER HEADACHES AND THE EVIDENCE INDICATED THAT DR. ALLEN HAD BEEN TREATING HER FOR NECK, BACK, SHOULDER AND LEG PAINS SINCE 1967 - THE FULLY COMPLETED 801 INDICATED THAT CLAIMANT QUIT HER JOB ON THE ADVICE OF HER DOCTOR THAT THE JOB WAS IRRITATING HER BACK AND LEG PAIN.

THE EMPLOYER TESTIFIED THAT CLAIMANT HAD COMPLAINED OF ACHING LEGS BECAUSE OF BEING ON HER FEET ALL DAY BUT DID NOT RECALL CLAIMANT COMPLAINING OF HEADACHES NOR DID SHE DISCUSS HER PROBLEM AT ANY TIME WITH HIM DURING 1973.

IN ADDITION TO THE TREATMENT RECEIVED BY HER FAMILY DOCTOR, CLAIMANT WAS ALSO TREATED BY SEVERAL ORTHOPEDISTS, NEUROLOGISTS AND A VASCULAR SURGEON - SHE HAD A BRAIN SCAN AND A MYELOGRAM IN JANUARY, 1975. ON JANUARY 28, 1975 SHE UNDERWENT LEFT GREATER OCCIPITAL NERVE SURGERY WHICH AFFORDED CLAIMANT COMPLETE RELIEF FROM PAIN ON THE LEFT GREATER OCCIPITAL REGION AND ON THE LEFT SIDE OF THE NECK BUT SHE STILL HAS PAIN IN THE PARIETAL REGION AND ALSO CONSIDERABLE SENSITIVITY IN THE SCALP IN THAT REGION WHICH IS AFFECTED BY TENSION AND INCREASED ACTIVITY.

THE REFEREE FOUND THAT CLAIMANT BELIEVED THAT HER JOB HAD CAUSED HER PROBLEMS AND THAT SHE HAD DISCUSSED THESE PROBLEMS WITH DR. ALLEN

WHO HAD INFORMED HER THAT HER WORK WAS TOO HEAVY FOR HER AND THAT SHE SHOULD QUIT. HE BELIEVED THAT CERTAIN MEDICAL EVIDENCE COULD LEAD ONE TO BELIEVE THAT CLAIMANT MIGHT HAVE BEEN TOTALLY DISABLED WHEN SHE LEFT HER WORK ON MARCH 13, 1973 BUT HE WAS UNABLE TO DETERMINE WHAT CAUSED THIS TOTAL DISABILITY. THE REFEREE FELT THE MEDICAL EVIDENCE WAS EQUIVOCAL AND THAT THE OCCUPATIONAL DISEASE ARGUMENT WAS NOT PERSUASIVE. HE BELIEVED THAT THE CLAIMANT VISITED THE DIVISION OF VOCATIONAL REHABILITATION AS A RESULT OF HER DISCUSSION WITH DR. O'BRIEN IN BOISE DURING NOVEMBER, 1973 AND THAT, AT THAT TIME, A REASONABLE PERSON COULD CONCLUDE THAT CLAIMANT SHOULD HAVE KNOWN THAT DR. O'BRIEN SUGGESTED OCCUPATIONAL ILLNESS. CLAIMANT STATED THAT MRS. HALL, WITH WHOM SHE SPOKE DURING HER VISIT AT THE DIVISION OF VOCATIONAL REHABILITATION INFORMED HER THAT SHE MIGHT HAVE AN OCCUPATIONAL ILLNESS.

BASED UPON THESE FINDINGS, THE REFEREE CONCLUDED THAT HE HAD NO ALTERNATIVE, UNDER THE PROVISIONS OF ORS 656.807(1), BUT TO FIND THAT THE OCCUPATIONAL DISEASE CLAIM WAS VOID BECAUSE IT HAD NOT BEEN FILED WITHIN 180 DAYS FROM THE DATE CLAIMANT BECAME DISABLED OR WAS INFORMED THAT SHE COULD BE SUFFERING FROM AN OCCUPATIONAL DISEASE, WHICH DATE HE FOUND TO BE NOVEMBER, 1973. HE AFFIRMED THE DENIAL OF THE FUND, DATED DECEMBER 10, 1974.

THE BOARD, ON DE NOVO REVIEW, DISAGREES WITH THE REFEREE. THE MEDICAL EVIDENCE DOES INDICATE THAT CLAIMANT CLEARLY WAS SUFFERING FROM AN OCCUPATIONAL DISEASE. HOWEVER, THERE IS NOT A SCINTILLA OF EVIDENCE IN THE RECORD TO INDICATE THAT CLAIMANT WAS EVER INFORMED BY A PHYSICIAN THAT SHE WAS SUFFERING FROM AN OCCUPATIONAL DISEASE (UNDERSCORED). DR. O'BRIEN INFORMED DR. ALLEN THAT, IN HIS OPINION, CLAIMANT WAS SUFFERING FROM A OCCIPITAL NEURITIS AND THAT THIS WOULD BE AN OCCUPATIONAL ILLNESS, HOWEVER, CLAIMANT WAS NOT SO INFORMED BY DR. O'BRIEN NOR WAS SHE EVEN AWARE OF THIS REPORT UNTIL HER ATTENTION WAS CALLED TO IT BY MRS. HALL AT A MUCH LATER DATE.

WHEN CLAIMANT QUIT WORKING IN MARCH, 1973 IT WAS, ACCORDING TO CLAIMANT'S TESTIMONY, BECAUSE DR. ALLEN HAD INDICATED THAT THE WORK WAS TOO HEAVY FOR HER AND THAT SHE WOULD BE BETTER OFF NOT WORKING. THEREFORE, ALTHOUGH CLAIMANT WAS INFORMED BY DR. ALLEN THAT THERE WAS A RELATIONSHIP BETWEEN HER WORK AND HER PHYSICAL DIFFICULTIES, NEVERTHELESS, NO EVIDENCE IN THE RECORD INDICATES THAT ANY DOCTOR AT ANY TIME PRIOR TO HER FILING A CLAIM, SPECIFICALLY TOLD HER, SIMPLY AND DIRECTLY, THAT HER CONDITION AROSE OUT OF HER EMPLOYMENT OR ANYTHING CLEARLY TO THAT EFFECT.

THE BOARD FEELS THAT THE FACTS IN THIS CASE ARE VERY SIMILAR TO THOSE IN TEMPLETON V. POPE TALBOT, INC. (UNDERSCORED), 7 OR APP 119. IN THAT CASE CLAIMANT HAD DIFFICULTIES WITH HIS NECK AND SHOULDER FOR ABOUT TWO YEARS PRIOR TO THE TIME HE FILED HIS OCCUPATIONAL DISEASE, ALSO DURING THIS PERIOD HE HAD BEEN TOLD BY DOCTORS THAT THERE WAS A RELATIONSHIP BETWEEN HIS WORK AND HIS PHYSICAL DIFFICULTIES BUT NO DOCTOR AT ANY TIME PRIOR TO THE FILING OF HIS CLAIM, SPECIFICALLY TOLD HIM, SIMPLY AND DIRECTLY, THAT THIS CONDITION AROSE OUT OF HIS EMPLOYMENT OR ANYTHING CLEARLY TO THAT EFFECT. THE COURT HELD THAT THE STATEMENTS OF CLAIMANT'S DOCTORS MADE TO HIM WERE NOT SUFFICIENT TO MAKE THE LIMITATION STATUTE (ORS 656.807-1-) COMMENCE TO RUN. THE COURT CITED A WASHINGTON SUPREME COURT DECISION WHICH STATED IN PART THAT EVEN WHEN SUCH A CAUSE OF ACTION EXISTS, THE STATUTE DELAYS THE RUNNING OF THE STATUTE OF LIMITATIONS UNTIL THE WORKMAN IS GIVEN NOTICE BY A DOCTOR THAT HIS DISABLING DISEASE IS OCCUPATIONAL IN ITS NATURE AND CAUSATION. IT IS NOT ENOUGH THAT THE WORKMAN FINDS THAT HE HAS A PARTICULAR DISEASE, THE RECORD MUST AFFIRMATIVELY SHOW THAT THE WORKMAN WAS ADVISED FURTHER THAT THE DISEASE WAS CAUSED BY OR AROSE OUT OF HIS EMPLOYMENT.

THE BOARD CONCLUDES THAT, IN THE CASE PRESENTLY BEFORE IT, CLAIMANT WAS NOT, AND STILL HAS NOT BEEN, ADVISED BY ANY PHYSICIAN THAT SHE IS SUFFERING FROM AN OCCUPATIONAL DISEASE AND, THEREFORE, CLAIMANT'S CLAIM WAS TIMELY FILED UNDER THE PROVISIONS OF ORS 656.807(1) AND THE DENIAL BY THE FUND WAS IMPROPER. HAVING SO CONCLUDED, THE BOARD WILL NOT RULE ON THE ALTERNATIVE REQUEST THAT THE MATTER BE REMANDED TO THE REFEREE FOR THE TAKING OF FURTHER TESTIMONY ON THE ISSUE OF TIMELINESS.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 18, 1975 IS REVERSED.

CLAIMANT'S CLAIM FOR AN OCCUPATIONAL DISEASE IS REMANDED TO THE STATE ACCIDENT INSURANCE FUND FOR THE ACCEPTANCE AND PAYMENT OF COMPENSATION, AS PROVIDED BY LAW, COMMENCING MARCH 13, 1973 AND UNTIL THE CLAIM IS CLOSED PURSUANT TO ORS 656.268.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY FEE FOR HIS SERVICES AT THE HEARING BEFORE THE REFEREE THE SUM OF 1,000 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW THE SUM OF 400 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 76-715 JUNE 11, 1976

WALLACE PUZIO, CLAIMANT

ALLAN COONS, CLAIMANT'S ATTY.
KEITH SKELTON, DEFENSE ATTY.
OWN MOTION ORDER REMANDING FOR HEARING

IN 1959, WHILE IN THE EMPLOY OF MATRON PLYWOOD, INSURED BY THE STATE ACCIDENT INSURANCE FUND, CLAIMANT SUFFERED A COMPENSABLE INDUSTRIAL INJURY TO HIS RIGHT SHOULDER. THE CLAIM WAS ULTIMATELY CLOSED WITH AN AWARD FOR PERMANENT DISABILITY. CLAIMANT'S FIVE YEAR AGGRAVATION PERIOD HAS EXPIRED.

ON FEBRUARY 9, 1976 CLAIMANT REQUESTED A HEARING ON AN ALLEGED INDUSTRIAL INJURY SUFFERED JUNE 12, 1975 WHILE IN THE EMPLOY OF LANE PLYWOOD, INSURED BY LIBERTY MUTUAL.

ON MARCH 23, 1976 LIBERTY MUTUAL REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND REOPEN CLAIMANT'S 1959 CLAIM, CONTENDING CLAIMANT'S PRESENT CONDITION WAS AN AGGRAVATION OF THE 1959 INJURY FOR WHICH THE FUND WAS LIABLE RATHER THAN A NEW INJURY FOR WHICH IT WOULD BE LIABLE.

THE EVIDENCE BEFORE THE BOARD, AT THE PRESENT TIME, IS NOT SUFFICIENT FOR IT TO DETERMINE THE MERITS OF THE REQUEST TO REOPEN THE 1959 CLAIM UNDER ITS OWN MOTION JURISDICTION. TO AFFORD ALL PARTIES CONCERNED THE OPPORTUNITY OF MEETING THE ISSUE OF WHETHER CLAIMANT HAS SUFFERED AN AGGRAVATION OF HIS 1959 INDUSTRIAL INJURY OR A NEW INJURY AS A RESULT OF THE INCIDENT OF JUNE 12, 1975 THE STATE ACCIDENT INSURANCE FUND IS HEREBY MADE A PARTY DEFENDANT AND THE MATTER IS REFERRED TO THE HEARINGS DIVISION WITH INSTRUCTIONS TO HOLD A HEARING AND RECEIVE EVIDENCE ON THIS ISSUE. UPON CONCLUSION OF THE HEARING, IF THE REFEREE FINDS THAT CLAIMANT HAS SUFFERED AN AGGRAVATION OF HIS 1959 INJURY, HE SHALL CAUSE A TRANSCRIPT OF THE PROCEEDINGS TO BE PREPARED AND SUBMITTED TO THE BOARD WITH HIS RECOMMENDATIONS - HOWEVER, IF HE FINDS CLAIMANT SUFFERED A NEW INJURY ON JUNE 12, 1975, HE SHALL ENTER A FINAL AND APPEALABLE ORDER THEREON.

CLAIM NO. B53—116218 JUNE 11, 1976

EUGENE SPARKS, CLAIMANT
OWN MOTION DETERMINATION

CLAIMANT SUFFERED A COMPENSABLE INJURY ON JANUARY 13, 1967, HIS CLAIM WAS FIRST CLOSED BY A DETERMINATION ORDER MAILED MARCH 5, 1968 WHICH AWARDED CLAIMANT COMPENSATION FOR TEMPORARY TOTAL DISABILITY ONLY. CLAIMANT'S AGGRAVATION RIGHTS HAVE EXPIRED.

THE CLAIM WAS REOPENED AND CLAIMANT UNDERWENT A LAMINECTOMY AND FUSION AT THE L5-S1 LEVEL ON JANUARY 14, 1972. ON DECEMBER 26, 1968 A SECOND DETERMINATION ORDER AWARDED CLAIMANT 10 PER CENT LOSS OF AN ARM BY SEPARATION FOR UNSCHEDULED LOW BACK DISABILITY - ON AUGUST 29, 1972 A THIRD DETERMINATION ORDER AWARDED CLAIMANT AN ADDITIONAL 25 PER CENT.

ON MARCH 13, 1973 CLAIMANT CONSULTED HIS TREATING PHYSICIAN, DR. RAY GREWE, AND, BASED ON HIS REPORT, EMPLOYERS MUTUAL OF WAUSAU VOLUNTARILY REOPENED THE CLAIM. CLAIMANT HAS HAD THREE SUBSEQUENT PROCEDURES, ALL OF WHICH HAVE BEEN ONLY OF MINIMAL HELP IN ALLEVIATING HIS PAINFUL SYMPTOMS.

ON DECEMBER 30, 1975 CLAIMANT WAS EXAMINED BY TWO ORTHOPEDIC SURGEONS AND ONE NEUROSURGEON, MEMBERS OF THE ORTHOPEDIC CONSULTANTS. THE CONSENSUS WAS THAT CLAIMANT'S TOTAL LOSS OF FUNCTION, AT THAT TIME, WAS SEVERE, THEY DID NOT BELIEVE THAT CLAIMANT NEEDED ANY FURTHER SURGICAL TREATMENT BUT WOULD NEED SUPERVISION AND MEDICATION IN THE FUTURE - CLAIMANT COULD NOT RETURN TO HIS FORMER OCCUPATION NOR TO ANY OCCUPATION AND REFERRAL TO THE DEPARTMENT OF VOCATIONAL REHABILITATION WAS NOT INDICATED.

ON MARCH 12, 1976 DR. GREWE, AFTER REVIEWING THE REPORT OF THE ORTHOPEDIC CONSULTANTS, STATED HE FELT THAT CLAIMANT COULD MAKE SOME DEFINITE GAINS IN HIS CONDITION AND, IN FACT, MIGHT BE REHABILITATED TO GAINFUL EMPLOYMENT IF HE HAD ADEQUATE PSYCHIATRIC THERAPY BUT BELIEVED CLAIMANT HAS PERMANENT TOTAL DISABILITY ON THE BASIS OF HIS INABILITY TO COPE WITH HIS PROBLEMS.

ON APRIL 20, 1976 THE CARRIER REQUESTED A DETERMINATION PURSUANT TO ORS 656.278. THE EVALUATION DIVISION OF THE BOARD RECOMMENDED THAT CLAIMANT BE GRANTED COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM MARCH 13, 1973 THROUGH MARCH 12, 1976 AND THAT HE BE DECLARED PERMANENTLY AND TOTALLY DISABLED AS OF MARCH 13, 1976.

IT IS SO ORDERED.

WCB CASE NO. 75—3076 JUNE 11, 1976

PHILIP J. TURNER, CLAIMANT
JOHN L. JACOBSON, CLAIMANT'S ATTY.
MARSHALL C. CHENEY, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER
CROSS REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 80 DEGREES FOR 25 PER CENT UNSCHEDULED LOW BACK DISABILITY, CONTENDING THAT THE AWARD IS GREATER THAN THE EVIDENCE

JUSTIFIES. THE CLAIMANT ALSO SEEKS BOARD REVIEW OF THE REFEREE'S ORDER, CONTENDING HE SHOULD BE AWARDED 160 DEGREES FOR 50 PER CENT UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT, A 23 YEAR OLD MILL EMPLOYEE, SUFFERED A COMPENSABLE BACK INJURY ON AUGUST 30, 1974, WHILE PULLING LUMBER ON THE GREEN CHAIN. HE WAS FIRST GIVEN CONSERVATIVE TREATMENT BY DR. MCKIM AND THEN RELEASED TO RETURN TO WORK - HOWEVER, DR. GERMAN, AN ORTHOPEDIST, SUGGESTED THAT CLAIMANT SHOULD NOT AT THAT TIME DO ANY HEAVY WORK. HE WAS NOT A GOOD CANDIDATE FOR FUTURE MANUAL LABOR NOR COULD HE TOLERATE TRUCK DRIVING. DR. GERMAN FELT THAT CLAIMANT HAD A CONGENITAL INSTABILITY OF HIS BACK WHICH WAS MADE SYMPTOMATIC BY THE INDUSTRIAL INJURY.

CLAIMANT WAS RELEASED TO WORK ON APRIL 1, 1975 TO WORK NOT INVOLVING TRUCK DRIVING OR LIFTING WEIGHTS GREATER THAN 30 POUNDS - HIS CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED APRIL 29, 1975 WHEREBY CLAIMANT WAS AWARDED TIME LOSS ONLY.

AFTER CLAIM CLOSURE CLAIMANT WAS EXAMINED BY DR. JOHNSON, AN ORTHOPEDIST IN BOISE, WHO DIAGNOSED LUMBAR INSTABILITY WITH NERVE IMPINGEMENT AND RECOMMENDED BACK FUSION SURGERY. HE STATED THAT EVEN WITH THE SURGERY CLAIMANT SHOULD NOT RETURN TO HEAVY WORK AND HE CAUSALLY RELATED THE NEED FOR THIS SURGERY TO THE INDUSTRIAL INJURY.

CLAIMANT IS PRESENTLY EMPLOYED BY ZAEL'S JEWELRY IN NAMPA, IDAHO AS A SALES CLERK, HE EARNS APPROXIMATELY 800 DOLLARS A MONTH AND TESTIFIED THAT THE BENEFITS WERE 'PRETTY GOOD' AND HE WOULD LIKE TO STAY WITH IT AFTER HE FINISHES SCHOOL. CLAIMANT HAS COMPLETED TWO YEARS AT EASTERN OREGON COLLEGE AND PLANS TO RETURN TO SCHOOL, RECEIVE HIS DEGREE IN BUSINESS ADMINISTRATION AND CONTINUE IN THE JEWELRY BUSINESS.

CLAIMANT DENIES ANY PRIOR BACK PROBLEMS ALTHOUGH HE DID HAVE A CONGENITAL INSTABILITY. HIS WORK EXPERIENCE HAS INVOLVED HEAVY LABOR JOBS OF THE TYPE TO WHICH THE DOCTORS WHO HAVE EXAMINED AND-OR TREATED CLAIMANT RECOMMENDED THAT HE NOT RETURN.

THE REFEREE FOUND THAT CLAIMANT HAD DECLINED TO HAVE THE RECOMMENDED SURGERY BUT THAT THE REFUSAL WAS NOT UNREASONABLE, THE RECOMMENDING DOCTOR STATED THAT, AT BEST, IT WOULD PROVIDE SYMPTOMATIC RELIEF BUT WOULD NOT ALLOW CLAIMANT TO RETURN TO HIS FORMER WORK.

THE REFEREE FOUND THAT AS A RESULT OF THE INJURY CLAIMANT HAD SUFFERED A LOSS OF EARNING CAPACITY. THE FACTORS OF AGE, EDUCATION, WORK EXPERIENCE, POTENTIAL FOR WORK REHABILITATION AND PHYSICAL IMPAIRMENT HAD TO BE CONSIDERED IN MEASURING CLAIMANT'S LOSS OF EARNING CAPACITY AND IT WAS NECESSARY TO LOOK AT THE WHOLE BROAD EARNING CAPACITY PICTURE NOT JUST THE TEMPORARY DIFFERENCE IN 'BEFORE AND AFTER' WAGES. BECAUSE CLAIMANT COULD NO LONGER PERFORM HEAVY LABOR WORK HE HAD SUFFERED A SEVERE LOSS OF WAGE EARNING CAPACITY, BUT, AFTER CONSIDERING CLAIMANT'S AGE, EDUCATION AND POTENTIAL FOR FUTURE EARNING CAPACITY, ALL FAVORABLE TO CLAIMANT, HE CONCLUDED THAT AN AWARD OF 25 PER CENT OF THE MAXIMUM ALLOWABLE WOULD ADEQUATELY COMPENSATE CLAIMANT.

THE BOARD, ON DE NOVO REVIEW, BELIEVES THAT AN AWARD OF 25 PER CENT IS NOT JUSTIFIED BECAUSE OF CLAIMANT'S AGE (HE IS ONLY 23 YEARS OLD), HIS PRIOR EDUCATION AND HIS EXCEEDINGLY HIGH POTENTIAL FOR PROVIDING A GOOD LIVELIHOOD FOR HIMSELF AND HIS FAMILY AFTER HE HAS FINISHED HIS SCHOOLING.

EXAMINATION OF CASES PREVIOUSLY DECIDED BY THE BOARD INVOLVING YOUND EDUCATED CLAIMANTS WITH SIMILAR INJURIES REVEALS THAT SELDOM,

IF EVER, AWARDS IN EXCESS OF 10 PER CENT FOR UNSCHEDULED BACK DISABILITY HAVE BEEN MADE. THE BOARD CONCLUDES, IN THIS CASE, THAT CLAIMANT WOULD BE ADEQUATELY COMPENSATED FOR HIS LOSS OF EARNING CAPACITY BY AN AWARD OF 32 DEGREES WHICH EQUALS 10 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE.

HAVING DECIDED THAT THE REFEREE'S AWARD WAS EXCESSIVE, IT IS NOT NECESSARY FOR THE BOARD TO SPEAK TO THE CROSS-REQUEST MADE BY THE CLAIMANT THAT THE REFEREE'S AWARD WAS NOT ADEQUATE.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 20, 1975 IS MODIFIED.

CLAIMANT IS AWARDED 32 DEGREES OF A TOTAL OF 320 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY. THIS IS IN LIEU OF THE AWARD MADE BY THE REFEREE IN HIS ORDER DATED NOVEMBER 20, 1975, WHICH IN ALL OTHER RESPECTS IS AFFIRMED.

WCB CASE NO. 75-1095 JUNE 15, 1976

DALE DAVIDSON, CLAIMANT

RALF ERLANDSON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH HELD THAT THE ADVANCED PAYMENT OF CLAIMANT'S AWARD WAS VALID AND, THEREFORE, TERMINATED CLAIMANT'S RIGHT OF APPEAL FROM THE DETERMINATION ORDER MAILED AUGUST 26, 1974 ON THE ISSUE OF EXTENT OF PERMANENT DISABILITY - THAT THE ISSUE OF EXTENT OF PERMANENT DISABILITY WAS MOOT AND THAT THE REQUEST TO REOPEN FOR FURTHER MEDICAL CARE AND TREATMENT SHOULD BE DENIED, AS WELL AS THE REQUEST FOR REOPENING FOR AGGRAVATION.

CLAIMANT SUFFERED AN INDUSTRIAL INJURY WHICH WAS ACCEPTED AND HIS CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED AUGUST 26, 1974 WHICH AWARDED HIM 25 PER CENT FOR UNSCHEDULED LOW BACK DISABILITY. SUBSEQUENT TO THE ISSUANCE OF THE DETERMINATION ORDER CLAIMANT RECEIVED A FORM LETTER FROM THE FUND ADVISING AS TO THE AMOUNT OF THE MONTHLY PAYMENTS, THE DATES OF THE PAYMENTS AND FOR WHAT PERIODS THEY COULD BE EXPECTED.

CLAIMANT TESTIFIED THAT BEFORE HE HAD RECEIVED ANY PAYMENT, AND BECAUSE HE WAS AFRAID HE MIGHT LOSE HIS TRUCK BECAUSE OF HIS INABILITY TO MAKE PAYMENTS DUE ON ITS PURCHASE, HE CALLED THE FUND TO MAKE CERTAIN INQUIRIES. AS A RESULT OF THE CONVERSATION HE TRAVELED TO SALEM ON SEPTEMBER 18, 1974 AND TALKED TO MR. GILL. WHILE IN SALEM, CLAIMANT SIGNED A REQUEST FOR A LUMP SUM PAYMENT, HAVING FIRST BEEN TOLD THAT HE COULD HAVE MONEY BEFORE LEAVING THE OFFICE. CLAIMANT IMMEDIATELY RECEIVED A LUMP SUM CHECK IN THE AMOUNT OF 5,132.79 DOLLARS - ON THE LUMP SUM AGREEMENT HE HAD WRITTEN ' WILL LOSE MY CAT WITH FRONT LOADER AND ALSO MY TWO CHEV TRUCK WHICH I USE FOR EARING (SIC) MY LIVING.' CLAIMANT ALLEGES HE DID NOT UNDERSTAND THE WAIVER PRINTED IN THE SMALL BOX IMMEDIATELY BELOW AND TO THE LEFT OF THE STATEMENT HE HAD WRITTEN.

CLAIMANT HAD ATTEMPTED TO CONSULT WITH HIS ATTORNEY ON SEPTEMBER 13, 1974 BUT WAS UNABLE TO MEET WITH HIM UNTIL A LATER DATE AND, AS A RESULT OF THAT MEETING, A REQUEST FOR HEARING WAS FILED

QUESTIONING THE ADEQUACY OF THE DETERMINATION ORDER AWARD. FOLLOWING THIS REQUEST AN ADDITIONAL MEDICAL REPORT WAS RECEIVED FROM DR. FAX, WHO HAD INITIALLY TREATED CLAIMANT FOR HIS INDUSTRIAL INJURY, WHICH STATED THAT CLAIMANT'S CONDITION ON MARCH 5, 1975 WAS ESSENTIALLY THE SAME AS IT HAD BEEN ON THE DATE OF HIS FINAL EXAMINATION OF JULY 15, 1974.

THE REFEREE FOUND NO SHOWING OF FRAUD NOR ANY EFFORT TO MISLEAD OR DECEIVE THE CLAIMANT BY THE FUND. HE FOUND THAT THE WAIVER, WHICH IS ACCOMPLISHED BY THE LUMP SUM PAYMENT, MUST BE DISTINGUISHED FROM A TRUE RELEASE WHICH TERMINATES FOREVER CLAIMANT'S RIGHTS. IN THIS CASE CLAIMANT'S RIGHTS HAD ALREADY BEEN ESTABLISHED BY THE DETERMINATION ORDER FROM WHICH HE HAD A RIGHT TO APPEAL IF HE WAS DISSATISFIED WITH THE AWARD. NO LUMP SUM AWARDS WILL BE MADE UNTIL THE TIME OF APPEAL HAS EXPIRED. THE PROVISIONS OF ORS 656.230(1) SPECIFICALLY PROVIDE THAT IF THE TIME FOR APPEAL HAS NOT EXPIRED THEN THE WAIVER OF SUCH RIGHT OF APPEAL MUST BE SIGNED, AND ADDITIONALLY, THE BOARD MUST APPROVE THE LUMP SUM AGREEMENT. THESE ACTS WERE DONE.

THE REFEREE FOUND THAT CLAIMANT HAD BEEN DEPRIVED OF NO INHERENT RIGHTS AND, THEREFORE, THERE WAS NO DENIAL OF EQUAL PROTECTION AND DUE PROCESS OF LAW AS GUARANTEED UNDER THE 5TH AND 14TH AMENDMENT OF THE U. S. CONSTITUTION. CLAIMANT, BY ACCEPTING THE LUMP SUM, IN EFFECT, WAS AGREEING WITH THE AMOUNT OF COMPENSATION AWARDED TO HIM BY THE DETERMINATION ORDER - OBVIOUSLY, HE COULD NOT LATER APPEAL ON THE ISSUE OF THE INADEQUACY OF SUCH AWARD.

HAVING SO FOUND, THE QUESTION OF EXTENT OF DISABILITY BECAME MOOT - HOWEVER, THE REFEREE TOOK THE PRECAUTION OF INCLUDING IN HIS ORDER A FINDING, BASED UPON DR. FAX'S REPORTS OF JUNE 5 AND JULY 16, 1974, THAT THE AWARD OF 25 PER CENT WAS ADEQUATE COMPENSATION FOR CLAIMANT'S LOSS OF EARNING CAPACITY.

THE REFEREE ALSO, BASED UPON DR. FAX'S REPORT OF MARCH 5, 1975, FOUND NO NEED FOR FURTHER MEDICAL CARE AND TREATMENT.

IN CONCLUSION THE REFEREE STATED THAT CLAIMANT'S AGGRAVATION RIGHTS REMAINED IN FULL EFFECT AND THAT THIS HAD BEEN EXPLAINED TO CLAIMANT'S ATTORNEY BY THE FUND IN ITS LETTER DATED FEBRUARY 27, 1975. THE LUMP SUM SETTLEMENT DOES NOT IN ANY WAY AFFECT CLAIMANT'S AGGRAVATION RIGHTS SHOULD CLAIMANT'S CONDITION WORSEN IN THE FUTURE. HOWEVER, THE REFEREE FOUND THAT THE TESTIMONY RECEIVED AT THE HEARING DID NOT SUPPORT, AT THAT TIME, A CLAIM FOR AGGRAVATION.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE WELL-WRITTEN OPINION OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 14, 1975 IS AFFIRMED.

WCB CASE NO. 75-1493 JUNE 15, 1976

DENNIS LEE BIGGS, CLAIMANT

NELS PETERSON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT
CROSS-REQUEST FOR REVIEW BY SAIF

Reviewed by Board Members Wilson and Moore.

The claimant requests review by the Board on the referee's order which affirmed the determination order mailed April 7, 1975, contending claimant's claim was prematurely closed or, in the alternative, he was entitled to greater award for his permanent partial disability and also to vocational rehabilitation. The State Accident Insurance Fund cross-requested review by the Board of that portion of the order which directed it to pay claimant's attorney an attorney fee.

Claimant, a 25 year old window cleaner, fell approximately 17 feet on April 3, 1975 and sustained an injury to his back and left leg. Dr. Stark diagnosed an acute lumbar contusion and strain, possible compression fracture of T8 and T9 '(doubt fresh)'. On April 23, claimant consulted Dr. Wisdom who diagnosed a probable acute compression fractures of the dorsal spine, acute dorsal and lumbar spine strain and sprain of the left ankle. The medical reports indicate that the T8 and T9 fractures pre-existed the industrial injury and there was also some question whether, in fact, there was compression fracture.

Initially, the fund had denied claimant's claim for emotional or psychological problems and hospitalization therefor. After a hearing the denial was affirmed by the referee and later by the Board and the circuit court.

It was not specifically stated that claimant should seek a different type of work based solely upon his physical ability but it was recommended that he not return to work as a window cleaner from a psychological standpoint. A vocational rehabilitation program was authorized, but subsequently terminated by a letter dated March 11, 1975 in which the disability prevention division advised claimant - 'you have not followed through with vocational planning'. The claim was closed by determination order mailed April 7, 1975 whereby claimant was awarded compensation for temporary total disability from April 3, 1974 through March 19, 1975.

Claimant states he is enrolled at Clark Community College, taking a two year course which will qualify him as a drug and alcohol counselor.

There are unpaid bills for prescriptions which Dr. Wisdom testified he had ordered for the treatment of claimant's pain situation resulting from the industrial injury. The fund had previously denied payment of these medicines on the grounds that the prescriptions were for the treatment of either claimant's addictive problems (claimant had become addicted to heroin after suffering severe injuries from an automobile accident in 1966), or his psychological problems.

Claimant contends that his claim was prematurely closed inasmuch as he was still vocationally handicapped at the time of the closure.

THE REFEREE FOUND, BASED UPON THE MEDICAL REPORTS, THAT CLAIMANT HAD A SEVERE FUNCTIONAL OVERLAY - HE ALSO FOUND THAT CLAIMANT'S CREDIBILITY WAS VERY POOR. CLAIMANT'S EXPLANATION OF TERMINATION OF HIS AUTHORIZED PROGRAM FOR VOCATIONAL REHABILITATION WAS UNBELIEVABLE AND THE REFEREE DECLINED TO MODIFY THE DETERMINATION ORDER SOLELY ON CLAIMANT'S TESTIMONY. IF CLAIMANT ACTUALLY DESIRES THE TRAINING AND EDUCATION AS HE SAYS, IT WILL BE A RELATIVELY SIMPLE MATTER TO SECURE CLEARANCE FROM THE DISABILITY PREVENTION DIVISION AND REGAIN AN AUTHORIZED PROGRAM STATUS - HOWEVER, THE CLAIMANT MUST RECOGNIZE THAT AUTHORIZED TRAINING PROGRAMS HAVE TO COMPLY WITH THE RULES AND GUIDELINES ESTABLISHED FOR SUCH ASSISTANCE.

WITH RESPECT TO THE UNPAID PRESCRIPTION EXPENSES, THE REFEREE FOUND THAT DR. WISDOM DID ORDER THE PRESCRIPTIONS, THEREFORE, THE REJECTION OF SUCH EXPENSE WAS ERRONEOUS AND THE BILLS SHOULD BE REMANDED TO THE FUND FOR PAYMENT. THE REFEREE FOUND THAT IT WOULD HAVE BEEN A VERY SIMPLE MATTER FOR THE FUND TO VERIFY WITH DR. WISDOM'S OFFICE WHETHER HE HAD ORDERED SUCH MEDICATION AND ALSO THE PURPOSE OF THE MEDICATION. HE CONCLUDED THAT THE FUND'S REFUSAL TO PAY THESE EXPENSES UNDER THOSE CIRCUMSTANCES WAS UNREASONABLE AND ARBITRARY AND HE DIRECTED THE FUND TO PAY A FEE TO CLAIMANT'S ATTORNEY.

THE REFEREE CONCLUDED THAT THE CLAIM DID NOT JUSTIFY REOPENING ON THE BASIS OF ADDITIONAL MEDICAL CARE - THE ONLY CARE RECOMMENDED BY ANY OF THE PHYSICIANS WAS PSYCHOLOGICAL COUNSELING AND THE PRIOR DENIAL BY THE FUND OF ANY RESPONSIBILITY FOR CLAIMANT'S PSYCHOLOGICAL PROBLEMS HAS BEEN UPHELD BY THE REFEREE, THE BOARD AND THE CIRCUIT COURT.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE ORDER OF THE REFEREE IN ITS ENTIRETY.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 5, 1975 IS AFFIRMED.

WCB CASE NO. 75-2318 JUNE 15, 1976

CRAIG OLSEN, CLAIMANT

DON WILSON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH UPHELD THE DENIAL OF CLAIMANT'S CLAIM BY THE STATE ACCIDENT INSURANCE FUND ON MAY 15, 1975.

ON APRIL 30, 1975, WHILE ON THE PREMISES OF THE EMPLOYER BUT DURING THE LUNCH BREAK FOR WHICH CLAIMANT WAS NOT PAID, CLAIMANT, AT THE REQUEST OF A CO-EMPLOYEE, TOOK THE LATTER'S BICYCLE FOR A TEST RIDE ON THE DOCK. HE HAD TOLD HIS CO-EMPLOYEE THAT HE WOULD TRY TO FIX THE BIKE IF HE COULD. AS HE WAS RIDING THE BIKE ON THE DOCK TO DETERMINE WHAT WAS WRONG, THE FRONT TIRE BECAME WEDGED BETWEEN THE IRON DOCK AND A WOOD BUMPER AND AS A RESULT CLAIMANT WAS THROWN ONTO THE ASPHALT PARKING LOT. CLAIMANT WAS HOSPITALIZED FOR SIX DAYS AND WAS OFF WORK FOR A MONTH.

THE ONLY ISSUE TO BE DETERMINED WAS WHETHER CLAIMANT'S INJURIES

WERE ATTRIBUTABLE TO AN ACCIDENT WHICH AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT.

THE REFEREE, RELYING ON LARSON (UNDERSCORED), WHICH BASICALLY SETS FORTH AT LEAST FOUR SITUATIONS IN WHICH THE COURSE OF EMPLOYMENT GOES BEYOND THE EMPLOYEE'S FIXED HOURS AT WORK, ONE OF WHICH IS DURING UNPAID LUNCH HOURS ON THE PREMISES, FOUND THAT EVEN IF IT WAS ACCEPTED THAT LUNCH TIME ON THE PREMISES IS IN THE COURSE OF EMPLOYMENT, IN THE INSTANT CASE, CLAIMANT WAS RIDING THE BICYCLE TO DIAGNOSE WHAT WAS WRONG WITH ITS GEAR CHANGER AND IT WAS NOT A JOURNEY TO AND FROM MEALS NOR DID HE APPEAR TO BE WITHIN THE 'INHERENT EMPLOYMENT DANGER' RULE. HE FOUND THAT THE FACTS WERE DIFFERENT FROM THE 'HORSE-PLAY' INJURIES WHICH HAVE BEEN HELD COMPENSABLE IN OREGON, BASED UPON THE RATIONALE THAT THE EMPLOYER MUST EXPECT SOME PRACTICAL JOKES FROM WORK CREWS DURING THE WORKING HOURS THAT CAN RESULT IN INJURIES.

THE REFEREE CONCLUDED THAT IN THIS CASE CLAIMANT'S INJURY DID NOT ARISE IN THE COURSE OF HIS EMPLOYMENT BECAUSE ALTHOUGH HE WAS CLEARLY RIDING THE BICYCLE ON THE EMPLOYER'S PREMISES HE WAS DOING SO AT THE REQUEST OF AND FOR THE BENEFIT OF A CO-EMPLOYEE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 2, 1975, IS AFFIRMED.

WCB CASE NO. 75-3326 JUNE 15, 1976

GERTRUDE CRABTREE, CLAIMANT

LARRY BRUUN, CLAIMANT'S ATTY.
KEITH SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED AS OF DECEMBER 2, 1975.

CLAIMANT WAS A 56 YEAR OLD RAIMANN OPERATOR WHEN SHE SUFFERED A COMPENSABLE INJURY ON MARCH 27, 1974, I.E. A FRACTURE OF HER RIGHT FEMUR. TREATMENT INCLUDED THE INSTALLATION OF A SMITH-PETERSON NAIL. IN FEBRUARY, 1975 CLAIMANT WAS EVALUATED FOR BACK COMPLAINTS BY DR. FRY, AN ORTHOPEDIST, WHO FOUND OSTEO-ARTHRITIS OF THE LUMBAR SPINE WITH NARROWING OF THE L4-5. HE INDICATED, IN HIS REPORT OF MARCH 19, 1975, THAT THERE WAS A POSSIBILITY OF AVASCULAR NECROSIS IN THE RIGHT FEMORAL HEAD. DR. FRY FELT THAT CLAIMANT'S PRESENT WORK WAS AGGRAVATING HER HIP AND THAT, ALTHOUGH HER CONDITION WAS STATIONARY, WITH HER PRESENT DIFFICULTY WORKING CLAIMANT SHOULD NOT RETURN TO HER FORMER JOB.

ON JULY 29, 1975 A DETERMINATION ORDER AWARDED CLAIMANT 37.5 DEGREES FOR 25 PER CENT LOSS OF HER RIGHT LEG. THEREAFTER, DR. FRY ADVISED CLAIMANT'S ATTORNEY THAT CLAIMANT PROBABLY DID NOT INJURE HER BACK WHEN SHE SUFFERED THE HIP INJURY BUT THE BROKEN HIP AND THE INABILITY OF CLAIMANT TO WALK ON HER RIGHT LEG COULD AFFECT HER BACK - ALSO THE FRACTURED HIP COULD AGGRAVATE THE OSTEO-ARTHRITIS OF THE LUMBAR SPINE.

CLAIMANT WAS SUBSEQUENTLY EXAMINED BY DR. ELLISON, AN ORTHOPEDIST, WHO STATED, IN A REPORT DATED SEPTEMBER 25, 1975, THAT CLAIMANT HAS HAD A SIGNIFICANT INJURY IN TERMS OF HER FRACTURE AND THIS CONTINUES TO BE A PROBLEM BECAUSE OF THE SIGNIFICANT DEGENERATIVE DISEASE AND PROBABLE AVASCULAR NECROSIS. HE SAID CLAIMANT HAD SEVERE LUMBAR DEGENERATIVE DISEASE AND HE THOUGHT THAT EITHER ONE OF THESE ENTITIES WOULD PRECLUDE HER FROM RETURNING TO ANY KIND OF EMPLOYMENT ON A CONSISTENT BASIS.

CLAIMANT HAD RETURNED TO WORK ON DECEMBER 2, 1974 FOR THE SAME EMPLOYER, BUT WORKING ON A DIFFERENT MACHINE - AT FIRST SHE WORKED ONLY FOUR HOURS A DAY, LATER SHE INCREASED THIS TO SIX HOURS A DAY AND THEN SHE TRIED A FULL 8 HOUR SHIFT UNTIL MARCH 25, 1975, AT WHICH TIME SHE QUIT BECAUSE OF THE PAIN, DISCOMFORT AND FATIGUE.

CLAIMANT HAS AN 11TH GRADE EDUCATION AND PRIOR TO HER INJURY HAD WORKED 30 YEARS FOR THE SAME EMPLOYER - SHE HAD SUFFERED A BACK INJURY IN 1944 OR 1945 WHICH REQUIRED TREATMENT OVER THE YEARS UP TO THE TIME OF THE INDUSTRIAL INJURY AND CAUSED HER TO OCCASIONALLY MISS A DAY OR TWO OF WORK.

THE REFEREE FOUND NO REASON TO QUESTION CLAIMANT'S CREDIBILITY OR MOTIVATION. HE FOUND THAT THE EVIDENCE CLEARLY SUPPORTED THE FINDING THAT CLAIMANT'S BACK AND HIP DISABILITY WERE CONNECTED TO HER INDUSTRIAL INJURY AND, AFTER TAKING INTO ACCOUNT CLAIMANT'S AGE, EDUCATION, EXPERIENCE AND POTENTIAL, TOGETHER WITH THE INJURY RESIDUALS, CONCLUDED THAT CLAIMANT IS UNABLE TO WORK GAINFULLY, SUITABLY AND REGULARLY.

THE BOARD, ON DE NOVO REVIEW, RELYING HEAVILY ON DR. ELLISON'S OPINION THAT EITHER CLAIMANT'S SIGNIFICANT INJURY IN TERMS OF HER HIP FRACTURE AND THE CONTINUING PROBLEM BECAUSE OF THE SIGNIFICANT DEGENERATIVE DISEASE AND PROBABLE AVASCULAR NECROSIS OR HER SEVERE LUMBAR DEGENERATIVE DISEASE WOULD PRECLUDE CLAIMANT FROM RETURNING TO ANY KIND OF EMPLOYMENT ON A CONSISTENT BASIS AND THE OPINION OF DR. FITCHETT THAT THE ARTHRITIS IN CLAIMANT'S HIP WOULD WORSEN WITH TIME AND MIGHT VERY WELL PROGRESS TO THE POINT WHERE CLAIMANT WOULD HAVE SUCH SEVERE PAIN THAT ANY SORT OF WORK WOULD BE UNFEASIBLE FOR HER, AGREES WITH THE CONCLUSION REACHED BY THE REFEREE THAT CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 2, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400 DOLLARS, PAYABLE BY THE EMPLOYER.

SAIF CLAIM NO. A 579585 JUNE 15, 1976

JAMES E. NATIONS, CLAIMANT

ALLEN OWEN, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
AMENDED OWN MOTION ORDER

ON JUNE 1, 1976 THE BOARD ENTERED ITS OWN MOTION ORDER IN THE ABOVE ENTITLED MATTER. THE ORDER AWARDED CLAIMANT'S COUNSEL 25 PER CENT OF THE TEMPORARY TOTAL DISABILITY COMPENSATION PAYABLE OUT OF SUCH COMPENSATION AS PAID TO A MAXIMUM OF 250 DOLLARS BUT FAILED TO

INCLUDE AN AWARD OF A REASONABLE ATTORNEY FEE PAYABLE AFTER CLAIM CLOSURE PURSUANT TO ORS 656.278.

ORDER

IT IS HEREBY ORDERED THAT CLAIMANT'S COUNSEL IS AWARDED, AS A REASONABLE ATTORNEY FEE, 25 PER CENT OF ANY ADDITIONAL PERMANENT PARTIAL DISABILITY COMPENSATION AWARDED CLAIMANT AS A RESULT OF SUBSEQUENT ACTION BY THE EVALUATION DIVISION PURSUANT TO ORS 656.278, PAYABLE OUT OF SAID COMPENSATION AS PAID, TO A MAXIMUM OF 2,000 DOLLARS.

WCB CASE NO. 74-661 JUNE 15, 1976

EARL WEEDEMAN, CLAIMANT

MARK HARDIN, CLAIMANT'S ATTY.
NOREEN SALTVEIT, DEFENSE ATTY.
OWN MOTION ORDER

ON APRIL 7, 1976 THE CLAIMANT REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION PURSUANT TO ORS 656.278 AND REOPEN HIS CLAIM FOR A 1969 COMPENSABLE INJURY.

CLAIMANT'S COUNSEL WAS ADVISED, ON APRIL 12, 1976, THAT IT WOULD BE NECESSARY TO FURNISH THE BOARD A CURRENT MEDICAL REPORT WHICH WOULD SHOW THAT THE CONDITION OF CLAIMANT WAS WORSENED AND HIS PRESENT CONDITION IS DIRECTLY RELATED TO THE 1969 INJURY.

ON JUNE 7, 1976 THE BOARD WAS FURNISHED A COPY OF A MEDICAL REPORT FROM DR. SURBAUGH, AN ORTHOPEDIC PHYSICIAN, WHO HAD EXAMINED CLAIMANT ON MARCH 10, 1976.

THE BOARD, AFTER STUDYING THE CONTENTS OF DR. SURBAUGH'S REPORT, CONCLUDES IT IS NOT SUFFICIENT TO SUPPORT CLAIMANT'S CLAIM FOR AGGRAVATION OF HIS 1969 INJURY. IN FACT, DR. SURBAUGH ADMITS THAT THE NATURE OF SUCH AGGRAVATION WOULD HAVE TO BE CORROBORATED WITH MEDICAL REPORTS WHICH POST-DATED INCIDENTS SUBSEQUENT TO THE INDUSTRIAL INJURY OF 1969 WHICH IN TURN WOULD BE COMPARED WITH HIS PRESENT EVALUATION OF CLAIMANT'S CONDITION. SUBJECTIVELY, CLAIMANT CAN SUBSTANTIATE THAT HIS SYMPTOMS ARE, IN FACT, AGGRAVATED AND THAT HE CONTINUES TO BE SYMPTOMATIC - HOWEVER, THIS IS NOT SUFFICIENT MEDICAL EVIDENCE TO JUSTIFY REOPENING THE CLAIM.

ORDER

THE REQUEST FOR THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278 AND REOPEN CLAIMANT'S CLAIM FOR HIS 1969 INDUSTRIAL INJURY IS, AT THIS TIME, DENIED.

WCB CASE NO. 75-1942 JUNE 16, 1976

MERRIBETH RICHMOND, CLAIMANT

HUGH COLE, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 80 DEGREES FOR 25 PER CENT UNSCHEDULED PERMANENT PARTIAL DISABILITY. THE CLAIM HAD BEEN CLOSED PREVIOUSLY BY TWO DETERMINATION ORDERS WHICH HAD ALLOWED TEMPORARY TOTAL DISABILITY, BUT HAD MADE NO AWARDS FOR PERMANENT PARTIAL DISABILITY.

CLAIMANT SUSTAINED A COMPENSABLE INJURY NOVEMBER 27, 1972 WHILE LIFTING MATTRESSES AT A JUVENILE CORRECTION FACILITY. THE INJURY WAS DIAGNOSED BY DR. GROSSENBACHER AS "THORACIC STRAIN, CHRONIC, RECURRENT."

CLAIMANT UNDERWENT EVALUATION AT THE BOARD'S DISABILITY PREVENTION DIVISION - IT WAS THEIR RECOMMENDATION THAT NO ORTHOPEDIC TREATMENT WAS NECESSARY, THAT HER CONDITION WAS STATIONARY AND SHE COULD RETURN TO WORK. LOSS OF FUNCTION OF THE BACK WAS RATED "MINIMAL". DR. GROSSENBACHER ALSO STATED HER DISABILITY WAS "0-MINIMAL". NUMEROUS PHYSICAL AND PSYCHOLOGICAL PROBLEMS WERE DOCUMENTED IN THE RECORD BUT WERE TOTALLY UNRELATED TO THE INDUSTRIAL INJURY.

CLAIMANT IS A VERY PERSONABLE INDIVIDUAL WHO LIKES WORKING WITH PEOPLE AND IS NOW ENROLLED AT THE UNIVERSITY OF OREGON MAJORING IN SOCIOLOGY AND COUNSELING.

AFTER REVIEWING THE ENTIRE RECORD, THE BOARD FINDS CLAIMANT HAS SUFFERED NO DIMINISHMENT OF HER WAGE EARNING CAPACITY, THEREFORE, CLAIMANT IS NOT ENTITLED TO ANY AWARD OF PERMANENT PARTIAL DISABILITY. THE DETERMINATION ORDERS MAILED NOVEMBER 7, 1973 AND MAY 1, 1974 ARE AFFIRMED.

ORDER

THE ORDER OF THE REFEREE, DATED NOVEMBER 12, 1975, IS REVERSED.

WCB CASE NO. 75-3415 JUNE 16, 1976

JOSEPH S. BLAHA, CLAIMANT

KEITH TICHENOR, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 80 DEGREES FOR UNSCHEDULED LEFT SHOULDER DISABILITY CONTENDING HE IS ENTITLED TO MORE.

CLAIMANT, A 42 YEAR OLD JOURNEYMAN ELECTRICIAN, HAS BEEN EMPLOYED BY THE EMPLOYER SINCE 1959. ON OCTOBER 28, 1974 CLAIMANT SUFFERED A COMPENSABLE INJURY, HE CONTINUED WORKING BUT MISSED ABOUT

THREE WEEKS THE LATTER PART OF FEBRUARY AND THE EARLY PART OF MARCH, 1975, AND ANOTHER THREE OR FOUR WEEKS IN APRIL, 1975. HE HAS BEEN WORKING CONTINUOUSLY SINCE APRIL, 1975.

SINCE NOVEMBER 4, 1974 CLAIMANT HAD BEEN UNDER THE CARE OF DR. KAYSER WHO DIAGNOSED A CONTUSION, LEFT SHOULDER POSTERIOR. HE PERFORMED A LEFT SHOULDER ARTHROGRAM ON DECEMBER 11, 1974 AND FOUND NO ADHESIONS IN THE SHOULDER JOINT, NO FILLING DEFECTS TO SUGGEST SYNOVITIS AND THE VISUALIZED PORTIONS OF THE ARTICULAR CARTILEGE SEEMED NORMAL. NO ROTATOR CUFF TEAR WAS NOTED.

ON DECEMBER 20, 1974 THE CLAIM WAS CLOSED AS A NON-DISABLING INJURY AND CLAIMANT WAS ADVISED OF HIS RIGHTS. LATER THE CLAIM WAS REOPENED FOR THE PAYMENT OF TIME LOSS. ON APRIL 28, 1975 CLAIMANT WAS AUTHORIZED TO RETURN TO WORK BY DR. KAYSER ALTHOUGH HE CONTINUED TO TREAT CLAIMANT.

ON JULY 29, 1975 A DETERMINATION ORDER AWARDED CLAIMANT 32 DEGREES FOR 10 PER CENT UNSCHEDULED LEFT SHOULDER DISABILITY.

ON AUGUST 13, 1975 DR. DAVIS EXAMINED CLAIMANT AND FOUND THAT HE HAD FULL RANGES OF MOTION IN THE LEFT SHOULDER WITH PAIN EXPRESSED AT EXTREMES OF ABDUCTION AND EXTERNAL ROTATION WITH REFERRAL OF PAIN TO THE ANTERIOR ASPECT OF THE SHOULDER. X-RAYS OF THE NECK AND LEFT SHOULDER INDICATED NO ABNORMALITIES FROM THE OSSEOUS STANDPOINT. DR. DAVIS' IMPRESSION WAS THAT THERE WAS AN INCOMPLETE TENDON CAPSULAR TEAR OF THE ANTERIOR LEFT SHOULDER AND ALSO TENNIS ELBOW SYNDROME, LEFT. FROM A THERAPEUTIC STANDPOINT, CLAIMANT HAS THE ALTERNATIVE OF LIVING WITHIN THE RESTRICTIONS THAT HE HAS IN THE LEFT SHOULDER, AS FAR AS THE SYMPTOMS ARE CONCERNED, OR SUBMITTING TO EXPLORATION, WITH THE HOPE THAT HE WOULD HAVE A LESION THAT COULD BE CHANGED BY SURGICAL INTERVENTION - HOWEVER, DR. DAVIS DID NOT FEEL THAT THE PROSPECTS OF A CHANGE BY SURGICAL MANAGEMENT WERE GOOD. CLAIMANT ELECTED NOT TO HAVE THE EXPLORATORY SURGERY.

CLAIMANT HAS A HIGH SCHOOL DIPLOMA AND SERVED FOUR YEARS IN THE AIR FORCE AS A RADAR TECHNICIAN. AT THE PRESENT TIME HE COMPLAINS OF A DULL ACHE IN HIS SHOULDER WHICH IS PRESENT AT ALL TIMES, ALSO ACHE IN THE LEFT PART OF HIS NECK DOWN TO HIS ELBOW. OVER USE OF THE SHOULDER RESULTS IN SEVERE PAIN AND CLAIMANT CANNOT LIFT WEIGHTS OVER HIS HEAD.

THE REFEREE FOUND THAT CLAIMANT HAD SUSTAINED THE BURDEN OF PROVING THAT HIS AWARD, BASED UPON LOSS OF EARNING CAPACITY, WAS INAPPROPRIATE. HE FOUND THAT CLAIMANT NOW HAS A HANDICAP COMPETING FOR JOBS IN THE OPEN MARKET. HE CONCLUDED THAT CLAIMANT SHOULD BE AWARDED AN ADDITIONAL 48 DEGREES WHICH WOULD REPRESENT AN AGGREGATE OF 80 DEGREES FOR 25 PER CENT OF THE MAXIMUM ALLOWABLE FOR UNSCHEDULED DISABILITY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 22, 1975, IS AFFIRMED.

WCB CASE NO. 75-2388 JUNE 16, 1976

CHARLES A. WIEBKE, CLAIMANT

ROGER WARREN, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

Reviewed by Board Members Wilson and Moore.

Claimant seeks review by the Board of the referee's order which affirmed the denial of claimant's claim for aggravation by the employer.

Claimant had suffered an injury to his left hand on December 19, 1972. The claim was closed by a determination order mailed October 18, 1973, whereby claimant received 100 per cent loss of the left thumb, 40 per cent of the left index finger (loss of opposition), 30 per cent loss of the left middle finger (loss of opposition), 20 per cent loss of the left ring finger (loss of opposition), and 10 per cent loss of the left little finger (loss of opposition).

Claimant's treating physician, Dr. Paluska, an orthopedist, examined claimant in April, 1975. Claimant was complaining of left forearm pain. Dr. Paluska, on April 24, 1975, did not recommend reopening without objective findings. On October 16, 1975 Dr. Nathan, a specialist in hand surgery, stated he noted nothing indicating aggravation.

On November 18, 1975 Dr. Paluska said it was only natural for claimant to associate the pain in his arm with his industrial accident but he found no cause-and-effect relationship between the industrial injury and the pain that claimant complained of in his left upper arm.

The referee found no sufficient medical evidence to support claimant's claim for aggravation.

The Board, on de novo review, affirms and adopts the order of the referee.

The Board notes that the claimant represents himself both at the hearing and on review and, as a lay person, probably was not familiar with the statutory requirements relating to a claim for aggravation. The Board calls to claimant's attention the necessity for supporting a claim for aggravation with medical evidence indicating that since the last award or arrangement of compensation his condition has worsened and that such worsened condition results from the original injury.

Claimant's claim was closed by a determination order dated October 18, 1973, therefore, he has aggravation rights that will not expire until October 17, 1978. If, in the future, claimant's condition becomes worse and medical evidence indicates that the worsened condition results from the industrial injury then claimant again may file a claim for aggravation.

ORDER

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

WCB CASE NO. 75-3898 JUNE 16, 1976

FRANCIS M. STARK, CLAIMANT

KEITH TICHENOR, CLAIMANT'S ATTY.
NOREEN SALTVEIT, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH DENIED CLAIMANT'S CLAIM FOR INCREASED COMPENSATION ON ACCOUNT OF AGGRAVATION.

CLAIMANT SUSTAINED A COMPENSABLE ANKLE FRACTURE ON MARCH 31, 1971. HE RETURNED TO FULL TIME WORK AND HIS CLAIM WAS CLOSED WITHOUT ANY AWARD FOR PERMANENT PARTIAL DISABILITY. NO APPEAL WAS TAKEN FROM THIS CLOSURE.

THEREAFTER, CLAIMANT HAD TWO CERVICAL FUSIONS, NON-RELATED AND IN 1974 RETIRED UNDER AN OFF-THE-JOB COVERAGE.

CLAIMANT'S LOW BACK PROBLEMS STARTED IN MARCH, 1975, A YEAR FOLLOWING HIS RETIREMENT. DR. MISKO DIAGNOSED SPONDYLOSIS, THE SAME CONDITION FOR WHICH CLAIMANT HAD HAD THE PREVIOUS SURGERIES. HE INDICATED THAT THERE WAS NO DEFINITIVE TREATMENT FOR THIS COMPLAINT AND THAT X-RAYS TAKEN BACK IN 1968 SHOWED THE PROGRESSIVE SPONDYLOSIS CONDITION HAD BEGUN AS OF THAT TIME.

CLAIMANT FILED AN AGGRAVATION CLAIM IN JUNE, 1975, CONTENDING THAT THE 1971 INJURY, ESSENTIALLY FOR AN ANKLE FRACTURE, WAS AGGRAVATED AND SOMEHOW RELATED TO THE ADVANCING OF THE SPONDYLOSIS DISEASE CONDITION. THIS CLAIM WAS DENIED BY THE CARRIER.

SINCE SPONDYLOSIS IS A JOINT DISEASE WHICH CAN COME ON WITHOUT ANY INJURY, OR SIMPLY BY ORDINARY WEAR AND TEAR, IT APPEARS CLAIMANT'S PRESENT SPONDYLOSIS CONDITION IS NOT RELATED TO THE ANKLE INJURY OF 1971 AT WHICH TIME CLAIMANT WAS ONLY OFF WORK FOR A SHORT TIME, AND WHICH, IN FACT, PRODUCED NO BACK SYMPTOMS.

THE FACT THAT CLAIMANT HAD SPONDYLOSIS SO SEVERE IN HIS CERVICAL SPINE AS TO REQUIRE HIM TO RETIRE FROM WORK AS A PERMANENT TOTAL DISABILITY RECIPIENT UNDER OFF-THE-JOB COVERAGE WOULD INDICATE THAT THIS IS A DISEASE TO WHICH THE CLAIMANT IS PRONE AND THAT THE IMMOBILIZATION FROM TWO CERVICAL SURGERIES WOULD PROBABLY HAVE ACCELERATED THE SAME DISEASE CONDITION IN HIS LOWER BACK.

THE BOARD, ON DE NOVO REVIEW, FINDS FROM A MEDICAL-LEGAL-CAUSAL RELATIONSHIP STANDPOINT CLAIMANT HAS FAILED TO SUSTAIN HIS BURDEN OF PROOF. THE BOARD CONCURS WITH THE REFEREE'S DENIAL OF HIS AGGRAVATION CLAIM.

ORDER

THE ORDER OF THE REFEREE, DATED JANUARY 22, 1976, IS AFFIRMED.

WCB CASE NO. 75-2272 JUNE 16, 1976

BARBARA J. BARNES, CLAIMANT
JOHN H. HAUGH, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH SUSTAINED THE FUND'S DENIAL OF HER CLAIM FOR COMPENSATION.

CLAIMANT, WHO HOLDS AN LPN LICENSE, BEGAN WORKING AT THE UNIVERSITY OF OREGON MEDICAL SCHOOL IN 1967. FOR SOME TIME SHE WAS ON DUTY IN THE CORONARY CATHATERIZATION LABORATORY WHERE SHE WAS REQUIRED TO WEAR A HEAVY LEAD-COATED JACKET, WEIGHING APPROXIMATELY 10 POUNDS. CLAIMANT BEGAN HAVING BACK PROBLEMS AND FINALLY TRANSFERRED TO ANOTHER FLOOR. SHE EXPERIENCED BACK PAIN PERIODICALLY, DIAGNOSED AS BACK STRAIN. THE SYMPTOMS WOULD BE ALLEVIATED BY REST. ON MARCH 7, 1975 CLAIMANT'S SYMPTOMS INCREASED AND SHE CONSULTED DR. BIRD WHO FOUND NOTHING WRONG.

CLAIMANT RETURNED TO WORK AND WORKED UNTIL MARCH 15, 1975 WHEN SHE TOOK A THREE WEEK VACATION IN MEXICO. DURING THE TRIP HOME SHE EXPERIENCED SOME BACK DISCOMFORT, HOWEVER, ON ARRIVING HOME, ON APRIL 6, SHE HAD NO APPARENT PROBLEM. WHEN SHE RETURNED TO WORK ON APRIL 7 THERE WAS A HEAVY PATIENT LOAD AND SHE HAD LITTLE OR NO HELP - CLAIMANT BEGAN EXPERIENCING EXTREME PAIN, HER LEG WAS GOING NUMB AND SHE WAS LIMPING. SHE WAS EXAMINED BY DR. BIRD, COMPLETED THE SHIFT AND THE NEXT DAY WAS ADMITTED TO KAISER HOSPITAL WHERE A MYELOGRAM REVEALED A DEFECT AT THE L4-5 LEVEL. SURGERY WAS PERFORMED AND A HUGE DISC HERNIATION WAS FOUND AT THAT LEVEL.

THE REFEREE FOUND AN ABUNDANCE OF EVIDENCE TO SUPPORT CLAIMANT'S TESTIMONY OF PREVIOUS EPISODES AND SEVERE SYMPTOMS ON MARCH 7, 1975, AND THERE WAS ADEQUATE REASON TO BELIEVE HER SYMPTOMS WERE CAUSED BY HER WORK AGGRAVATING A PRE-EXISTING CONDITION. HAD SHE FILED A CLAIM ON MARCH 7 BEFORE GOING ON HER VACATION, HE FELT HER CLAIM WOULD HAVE BEEN ALLOWED, BUT SHE WAITED AND FILED A CLAIM RELYING UPON HER WORK ACTIVITIES OF APRIL 7, 1975, THE DAY SHE RETURNED TO WORK FROM HER VACATION. HE FURTHER GAVE NO WEIGHT TO THE OPINION OF DR. BIRD FOR THE REASON THAT IT WAS BASED UPON ERRONEOUS HISTORY FROM CLAIMANT.

THE BOARD, ON DE NOVO REVIEW, DISAGREES WITH THE REFEREE. THERE ARE PERIODS WHEN THE PERSON SUFFERING FROM THESE PROBLEMS EXPERIENCE LITTLE OR NO PAIN - THEN, FINALLY, THE CONDITION GRADUALLY BUILDS TO THE POINT WHERE THE DISC IS RUPTURED. BACK CLAIMS ARE NOTORIOUSLY DIFFICULT TO PINPOINT IN TIME. IN THIS CASE CLAIMANT RETURNED FROM HER VACATION, WENT BACK TO WORK AND EXPERIENCED A SEVERE EPISODE OF BACK PAIN WHICH REQUIRED SURGERY. THE BOARD CONCLUDES THAT CLAIMANT SUFFERED A COMPENSABLE INJURY ON APRIL 7, 1975.

ORDER

THE ORDER OF THE REFEREE, DATED OCTOBER 9, 1975, IS REVERSED.

CLAIMANT'S CLAIM IS REMANDED TO THE STATE ACCIDENT INSURANCE FUND FOR PAYMENT OF COMPENSATION, AS PROVIDED BY LAW, UNTIL CLOSURE PURSUANT TO ORS 656.268.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY FEE FOR HIS SERVICES IN CONNECTION WITH THE HEARING BEFORE THE REFEREE, THE SUM OF 850 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

CLAIMANT'S COUNSEL IS FURTHER AWARDED THE SUM OF 400 DOLLARS AS A REASONABLE ATTORNEY FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW.

WCB CASE NO. 75-1096 JUNE 16, 1976

MELVIN L. DICKASON, CLAIMANT

KENNETH COLLEY, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS BOARD REVIEW OF A REFEREE'S ORDER WHICH AFFIRMED THE DENIAL OF CLAIMANT'S CLAIM OF AGGRAVATION.

THE ISSUE IS - HAS CLAIMANT SUSTAINED A COMPENSABLE AGGRAVATION OF HIS INDUSTRIAL INJURY SINCE OCTOBER 2, 1972, THE DATE OF THE LAST AWARD OR ARRANGEMENT OF COMPENSATION?

CLAIMANT RECEIVED A COMPENSABLE INJURY ON AUGUST 20, 1970 WHEN HE FRACTURED THE 9TH, 10TH AND 12TH RIBS AND RECEIVED AN ACUTE HYPER-EXTENSION STRAIN OF HIS NECK. HE RECEIVED CONSERVATIVE TREATMENT. NO AWARD OF PERMANENT PARTIAL DISABILITY WAS GIVEN UNTIL THE ENTRY OF A REFEREE'S OPINION AND ORDER ON OCTOBER 2, 1972, AN APPEAL FROM A THIRD DETERMINATION ORDER. THIS ORDER GRANTED CLAIMANT 48 DEGREES FOR 15 PER CENT UNSCHEDULED DISABILITY.

CLAIMANT'S COUNSEL ARGUES THAT THE REFEREE DID NOT GIVE SUFFICIENT WEIGHT TO THE ONE FAVORABLE REPORT FROM DR. MARTENS, NOR DID HE CONSIDER THE NEW 1975 AGGRAVATION LAW.

THE BOARD, ON DE NOVO REVIEW, FINDS THE REFEREE DID CAREFULLY CONSIDER ALL OF THE MEDICAL REPORTS INCLUDING THAT OF DR. MARTENS AND DR. FITCHETT. THE LATTER STATED, '... I CANNOT FIND ANY OBJECTIVE FINDINGS THAT WOULD INDICATE ANYTHING MORE THAN NATURAL PROGRESSION OF HIS DEGENERATIVE ARTHRITIS INVOLVING THE CERVICAL SPINE.'

THE BOARD CONCLUDES THAT CLAIMANT'S WORSENED CONDITION IS THE RESULT OF THE NATURAL AGING PROCESSES AND NOT THE RESULT OF HIS INDUSTRIAL INJURY.

ORDER

THE ORDER OF THE REFEREE, DATED JANUARY 8, 1976, IS AFFIRMED.

WCB CASE NO. 75-2477 JUNE 16, 1976

TANA MARUMOTO, CLAIMANT

DONALD WILSON, CLAIMANT'S ATTY.
JAMES HUEGLI, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the referee's order, contending the referee erred in failing to award her permanent partial disability for loss of effective opposition of her thumb to the remaining uninjured fingers on the right hand. A determination order dated October 18, 1974 awarded claimant 20 per cent of the maximum for loss of the right thumb. The referee increased the award to 20 per cent loss of the right thumb.

In 1973 claimant was employed by a mortgage corporation where she filled out a great number of insurance forms, done by hand and using considerable pressure to write through carbon paper forms. A painful condition known as a 'trigger thumb' developed and claimant ultimately underwent surgery. The injury was accepted as a compensable claim.

The referee found medical evidence that the lessened sensation over the radial side of the thumb was probably permanent. He was uncertain if the proximal sensory loss, the grip loss and opposition loss was work related in view of claimant's past medical history, however, giving the claimant the benefit of the doubt, he awarded her an additional 20 per cent, making a total award of 40 per cent of the maximum for loss of the right thumb.

The referee is allowed by statute to award claimant for the proportionate loss of her right thumb in lieu of rating the loss of each digit individually for loss of effective opposition and he did so when he increased her prior award.

The Board, on de novo review, concurs with the finding of disability made by the referee.

ORDER

The order of the referee, dated November 26, 1975, is affirmed.

SAIF CLAIM NO. FC 88580 JUNE 16, 1976

AMELIA JOY, CLAIMANT

DEPT. OF JUSTICE, DEFENSE ATTY.
AMENDED OWN MOTION DETERMINATION

On June 7, 1976 the Board entered its own motion determination in the above entitled matter. Inadvertently, an award of compensation for permanent partial disability equal to 25 per cent loss of the right leg granted by a third determination order, mailed June 11, 1974, was omitted from the resume of claimant's previous awards.

This award of 25 per cent was in addition to the award of 35 per cent made by the determination order mailed November 13, 1968, therefore, claimant had received a total of 60 per cent loss of the

RIGHT LEG PRIOR TO THE AWARD OF AN ADDITIONAL 20 PER CENT MADE BY THE OWN MOTION DETERMINATION ENTERED JUNE 7, 1976 AND CLAIMANT NOW HAS RECEIVED AWARDS TOTALLING 80 PER CENT OF THE MAXIMUM ALLOWABLE FOR HER SCHEDULED DISABILITY.

ORDER

THE FIRST PARAGRAPH ON PAGE 1 OF THE OWN MOTION DETERMINATION IS DELETED AND THE FOLLOWING SUBSTITUTED IN LIEU THEREOF =

> 'CLAIMANT SUFFERED A COMPENSABLE INJURY ON JULY 21, 1967. HER CLAIM WAS CLOSED ON NOVEMBER 13, 1968 WITH AN AWARD EQUAL TO 35 PER CENT LOSS OF THE RIGHT LEG. ON MARCH 22, 1973 A SECOND DETERMINATION ORDER AWARDED CLAIMANT COMPENSATION FOR TEMPORARY TOTAL DISABILITY ONLY AND, ON JUNE 11, 1974, A THIRD DETERMINATION ORDER AWARDED CLAIMANT AN ADDITIONAL 25 PER CENT LOSS OF HER RIGHT LEG, GIVING CLAIMANT A TOTAL AWARD EQUAL TO 60 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR HER SCHEDULED DISABILITY.'

IN THE SEVENTH LINE OF THE FOURTH PARAGRAPH ON PAGE 1 OF THE OWN MOTION DETERMINATION, THE FIGURE 55 PER CENT IS DELETED AND THE FIGURE '80 PER CENT' IS INSERTED IN LIEU THEREOF.

IN ALL OTHER RESPECTS THE OWN MOTION DETERMINATION ENTERED JUNE 7, 1976 IS RATIFIED AND REAFFIRMED.

WCB CASE NO. 75-4050-SI JUNE 18, 1976

IN THE MATTER OF SECOND INJURY FUND RELIEF OF
GRIFFITH ROOFING COMPANY, EMPLOYER
JOHN S. WATTS, EMPLOYER'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
ORDER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

PETER BARTELL WAS INJURED IN A SERIOUS TRAFFIC ACCIDENT IN 1962 - HE SUFFERED INTERNAL INJURIES AND ALSO INJURIES TO HIS LEFT LEG, LEFT ARM AND A DISLOCATION OF HIS SHOULDER. A LEFT FOREARM BONE GRAFT WAS PERFORMED NEAR THE WRIST. BARTELL WAS UNABLE TO WORK FOR A YEAR, THEN COMMENCED WORK AS A SERVICE STATION ATTENDANT - A JOB WHICH DID NOT REQUIRE ANY MECHANICAL WORK OR HEAVY LIFTING.

IN 1968 BARTELL WAS EMPLOYED BY GRIFFITH ROOFING COMPANY. AT THE INITIAL INTERVIEW BARTELL DID NOT MENTION HIS LEFT ARM INJURY, HOWEVER, A COUPLE OF WEEKS LATER THE EMPLOYER NOTICED A KNOT NEAR HIS LEFT WRIST AND, AT THAT TIME, BARTELL DESCRIBED HIS NEW YORK ACCIDENT. THE EMPLOYER WAS SOMEWHAT CONCERNED BUT INASMUCH AS THE ACCIDENT HAD OCCURRED NEARLY 6 YEARS PREVIOUSLY, AND BECAUSE BARTELL INDICATED HE COULD DO THE ROOFING JOB, HE WAS RETAINED AS AN EMPLOYEE. THE FACTS INDICATE THAT HE WAS AN EXCELLENT WORKER - LOST VERY LITTLE TIME FROM WORK, POSSIBLY TWO WEEKS OVER A PERIOD OF SEVERAL YEARS. THIS LOSS OF TIME WAS FROM BURSITIS AND ARTHRITIC PAIN IN HIS LEFT ARM.

DURING JANUARY 8, 1974 WHILE LAYING 4X8 SHEETS OF INSULATION ON HOT TAR, BARTELL'S LEFT ARM BECAME PROGRESSIVELY MORE PAINFUL - THIS WAS THE FIRST TIME EITHER HE OR THE EMPLOYER HAD NOTICED ANY SWELLING IN ADDITION TO THE LUMP ON THE WRIST. BARTELL WAS UNABLE TO CONTINUE

WORK BECAUSE OF THE PAIN WHICH FINALLY EXTENDED THE FULL LENGTH OF THE ARM, IT WAS DIFFERENT FROM ANY HE HAD PREVIOUSLY EXPERIENCED. DR. HALL DIAGNOSED 'NONUNIONABLE FRACTURE -- REINJURED'. SURGERY WAS PERFORMED IN JANUARY, 1974 AND AGAIN IN APRIL, 1975. ULTIMATELY, HE WAS CONSIDERED MEDICALLY STATIONARY AND A DETERMINATION ORDER WAS ISSUED ON AUGUST 26, 1975. CLAIMANT IS NOW BACK AT WORK.

THE EMPLOYER PETITIONED FOR SECOND INJURY RELIEF ON OR ABOUT JUNE 12, 1974 - IT WAS DENIED AND, ON AUGUST 29, 1975, THE EMPLOYER REQUESTED A HEARING.

PURSUANT TO ORS 656.622 THE BOARD ADOPTED SECOND INJURY BENEFIT RULES EFFECTIVE APRIL 1, 1973 (WCB ADMINISTRATIVE ORDER 3-1973). THE ONLY ISSUE BEFORE THE REFEREE, PURSUANT TO STIPULATION BY THE PARTIES, WAS WHETHER RULE 4A - 'CRITERIA FOR ELIGIBILITY' - HAD BEEN MET.

RULE 4A STATES -

> 'AN EMPLOYEE MUST HAVE PERMANENT DISABILITY DUE TO PREVIOUS ACCIDENT, DISEASE OR CONGENITAL CONDITION WHICH IS, OR IS LIKELY TO BE, AN OBSTACLE FOR EMPLOYMENT, OR REEMPLOYMENT.'

THE REFEREE FOUND PLAIN UNCONTROVERTED MEDICAL EVIDENCE THAT SHORTLY AFTER BARTELL WAS FORCED TO LEAVE THE ROOFING JOB THE FIRST DOCTOR WHO EXAMINED HIM FOUND AN OLD NON-UNITED FRACTURE AND THAT A FRACTURE WHICH IS NON-UNITED IS, AT THE TIME, A PERMANENT DISABILITY. THE REFEREE FOUND THE FRACTURE WAS DIRECTLY CONNECTED TO THE PREVIOUS ACCIDENT AND IT WAS AN OBSTACLE TO EMPLOYMENT AT THE TIME IT WAS DISCOVERED BECAUSE CLAIMANT HAD TO LEAVE HIS JOB.

THE REFEREE CONCLUDED THAT ON THE DATE BARTELL WENT TO WORK FOR GRIFFITH ROOFING COMPANY, AND ON THE DATE THAT HE WAS RETAINED AND ON JANUARY 8, 1974 WHEN HE BECAME DISABLED, THERE WAS IN EXISTENCE PERMANENT DISABILITY TO CLAIMANT'S LEFT WRIST DUE TO A PREVIOUS ACCIDENT. IF IT HAD NOT BEEN FOR THE INJURY SUFFERED IN 1962 THE CLAIM AGAINST GRIFFITH ROOFING COMPANY, CLOSED BY THE DETERMINATION ORDER DATED AUGUST 26, 1975, WOULD NOT HAVE ARISEN.

THE REFEREE FURTHER CONCLUDED THAT THE EMPLOYER, GRIFFITH ROOFING COMPANY, HAD SATISFIED THE CRITERIA FOR ELIGIBILITY SET FORTH IN RULE 4A AND WAS ENTITLED TO REIMBURSEMENT FROM THE SECOND INJURY RESERVE FUND (ORS 656.622). HE RECOMMENDED THAT THE BOARD ISSUE ITS ORDER ACCORDINGLY.

THE BOARD, AFTER DE NOVO REVIEW, ACCEPTS THE RECOMMENDATION OF THE REFEREE.

ORDER

THE EMPLOYEE, PETER B. BARTELL, HAD A PERMANENT DISABILITY DUE TO A PREVIOUS ACCIDENT WHICH WAS OR WAS LIKELY TO BE AN OBSTACLE TO EMPLOYMENT OR REEMPLOYMENT, AT TIMES PERTINENT TO THIS CASE, AND THE REQUEST OF THE EMPLOYER, GRIFFITH ROOFING COMPANY, FOR REIMBURSEMENT FROM THE SECOND INJURY RESERVE FUND IS ACCEPTED FOR 100 PER CENT PAYMENT.

ERIS LANDES, CLAIMANT

ERVIN B. HOGAN, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT COMPENSATION FOR PERMANENT TOTAL DISABILITY EFFECTIVE OCTOBER 31, 1975, THE DATE OF HIS ORDER. THE FUND'S CONTENTION IS THAT CLAIMANT SHOULD BE EVALUATED AT THE PAIN CLINIC BEFORE IT IS DETERMINED SHE IS PERMANENTLY AND TOTALLY DISABLED.

CLAIMANT SUFFERS FROM A CONDITION OF ARACHNOIDITIS RESULTING FROM THE LAMINECTOMY TO CORRECT THE DISC PROBLEM WHICH RESULTED FROM CLAIMANT'S COMPENSABLE INDUSTRIAL INJURY. THE CONDITION IS DESCRIBED AS AN INVOLVEMENT OF THE NERVE ROOTS WITH SCAR TISSUE AND IS INCURABLE. DR. MC INTOSH EXPLAINED THAT THE CONDITION IS NOT AMENABLE TO SURGICAL CORRECTION BECAUSE THE END RESULT IS ADDITIONAL SCARRING AND THE ARACHNOIDITIS RETURNS, OFTEN WORSE THAN BEFORE.

DURING A PRE-HEARING CONFERENCE ON JANUARY 9, 1975, COUNSEL FOR THE FUND SUGGESTED TO THE CLAIMANT SHE MIGHT DESIRE TO CONSIDER TREATMENT AT THE PAIN CLINIC. SHE AGREED AND AN APPOINTMENT WAS THEN MADE FOR JANUARY 21, 1975. PRIOR TO THE APPOINTMENT, CLAIMANT RECEIVED A BROCHURE DESCRIBING THE PROGRAM AT THE CLINIC AND, AFTER REVIEWING IT, CLAIMANT CONCLUDED SHE WOULD BE UNABLE TO MEET THE DEMANDS OF THE PROGRAM AND CANCELLED THE APPOINTMENT. CLAIMANT'S REACTION TO THE PROGRAM DESCRIBED AND HER RELUCTANCE TO PARTICIPATE IN THE PROGRAM IS BEST EXPRESSED BY HER TESTIMONY -

> 'WELL, I WOULD BE THE FIRST PERSON IN THE WORLD TO GET SOME HELP. I MEAN, NOBODY WANTS TO LIVE IN PAIN. BUT I ALSO KNOW THAT THE LEAST THING I DO PHYSICALLY TAKES A TERRIBLE TOLL ON ME AND MAKES ME SO MUCH WORSE. I AM JUST HOLDING MY HEAD ABOVE WATER NOW PAINWISE AND MANAGING TO MANAGE MY LIFE. AND THE THING ABOUT THE PAIN CLINIC THAT MADE ME SAY I COULD NOT GO WAS THE PHYSICAL SCHEDULE. IT'S VERY DIFFICULT FOR ME TO SIT, I CAN'T STAND, I CAN'T WALK. I COULDN'T MANAGE THEIR DAY, THEIR DAILY SCHEDULE.' (TRANS. PP 38-39).

BEFORE A CLAIMANT'S REFUSAL OF TREATMENT MAY BE CONSIDERED AS A FACTOR IN DETERMINING THE NATURE OF DISABILITY IT MUST APPEAR THAT THE PROFFERED TREATMENT 'MIGHT RESTORE HIM TO THE PHYSICAL ABILITY TO WORK'. BRECHT V. SAIF (UNDERSCORED), 12 OR APP 615. DR. THOMPSON'S REPORT OF SEPTEMBER 10, SUGGESTS THAT NO THERAPY IS LIKELY TO DIMINISH PLAINTIFF'S DISABILITY TO THE POINT WHERE SHE WOULD BE ABLE TO WORK. DR. MC INTOSH WAS OF THE OPINION THAT THE SUGGESTED TREATMENT WOULD NOT RETURN CLAIMANT TO GAINFUL EMPLOYMENT.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS OF THE REFEREE THAT CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED AND ALTHOUGH A SESSION AT THE PAIN CLINIC MIGHT ASSIST CLAIMANT IN LIVING WITH HER PAIN, IT WOULD NOT ENABLE HER TO RETURN TO ANY TYPE OF EMPLOYMENT.

ORDER

THE ORDER OF THE REFEREE, DATED OCTOBER 31, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW THE SUM OF 350 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-2817 JUNE 18, 1976

PATRICK J. HOFFART, CLAIMANT

KEITH TICHENOR, CLAIMANT'S ATTY.
R. KENNEY ROBERTS, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED HIM 54 DEGREES FOR 40 PER CENT LOSS OF THE LEFT FOOT.

CLAIMANT, A 47 YEAR OLD ELECTRICIAN, FRACTURED THE HEEL OF HIS LEFT FOOT ON JUNE 19, 1974 WHEN HE JUMPED TEN FEET FROM A DOCK TO AVOID A THREATENING GASOLINE FIRE.

CLAIMANT WAS TREATED BY DR. BACHHUBER, AN ORTHOPEDIC SURGEON, WHO DIAGNOSED A COMMINUTED FRACTURES ANTERIOR AND POSTERIOR SURFACES OF LEFT OSCALCIS WITH LOSS OF BOEHLER'S ANGLE. CLAIMANT RETURNED TO THE SAME TYPE OF WORK FOR THE SAME EMPLOYER IN OCTOBER, 1974. THE ONLY THING CLAIMANT HAS BEEN UNABLE TO DO SINCE THE INJURY IS WORK INVOLVING CLIMBING LADDERS, AND OUTSIDE LIGHTING WORK WHICH INVOLVES STANDING IN A 'CHERRY PICKER', A BASKET ELEVATED BY A TRUCK HOIST.

THE REFEREE FOUND THAT CLAIMANT EXPERIENCES SWELLING AT NIGHT AFTER WORK, THAT HE IS UNABLE TO TURN HIS FOOT SIDE-TO-SIDE, OR IN AND OUT, BUT DOES HAVE FULL MOTION UP AND DOWN. CLAIMANT HAS NOT LOST ANY TIME FROM WORK BECAUSE OF HIS INJURY, ALTHOUGH HE HAS EXPERIENCED CRAMPING SENSATIONS IN HIS LEG WHICH IS SEVERE ENOUGH TO AWAKEN HIM TWO OR THREE TIMES A WEEK. ALSO HE HAS TO AVOID WALKING ON UNEVEN TERRAIN AND FEELS A CERTAIN LACK OF BALANCE WHEN WORKING ON SCAFFOLDS.

THE REFEREE FOUND THAT CLAIMANT HAD NO TENDENCY TO EXAGGERATE HIS SYMPTOMS BUT, TO THE CONTRARY, APPEARED REMARKEDLY RESTRAINED IN DESCRIBING THEM. THE REFEREE CONCLUDED, BASED UPON THE CREDIBLE TESTIMONY OF THE CLAIMANT, WHICH WAS SUPPORTED BY MEDICAL FINDINGS, THAT CLAIMANT WAS ENTITLED TO AN AWARD EQUAL TO 40 PER CENT OF THE MAXIMUM ALLOWABLE FOR HIS SCHEDULED DISABILITY. HIS CLAIM HAD INITIALLY BEEN CLOSED BY A DETERMINATION ORDER MAILED JUNE 30, 1975 WHEREBY CLAIMANT WAS AWARDED 25 PER CENT OF THE LEFT FOOT.

THE BOARD, ON DE NOVO REVIEW, AGREES THAT CLAIMANT IS ENTITLED TO THIS INCREASE OF 15 PER CENT AND AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED NOVEMBER 6, 1975, IS AFFIRMED.

WCB CASE NO. 75-2271 JUNE 18, 1976

RICHARD BURNS, CLAIMANT

ALLEN T. MURPHY, CLAIMANT'S ATTY.
R. KENNEY ROBERTS, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS REVIEW BY THE BOARD OF A REFEREE'S ORDER WHICH AFFIRMED A DETERMINATION ORDER GRANTING CLAIMANT NO AWARD FOR PERMANENT PARTIAL DISABILITY.

CLAIMANT HAD WORKED AS A CARPENTER FOR MANY YEARS AND SUSTAINED A COMPENSABLE INJURY ON OCTOBER 11, 1974 WHILE WORKING ON A SCAFFOLDING LIFTING A COLUMN FORM WITH A CO-WORKER. HE RECEIVED CONSERVATIVE TREATMENT BY A CHIROPRACTOR WHO DIAGNOSED AN ACUTE LUMBAR STRAIN. HE CONSULTED DR. CHERRY, AN ORTHOPEDIST, ON NOVEMBER 27, 1974. DR. CHERRY'S REPORT INDICATED CLAIMANT'S EXAMINATION WAS ALMOST COMPLETELY NORMAL.

DR. JOHN C. VESSELY AND DR. MICHAEL S. BASKIN, ALSO ORTHOPEDISTS, EXAMINED CLAIMANT AND COULD FIND NO OBJECTIVE FINDINGS THAT WOULD ACCOUNT FOR HIS SUBJECTIVE COMPLAINTS.

CLAIMANT TESTIFIED HE HAD TRIED TO RETURN TO WORK ON TWO OCCASIONS BUT WAS UNABLE TO LIFT SUFFICIENTLY TO DO THE WORK.

THE REFEREE GAVE LITTLE WEIGHT TO THE FILMS TAKEN BY AN INVESTIGATOR SINCE IT WAS NOT CLEARLY ESTABLISHED THAT CLAIMANT WAS ACTUALLY THE PERSON PHOTOGRAPHED MOVING FURNITURE.

THE BOARD, ON DE NOVO REVIEW, FINDS A COMPLETE LACK OF MEDICAL EVIDENCE FROM ANY TREATING PHYSICIAN TO ESTABLISH CLAIMANT'S ENTITLEMENT TO AN AWARD OF PERMANENT DISABILITY.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 31, 1975, IS AFFIRMED.

WCB CASE NO. 75-1270 JUNE 18, 1976

GARWOOD BROCKMAN, CLAIMANT

BABCOCK, ACKERMAN AND HANLON,
CLAIMANT'S ATTYS.
KEITH D. SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

BY A DETERMINATION ORDER DATED MARCH 14, 1975, CLAIMANT WAS AWARDED 96 DEGREES FOR 50 PER CENT LOSS OF THE LEFT ARM AND 64 DEGREES FOR 20 PER CENT UNSCHEDULED DISABILITY TO THE LEFT SHOULDER. AFTER A HEARING, THE REFEREE AWARDED CLAIMANT AN ADDITIONAL 57.6 DEGREES FOR 30 PER CENT LOSS OF THE LEFT ARM, A TOTAL OF 153.6 DEGREES FOR 80 PER CENT LOSS OF LEFT ARM. CLAIMANT REQUESTS BOARD REVIEW, CONTENDING HE IS ENTITLED TO AN AWARD FOR PERMANENT TOTAL DISABILITY.

CLAIMANT, A 65 YEAR OLD FALLER-BUCKER, SUFFERED A COMPENSABLE INJURY ON JUNE 8, 1973. A DEFINITIVE DIAGNOSIS WAS NOT MADE UNTIL CLAIMANT WAS SEEN BY DR. DAVIS, A NEUROLOGIST, WHO FOUND A RIGHT CEREBRAL CORTEX LESION CAUSED BY LODGING OF AN EMBULUS.

THE REFEREE FOUND CLAIMANT WAS NOT PERMANENTLY AND TOTALLY DISABLED. HE FOUND THE MAJOR PORTION OF CLAIMANT'S DISABILITY TO BE ENTIRELY IN THE LEFT UPPER EXTREMITY AND DESCRIBED HIM AS BEING INDUSTRIALLY A 'ONE-ARMED' MAN. CLAIMANT HAD VOLUNTARILY RETIRED FROM THE WORK FORCE. THE REFEREE CONCLUDED THAT THE AWARD FOR UNSCHEDULED DISABILITY GRANTED CLAIMANT WAS ADEQUATE BUT HE FELT THAT CLAIMANT HAD LOST FOUR FIFTHS OF THE USE OF HIS ARM AND THEREUPON AWARDED HIM THE ADDITIONAL 30 PER CENT.

ON DE NOVO REVIEW, THE BOARD CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE AND AFFIRMS AND ADOPTS HIS ORDER.

ORDER

THE ORDER OF THE REFEREE DATED OCTOBER 15, 1975 IS AFFIRMED.

WCB CASE NO. 74-2815 JUNE 18, 1976

JACK BOONE, CLAIMANT

J. DAVID KRYGER, CLAIMANT'S ATTY.
CHARLES PAULSON, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE EMPLOYER'S DENIAL OF CLAIMANT'S CLAIM FOR AGGRAVATION.

CLAIMANT, A 27 YEAR OLD HEAVY EQUIPMENT OPERATOR, SUSTAINED A COMPENSABLE BACK INJURY ON FEBRUARY 11, 1972 WHEN HE FELL BACKWARDS ACROSS A CEMENT CURB. THE DIAGNOSIS WAS ACUTE LUMBOSACRAL SPRAIN AND CLAIMANT RECEIVED PHYSICAL THERAPY, ULTRA-SOUND, MASSAGE AND MEDICATION.

DR. PALUSKA, AN ORTHOPEDIC SURGEON, WAS CLAIMANT'S TREATING PHYSICIAN - HE RELEASED CLAIMANT TO RETURN TO WORK ON JUNE 22, 1972, AT THAT TIME HIS FINDINGS WERE NORMAL EXCEPT FOR TENDERNESS IN THE RIGHT SCIATIC NOTCH. THE CLAIM WAS CLOSED JULY 7, 1972 BY DETERMINATION ORDER AWARDING CLAIMANT COMPENSATION FOR TEMPORARY TOTAL DISABILITY ONLY. ON APPEAL THE AWARD WAS AFFIRMED.

ON JULY 23, 1972 CLAIMANT WENT SWIMMING WITH SOME FRIENDS AND HIS BACK BEGAN TO BOTHER HIM TO THE EXTENT THAT HE AND HIS FRIENDS DECIDED TO RETURN HOME. ON THE RETURN TRIP THEY WERE INVOLVED IN AN AUTOMOBILE ACCIDENT AND CLAIMANT'S LEFT KNEE WAS INJURED. CLAIMANT DID NOT FEEL THAT THE IMPACT OF THE AUTOMOBILE ACCIDENT CAUSED HIS BACK TO WORSEN BUT HE DID INFORM DR. BURR, WHO TREATED THE LEFT KNEE INJURY, OF HIS INDUSTRIAL INJURY AND THE TROUBLE HE HAD BEEN HAVING PREVIOUSLY WITH HIS BACK.

IN SEPTEMBER, 1973, CLAIMANT COMMENCED ATTENDING CLATSOP COMMUNITY COLLEGE UNDER THE AUSPICES OF THE DIVISION OF VOCATIONAL REHABILITATION AND, AT THE DATE OF THE HEARING, WAS STILL ATTENDING CLASSES.

IN APRIL, 1974 CLAIMANT BEGAN HAVING TROUBLE WITH HIS BACK AND HE COULDN'T PARTICIPATE FULLY AT SCHOOL. DR. PALUSKA, ON JANUARY 10, 1974, HAD REPORTED THAT HE DID NOT FEEL ANY REFERRAL OF CLAIMANT TO THE BACK CLINIC AT THAT TIME WOULD HELP BECAUSE IT WOULD BE IMPOSSIBLE FOR THE EXAMINERS TO DETERMINE WHETHER OR NOT HIS BACK COMPLAINTS WERE ALL RELATED TO A BACK CONDITION WHICH OCCURRED PRIOR TO THE AUTOMOBILE ACCIDENT. HE FELT THE AUTOMOBILE ACCIDENT COULD HAVE AGGRAVATED HIS BACK CONDITION.

IN APRIL, 1974 CLAIMANT WAS SEEN BY DR. STEINMANN, A GENERAL PRACTITIONER, COMPLAINING OF BACK PROBLEMS. HE INFORMED DR. STEINMANN OF HIS INDUSTRIAL INJURY AND THE DOCTOR'S REPORT ALSO REFERRED TO AN EXACERBATION OF SYMPTOMS A FEW DAYS PREVIOUS TO THE EXAMINATION WHEN CLAIMANT SLIPPED WHILE GETTING OUT OF BED. HOWEVER, THERE WAS NO REFERENCE IN THE DOCTOR'S REPORT TO THE AUTOMOBILE ACCIDENT. DR. STEINMANN NOTED THE ONLY OBJECTIVE SYMPTOM FOUND WAS A MUSCLE SPASM.

DR. STEINMANN, HAVING BEEN PROVIDED WITH COPIES OF ALL OF THE MEDICAL REPORTS RELATING TO CLAIMANT'S AUTOMOBILE ACCIDENT, STATED THAT IF CLAIMANT TRULY HAD NO SYMPTOMS REFERRABLE TO HIS BACK AT THE TIME OF THE AUTOMOBILE ACCIDENT, IT WOULD BE REASONABLE TO BELIEVE THAT HIS PRESENT BACK SYMPTOMS PROBABLY WERE NOT RELATED TO THAT AUTOMOBILE ACCIDENT - HOWEVER, IT WOULD BE VERY DIFFICULT TO STATE THAT CATEGORICALLY.

CLAIMANT TESTIFIED THAT HE HAD NOT NOTICED ANY SUDDEN INCREASE IN LOW BACK SYMPTOMS FOLLOWING THE AUTOMOBILE ACCIDENT BUT THAT HIS BACK CONDITION HAD GRADUALLY WORSENED PRIOR THERETO AND HAD CONTINUED TO WORSEN.

THE EMPLOYER DENIED THE CLAIMANT'S CLAIM FOR AGGRAVATION ON JULY 12, 1974. CLAIMANT CONTENDS THAT DR. STEINMANN'S REPORT, REFERRED TO ABOVE, TOGETHER WITH HIS OWN TESTIMONY PROVIDED THE NECESSARY PROOF FOR AGGRAVATION.

THE REFEREE FOUND CLAIMANT'S CONTENTION WAS NOT TENABLE. THE FINAL PARAGRAPH OF DR. STEINMANN'S REPORT INDICATES THAT IF (UNDERSCORED) CLAIMANT HAD NO BACK SYMPTOMS AT THE TIME OF THE AUTOMOBILE ACCIDENT, IT WOULD BE REASONABLE TO CONCLUDE THAT THE PRESENT BACK SYMPTOMS WERE NOT RELATED TO THE SAID ACCIDENT. HOWEVER, THE REFEREE FOUND EVIDENCE THAT THE AUTOMOBILE ACCIDENT DID EXACERBATE CLAIMANT'S BACK SYMPTOMS. THE REPORTS FROM DR. BURR, WHO TREATED CLAIMANT'S LEFT KNEE INJURY, MAKE NO REFERENCE THEREIN TO ANY BACK COMPLAINTS. FURTHERMORE, AT A PREVIOUS HEARING IN AUGUST, 1972 THERE WAS TESTIMONY FROM BOTH CLAIMANT AND ONE OF HIS WITNESSES TO THE EFFECT THAT CLAIMANT DID HAVE BACK SYMPTOMS AFTER THE AUTOMOBILE ACCIDENT.

THE REFEREE REVIEWED THE COMPLETE RECORD OF THE HEARING HELD ON AUGUST 17, 1972 (WCB CASE NO. 72-1826) AND NOTED THAT IN THE ORDER ENTERED AS A RESULT OF THAT HEARING THAT THE REFEREE FELT THAT THE INTERVENING NON-RELATED AUTOMOBILE ACCIDENT MADE THE PROBLEM OF ASSESSING PERMANENT DISABILITY MORE DIFFICULT. THE REFEREE FELT THAT STILL REMAINED TRUE.

ALTHOUGH THE CLAIMANT TENDED TO BELITTLE THE SEVERITY OF THE AUTOMOBILE ACCIDENT, THE TESTIMONY INDICATES THAT BOTH CARS INVOLVED WERE MOVING AT A FAIRLY HIGH RATE OF SPEED. THE VEHICLE IN WHICH CLAIMANT WAS RIDING SUFFERED DAMAGE AMOUNTING TO 1500 DOLLARS, THE OTHER CAR WAS TOTALLY WRECKED.

THE REFEREE CONCLUDED, AFTER CONSIDERING ALL OF THE FACTS AND THE MEDICAL EVIDENCE, THAT IT WOULD BE IMPOSSIBLE TO FIND THAT CLAIMANT'S PRESENT BACK CONDITION WAS CAUSALLY RELATED TO THE INDUSTRIAL

INJURY AND NOT TO THE AUTOMOBILE ACCIDENT. CLAIMANT'S CONDITION MAY HAVE WORSENED SINCE AUGUST, 1972, HOWEVER, CLAIMANT HAS FAILED TO CARRY HIS BURDEN OF PROOF WITH REGARD TO WHAT INCIDENT THE AGGRAVATION, IF ANY, CAN BE CHARGED.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED NOVEMBER 26, 1975, IS AFFIRMED.

WCB CASE NO. 75-1143 JUNE 18, 1976

FRANK BLANTON, CLAIMANT

RICHARD HAMMERSLEY, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH SUSTAINED THE DENIAL OF HIS CLAIM FOR AGGRAVATION.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON JANUARY 6, 1972 TO HIS LEFT ARM. DR. WHITE DIAGNOSED A PARTIAL LEFT ULNAR PALSY AND PERFORMED TRANSPLANT SURGERY. THE CLAIM WAS CLOSED MAY 1, 1972 WITH AN AWARD OF 10 DEGREES FOR PARTIAL LOSS OF THE LEFT ARM.

SHORTLY THEREAFTER, CLAIMANT COMPLAINED OF COMPLETE INABILITY TO USE HIS LEFT ARM. IN AUGUST, 1972 CLAIMANT WAS HOSPITALIZED AND MANIPULATION OF THE SHOULDER UNDER ANESTHESIA WAS PERFORMED.

IN LATE 1972 CLAIMANT WAS SEEN AT THE DISABILITY PREVENTION DIVISION WHERE DR. MASON DIAGNOSED A FROZEN SHOULDER SYNDROME CAUSED POSSIBLY BY DISUSE CAPSULITIS AND A GROSS CONVERSION REACTION. A PSYCHOLOGIST AT THE CENTER FELT CLAIMANT WAS USING PHYSICAL COMPLAINTS TO HELP SOLVE EMOTIONAL PROBLEMS. CLAIMANT WAS DISCHARGED WITH A RATING OF 'MINIMAL' ARM AND HAND DISABILITY.

THE CLAIM WAS CLOSED A SECOND TIME IN FEBRUARY, 1973 WITH AN ADDITIONAL 5 PER CENT LEFT ARM DISABILITY. A STIPULATED SETTLEMENT FOLLOWED ON MAY 23, 1973 GRANTING AN ADDITIONAL 40 DEGREES FOR UNSCHEDULED DISABILITY. THE ISSUE ON REVIEW IS WHETHER CLAIMANT'S CONDITION HAS WORSENED SINCE THIS DATE WHICH IS THE LAST AWARD OR ARRANGEMENT OF COMPENSATION.

ON FEBRUARY 4, 1975 DR. GILL REPORTED CLAIMANT'S HAND WAS SO COMPLETELY CLUTCHED THE FINGERNAILS WERE DIGGING INTO THE PALM OF THE HAND. CLAIMANT WAS SUBSEQUENTLY HOSPITALIZED, SURGERY WAS PERFORMED AND THE CONTRACTED LEFT HAND WAS FORCIBLY EXTENDED.

THE FUND DENIED CLAIMANT'S CLAIM OF AGGRAVATION.

IN APRIL, 1975, CLAIMANT COMMENCED SEEING DR. BLACHLY, A UNIVERSITY OF OREGON PSYCHIATRIST, WHO RECOMMENDED ELECTRO-CONVULSIVE THERAPY. THIS WAS REFUSED BY THE CLAIMANT. HE NOTED SUICIDAL THREATS BY CLAIMANT, ALSO CLAIMANT KEPT TEARING OFF BANDAGES TO OPEN HIS WOUND. THE DOCTOR DIAGNOSED 'A PARANOID DEPRESSIVE PSYCHOSIS MANIFESTED BY BIZARRE CONTRACTURES OF THE LEFT HAND WITH PAIN IN ALL THE JOINTS OF THE LEFT UPPER EXTREMITY.'

FOLLOWING THE HEARING, CLAIMANT WAS EXAMINED BY DR. QUAN, PSYCHIATRIST, WHO FELT THE PSYCHOTIC EPISODES WERE NOT RELATED TO THE WORK INJURY, BUT RATHER PROBABLY TO MARITAL DISCORD.

THE REFEREE FOUND THAT CLAIMANT'S REAL MEDICAL PROBLEM WAS PRIMARILY ONE OF CONVERSION-REACTION AND THAT SUCH A PROBLEM COULD BE THE BASIS OF A DISABILITY AWARD. HE FELT THIS CONDITION WAS TO SOME EXTENT RELATED TO THE INDUSTRIAL INJURY, BUT THERE HAD BEEN NO SHOWING THAT THE CONDITION HAD WORSENED SINCE MAY OF 1973.

THE REFEREE FOUND CLAIMANT HAD COMPLETELY FAILED TO TAKE ADVANTAGE OF ANY TYPE OF TREATMENT SUGGESTED BY THE DOCTORS.

THE BOARD, ON DE NOVO REVIEW, CONCURS, AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 16, 1975, IS AFFIRMED.

(NO NUMBER AVAILABLE) JUNE 18, 1976

ESPERANZO BLANCO, CLAIMANT

OWN MOTION DETERMINATION

CLAIMANT SUFFERED A COMPENSABLE INJURY ON APRIL 12, 1968 AND, ON APRIL 24, 1969, A DETERMINATION ORDER GRANTED CLAIMANT COMPENSATION FOR TEMPORARY TOTAL DISABILITY ONLY. ON MARCH 11, 1974 A SECOND DETERMINATION ORDER GRANTED CLAIMANT ADDITIONAL TEMPORARY TOTAL DISABILITY AND AN AWARD OF 96 DEGREES FOR 30 PER CENT UNSCHEDULED LOW BACK DISABILITY. CLAIMANT'S AGGRAVATION RIGHTS HAVE EXPIRED.

THE CLAIM WAS REOPENED VOLUNTARILY BY THE CARRIER FOR AGGRAVATION ON DECEMBER 2, 1974. SUBSEQUENT TO THIS REOPENING CLAIMANT RECEIVED CONSERVATIVE TREATMENT AND A NEUROLOGICAL EVALUATION BY DR. BUZA WHO RECOMMENDED CONSERVATIVE TREATMENT ONLY.

ON DECEMBER 22, 1975 DR. BURR RECOMMENDED CLAIMANT BE RE-EXAMINED AND, ON MARCH 25, 1976, DR. PASQUESI EXAMINED CLAIMANT AND FOUND HER CONDITION TO BE ESSENTIALLY THE SAME AS IT WAS ON APRIL 11, 1974.

THE EVALUATION DIVISION OF THE BOARD RECOMMENDS NO INCREASE IN CLAIMANT'S PERMANENT PARTIAL DISABILITY AWARD.

ORDER

CLAIMANT IS ENTITLED TO THE COMPENSATION FOR TEMPORARY TOTAL DISABILITY PREVIOUSLY PAID BY THE FUND FROM DECEMBER 2, 1974 THROUGH APRIL 11, 1976 - IN ALL OTHER RESPECTS THE DETERMINATION ORDER DATED MARCH 11, 1974 IS AFFIRMED.

SAIF CLAIM NO. C 29634 JUNE 18, 1976

DANIEL GRAVEN, CLAIMANT

DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION DETERMINATION

CLAIMANT SUFFERED A COMPENSABLE INJURY ON JULY 14, 1966 AND HIS CLAIM WAS FIRST CLOSED BY DETERMINATION ORDER ON DECEMBER 1, 1966 WITH NO AWARD OF PERMANENT PARTIAL DISABILITY. CLAIMANT'S AGGRAVATION RIGHTS HAVE EXPIRED.

CLAIMANT'S CLAIM WAS REOPENED FOR FURTHER TREATMENT IN 1971 AND CLAIMANT UNDERWENT A LAMINECTOMY AND LATERAL FUSION AT L4-5, S1. ON MARCH 8, 1973 A SECOND DETERMINATION ORDER AWARDED CLAIMANT 40 PER CENT UNSCHEDULED LOW BACK PERMANENT PARTIAL DISABILITY.

ON NOVEMBER 25, 1975, THE STATE ACCIDENT INSURANCE FUND VOLUNTARILY REOPENED CLAIMANT'S CLAIM FOR FURTHER TREATMENT FOR DEGENERATION OF THE DISC SPACE AT THE FIRST LEVEL ABOVE THE FUSION. CLAIMANT WAS RELEASED TO WORK ON APRIL 12, 1976.

ON MAY 19, 1976 THE STATE ACCIDENT INSURANCE FUND REQUESTED A DETERMINATION PURSUANT TO ORS 656.278 AND THE EVALUATION DIVISION OF THE BOARD RECOMMENDED CLAIMANT RECEIVE COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM NOVEMBER 25, 1975 THROUGH APRIL 11, 1976, AND AN ADDITIONAL AWARD OF 10 PER CENT UNSCHEDULED DISABILITY, MAKING CLAIMANT A TOTAL AWARD OF 50 PER CENT PERMANENT PARTIAL DISABILITY.

ORDER

THE STATE ACCIDENT INSURANCE FUND SHALL PAY CLAIMANT TEMPORARY TOTAL DISABILITY FROM NOVEMBER 25, 1975 THROUGH APRIL 11, 1976. CLAIMANT IS ALSO GRANTED AN ADDITIONAL AWARD OF 10 PER CENT LOSS OF AN ARM BY SEPARATION FOR UNSCHEDULED LOW BACK DISABILITY.

WCB CASE NO. 75-3308 JUNE 21, 1976

JESSIE L. TURNER, CLAIMANT

SAMUEL SUWOL, CLAIMANT'S ATTY.
NOREEN SALTVEIT, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH UPHELD THE EMPLOYER'S DENIAL OF CLAIMANT'S CLAIM FOR A BACK INJURY BUT ORDERED CLAIMANT'S TIME LOSS BENEFITS REINSTATED FROM JULY 4, 1975 TO AUGUST 12, 1975 AND DIRECTED THE EMPLOYER TO PAY CLAIMANT A 5 PER CENT PENALTY THEREOF.

CLAIMANT WAS INJURED ON JUNE 25, 1975 WHEN SOME ROCKS FELL ON HIS RIGHT HAND. HE WAS SEEN BY DR. ECKHART, WHO OBSERVED A RED SWOLLEN TENDER KNUCKLE ON THE RIGHT THIRD FINGER WITH LIMITED MOTION AND PAIN ON MOVEMENT - HE PUT THE HAND IN A SPLINT FOR THREE OR FOUR DAYS. CLAIMANT WAS OFF WORK FOR TWO DAYS.

AT THE HEARING, CLAIMANT TESTIFIED THAT AT THE SAME TIME HE HURT HIS HAND HE FELL OVER A RAIL AND INJURED HIS BACK, HE DID NOT FILE A FORM 801 BUT STATED THAT HE MENTIONED HIS BACK INJURY WHILE HE WAS

IN THE HOSPITAL. CLAIMANT CLAIMS HE HAS NOT BEEN ABLE TO WORK ON ACCOUNT OF HIS BACK, THAT THE EMPLOYER OFFERED HIM PART-TIME WORK WASHING CARS BUT HE WAS UNABLE TO DO IT. CLAIMANT ADMITTED THAT HE DID NOT MENTION HURTING HIS BACK WHEN THE EMPLOYER FILLED OUT THE FORM 801.

CLAIMANT ADVISED DR. ECKHART THAT HE DESIRED TO BE TREATED BY HIS FAMILY PHYSICIAN, DR. MINTZ. ON JULY 3, 1975 DR. MINTZ FIRST EXAMINED CLAIMANT AND ON JULY 23, 1975 FILED A PHYSICIANS INITIAL REPORT OF WORK INJURY IN WHICH HE REPORTED THAT THE CLAIMANT STATED HE HAD FALLEN ON HIS HAND AND STRAINED HIS BACK AS WELL. ON AUGUST 23, 1975 DR. MINTZ INDICATED THAT THE RIGHT UPPER LIMB WAS MUCH BETTER BUT THE PROGNOSIS WAS GUARDED AS TO THE SEVERITY OF THE PERSISTENT SYMPTOMS FROM THE BACK INJURY.

THE REFEREE FOUND THAT CLAIMANT FAILED TO SUSTAIN HIS BURDEN OF PROOF THAT HE HAD SUFFERED A BACK INJURY WHEN THE ROCK FELL ON HIS HAND. THE DOCTORS WHO TREATED HIM FOR THE HAND INJURY RECEIVED NO HISTORY OF A BACK INJURY NOR DID CLAIMANT TELL HIS EMPLOYER OF A BACK INJURY. THE REFEREE FOUND THAT THE TWO PHYSICIANS WHO HAD ORIGINALLY TREATED CLAIMANT RECEIVED CONSISTENT HISTORIES BUT THEREAFTER CLAIMANT GAVE A DIFFERENT HISTORY TO EACH PHYSICIAN WHO EXAMINED OR TREATED HIM.

THE REFEREE AFFIRMED THE DENIAL OF THE BACK INJURY.

THE CARRIER ADVISED CLAIMANT, ON JULY 21, 1975, THAT IT HAD SENT HIM A TIME LOSS COMPENSATION CHECK PAYING HIM THROUGH JULY 4, 1975 AS A RESULT OF THE JUNE 25, 1975 INJURY BUT IT HAD BEEN ADVISED BY THE EMPLOYER THAT IT HAD A JOB AVAILABLE AND WITHIN CLAIMANT'S CAPABILITIES AND, THEREFORE, IT WOULD TERMINATE TIME LOSS AS OF JULY 5, 1975 WHEN THE JOB BECAME AVAILABLE.

THE REFEREE FOUND THAT CLAIMANT'S TIME LOSS SHOULD BE REINSTATED FROM JULY 4, 1975 UNTIL AUGUST 12, 1975 WHICH WAS THE DATE THAT DR. NATHAN INDICATED THAT CLAIMANT WAS RELEASED FOR WORK AS FAR AS HIS HAND INJURY WAS CONCERNED AND THAT HE HAD OBSERVED NO EVIDENCE OF PERMANENT PARTIAL DISABILITY. THE EMPLOYER SHOULD NOT HAVE TERMINATED TIME LOSS ON JULY 5, 1975 MERELY BECAUSE IT HAD A JOB AVAILABLE WHICH WAS WITHIN CLAIMANT'S CAPABILITIES, IT HAD A DUTY TO PROPERLY PROCESS THE CLAIM UNDER ORS 656.268. THE REFEREE CONCLUDED THAT HAVING FAILED TO PROCESS THE CLAIM PROPERLY THE EMPLOYER WAS SUBJECTED TO A 5 PER CENT PENALTY AND SHOULD BE DIRECTED TO PAY CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY FEE FOR SECURING THE REINSTATEMENT OF TIME LOSS BENEFITS.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 15, 1975, IS AFFIRMED.

WCB CASE NO. 75-3823 JUNE 21, 1976

WILLIAM H. MILLER, CLAIMANT

DONALD WILSON, CLAIMANT'S ATTY.
ROGER WARREN, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH HELD THAT THE EMPLOYER AND ITS CARRIER WERE NOT GUILTY OF IMPROPER CONDUCT, THAT THE HANDLING OF THE REJECTION WAS PROMPT AND CLAIMANT'S COUNSEL WAS FULLY ADVISED AS TO THE REASONS THEREFOR, I.E., RELIANCE UPON ITS CORRECT INTERPRETATION OF THE RULING OF THE WORKMEN'S COMPENSATION BOARD.

THE SOLE ISSUE BEFORE THE REFEREE WAS THE CARRIER'S ALLEGED WILFUL FAILURE TO ABIDE BY THE REFEREE'S ORDER, SPECIFICALLY, ITS ALLEGED REFUSAL TO PAY FOR MEDICAL CARE AND TREATMENT INCURRED IN THE CARE AND TREATMENT OF A COMPENSABLE INJURY. BASED UPON THE ALLEGED WILFUL FAILURE THE CLAIMANT SOUGHT PENALTIES AND ATTORNEY FEES.

INITIALLY, CLAIMANT'S CLAIM WAS DENIED BUT, AFTER A HEARING BEFORE REFEREE GEORGE RODE, THE CLAIM WAS ORDERED ACCEPTED BY AN OPINION AND ORDER, DATED AUGUST 1, 1975. ON AUGUST 19, CLAIMANT'S ATTORNEY FORWARDED A STATEMENT TO THE CARRIER, THROUGH ITS ATTORNEY - A STATEMENT FROM THE OREGON ORTHOPEDIC CLINIC, IN THE AMOUNT OF 115.61 DOLLARS, REPRESENTING TREATMENT TO CLAIMANT. ON AUGUST 25, THE CARRIER REQUESTED BOARD REVIEW OF REFEREE RODE'S ORDER. ON AUGUST 27 THE CARRIER REJECTED PAYMENT OF THE AFORESAID MEDICAL BILLING, PENDING THE REVIEW ON THE BASIS OF PREVIOUS BOARD DECISIONS INDICATING SUCH ACTION WAS PERMITTED.

THE CARRIER'S COUNSEL FORWARDED TO CLAIMANT'S COUNSEL A COPY OF THE ORDER ON REVIEW ENTERED IN THE MATTER OF THE COMPENSATION OF BETTY RIVERA, CLAIMANT (UNDERSCORED), WCB CASE NO. 74-2377, DATED MAY 28, 1975. TESTIMONY AT THE HEARING INDICATED THAT AT THE TIME THIS COPY WAS FURNISHED TO CLAIMANT'S COUNSEL THE CARRIER'S COUNSEL WAS UNAWARE THAT THE ORDER ON REVIEW HAD BEEN REVERSED BY THE CIRCUIT COURT FOR MARION COUNTY ON NOVEMBER 3, 1975.

THE REFEREE FOUND THAT THE CASE BEFORE HIM RAISED THE IDENTICAL ISSUE AS THAT RAISED IN THE RIVERA (UNDERSCORED) CASE. THERE ALSO WAS THE ADDITIONAL ISSUE RAISED THROUGH THE INTRODUCTION OF THE CIRCUIT JUDGE'S MEMORANDUM OPINION, I.E., IS THE REVERSAL BY A CIRCUIT COURT OF THE BOARD'S ORDER A CONTROLLING DECISION? IF SO, DID THE CARRIER HAVE AN AFFIRMATIVE DUTY TO BECOME AWARE OF SUCH DECISION ON NOVEMBER 4, 1975 AND WAS ITS FAILURE TO REVERSE AND CORRECT ITS REJECTION OF THE PAYMENT OF MEDICAL EXPENSES AS OF THAT DATE UNREASONABLE CONDUCT?

IN THE MATTER OF THE COMPENSATION OF WILLIAM R. WOOD, CLAIMANT (UNDERSCORED), WCB CASE NO. 69-319 DATED JULY 30, 1971, THE BOARD STATED -

> '...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...'

THE REFEREE FOUND THAT IN THE CASE PRESENTLY BEFORE HIM, THE INJURY HAD OCCURRED, AND ITS HEARINGS WERE HELD IN MULTNOMAH COUNTY

BUT IT WAS THE CIRCUIT COURT FOR MARION COUNTY WHICH REVERSED THE BOARD ON RIVERA (UNDERSCORED). THE REFEREE CONCLUDED THAT A CIRCUIT JUDGE'S RULING IS AN INDIVIDUAL DECISION, SUBJECT TO APPEAL AS IS THE REFEREE'S DECISION, WHEREAS THE ORDER ON REVIEW ENTERED BY THE BOARD AND THE OPINIONS OF THE COURT OF APPEALS ARE STATEWIDE IN APPLICATION, THEREFORE, A RULING MADE BY A CIRCUIT JUDGE IN ONE CIRCUIT OF THIS STATE IS NOT NECESSARILY BINDING OUTSIDE THAT CIRCUIT.

THE REFEREE CONCLUDED THAT UNTIL THE COURT OF APPEALS RULED ON THIS QUESTION, HE, AS A REFEREE, HAD NO CHOICE BUT TO CONFORM TO THE PREVIOUS DECISIONS OF THE BOARD WHEN SUCH DECISIONS WERE CLEAR AND UNAMBIGUOUS. HE, THEREFORE, ORDERED THE MATTER DISMISSED.

THE BOARD, ON DE NOVO REVIEW, REAFFIRMS ITS POSITION STATED IN BOTH THE WOOD (UNDERSCORED) AND RIVERA (UNDERSCORED) CASES THAT ALTHOUGH MEDICAL SERVICES ARE DEFINED AS COMPENSATION, SUCH SERVICES ARE NOT DEEMED TO BE COMPENSATION UNDER THE PROVISIONS OF ORS 656.313.

ORDER

THE ORDER OF THE REFEREE, DATED JANUARY 9, 1976, IS AFFIRMED.

WCB CASE NO. 75-2357 JUNE 21, 1976

KENNETH THOMPSON, CLAIMANT

CHARLES PAULSON, CLAIMANT'S ATTY.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH FOUND THAT THE TOTAL AWARDS OF 160 DEGREES EQUAL TO 50 PER CENT UNSCHEDULED LOW BACK DISABILITY WHICH CLAIMANT HAD PRESENTLY RECEIVED WAS SUFFICIENT - CLAIMANT CONTENDS THAT HE IS PERMANENTLY AND TOTALLY DISABLED.

CLAIMANT SUFFERED A COMPENSABLE LOW BACK INJURY ON JANUARY 8, 1971 WHILE LIFTING A HEAVY CONCRETE FORM. HE RECEIVED CONSERVATIVE TREATMENT AND IN 1972 UNDERWENT SURGERY TO RELIEVE RIGHT LEG PAIN. THE SURGERY PROVIDED ONLY TEMPORARY RELIEF.

CLAIMANT'S CLAIM HAD INITIALLY BEEN CLOSED BY A DETERMINATION ORDER MAILED SEPTEMBER 3, 1971 WHEREBY CLAIMANT RECEIVED AN AWARD OF 64 DEGREES. THE CLAIM WAS LATER REOPENED AND THEN CLOSED BY DETERMINATION ORDER OF APRIL 29, 1975 WHICH AWARDED CLAIMANT AN ADDITIONAL 96 DEGREES OR A TOTAL OF 160 DEGREES.

CLAIMANT HAS A 10TH GRADE EDUCATION AND POSSESSES A GED. HE WAS A PARATROOPER IN THE ARMY UNTIL 1953 AND, THEREAFTER, WORKED AS A LABORER ON A HIGHWAY CONSTRUCTION CREW, PULLED ON THE GREENCHAIN AND, SINCE JANUARY, 1960 UNTIL THE DATE OF HIS INJURY, WORKED AS A CARPENTER. CLAIMANT HAS NOT WORKED SINCE HIS INDUSTRIAL INJURY.

CLAIMANT TESTIFIED THAT HIS PRINCIPAL PHYSICAL PROBLEMS WERE IN HIS LOW BACK AND RIGHT LEG, HE EXPERIENCES CRAMPING AND HIS LEG GOES NUMB CAUSING HIM TO FALL DOWN. HE HAS HAD TO DISCONTINUE TRAINING IN DRAFTING BECAUSE BENDING OVER THE DRAFTING TABLES CAUSED TOO MUCH BACK PAIN. CLAIMANT LIVES ON A FOUR ACRES PLOT OF LAND WHERE HE KEEPS A VARIETY OF ANIMALS. HIS ACTIVITIES INCLUDE EXTENSIVE TRIPS,

ONE COVERING SOME 2,000 MILES IN TWO WEEKS. CLAIMANT ALSO DOES EXTENSIVE HUNTING AND FISHING. CLAIMANT HAS HAD SPORADIC TRAINING IN ELECTRONICS AND ARCHITECTURAL DRAWING AND, WHILE IN THE ARMY, WAS AN APPRENTICE RADARMAN. CLAIMANT TESTIFIED THAT HE CONTACTED THE OFFICE OF THE VOCATIONAL REHABILITATION DIVISION - HOWEVER, A LETTER FROM THE VOCATIONAL REHABILITATION DIVISION SENIOR COUNSELOR IN BEND INDICATED ONLY ONE CAUSAL TALK WITH CLAIMANT AND NO FOLLOW-UP.

CLAIMANT WAS EXAMINED BY THE ORTHOPEDIC CONSULTANTS ON MARCH 19, 1975 AND THE REPORT, BASED THEREON, INDICATED THAT CLAIMANT COULD NOT RETURN TO HIS FORMER OCCUPATION OF CARPENTRY BUT HE COULD CARRY ON OTHER OCCUPATIONS, WITH TRAINING, SUCH AS A SALESMAN OR INSPECTOR. DR. CLARK, CLAIMANT'S TREATING PHYSICIAN, CONCURRED IN THIS OPINION.

THE REFEREE FOUND THE RECORD COMPELLED A CONCLUSION THAT CLAIMANT HAD MADE SATISFACTORY ADJUSTMENTS TO HIS DISABILITY AND WAS FULLY OCCUPIED WITH HIS FOREGOING PURSUITS. THE REFEREE FOUND CLAIMANT UTTERLY LACKING IN ANY MOTIVATION, EITHER TO WORK OR TO BE RETRAINED.

THE REFEREE CONCLUDED THAT THE AWARD OF 160 DEGREES, WHICH REPRESENTS 50 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR UNSCHEDULED DISABILITY, ADEQUATELY COMPENSATES CLAIMANT FOR THE LOSS OF EARNING CAPACITY RESULTING FROM HIS INDUSTRIAL INJURY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE REFEREE'S ORDER.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 5, 1975 IS AFFIRMED.

WCB CASE NO. 75-2640 JUNE 21, 1976

FRANCISCO VELASQUEZ, CLAIMANT

DONALD WILSON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE STATE ACCIDENT INSURANCE FUND'S DENIAL OF CLAIMANT'S CLAIM FOR AGGRAVATION.

CLAIMANT HAD SUFFERED A COMPENSABLE INJURY ON APRIL 4, 1974 WHICH WAS CLOSED BY DETERMINATION ORDER DATED OCTOBER 22, 1974 AWARDING COMPENSATION FOR TEMPORARY TOTAL DISABILITY ONLY (WCB CASE NO. 74-4122). CLAIMANT FILED A REQUEST FOR HEARING ON NOVEMBER 14, 1974 AND A HEARING WAS HELD BEFORE REFEREE JAMES P. LEAHY ON APRIL 4, 1975. REFEREE LEAHY, BY HIS OPINION AND ORDER ENTERED APRIL 30, 1975, AFFIRMED THE DETERMINATION ORDER OF OCTOBER 22, 1974. THIS ORDER WAS AFFIRMED BY THE BOARD ON SEPTEMBER 4, 1975 AND BY THE CIRCUIT COURT FOR MULTNOMAH COUNTY ON DECEMBER 2, 1975.

THE FUND MOVED TO DISMISS ON THE GROUNDS THAT THE REFEREE DID NOT HAVE JURISDICTION TO HEAR THE AGGRAVATION CLAIM. THE ORDER IN WCB CASE NO. 74-4122 WAS ENTERED ON APRIL 30, 1974 AND THE DENIAL OF CLAIMANT'S CLAIM FOR AGGRAVATION WAS MAILED ON MAY 12, 1975, THEREFORE, THE REFEREE CONCLUDED THAT HE HAD JURISDICTION TO DETERMINE

WHETHER OR NOT THERE WAS AN AGGRAVATION, OR THAT CLAIMANT'S CONDITION HAD WORSENED BETWEEN APRIL 30, 1975 AND MAY 12, 1975. THE FUND'S MOTION WAS DENIED.

CLAIMANT CONTENDED THAT THE EVIDENCE WOULD SHOW CLAIMANT'S CONDITION HAS BECOME AGGRAVATED SINCE THE DETERMINATION ORDER OF OCTOBER 22, 1974, AND, THEREFORE, THE CLAIM SHOULD BE ACCEPTED FOR FURTHER MEDICAL CARE AND PAYMENT OF COMPENSATION BECAUSE CLAIMANT WAS HOSPITALIZED BY DR. HODA IN FEBRUARY, 1975.

THE REFEREE HELD THAT CLAIMANT COULD NOT COLLATERALLY ATTACK THE REFEREE'S ORDER IN WCB CASE NO. 74-4122 BY ENDEAVORING TO RELITIGATE THE FACTS AND ISSUES DECIDED THEREIN. HE CONCLUDED THAT IN ORDER TO PREVAIL CLAIMANT WOULD HAVE TO SHOW AN AGGRAVATION HAD OCCURRED SINCE APRIL 30, 1975, THE DATE OF THE REFEREE'S ORDER IN WCB CASE NO. 74-4122, BECAUSE THIS WAS THE LAST AWARD OR ARRANGEMENT OF COMPENSATION.

CLAIMANT DID NOT PRESENT ANY TESTIMONY AT THE HEARING AND THERE WERE NO MEDICAL REPORTS WRITTEN SUBSEQUENT TO APRIL 17, 1975. THE REFEREE CONCLUDED THAT THERE WAS ABSOLUTELY NO EVIDENCE TO INDICATE CLAIMANT'S CONDITION HAD CHANGED, EITHER FOR THE WORSE OR FOR THE BETTER, SUBSEQUENT TO APRIL 30, 1975 AND HE AFFIRMED THE DENIAL OF CLAIMANT'S AGGRAVATION CLAIM.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED SEPTEMBER 30, 1975, IS AFFIRMED.

WCB CASE NO. 75-9236 JUNE 21, 1976

ARCHIE T. WILSON, CLAIMANT

JOHN SVOBODA, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO IT FOR THE PAYMENT OF COMPENSATION, AS PROVIDED BY LAW, AND AWARDED CLAIMANT'S ATTORNEY A FEE OF 700 DOLLARS.

DURING THE SUMMER OF 1974 CLAIMANT HAD STARTED TO LOSE WEIGHT AND HAD BEEN UNABLE TO INGEST FOOD. IN SEPTEMBER, 1974 HE CAME UNDER THE CARE OF DR. BYERLY WHO HOSPITALIZED CLAIMANT IN NOVEMBER. HE DIAGNOSED A 'PROBABLE FUNCTIONAL COLITIS, RULE OUT ULCERATIVE COLITIS OR BACTERIAL CAUSES FOR ENTERITIS.' ON NOVEMBER 6, 1974 DR. BAKER AGREED WITH DR. BYERLY THAT THE DIFFERENTIAL DIAGNOSIS SHOULD INCLUDE GASTROENTERITIS, EITHER BACTERIAL OR VIRAL AND ALSO NON-SPECIFIC ULCERATIVE COLITIS, OR ENTERITIS SHOULD BE CONSIDERED AS WELL AS FUNCTIONAL BOWEL DISEASE SINCE THE CLAIMANT HAS BEEN UNDER CONSIDERABLE DISTRESS. DR. BAKER'S DISCHARGE SUMMARY DATED NOVEMBER 15, 1974 STATES - 'ABDOMINAL PAIN OF UNDETERMINED ETIOLOGY, IRRITABLE BOWEL SYNDROME SUSPECTED.'

ON NOVEMBER 13, 1974, CLAIMANT, A TAX CONSULTANT, FILED A

CLAIM FOR ABDOMINAL ILLNESS WHICH HE ATTRIBUTED TO THE STRESS CAUSED BY HIS JOB.

DR. PARCHER, A MEDICAL CONSULTANT FOR THE FUND, EXPRESSED HIS OPINION ON FEBRUARY 6, 1975 THAT CLAIMANT'S BOWEL PROBLEM WAS NOT WORK RELATED, THAT CLAIMANT HAD A HISTORY OF SEVERAL PRIOR EPISODES AND THIS APPARENTLY WAS A CASE OF HYPER IRRITABLE BOWEL, SPASTIC.

ON FEBRUARY 19, 1975 THE FUND DENIED THE CLAIM ON THE GROUNDS THAT THE CONDITION FOR WHICH CLAIMANT FILED HIS CLAIM I.E., COLITIS, WAS NOT THE RESULT OF HIS WORK ACTIVITY OF APPROXIMATELY OCTOBER 25, 1974 BUT WAS A PRE-EXISTING CONDITION.

THE FUND CONTENDS THAT THERE IS NO MEDICAL OPINION STATING CAUSAL RELATIONSHIP BETWEEN CLAIMANT'S WORK ACTIVITY AND HIS ILLNESS SINCE THE ONLY MEDICAL OPINION IN EVIDENCE ON CAUSAL RELATIONSHIP IS THE NEGATIVE OPINION OF DR. PARCHER. THE REFEREE AGREED THAT THERE WAS NO SPECIFIC OR DEFINITE STATEMENT OF CAUSAL RELATIONSHIP BY EITHER DR. BYERLY OR DR. BAKER. HOWEVER, HE FOUND THAT BECAUSE CLAIMANT'S CONDITION SEEMED TO IMPROVE WHEN HE USED THE TRANQUILIZERS WHICH WERE PRESCRIBED, A FACT SPECIFICALLY CONFIRMED IN DR. BAKER'S DISCHARGE SUMMARY, THIS GAVE, AT LEAST, A STRONG SUGGESTION THAT, IN SPITE OF DR. BAKER'S FAILURE TO COME TO A POSITIVE DIAGNOSIS AS TO THE SOURCE, THE ILLNESS WAS ONE HAVING ITS SOURCE IN EMOTIONAL TENSION.

THE REFEREE FOUND THAT CLAIMANT HAD BEEN UNDER CONSIDERABLE TENSION BETWEEN JULY AND SEPTEMBER, 1974, THAT HE WAS FACED WITH TWO LAWSUITS SEEKING LARGE AMOUNTS OF DAMAGES FROM THE PARTNERSHIP AND THAT BOTH DR. BYERLY AND DR. BAKER HAD URGED HIM TO REDUCE HIS WORK LOAD. THE REFEREE ALSO FOUND THE PROBABILITY THAT THE ILLNESS WAS FUNCTIONAL COULD BE SUGGESTED BY THE FACT THAT THE SEVERAL CLINICAL TESTS FOR DETERMINATION OF A PHYSICAL SOURCE OF ILLNESS WERE ALL NEGATIVE. THE REFEREE CONCLUDED THAT THE RECORD AS A WHOLE DEMONSTRATED A MEDICAL CAUSAL RELATIONSHIP BETWEEN CLAIMANT'S WORK ACTIVITY AND HIS ILLNESS AND HE REMANDED THE CLAIM TO THE FUND.

THE BOARD, ON DE NOVO REVIEW, DISAGREES WITH THE OPINION OF THE REFEREE, EXCEPT WHERE HE STATES THAT THERE IS NO SPECIFIC OR DEFINITE STATEMENT OF CAUSAL RELATIONSHIP BY EITHER DR. BYERLY OR BY DR. BAKER AND THAT DR. BAKER'S DISCHARGE DIAGNOSIS WAS ABDOMINAL PAIN OF UNDETERMINATED ETIOLOGY IRRITABLE BOWEL SYNDROME SUSPECTED AND THAT IN AND OF ITSELF WAS CERTAINLY NOT A STATEMENT OF CAUSAL RELATIONSHIP.

DR. PARCHER'S MEDICAL OPINION THAT CLAIMANT'S CONDITION WAS NOT WORK RELATED REMAINS UNCONTROVERTED AS FAR AS THE RECORD IS CONCERNED. IN A COMPLEX CASE OF CAUSAL CONNECTION IT MUST BE SHOWN BY EXPERT MEDICAL TESTIMONY. FISHER V. CONSOLIDATED FREIGHTWAYS (UNDERSCORED), 12 OR APP 417. THE POSSIBILITY OF A CAUSAL CONNECTION IS NOT ENOUGH, MCEWAN V. ORTHO PHARMACEUTICAL (UNDERSCORED), 99 OR ADV SH 2357.

THE REFEREE FOUND A PROBABILITY THAT CLAIMANT'S ILLNESS WAS FUNCTIONAL BECAUSE OF THE FACT THAT THE SEVERAL CLINICAL TESTS FOR DETERMINATION OF A PHYSICAL SOURCE OF THE ILLNESS WERE ALL NEGATIVE. THE BOARD DOES NOT BELIEVE THAT THIS IS A PROPER WAY TO ESTABLISH MEDICAL CAUSAL RELATIONSHIP.

THE BOARD CONCLUDES THAT CLAIMANT HAS FAILED TO CARRY HIS BURDEN OF PROOF IN THIS CASE AND, IN FACT, THE PREPONDERANCE OF THE MEDICAL EVIDENCE ESTABLISHES THAT CLAIMANT'S ABDOMINAL PAIN DID NOT ARISE OUT OF HIS EMPLOYMENT.

ORDER

THE ORDER OF THE REFEREE, DATED FEBRUARY 5, 1976, IS REVERSED.

WCB CASE NO. 75-3100 JUNE 21, 1976

TERRY YARBROUGH, CLAIMANT

HUGH COLE, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE ISSUE ON APPEAL OF THE REFEREE'S ORDER INVOLVES THE CLAIMANT'S ENTITLEMENT TO THE PAYMENT OF TEMPORARY TOTAL DISABILITY BENEFITS BETWEEN JANUARY 2, 1975, WHEN HE WAS DECLARED MEDICALLY STATIONARY, AND JULY 15, 1975, WHEN, BY ADMINISTRATIVE ORDER OF THE BOARD, CLAIMANT WAS REINSTATED TO RECEIPT OF TEMPORARY TOTAL DISABILITY BENEFITS WHILE UNDER AN AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION.

CLAIMANT RECEIVED A COMPENSABLE BACK INJURY ON MARCH 20, 1974. A DETERMINATION ORDER DATED FEBRUARY 7, 1975 GRANTED CLAIMANT TEMPORARY TOTAL DISABILITY COMPENSATION FOR MARCH 20, 1974 THROUGH OCTOBER 7, 1974, AND 48 DEGREES FOR 15 PER CENT OF THE MAXIMUM FOR UNSCHEDULED DISABILITY. AN ADMINISTRATIVE DETERMINATION ORDER ISSUED JULY 20, 1975 STATED CLAIMANT HAD BECOME 'VOCATIONALLY HANDICAPPED' AND WAS ENTITLED TO FURTHER TREATMENT, REHABILITATION AND COMPENSATION BENEFITS.

THE REFEREE FOUND THAT CLAIMANT'S CLAIM HAD BEEN PREMATURELY CLOSED BY THE FIRST DETERMINATION ORDER BECAUSE DR. CHERRY HAD FOUND CLAIMANT TO BE MEDICALLY STATIONARY AS OF JANUARY 2, 1975 RATHER THAN ON OCTOBER 7, 1974. HE MODIFIED THE FIRST DETERMINATION ORDER BY GRANTING CLAIMANT TEMPORARY TOTAL DISABILITY COMPENSATION FROM MARCH 20, 1974 THROUGH JANUARY 2, 1975 (THIS ISSUE WAS NOT RAISED ON REVIEW).

THE REFEREE ORDERED PAYMENT OF COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM JANUARY 2, 1975 THROUGH JULY 14, 1975. THE FUND ARGUES THIS WAS ERRONEOUS BECAUSE CLAIMANT WAS NOT IN AN AUTHORIZED PROGRAM OF VOCATIONAL REHABILITATION ON JANUARY 2, 1975.

WCB ADMINISTRATIVE ORDER 1-1976, EFFECTIVE MARCH 29, 1976, PROVIDES THAT TEMPORARY TOTAL DISABILITY COMPENSATION BEGINS WHEN CLAIMANT IS ENROLLED IN VOCATIONAL REHABILITATION. HOWEVER, AT THE TIME OF THE HEARING, DECEMBER 9, 1975, THE GOVERNING RULES REGARDING VOCATIONAL REHABILITATION, WERE SET FORTH IN WCB ADMINISTRATIVE ORDER 4-1975, AND ALLOWED THE PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION AT THE DISCRETION OF THE REFEREE.

FOR THE ABOVE REASONS, THE BOARD, AFTER DE NOVO REVIEW, CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE AND AFFIRMS HIS ORDER.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 31, 1975, IS AFFIRMED.

SAIF CLAIM NO. YC 162135 JUNE 22, 1976

BILLY R. MC KINNEY, CLAIMANT

DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION DETERMINATION

CLAIMANT SUFFERED A COMPENSABLE INJURY ON DECEMBER 19, 1968 WHEN HE STRAINED HIS BACK LIFTING TIMBER ON THE GREENCHAIN. HIS CLAIM INITIALLY WAS CLOSED BY A DETERMINATION ORDER MAILED MAY 9, 1969 WHICH GRANTED COMPENSATION FOR TEMPORARY TOTAL DISABILITY ONLY. CLAIMANT'S AGGRAVATION RIGHTS EXPIRED ON MAY 10, 1974. BETWEEN MAY 9, 1969 AND FEBRUARY 28, 1974 THE CLAIMANT HAS RECEIVED AWARDS WHICH TOTALED 160 DEGREES FOR 50 PER CENT UNSCHEDULED LOW BACK DISABILITY.

THE CLAIM WAS VOLUNTARILY REOPENED BY THE STATE ACCIDENT INSURANCE FUND AND A REPAIR OF A PSEUDOARTHORSIS WAS PERFORMED BY DR. GRIPEKOVEN ON MAY 29, 1975.

CLAIMANT WAS SEEN AT THE DISABILITY PREVENTION DIVISION ON FEBRUARY 12, 1976 WITH CONTINUED LOW BACK COMPLAINTS AND INCREASING PROBLEMS WITH HIS LEFT LEG. CLAIMANT HAS A 4TH GRADE EDUCATION AND HE WAS FOUND TO BE MARGINALLY LITERATE.

ON APRIL 16, 1976 DR. GRIPEKOVEN DISCHARGED CLAIMANT AS BEING MEDICALLY STATIONARY WITH MODERATE TO SEVERE DISABILITY DUE TO CONTINUED BACK AND LEG DISCOMFORT - HE STATED CLAIMANT SHOULD BE EMPLOYED AT WORK INVOLVING NO REPETITIVE LIFTING OVER 30 POUNDS. ON APRIL 20, 1976, DR. STEELE, AFTER EXAMINING CLAIMANT, CONCURRED WITH DR. GRIPEKOVEN.

THE FUND REQUESTED A DETERMINATION, PURSUANT TO ORS 656.278, ON APRIL 28, 1976. EVALUATION DIVISION OF THE BOARD WAS OF THE OPINION THAT CLAIMANT HAD BEEN ADEQUATELY COMPENSATED FOR HIS LOSS OF WAGE EARNING CAPACITY BY THE PREVIOUS AWARDS TOTALLING 50 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR UNSCHEDULED DISABILITY BUT THAT HE DID HAVE INCREASED IMPAIRMENT IN HIS RIGHT LEG. IT RECOMMENDED THAT THE BOARD GRANT CLAIMANT AN AWARD EQUAL TO 37.5 DEGREES FOR 25 PER CENT LOSS OF THE RIGHT LEG AND COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM MAY 28, 1975 THROUGH APRIL 20, 1976.

ORDER

CLAIMANT IS AWARDED COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM MAY 28, 1975 THROUGH APRIL 20, 1976 AND 37.5 DEGREES OF A MAXIMUM 150 DEGREES FOR LOSS OF THE RIGHT LEG. THIS IS IN ADDITION TO, NOT IN LIEU OF, ALL PREVIOUS AWARDS RECEIVED BY CLAIMANT.

WCB CASE NO. 72-1188 JUNE 22, 1976

HAROLD LACY, CLAIMANT

ROLF OLSON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER ON REMAND WHICH FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED FROM AND AFTER THE DATE OF HIS ORDER, JANUARY 14,

1976, AND DIRECTED THE FUND TO PAY CLAIMANT'S COUNSEL A REASONABLE ATTORNEY FEE FIXED AT 250 DOLLARS.

ON JULY 12, 1974 AN OPINION AND ORDER WAS ENTERED BY REFEREE JOHN F. DRAKE, WHICH DIRECTED THE FUND TO PAY CLAIMANT COMPENSATION OF PERMANENT TOTAL DISABILITY FROM AND AFTER SEPTEMBER 27, 1972 (THE DATE OF DR. RENNEBOHM'S FIRST EVALUATION) AND ALLOWING ANY PERMANENT PARTIAL DISABILITY COMPENSATION PAID SUBSEQUENT TO THAT DATE, TO BE USED AS AN OFFSET AND FURTHER AWARDED CLAIMANT 25 PER CENT OF THE INCREASED COMPENSATION PAYABLE FROM CLAIMANT'S COMPENSATION AS PAID BUT NOT TO EXCEED 1500 DOLLARS. THE ORDER WAS AFFIRMED BY THE BOARD ON DECEMBER 30, 1974, BUT THE CIRCUIT COURT OF MARION COUNTY REMANDED THE CASE TO REFEREE DRAKE FOR HIS FURTHER CONSIDERATION, AFTER TAKING THE DEPOSITION OF DR. JOHN A. RENNEBOHM, AND TO ENTER A NEW OPINION AND ORDER BASED UPON THAT ADDITIONAL EVIDENCE.

ON OCTOBER 6, 1975, FOLLOWING THE SUBMISSION OF DR. RENNEBOHM'S DEPOSITION, CLAIMANT'S COUNSEL MOVED THE MATTER BE SET DOWN FOR A NEW HEARING TO PERMIT CLAIMANT TO PRESENT ADDITIONAL EVIDENCE. REFEREE DRAKE DENIED THE MOTION, STATING THE CASE HAD BEEN REMANDED TO HIM SOLELY FOR THE CONSIDERATION OF DR. RENNEBOHM'S TESTIMONY.

IT WOULD SERVE LITTLE PURPOSE, AT THIS TIME, TO REITERATE THE FINDINGS AND CONCLUSIONS EXPRESSED BY REFEREE DRAKE IN HIS OPINION AND ORDER ENTERED ON JULY 12, 1974 (EXHIBIT A). SUFFICE IT TO SAY THAT THE REFEREE, AFTER CONSIDERING DR. RENNEBOHM'S DEPOSITION, TOGETHER WITH THE EVIDENCE PREVIOUSLY SUBMITTED, IS STILL OF THE OPINION THAT CLAIMANT IS PERMANENTLY AND TOTALLY DISABLED.

THE REFEREE, AFTER READING DR. RENNEBOHM'S DEPOSITION, IN ITS ENTIRETY, FELT IT WAS CLEAR THAT DR. RENNEBOHM DID NOT BELIEVE THAT PSYCHOTHERAPY WOULD BE OF ANY MATERIAL BENEFIT IN REDUCING CLAIMANT'S DISABILITY - THAT THE PSYCHOPATHOLOGICAL DISABILITY WAS RELATED TO THE INJURY - THE DECISION NOT TO PROCEED WITH PSYCHOTHERAPY WAS A JOINT DECISION MADE BY THE CLAIMANT AND HIM AND CLAIMANT'S RELUCTANCE TO UNDERGO THIS KIND OF TREATMENT WAS LARGELY THE RESULT OF PSYCHOPATHOLOGICAL DISABILITY.

THE REFEREE CONCLUDED THAT IF A DISABLING PSYCHOPATHOLOGY WAS THE RESULT OF AN INDUSTRIAL INJURY THE EFFECTS OF THE PSYCHOLOGICAL DISABILITY WERE COMPENSABLE. IF THE RELUCTANCE TO OBTAIN PSYCHOTHERAPY FOR MITIGATION OF AN ILLNESS RESULTS FROM THE PSYCHOPATHOLOGY ITSELF, AND TO THE DEGREE THAT THE CLAIMANT IS ACTUALLY DETERRED FROM SEEKING PSYCHOTHERAPY, THEN THE FAILURE TO OBTAIN SUCH TREATMENT CANNOT BE CATEGORIZED AS 'LACK OF MOTIVATION' BUT RATHER AS A PRODUCT OF THE ILLNESS ITSELF, FALLING OUTSIDE OF THE AREA OF THE CLAIMANT'S CONSCIOUS CONTROL.

THE BOARD, ON DE NOVO REVIEW, FEELS THAT THE REFEREE HAS EXPLORED AT GREAT DEPTH THE FACTUAL SITUATION IN BOTH HIS OPINION AND ORDER DATED JULY 12, 1974 AND HIS ORDER ON REMAND DATED JANUARY 14, 1976 AND IT AGREES WITH THE FINDINGS AND CONCLUSIONS REACHED BY THE REFEREE.

CLAIMANT, IN HIS BRIEF, REQUESTS THE BOARD TO INCREASE THE ATTORNEY FEE ALLOWED BY THE REFEREE IN HIS ORDER DATED JANUARY 14, 1976. THE BOARD FEELS THAT THE FEE AWARDED IS SUFFICIENT - CLAIMANT'S COUNSEL ALREADY HAD BEEN AWARDED BY THE EARLIER ORDER, 25 PER CENT OF THE INCREASED COMPENSATION EQUAL TO 1500 DOLLARS.

WITH RESPECT TO THE REIMBURSEMENT OF THE COST OF OBTAINING A COPY OF DR. RENNEBOHM'S DEPOSITION, WHICH WAS 18 DOLLARS, THE BOARD FEELS THAT THE FUND SHOULD REIMBURSE CLAIMANT FOR THAT SUM.

ORDER

THE ORDER OF THE REFEREE, DATED JANUARY 14, 1975, IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED, AS A REASONABLE ATTORNEY FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 350 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-1450 JUNE 22, 1976
WCB CASE NO. 75-1975

ROLLAN C. HILLS, CLAIMANT

MICHAEL JOHNSON, CLAIMANT'S ATTY.
JAMES HUEGLI, EMPLOYER'S ATTY.
RICHARD LANG, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH APPROVED THE DENIAL OF CLAIMANT'S CLAIM FOR AGGRAVATION AND ALSO THE DENIAL OF CLAIMANT'S CLAIM FOR AN ALLEGED INJURY SUFFERED ON JANUARY 14, 1975.

CLAIMANT HAD SUSTAINED A COMPENSABLE LOW BACK INJURY ON APRIL 21, 1972 WHILE EMPLOYED BY BOISE CASCADE. THE CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED MARCH 8, 1974 AWARDING CLAIMANT 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY.

ON JANUARY 14, 1974 CLAIMANT, WHILE EMPLOYED BY TERRY INDUSTRIES, ALLEGEDLY SUFFERED AN INJURY TO HIS RIGHT HIP AND LEG.

AT THE TIME OF THE HEARING CLAIMANT WAS SUFFERING FROM A DISC HERNIATION. ON MARCH 5, 1975 BOISE CASCADE HAD DENIED RESPONSIBILITY FOR CLAIMANT'S CONDITION AND, ON MAY 15, 1975, TERRY INDUSTRIES HAD DENIED RESPONSIBILITY FOR THE ALLEGED INJURY OF JANUARY 14, 1975.

AFTER THE CLAIMANT RECOVERED FROM HIS 1972 INJURY HE WORKED UNTIL AUGUST, 1974 FIXING LAWNMOWERS, TRACTORS, DOING 'LUBE' JOBS, OVERHAULING MOTORS AND PERFORMING TUNEUPS. DURING THIS PERIOD CLAIMANT DID NOT MISS ANY TIME FROM WORK AND WAS ABLE TO OPERATE A SNOWMOBILE, GO BOWLING, HUNT AND RUN HIS RANCH WHICH INVOLVED HAYING, GIVING CATTLE NECESSARY SHOTS AND TENDING TO WINTER FEEDING. CLAIMANT TESTIFIED THAT DURING THIS ENTIRE PERIOD AND UP TO THE TIME OF HIS ALLEGED INJURY AT TERRY INDUSTRIES HE HAD HAD NO BACK PROBLEMS BUT FOLLOWING THAT INCIDENT HE WAS UNABLE TO PERFORM ANY OF THE FOREGOING ACTIVITIES.

THE REFEREE FOUND EVIDENCE THAT CLAIMANT HAD HAD BACK PAIN FOR TWO OR THREE MONTHS PRIOR TO THE 1975 INCIDENT, ALTHOUGH CLAIMANT ATTRIBUTED HIS BACK PAINS TO SNOWMOBILING AND SHOVELING SNOW. CLAIMANT'S WIFE TESTIFIED THAT SHE WAS AWARE OF CLAIMANT'S BACK PRIOR TO THE JANUARY, 1975 INCIDENT, AS DID CLAIMANT'S FATHER. THE EVIDENCE INDICATES THAT CLAIMANT STATED ON HIS APPLICATION FORM TO TERRY INDUSTRIES THAT HE HAD HAD NO PREVIOUS BACK PROBLEMS.

THE REFEREE FOUND THAT CLAIMANT'S EXPLANATION OF THESE INCONSISTENCIES WERE NOT WORTHY OF BELIEF. HE FOUND CLAIMANT'S TESTIMONY WAS NOT CREDIBLE - THE MEDICAL REPORTS WHICH WERE RECEIVED IN EVIDENCE WERE BASED UPON FALSE HISTORY RELATED BY CLAIMANT AND, THEREFORE, WERE VALUELESS.

THE REFEREE CONCLUDED THAT CLAIMANT HAD FAILED TO SUSTAIN HIS BURDEN OF PROVING AN AGGRAVATION OF HIS 1972 INJURY AND HE HAD ALSO FAILED TO PROVE THAT HE HAD SUFFERED A NEW COMPENSABLE INJURY ON JANUARY 14, 1975.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED NOVEMBER 6, 1975, IS AFFIRMED.

WCB CASE NO. 75-4145 JUNE 22, 1976

WARREN COLLINS, CLAIMANT

DYE AND OLSON, CLAIMANT'S ATTYS.
R. KENNEY ROBERTS, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH DIRECTED THE EMPLOYER TO PAY CLAIMANT THE SUM EQUAL TO 10 PER CENT OF THE COMPENSATION DUE TO HIM FROM THE INDUSTRIAL INJURY OF SEPTEMBER 7, 1975, AS OF OCTOBER 7, 1975, PURSUANT TO ORS 656.268(8) AND, IN ADDITION, TO PAY HIS ATTORNEY THE SUM OF 50 DOLLARS AS ATTORNEY FEE PURSUANT TO ORS 656.382(1), CONTENDING THAT NEITHER THE AMOUNT OF THE PENALTY NOR THE ATTORNEY FEE WAS ADEQUATE.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON SEPTEMBER 7, 1975. AFTER WORKING THE BALANCE OF THE DAY, HE DETERMINED THE FOLLOWING MORNING THAT MEDICAL ATTENTION WAS NECESSARY AND MADE AN APPOINTMENT TO SEE HIS PHYSICIAN. AT THAT TIME, HE WENT TO THE EMPLOYER'S OFFICE AND COMPLETED AN INJURY FORM WHICH HE TESTIFIED WAS NOT A FORM 801 BUT SOME TYPE OF A COMPANY REPORT FORM CONSISTING OF TWO PAGES. HE WAS ASSISTED IN COMPLETING THIS FORM BY HIS SUPERVISOR. CLAIMANT WAS OFF WORK UNTIL SEPTEMBER 17, 1975.

SHORTLY AFTER THE ACCIDENT CLAIMANT RECEIVED PAGE 5 OF THE FORM 801 WHICH INDICATED THAT THE EMPLOYER HAD, IN FACT, MADE UP AN 801 AND SUBMITTED IT TO THE CARRIER. ON OCTOBER 2, 1975, CLAIMANT RECEIVED PAGE 3 OF THE 801, SECTION 33 THEREOF INDICATED THAT THE CLAIM HAD BEEN ACCEPTED AS A 'NON-DISABLING INJURY'. THIS PORTION OF THE FORM WAS DATED SEPTEMBER 18, 1975 AND CLAIMANT STATED HE IMMEDIATELY TOOK THIS FORM TO HIS ATTORNEY BECAUSE HE FELT THAT HIS CLAIM WAS DISABLING AND HE WAS CONCERNED ABOUT HIS RIGHTS.

CLAIMANT'S ATTORNEY FILED A REQUEST FOR HEARING ON OCTOBER 3, 1975. ON OCTOBER 6, 1975 THE CARRIER MAILED ITS LOSS DRAFT TO CLAIMANT FOR COMPENSATION DUE HIM FOR THE TIME LOSS OF HIS INJURY. THE FORM 802 SUBMITTED TO THE BOARD ON THAT DATE ALLEGED THAT THE CARRIER FIRST BECAME AWARE OF TIME LOSS WHEN IT RECEIVED THE PHYSICIAN'S INITIAL REPORT (FORM 827) FROM DR. HOWARD. THE CARRIER, AFTER RECEIPT OF THE NOTICE OF HEARING, ADMITTED THE FACTS AND REQUESTED THE MATTER BE AJUDICATED WITHOUT NECESSITY OF A FORMAL HEARING- HOWEVER, CLAIMANT'S COUNSEL WOULD NOT WAIVE HIS RIGHT TO A HEARING AND THE HEARING WAS HELD ON DECEMBER 12, 1975.

REFEREE FOUND LITTLE DISPUTE, IF ANY, ON THE ISSUE OF THE CARRIER BEING GUILTY OF DELAY IN PROCESSING THE CLAIM AND FORWARDING LOSS

DRAFT TO CLAIMANT. THE CARRIER ALLEGES IT WAS UNAWARE OF ANY TIME LOSS, BELIEVED CLAIMANT HAD SUFFERED A NON-DISABLING INJURY, HOWEVER, THE FORM 801, SECTION 42, INDICATES THAT CLAIMANT DID NOT RETURN TO HIS NEXT SCHEDULED SHIFT AFTER THE ACCIDENT AND, THEREFORE, THE EMPLOYER WAS AWARE OF TIME LOSS INVOLVED AND WAS BOUND BY SUCH KNOWLEDGE.

THE REFEREE FOUND THAT SUCH ERRORS ARE TO BE EXPECTED IN ANY SYSTEM WHICH INVOLVES PAPER WORK HANDLED BY NUMEROUS INDIVIDUALS AND IN GREAT QUANTITY - THAT THE PURPOSE OF ORS 656.262(8) WAS SIMPLY TO INSURE THAT EMPLOYERS AND CARRIERS WILL USE EVERY EFFORT TO HOLD DOWN SUCH ERRORS AND ENCOURAGE THEM NOT TO BECOME CARELESS IN THEIR PROCEDURES.

THE REFEREE CONCLUDED THAT IN THIS CASE THERE WAS NO EVIDENCE THAT CLAIMANT CALLED OR ATTEMPTED TO CALL THE CARRIER AFTER HE RECEIVED PAGE 3 OF THE FORM 801 WHICH INDICATED THAT HIS CLAIM WAS BEING TREATED AS 'NON-DISABLING'. HE FELT THAT IT WAS THE DUTY OF THE CLAIMANT TO CALL TO THE CARRIER'S ATTENTION THE FACT THAT A MISTAKE HAD BEEN MADE. HE FURTHER FOUND THAT WHEN THE ERROR WAS DISCOVERED BY THE CARRIER IT WAS QUICKLY CORRECTED.

ON THE BASIS OF THE EVIDENCE SUBMITTED, THE REFEREE CONCLUDED THAT THE CARRIER WAS GUILTY OF MISHANDLING THE CLAIM BUT THAT THIS ERROR WAS QUICKLY RECTIFIED WHEN DISCOVERED. THE REQUEST FOR HEARING IN THIS CASE WAS AN UNNECESSARY ACTION, THERE WAS NO EFFORT MADE BY THE CARRIER TO RESIST THE CLAIM AND THE LETTER FROM THE COUNSEL FOR THE CARRIER, DATED DECEMBER 9, 1975, INDICATED A WILLINGNESS ON THE PART OF THE CARRIER TO ACCEPT ANY PENALTIES ASSESSED BY THE BOARD FOR ITS DELAY IN MISHANDLING.

THE REFEREE CONCLUDED THAT NOTHING HAD BEEN ADDED BY THE TESTIMONY TAKEN AT THE HEARING, THEREFORE, HE ASSESSED A PENALTY OF 10 PER CENT OF THE COMPENSATION DUE CLAIMANT AS OF OCTOBER 7, 1975 AND AWARDED A MINIMAL ATTORNEY FEE TO COVER CLAIMANT'S FIRST VISIT TO HIS ATTORNEY AND A REASONABLE ALLOWANCE FOR THE ESTIMATED TIME THE ATTORNEY SHOULD (UNDERSCORED) HAVE SPENT CONTACTING THE COMPANY AND WORKING OUT A CONCLUSION TO THIS EXTREMELY MINOR MATTER WITHOUT THE NECESSITY OF A FORMAL HEARING.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE REFEREE. THIS CASE IS AN EXCELLENT EXAMPLE OF A MOUNTAIN MANUFACTURED FROM A MOLEHILL. THERE IS SOME QUESTION AS TO WHETHER ANY PENALTY OR ATTORNEY FEE IS JUSTIFIED, HOWEVER, BECAUSE THE SUMS INVOLVED ARE SUCH LITTLE CONSEQUENCE THE BOARD WILL NOT DISTURB THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED JANUARY 5, 1976, IS AFFIRMED.

WCB CASE NO. 74-1930 JUNE 22, 1976

JEAN CHISHOLM, CLAIMANT

JACK OFELT, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
ORDER

THE BOARD ENTERED AN ORDER ON REVIEW ON OCTOBER 21, 1975 WHICH WAS APPEALED TO THE CIRCUIT COURT FOR CLACKAMAS COUNTY WHICH, ON MARCH 15, 1976, REVERSED AND REMANDED THE MATTER TO THE BOARD WITH DIRECTIONS TO REVIEW THE REFEREE'S OPINION AND ORDER.

A TRANSCRIPT OF THE HEARING BEFORE THE REFEREE WAS RECEIVED AND THE PARTIES WERE NOTIFIED OF THE TIME WITHIN WHICH THEY WOULD BE ALLOWED TO FILE THEIR BRIEFS, THE FINAL DATE BEING JULY 27, 1976.

ON JUNE 14, 1976 THE STATE ACCIDENT INSURANCE FUND MOVED FOR A STAY FOR THE PROCEEDINGS BEFORE THE BOARD FOR THE REASON THAT THE CIRCUIT COURT'S ORDER OF REMAND HAS BEEN APPEALED TO THE COURT OF APPEALS AND IS NOW PENDING IN THAT COURT.

THE BOARD, BEING FULLY APPRISED OF ALL THE FACTS, IS OF THE OPINION THAT THE APPEAL OF THE CIRCUIT COURT'S ORDER TO THE COURT OF APPEALS AUTOMATICALLY STAYS ANY FURTHER PROCEEDINGS - HOWEVER, FOR THE PURPOSE OF A COMPLETE RECORD THE BOARD WILL ISSUE AN ORDER STAYING FURTHER PROCEEDINGS BEFORE IT UNTIL A DECISION HAS BEEN MADE BY THE COURT OF APPEALS.

ORDER

THE MOTION FOR STAY OF ANY FURTHER PROCEEDINGS BEFORE THE WORKMEN'S COMPENSATION BOARD IN THE ABOVE ENTITLED MATTER IS HEREBY GRANTED.

CLAIM NO. 52D-862588 JUNE 22, 1976

(OLD CLAIM NO. 00262)

TRENTON WANN, CLAIMANT

EVOHL MALAGON, CLAIMANT'S ATTY.
RICHARD BUTLER, DEFENSE ATTY.
ORDER

ON JUNE 1, 1976 THE BOARD DENIED CLAIMANT'S REQUEST TO REOPEN HIS JUNE 21, 1966 CLAIM PURSUANT TO ORS 656.278.

ON JUNE 11, 1976 CLAIMANT, THROUGH HIS ATTORNEY, REQUESTED THE BOARD TO RECONSIDER ITS OWN MOTION ORDER AND SCHEDULED THE MATTER FOR A HEARING.

NO ADDITIONAL MEDICAL EVIDENCE HAS BEEN PRESENTED TO THE BOARD AND, AFTER CAREFUL CONSIDERATION OF THE FACTS, THE BOARD CONCLUDES THAT THE REQUEST TO RECONSIDER SHOULD BE DENIED.

ORDER

THE REQUEST TO RECONSIDER THE OWN MOTION ORDER ENTERED ON JUNE 1, 1976 IS HEREBY DENIED.

WCB CASE NO. 76-135-SI JUNE 22, 1976

IN THE MATTER OF SECOND INJURY FUND RELIEF OF

GENERAL SHEET METAL WORKS, INC.

ORDER

THE EMPLOYER, GENERAL SHEET METAL WORKS INC., HAD APPLIED FOR SECOND INJURY RELIEF WHICH WAS DENIED BY A DETERMINATION ORDER MAILED DECEMBER 8, 1975. ON JANUARY 8, 1976 A REQUEST FOR HEARING ON THE DENIAL WAS RECEIVED BY THE WORKMEN'S COMPENSATION BOARD.

A NOTICE OF HEARING WAS MAILED TO HAL MC BRIDE, OF GENERAL SHEET

METAL WORKS, INC., 3601 S.E. 27TH, PORTLAND, OREGON ON FEBRUARY 20, 1976, NOTIFYING HIM THAT A HEARING HAD BEEN SET FOR 1:30 P.M., FRIDAY, APRIL 9, 1976 IN ROOM 2 OF THE LABOR AND INDUSTRIES BUILDING, SALEM, OREGON. AT THE TIME AND PLACE FOR THIS HEARING NO REPRESENTATIVE OF GENERAL SHEET METAL WORKS, INC. APPEARED. THE LEGAL DIVISION OF THE BOARD, REPRESENTING THE BOARD, WAS PRESENT AND PREPARED TO GO FORWARD WITH THE HEARING.

THE BOARD, THROUGH ITS REPRESENTATIVE, MOVED FOR A RECOMMENDATION TO DISMISS THE EMPLOYER'S REQUEST FOR HEARING FOR THE REASON THAT IT WAS NOT TIMELY FILED, AND DECLARING THE SECOND INJURY DETERMINATION ORDER OF DECEMBER 8, 1975 FINAL BY OPERATION OF LAW.

RULE XII A OF THE RULES FOR PAYMENT OF SECOND INJURY BENEFITS (WCB ADMINISTRATIVE ORDER 3-1973) REQUIRES THE EMPLOYER, IF DISSATISFIED WITH THE DETERMINATION ORDER ISSUED ON AN APPLICATION FOR SECOND INJURY RELIEF, TO FILE (UNDERSCORED) A REQUEST FOR HEARING WITHIN 30 DAYS FROM THE DATE OF MAILING OF SAID DETERMINATION ORDER OR OTHERWISE THE ORDER AS ISSUED SHALL BE FINAL AND NOT SUBJECT TO REVIEW.

THE REFEREE FOUND THAT IN THIS CASE THE DETERMINATION ORDER DENYING THE EMPLOYER'S APPLICATION FOR SECOND INJURY RELIEF WAS MAILED DECEMBER 8, 1975 AND THE EMPLOYER'S REQUEST FOR HEARING UPON SUCH DENIAL, WAS NOT RECEIVED UNTIL JANUARY 8, 1976, 31 DAYS AFTER THE DATE OF MAILING OF THE DETERMINATION ORDER. UNDER OREGON CASE LAW NOTICE OR OTHER FORMS OR PROCEDURAL PAPERS MUST BE RECEIVED (UNDERSCORED) BY THE RECIPIENT. JUST DEPOSITING SAME IN THE MAIL DOES NOT COMPLY WITH THE REQUIREMENT OF FILING.

THE REFEREE FOUND THAT THE EMPLOYER WAS IN DEFAULT BECAUSE IT DID NOT APPEAR AT THE HEARING AND PURSUE ITS REMEDY AND, THEREFORE, WAS DEEMED TO HAVE ABANDONED ITS REQUEST FOR HEARING.

THE REFEREE RECOMMENDED THAT THE BOARD ISSUE AN ORDER DISMISSING THE EMPLOYER'S REQUEST FOR HEARING BECAUSE (1) IT WAS NOT TIMELY FILED AND (2) THE EMPLOYER HAD ABANDONED HIS REQUEST FOR HEARING BY NOT APPEARING AT THE HEARING TO PURSUE ITS REMEDY.

HE FURTHER RECOMMENDED THAT THE BOARD ISSUE AN ORDER DECLARING THE DETERMINATION ORDER-SECOND INJURY BENEFITS, DATED DECEMBER 8, 1975, DENYING EMPLOYER'S APPLICATION FOR REIMBURSEMENT FROM THE SECOND INJURY RESERVE FUND TO BE CONSIDERED A FINAL ORDER BY OPERATION OF LAW.

THE BOARD ACCEPTS THE RECOMMENDATIONS OF THE REFEREE.

ORDER

THE REQUEST BY THE EMPLOYER, GENERAL SHEET METAL WORKS INC., IS DISMISSED AND THE DETERMINATION ORDER-SECOND INJURY BENEFITS, MAILED DECEMBER 8, 1975 IS DECLARED TO BE A FINAL ORDER BY OPERATION OF LAW.

WCB CASE NO. 75-1698-SI JUNE 22, 1976

IN THE MATTER OF THE PETITION OF
PACIFIC NORTHWEST BELL
FOR REIMBURSEMENT FROM THE SECOND
INJURY RESERVE FUND IN THE CASE OF
OCIE L. WEBSTER, CLAIMANT
ORDER ON REVIEW

Reviewed by Board Members Wilson and Moore.

On February 24, 1976 Referee Douglas Daughtry recommended that the Board deny the employer's request for reimbursement from the second injury reserve fund based upon the findings and conclusions contained in his recommended order.

The Board, after de novo review, adopts as its own, the findings and conclusions set forth in the recommended order, dated February 24, 1976, a copy of which is attached hereto and, by this reference, made a part of the Board's order.

RECOMMENDED ORDER -

The issues were framed in reference to Rule IV of WCB Administrative Order 3-1973, which is set out below -

CRITERIA FOR ELIGIBILITY

"A. An employe must have permanent disability due to previous accident, disease or congenital condition which is, or is likely to be, an obstacle for employment or reemployment.

B. The employer must have had knowledge of the preexisting disability at the time of hiring, rehiring or retention. Knowledge shall be implied to the employer if a hiring hall or similar source had knowledge of such disability at the time of hiring, rehiring or retention.

C. There must be a subsequent compensable injury that results in permanent disability or death.

D. The subsequent accident must be attributable wholly or partially to the preexisting disability of his injured employe or another of his employes.

E. The employer must have incurred an additional cost which is attributable to the results of the second injury."

In January 1973, claimant suffered a compensable injury while employed as an installer-repairman and when he reached out to make a tie at the access point on a telephone pole. At that time he felt a pain in his low back, but continued working and did not receive medical attention. On or about April 17, 1973, under similar circumstances, claimant again suffered similar back pain which caused him to seek and receive medical treatment.

The claim form, the bulk of the medical histories, the determination order regarding the extent of disability, the request for hearing regarding the extent of disability, the opinion and order

REGARDING THE EXTENT OF DISABILITY, THE REQUEST FOR REVIEW REGARDING THE EXTENT OF DISABILITY, THE ORDER ON REVIEW REGARDING THE EXTENT OF DISABILITY, AND THE DETERMINATION ORDER REGARDING ELIGIBILITY FOR SECOND INJURY BENEFITS ALL INDICATE THE DAY OF INJURY AS JANUARY 3, 1973.

I FIND, ON THE BASIS THAT CLAIMANT WAS SYMPTOM FREE PRIOR TO JANUARY 3, 1973, AND WAS NOT AFTER, AND DUE TO THE IDENTITY OF SYMPTOMS AND CONDITION FROM JANUARY 3, 1973 THROUGH APRIL 17, 1973, THAT CLAIMANT'S INJURY OCCURRED JANUARY 3, 1973 AND THAT HE DID NOT SUFFER A NEW OR SUBSEQUENT INJURY ON APRIL 17, 1973, BUT RATHER ON THAT DATE WAS SUFFERING FROM THE CONTINUED AND WORSENED EFFECTS OF THE JANUARY 1973 INJURY.

THEREFORE, FOR SECOND INJURY RELIEF TO BE GRANTED IN THIS CASE WHERE ONLY ONE INJURY HAS OCCURRED, IT MUST BE ESTABLISHED THAT CLAIMANT HAD A PRE-EXISTING DISABILITY, FROM A SOURCE OTHER THAN AN INJURY, AT THE TIME HE WAS INJURED ON JANUARY 3, 1973.

I FIND FROM REVIEWING THE RECORD IN WCB CASE NO. 73-3955, PROCEEDINGS TO DETERMINE THE EXTENT OF CLAIMANT'S PERMANENT DISABILITY, THERE IS NO QUESTION THAT CLAIMANT WAS THEN OVERWEIGHT. CLAIMANT'S COUNSEL IN HIS OPENING STATEMENT IN THAT CASE, WHILE NOT CONSTITUTING EVIDENCE, DOES CONTAIN THE ASSERTION THAT CLAIMANT WAS OVERWEIGHT WHEN INJURED AND HAD BEEN FOR SOMETIME PRIOR (TRANSCRIPT, P. 4), A FACT WHICH COUNSEL FOR THE BOARD CONCEDES. I FIND CLAIMANT'S OBESITY PRE-EXISTED THE INJURY.

THE QUESTION THEN BECOMES WHETHER OR NOT CLAIMANT'S OBESITY CONSTITUTED A PRE-EXISTING PERMANENT (UNDERSCORED) DISABILITY (EMPHASIS SUPPLIED). THERE IS NO OREGON LAW IN POINT. COUNSEL FOR THE BOARD REPRESENTS THAT OREGON SECOND INJURY LEGISLATION IS BORROWED AND PATTERNED AFTER THE NEW YORK SECOND INJURY LAW AND CITES, HARRY AND DAVID V. WORKMEN'S COMPENSATION BOARD (UNDERSCORED), 6 OR APP 566 (1971), IN SUPPORT OF THE PROPOSITION THAT NEW YORK CASES, INVOLVING THE SAME LAW AND SIMILAR FACTS, CAN BE CITED AS PRECEDENT IN THE BORROWING STATE, OREGON. I CONCUR.

TWO NEW YORK CASES WERE CITED IN SUPPORT OF THE CONTENTION THAT FOR OBESITY TO BE A PERMANENT CONDITION FOR THE PURPOSES OF ESTABLISHING A RIGHT TO RELIEF UNDER SECOND INJURY LAWS, THE OBESITY EXIST INDEPENDENT OF CONTROL BY THE CLAIMANT. THE COURT IN DURDALLER V. LIBERTY PRODUCTS CORPORATION (UNDERSCORED), 12 NY 2 ND 878, 198 NE 2 ND 679 (1962) STATED -

> '...WHERE PROOF WAS THAT GLANDULAR CONDITION WAS PERMANENT, AND THERE WAS NO DOUBT THAT EXTREME OBESITY WAS LIKELY TO HINDER EMPLOYMENT, AND IT WAS CONCEDED THAT INJURY SUSTAINED WAS GREATER THAN WOULD NORMALLY RESULT FROM INDUSTRIAL ACCIDENT...'

SECOND INJURY RELIEF WOULD LIE. IN THAT CASE, CLAIMANT HAD A GLANDULAR DISEASE RESULTING IN EXTREME OBESITY. IN ANOTHER CASE, SHIRLEY V. TRIANGLE MAINTENANCE CORPORATION (UNDERSCORED), 41 AD 2 ND 800, 341 NY SUPP 2 ND (1973), IT WAS CONTENDED, BUT NOT SUPPORTED BY THE EVIDENCE, THAT CLAIMANT HAD A PRE-EXISTING PERMANENT HYPERTHYROID CONDITION. IT WAS FOUND IN THAT CASE THAT ALL THE DOCTORS INDICATED CLAIMANT COULD AND SHOULD LOSE WEIGHT AND THAT AS A RESULT, CLAIMANT'S OBESITY NOR HIS DISC CONDITION RESULTED FROM THE SUBSEQUENT INJURY WAS PROVEN PERMANENT. IT WAS NOTED BEFORE THE BACK CONDITION COULD BE TREATED SURGICALLY CLAIMANT WOULD HAVE TO LOSE WEIGHT. SECOND INJURY RELIEF WAS DENIED.

IT IS NOTED IN THE INSTANT CASE, (JOINT EXHIBIT A-16), THAT WEIGHT

REDUCTION IS AN ABSOLUTE NECESSITY IF THE EFFECTS OF CLAIMANT'S BACK STRAIN ARE TO BE REDUCED.

I FIND NO MEDICAL EVIDENCE IN THIS RECORD WHICH INDICATES THAT CLAIMANT'S OBESITY IS PERMANENT AND BEYOND HIS CONTROL TO ALTER. THE RECORD IS REPLETE WITH REFERENCE TO THE EFFORTS OF HIS DOCTORS AND HIS EMPLOYER IN URGING CLAIMANT TO LOSE WEIGHT. CLAIMANT SIMPLY DID NOT DO WHAT COULD HAVE BEEN DONE.

I FIND CLAIMANT'S OBESITY DOES NOT CONSTITUTE A PRE-EXISTING PERMANENT CONDITION AS REQUIRED BY RULE IV.-A. BY THIS FINDING, I CONCLUDE THE OTHER FACTORS REGARDING ELIGIBILITY NEED NOT BE CONSIDERED.

WHILE THE EMPLOYER, BY HIRING AND RETAINING CLAIMANT, WITH THE KNOWLEDGE THAT AT ALL TIMES PERTINENT HE WAS OBESE, AND AFTER THIS INJURY DISABLED, IS TO BE COMMENDED FOR ADHERING TO THE SOCIAL PURPOSE OF THE SECOND INJURY LAW SUCH ADHERENCE UNFORTUNATELY DOES NOT DISPENSE WITH THE BURDEN OF PROOF ESTABLISHED BY THAT LAW WHICH BURDEN I FIND THE EMPLOYER HAS NOT CARRIED.

THEREFORE, IT IS RECOMMENDED THAT THE FOLLOWING ORDER BE ENTERED -

ORDER

THE EMPLOYER'S REQUEST FOR REIMBURSEMENT FROM THE SECOND INJURY RESERVE IS DENIED.

WCB CASE NO. 75-1308 JUNE 24, 1976

EARL BARTRON, CLAIMANT

JOHN HUTCHENS, CLAIMANT'S ATTY.
ROGER WARREN, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER IN WHICH THE REFEREE FOUND THAT THE EMPLOYER'S PARTIAL DENIAL OF MILEAGE REIMBURSEMENT BEYOND BOISE, IDAHO, WAS PROPER AND AFFIRMED THE DENIAL. THIS IS THE ONLY ISSUE ON BOARD REVIEW.

CLAIMANT, A RESIDENT OF NYSSA, WAS COMPENSABLY INJURED ON JANUARY 6, 1973. HIS TREATING PHYSICIAN, DR. SARAZIN, REFERRED CLAIMANT TO DR. BECKWITH WHO PRACTICES AT THE RINEHART CLINIC IN WHEELER, OREGON, A DISTANCE OF 500 MILES. ON MARCH 24, 1975 THE CARRIER REIMBURSED CLAIMANT FOR TRIPS TO AND FROM THE RINEHART CLINIC THROUGH NOVEMBER OF 1974 BUT, AT THE SAME TIME, DENIED FUTURE MILEAGE REIMBURSEMENT FOR TRAVEL FOR THIS PARTICULAR TREATMENT BEYOND BOISE, IDAHO.

THE REFEREE, RELIED ON WCB ADMINISTRATIVE ORDER 6-1969, EFFECTIVE OCTOBER 29, 1969, WHICH STATES IN PART THAT IT IS THE OBLIGATION OF THE EMPLOYERS, THEIR INSURERS AND THE STATE ACCIDENT INSURANCE FUND TO REIMBURSE INJURED WORKMEN FOR THE ACTUAL REASONABLE COST (UNDERSCORED), OF ALL TRANSPORTATION OF WORKMEN NECESSITATED BY THE WORKMEN'S TRAVEL IN OBTAINING REQUIRED MEDICAL SERVICES. HE CONCLUDED THAT CLAIMANT'S TRAVEL COSTS WERE NOT REASONABLE SINCE HIS TREATING DOCTOR, DR. SARAZIN, INDICATED CLAIMANT COULD RECEIVE THE NECESSARY CARE AND TREATMENT IN BOISE OR NAMPA, IDAHO.

IN ANOTHER CASE INVOLVING MILEAGE REIMBURSEMENT, IN THE MATTER OF THE COMPENSATION OF DONNA SCHULTZ, CLAIMANT (UNDERSCORED), WCB CASE NO. 75-159, THE CLAIMANT HAD BEEN INITIALLY TREATED BY HER DOCTOR IN PORTLAND, SHE LATER MOVED TO ALSEA, OREGON BUT CONTINUED TO COMMUTE BETWEEN ALSEA AND PORTLAND EVERY OTHER DAY FOR OFFICE CALLS TO HER TREATING PHYSICIAN. THE REFEREE FOUND THAT CLAIMANT COULD HAVE OBTAINED THE SAME TYPE OF MEDICAL CARE AND TREATMENT IN CORVALLIS THAT SHE RECEIVED IN PORTLAND AND IT WAS NOT REASONABLE TO EXPECT REIMBURSEMENT FOR THE TRIPS BETWEEN ALSEA AND PORTLAND. THE BOARD AFFIRMED THE REFEREE BUT THE CIRCUIT COURT RULED THAT SINCE CLAIMANT HAD BEEN A RESIDENT OF PORTLAND AND BEGAN HER TREATMENT IN PORTLAND, SHE WAS ENTITLED TO CONTINUE THAT TREATMENT - HOWEVER, HAD CLAIMANT BEEN A RESIDENT OF ALSEA AT THE TIME OF HER INJURY AND SIMPLY DECIDED TO BE TREATED IN PORTLAND WHEN SIMILAR TREATMENT WAS AVAILABLE IN ALSEA HER EXPENSES WOULD NOT BE RECOVERABLE.

IN THIS CASE BEFORE THE BOARD, CLAIMANT RESIDED IN NYSSA, HIS TREATMENT BEGAN THERE, AND DR. SARAZIN INDICATED CLAIMANT COULD RECEIVE THE SAME TREATMENT IN BOISE.

ON DE NOVO REVIEW, THE BOARD AGREES WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE AND AFFIRMS HIS ORDER.

ORDER

THE ORDER OF THE REFEREE, DATED JANUARY 2, 1976, IS AFFIRMED.

WCB CASE NO. 74-4323 JUNE 24, 1976

OPAL LILLIAN VETTER, CLAIMANT

JAMES FOURNIER, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM FOR AGGRAVATION TO THE FUND AND, HAVING FOUND CLAIMANT TO BE, AT THAT TIME, MEDICALLY STATIONARY, AWARDED CLAIMANT AN ADDITIONAL 96 DEGREES FOR 30 PER CENT UNSCHEDULED DISABILITY.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON MAY 21, 1969 WHEN SHE TWISTED HER BACK WHILE REACHING THROUGH A COUNTER - AT THAT TIME SHE WAS EMPLOYED IN THE CAFETERIA AS A FOOD SERVICE WORKER. DR. MELGARD PERFORMED SURGERY FOR A PROTRUDED DISC AND, AFTER AN UNEVENTFUL RECOVERY BY CLAIMANT, THE CLAIM WAS CLOSED BY DETERMINATION ORDER MAILED FEBRUARY 24, 1970 WHICH AWARDED CLAIMANT 64 DEGREES FOR 20 PER CENT UNSCHEDULED DISABILITY.

IN 1972 CLAIMANT REQUESTED A HEARING ON A DENIAL OF A CLAIM FOR AGGRAVATION. A HEARING WAS HELD ON FEBRUARY 20, 1974 AND ON APRIL 30, 1974, THE MATTER WAS DISMISSED BY THE REFEREE ON THE GROUNDS THAT THERE WERE NO WRITTEN MEDICAL OPINIONS TO SUPPORT THE CLAIM FOR AGGRAVATION WHICH WAS, AT THAT TIME, REQUIRED BY THE STATUTE. UPON APPEAL THE REFEREE WAS AFFIRMED BY AN ORDER ON REVIEW DATED JUNE 26, 1975.

IN DECEMBER, 1974 CLAIMANT AGAIN REQUESTED A HEARING ON AGGRAVATION AND THIS TIME SUBMITTED THE CLAIM TO THE FUND BASED UPON A MEDICAL OPINION OF DR. DODD. THE CLAIM WAS DENIED IN JANUARY, 1975.

DR. DODD ON OCTOBER 1, 1974 STATED CLAIMANT HAD HAD AN INCREASE OF DISABILITY SINCE HER LAST EVALUATION AND THERE WAS NOTHING, MEDICALLY, WHICH HE COULD DO TO HELP HER. HE THOUGHT, BASED UPON THE SUBJECTIVE COMPLAINTS OF CLAIMANT, THAT SHE PROBABLY WAS PERMANENTLY DISABLED. CLAIMANT TOLD DR. DODD THAT SINCE HER SURGERY IN 1970 SHE HAS FELT NO IMPROVEMENT BUT RATHER THERE HAS BEEN AN INCREASING DISABILITY TO THE POINT THAT SHE CAN DO NO GAINFUL WORK EXCEPT KEEP UP THE ESSENTIAL CARE OF HER HOME. SHE TOLD DR. DODD SHE WOULD NOT GO THROUGH ANOTHER SURGERY FOR HER BACK BUT SHE WOULD ALLOW A MYELOGRAM.

THE REFEREE FOUND THE CLAIMANT'S PROBLEMS HAVE NEVER CEASED. AT THE TIME OF HER INJURY SHE AND HER HUSBAND OPERATED A SHEEP RANCH. CLAIMANT WAS ABLE TO HELP OUT, ESPECIALLY DURING THE LAMBING SEASON AND WOULD WALK SOME 2,000 FEET TO THE BARN TWO OR THREE TIMES A DAY TO CHECK ON THE SHEEP THAT WERE LAMBING. ADDITIONALLY, SHE DID HER NORMAL HOUSEHOLD DUTIES. IN 1971 AND 1972 CLAIMANT WAS ABLE TO DO HER HOUSE WORK BUT SHE WAS HAVING CONSTANT TROUBLE WITH HER BACK. THE REFEREE FELT THAT PRIMARILY BECAUSE OF CLAIMANT'S AGE, SHE NEVER ATTEMPTED TO RETURN TO ANY GAINFUL EMPLOYMENT.

IN JUNE, 1973 CLAIMANT'S HUSBAND HAD A STROKE AND IS, FOR ALL PRACTICAL PURPOSES, PERMANENTLY DISABLED. CLAIMANT ATTEMPTED TO OPERATE THE SHEEP RANCH THEREAFTER BUT COULD NOT BECAUSE HER BACK PROBLEMS BECAME INCREASINGLY MORE SEVERE, THEREFORE, IN MAY, 1974 SHE AND HER HUSBAND WERE FORCED TO SELL THEIR RANCH AND MOVE TO MT. ANGEL WHERE THEY NOW RESIDE.

THE REFEREE FOUND, BASED UPON CLAIMANT'S TESTIMONY AND THE MEDICAL EVIDENCE, THAT CLAIMANT'S CONDITION HAS WORSENED SINCE THE LAST AWARD OR ARRANGEMENT OF COMPENSATION. HE FOUND CLAIMANT'S TESTIMONY TO BE QUITE CREDIBLE AND ALTHOUGH DR. DODD'S REPORT DID NOT GIVE ANY OBJECTIVE FINDINGS, IT DID INDICATE THAT HE FELT CLAIMANT HAD WORSENED OVER THE YEARS SINCE THE ORIGINAL CLOSURE.

THE REFEREE FOUND THAT CLAIMANT HAD NOT ATTEMPTED TO WORK AND IT WAS IMPOSSIBLE TO SAY WHETHER AT THIS STAGE OF HER LIFE AND IN THE SITUATION IN WHICH SHE FINDS HERSELF, WHETHER IT WOULD BE POSSIBLE FOR HER TO WORK. HE BELIEVED THAT IF IT WERE ABSOLUTELY NECESSARY FOR CLAIMANT TO RETURN TO WORK SHE PROBABLY COULD DO SO BUT SHE WOULD HAVE TO WORK WITH SUBSTANTIAL AMOUNT OF PAIN.

HE FOUND THAT CLAIMANT'S CONDITION AT THE PRESENT TIME WAS STATIONARY, SHE IS UNDOUBTEDLY HAVING SUBSTANTIAL PAIN AND IS FORCED TO LEAD A CONSIDERABLE SEDENTARY LIFE IN ORDER TO OFFSET SUCH PAIN.

BASED UPON THESE FACTORS, THE REFEREE FOUND THAT CLAIMANT HAD SUFFERED SUBSTANTIAL LOSS OF HER EARNING CAPACITY AS A RESULT OF HER INDUSTRIAL INJURY AND HE INCREASED THE PREVIOUS AWARD OF 20 PER CENT TO 50 PER CENT.

AT THE HEARING IT WAS CONTENDED THAT BECAUSE THE MEDICAL OPINION OF DR. DODD, DATED OCTOBER 1, 1974, PREDATED THE BOARD'S ORDER ON REVIEW CLAIMANT SHOULD BE REQUIRED TO SHOW THAT HER CONDITION HAD WORSENED SINCE THE DATE OF THE ORDER ON REVIEW AS THAT WOULD BE THE LAST ARRANGEMENT OF COMPENSATION.

THE REFEREE CONCLUDED THAT THE ORDER ON REVIEW MERELY AFFIRMED THE REFEREE WHOSE DISMISSAL OF CLAIMANT'S CLAIM WAS BASED ON JURISDICTIONAL GROUNDS AND THAT SUCH ORDER ON REVIEW COULD NOT, IN ANY SENSE, BE INTERPRETED AS A LAST ARRANGEMENT OF COMPENSATION. HE CONCLUDED THAT THE CLAIM FOR AGGRAVATION WAS FILED WELL WITHIN THE FIVE YEAR PERIOD.

HE ALSO CONCLUDED THAT THERE WAS NO INDICATION THAT CLAIMANT IS OR HAS BEEN TEMPORARILY TOTALLY DISABLED AND, THEREFORE, THERE WAS NO JUSTIFICATION TO AWARD COMPENSATION FOR TEMPORARY TOTAL DISABILITY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED NOVEMBER 14, 1974, IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED, AS A REASONABLE ATTORNEY FEE, THE SUM OF 350 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 75-1752 JUNE 24, 1976

JOSEPH KING, CLAIMANT

BRUCE WILLIAMS, CLAIMANT'S ATTY.
JAMES HUEGLI, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 114.80 DEGREES FOR LOSS OF BINAURAL HEARING.

CLAIMANT, WHO WAS 70 YEARS OLD AT THE TIME OF THE HEARING, HAS SUSTAINED A HEARING LOSS OVER AN UNSPECIFIED PERIOD OF TIME WHILE EMPLOYED BY THE EMPLOYER. THE INITIAL ONSET OF THIS HEARING LOSS, ACCORDING TO CLAIMANT, WAS ATTRIBUTABLE TO A POP VALVE GOING OFF. AFTER A SHORT PERIOD OF IMPROVEMENT, CLAIMANT'S HEARING LOSS PROGRESSIVELY WORSENED. HE HAS BEEN EXAMINED BY DR. THOMPSON, DR. EDIGER, AND DR. COOPER. HIS CLAIM WAS ACCEPTED AS AN OCCUPATIONAL DISEASE AND CLOSED ON DECEMBER 20, 1974 WITH A DETERMINATION ORDER WHICH GRANTED CLAIMANT COMPENSATION EQUAL TO 54 DEGREES FOR 28.13 PER CENT LOSS OF BINAURAL HEARING, RESULTING FROM 32.5 PER CENT LOSS OF HEARING IN THE LEFT EAR AND 27.5 PER CENT LOSS OF HEARING IN THE RIGHT EAR. CLAIMANT RETIRED FROM WORK ON OCTOBER 30, 1970 AND HAS NOT BEEN EXPOSED TO INDUSTRIAL NOISE SINCE.

DR. THOMPSON, ON APRIL 3, 1973, TESTED CLAIMANT'S HEARING AND REPORTED CLAIMANT HEARD AT A LEVEL OF 30 DECIBALS WHEN TESTED AT 500 TO 1000 CYCLES = HOWEVER, AT A 2,000 CYCLE FREQUENCY CLAIMANT'S ACUITY DROPPED TO 70 AND 80 DECIBALS = HE ALSO NOTED LOSS OF DISCRIMINATION WHICH HE DESCRIBED AS = 'HE HEARS, BUT HE DOES NOT UNDERSTAND.'

AUDIOLOGICAL EVALUATIONS WERE PERFORMED BY DR. EDIGER ON JUNE 18, 1973 AND AGAIN ON SEPTEMBER 23, 1974. A COMPARISON OF THE TEST RESULTS INDICATE THEY ARE SIMILAR, BOTH IN PATTERN AND IN EXTENT OF HEARING LOSS. AS A RESULT OF THE FIRST EVALUATION, DR. EDIGER REPORTED PURE TONE TESTS INDICATED MILD HEARING BILATERALLY IN THE LOWEST FREQUENCIES, WITH A SEVERE APPARENTLY SENSORI-NEURAL HEARING LOSS BILATERALLY IN THE HIGHER FREQUENCIES. CLAIMANT'S ABILITY TO DISCRIMINATE WAS FAIRLY GOOD, THE TESTED HEARING LOSS WAS CONSISTENT WITH CLAIMANT'S COMPLAINT OF DIFFICULTY WITH UNDERSTANDING SPEECH. AFTER THE SECOND EVALUATION, DR. EDIGER REPORTED THAT THE AVERAGE SCORES THROUGHOUT THE 500, 1,000 AND 2,000 CYCLE FREQUENCIES INDICATED A CHANGE OF ONLY THREE OR FOUR DECIBALS OVER THE FIRST EVALUATION. HE

FELT CLAIMANT WAS NOT AN IDEAL HEARING AID CANDIDATE AS HIS HEARING AID AMPLIFIED BUT DID NOT CLARIFY SPEECH.

DR. EDIGER, ON SEPTEMBER 22, 1974, TESTIFIED THAT CLAIMANT EXPERIENCED A 29.78 PER CENT LOSS OF BINAURAL HEARING RESULTING FROM 35.17 PER CENT LOSS OF HEARING IN THE LEFT EAR AND 28.92 PER CENT LOSS OF HEARING IN THE RIGHT EAR WHEN TESTED AT 500, 1,000, 2,000, 3,000, 4,000 AND 6,000 CYCLE FREQUENCIES. A DEDUCTION WAS MADE FOR THE PRESBYCUSIS FACTOR, THE LOSS OF HEARING DUE TO AGE, IN ACCORDANCE WITH THE NATIONAL INSTITUTE OF OCCUPATIONAL SAFETY AND HEALTH TABLES. DR. EDIGER ALSO INDICATED THAT CLAIMANT EXPERIENCED A 28.5 PER CENT LOSS OF BINAURAL HEARING RESULTING FROM 21 PER CENT LOSS OF HEARING IN THE LEFT EAR AND 15.99 PER CENT LOSS OF BINAURAL HEARING IN THE RIGHT EAR WHEN TESTED AT 500, 1,000, 2,000 CYCLE FREQUENCIES - NO DEDUCTION WAS MADE FOR THE PRESBYCUSIS FACTOR WHEN COMPUTING AT THESE CYCLES AS THE MIDDLE FREQUENCIES ARE NOT AS GREATLY AFFECTED BY THE AGING PROCESS AS ARE THE HIGHER FREQUENCIES. LIKEWISE, SPEECH DISCRIMINATION APPEARED TO BE A FACTOR IN CLAIMANT'S INABILITY TO UNDERSTAND SPEECH. ON SEPTEMBER 23, 1974 HIS SPEECH DISCRIMINATION SCORES WERE 88 PER CENT FOR THE RIGHT EAR AND 84 PER CENT FOR THE LEFT EAR.

ON MARCH 11, 1975 DR. COOPER HAD TESTED CLAIMANT AND FOUND A MODERATE MID AND HIGH FREQUENCY BILATERAL SENSORI-NEURAL HEARING LOSS WHICH WAS APPROXIMATELY EQUAL IN BOTH EARS. HE REPORTED CLAIMANT EXPERIENCED A 30 PER CENT LOSS OF BINAURAL HEARING RESULTING FROM 35 PER CENT LOSS OF HEARING IN THE LEFT EAR AND 29 PER CENT LOSS OF HEARING IN THE RIGHT EAR. POOR SPEECH DISCRIMINATION WAS CONSIDERED A FACTOR IN CLAIMANT'S INABILITY TO UNDERSTAND SPEECH. CLAIMANT'S SPEECH DISCRIMINATION SCORES WERE 64 PER CENT IN THE RIGHT EAR AND 52 PER CENT IN THE LEFT EAR. THE PRESBYCUSIS FACTOR WAS NOT TAKEN INTO CONSIDERATION.

THE EMPLOYER CONTENDS THAT THE REFEREE WAS IN ERROR IN USING 250 TO 8,000 CYCLES PER SECOND IN THE CALCULATION OF HEARING LOSS - THAT THE REFEREE FAILED TO USE PRESBYCUSIS CALCULATIONS IN DETERMINING HEARING LOSS - THAT HE ERRED IN THE USE OF WORK DISCRIMINATION AS A DETERMINATIVE FACTOR IN HEARING LOSS CASES BY APPLYING AN ARBITRARY FORMULA WITHOUT FOUNDATION AND ALSO IN GRANTING ANY AWARD AT ALL FOR WORD DISCRIMINATION LOSS AS NO EVIDENCE WAS PRESENTED THAT THE NOISE EXPOSURE AT BOISE CASCADE CAUSED SUCH WORD DISCRIMINATION AND, FINALLY, THAT THE REFEREE FAILED TO APPLY ORS 656.214(9) PROPERLY.

THE REFEREE, RELYING UPON THE BOARD'S ORDERS ON REVIEW IN OSCAR PRIVETTE, CLAIMANT (UNDERSCORED), WCB CASE NO. 73-1563, DATED JULY 18, 1974, CONNAN OLSON, CLAIMANT (UNDERSCORED), WCB CASE NO. 74-3365, DATED JANUARY 27, 1976, EDWARD J. LONG, CLAIMANT (UNDERSCORED), WCB CASE NO. 74-2725-E, DATED JANUARY 19, 1973 AND ROBERT M. FLICK, CLAIMANT (UNDERSCORED), WCB CASE NO. 74-1488, DATED JULY 3, 1975, CONCLUDED THAT THE BOARD HAD NOT ADOPTED THE RECOMMENDATIONS MADE BY MR. FULLERTON, ADMINISTRATOR OF THE EVALUATION DIVISION, TO THE BOARD ON MAY 17, 1976 (DEFENDANT'S EXHIBIT 9).

MR. FULLERTON HAD STATED THAT THE ABILITY TO DISCERN SPEECH WAS PART OF THE LOSS OF HEARING IN THE HIGHER FREQUENCIES. HE ALSO HAD STATED THAT DR. EDIGER, AS WELL AS OTHER SOURCES, CONTACTED BY EVALUATION DIVISION IN ITS PREPARATION OF THE HEARING LOSS COMPUTATION, HAD SAID THAT THERE WAS NO KNOWN WAY OR FORMULA TO ARRIVE AT COMPENSATION FOR HEARING LOSS THROUGH SPEECH DISCRIMINATION TESTING. THE DETERMINATION ORDER ISSUED IN THE INSTANT CASE WAS COMPUTED AT THE RANGE OF 500 THROUGH 2,000 CYCLES PER SECOND WHICH WAS THE PROCEDURE IN USE AT THAT TIME. ON FEBRUARY 18, 1976 THE EVALUATION DIVISION CHANGED TO THE RANGE 250 THROUGH 8,000 CYCLES PER SECOND, BUT, ON MARCH 24, 1976 IT ADOPTED THE RANGE OF 500 THROUGH 6,000 CYCLES PER SECOND (BULLETIN NO. 122, PUBLISHED ON APRIL 6, 1976).

THE REFEREE FELT THAT THE EVIDENCE PRESENTED AT THE TIME OF THE HEARING, RELATIVE TO COMPUTATION OF HEARING LOSS, CONTROLLED THE FREQUENCIES AND THE RANGES TO BE UTILIZED IN MAKING THE FINAL COMPUTATION AND THAT LOSS OF WORK DISCRIMINATION IS THE PROPER TEST OR FACTOR TO BE CONSIDERED IN COMPUTATION OF HEARING LOSS EVEN THOUGH THE LEGISLATURE DID NOT SPECIFICALLY PROVIDE FOR THE FACT OF LOSS OF WORK DISCRIMINATION OR THAT THERE IS NO WAY TO PRECISELY RATE THE LOSS OF DISCRIMINATION.

HE FOUND THAT SPEECH DISCRIMINATION WAS A PART OF NORMAL HEARING AND THAT THE EMPLOYER'S ARGUMENT THAT CLAIMANT HAD FAILED TO PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT HIS WORD LOSS DISCRIMINATION WAS ATTRIBUTABLE TO HIS WORK CONNECTED ACTIVITIES WAS WITHOUT MERIT. CLAIMANT HAD WORKED FOR THE EMPLOYER 37 YEARS AND DURING THAT TIME A BOILER POP VALVE WENT OFF APPROXIMATELY 12 INCHES FROM HIS HEAD AND, INITIALLY, PRECIPITATED HIS HEARING LOSS. CLAIMANT HAS WORKED AROUND NOISE EQUIPMENT DURING THE TERM OF HIS EMPLOYMENT AND, THEREFORE, WAS EXPOSED TO INDUSTRIAL NOISE OVER A LONG PERIOD OF TIME - HE DID NOT WEAR ANY TYPE OF EAR PROTECTION DEVICE DURING HIS EMPLOYMENT.

THE REFEREE FOUND THAT THE TYPE OF HEARING LOSS THAT CLAIMANT DISPLAYED WAS CONSISTENT WITH HIS COMPLAINTS OF DIFFICULTY IN UNDERSTANDING SPEECH, THAT HIS HEARING LOSS, INCLUDING LOSS OF DISCRIMINATION, WAS NOT UNLIKE THAT WHICH COULD ACCOMPANY PROLONGED EXPOSURE TO HIGH NOISE LEVELS AND THAT THE EMPLOYER ACCEPTED CLAIMANT'S HEARING LOSS CLAIM WITH KNOWLEDGE OF ALL THESE FACTS.

BOTH DR. EDIGER AND DR. COOPER MEDICALLY ESTABLISHED THE FACT OF THE HEARING LOSS AS WELL AS THE LOSS OF WORD DISCRIMINATION.

HE CONCLUDED THAT CLAIMANT HAD PROVED BY A PREPONDERANCE OF THE EVIDENCE, THAT IT WAS MORE PROBABLE THAN NOT, THAT CLAIMANT'S HEARING LOSS, INCLUDING LOSS OF WORD DISCRIMINATION, WAS THE RESULT OF HIS WORK-CONNECTED ACTIVITIES FOR THE EMPLOYER OVER A LONG PERIOD OF TIME.

USING THE STATUTORY FORMULA, THE REFEREE ESTABLISHED CLAIMANT'S BINAURAL HEARING LOSS DISABILITY AT 96.98 DEGREES AND AWARDED AN ADDITIONAL 17.82 DEGREES FOR CLAIMANT'S LOSS OF WORD DISCRIMINATION, THEREBY INCREASING CLAIMANT'S AWARD TO 114.80 DEGREES FOR 65 PER CENT BINAURAL HEARING LOSS.

THE BOARD, ON DE NOVO REVIEW, FINDS THAT IN ALL PROBABILITY CLAIMANT'S HEARING LOSS IS ATTRIBUTABLE TO HIS 37 YEARS OF EMPLOYMENT WITH THE EMPLOYER. A LONG DURATION OF REASONABLY LOUD NOISE EXPOSURE CAN BE MORE DAMAGING THAN A SHORT INCREMENT OF LOUDER NOISE. IT HAS BEEN ONLY RECENTLY THAT EFFORTS TO REDUCE NOISE EXPOSURE TO EMPLOYEES HAVE BEEN MADE, THEREFORE, ANY STUDIES OF NOISE LEVELS AT BOISE CASCADE, AT THE PRESENT TIME, WOULD UNDOUBTEDLY BE EXTREMELY DIFFERENT FROM THE NOISE TO WHICH CLAIMANT WAS EXPOSED AND FOR WHICH HIS CLAIM FOR HEARING LOSS WAS RECEIVED AND ACCEPTED BY THE EMPLOYER ON APRIL 16, 1973.

THE BOARD NOTES THAT CLAIMANT WAS 70 YEARS OLD AT THE TIME OF THE HEARING ON AUGUST 4, 1975, NEARLY FIVE YEARS AFTER CLAIMANT HAD RETIRED. PRESBYCUSIS, THE LOSS OF HEARING DUE TO AGE, DEFINITELY SHOULD BE CONSIDERED AS A FACTOR - THE DEVELOPMENT OF PRESBYCUSIS IN A NORMAL PERSON IS JUST AS PREDICTABLE AS THE AGING PROCESS IN OTHER BODY SYSTEMS. AT THE TIME THE REFEREE REJECTED DR. EDIGER'S INFORMATION REGARDING THE PRESBYCUSIS ADJUSTMENT BULLETIN NO. 122 HAD NOT BEEN PUBLISHED, HAD IT BEEN, PRESUMABLY DR. EDIGER'S OPINION WOULD HAVE BEEN ACCEPTED.

THE REFEREE IN MAKING HIS CALCULATION OF HEARING LOSS USED 250 TO 8,000 CYCLES PER SECOND, IN ACCORDANCE WITH PRIVETTE (UNDERSCORED) HOWEVER, NEITHER 250 NOR 8,000 CYCLES PER SECOND ENTER INTO THE SPEECH FREQUENCY RANGE NOR ARE THEY PARTICULARLY IMPORTANT SOUNDS IN RANGE OF HUMAN HEARING. THIS WAS THE BASIS FOR THE ISSUANCE OF BULLETIN NO. 122, WHICH SPECIFIED THE USE OF FREQUENCIES OF 500 THROUGH 6,000 CYCLES PER SECOND IN CASES OF HEARING LOSS.

USING PURE TONE ONLY, WITH ALLOWANCE FOR PRESBYCUSIS IN ACCORDANCE WITH BULLETIN NO. 122 AND THE RULES APPROVED FOR THE EVALUATION DIVISION, THE BOARD CONCLUDES THAT CLAIMANT HAS 36.24 PER CENT IMPAIRMENT IN HIS LEFT EAR AND 30.00 PER CENT IN HIS RIGHT EAR FOR A BINAURAL LOSS OF 30.78 PER CENT. IN ARRIVING AT THIS DETERMINATION THE BOARD DID NOT INCLUDE ANY AWARD FOR SPEECH DISCRIMINATION, AGREEING WITH MR. FULLERTON THAT THE ABILITY TO DISCERN SPEECH IS PART OF THE LOSS OF HEARING IN THE HIGHER FREQUENCY AND, THEREFORE, THE CLAIMANT HAD BEEN COMPENSATED FOR SUCH SPEECH DISCRIMINATION WHEN HIS HEARING LOSS WAS COMPUTED USING THE TESTING IN THE HIGHER FREQUENCIES. ALSO THE PRESBYCUSIS FACTOR USED WAS 16.67 WHICH IS THE VALUE APPENDED TO THE EVALUATION'S PROCEDURE FOR A 500 THROUGH 6,000 CYCLE PER SECOND RANGE RATHER THAN DR. EDIGER'S FACTOR OF 17.38 WHICH IS THE VALUE PROPOSED FOR USE ON A 250 THROUGH 8,000 CYCLE PER SECOND RANGE.

ORDER

THE ORDER OF THE REFEREE, DATED FEBRUARY 26, 1976, IS MODIFIED.

CLAIMANT IS AWARDED 59.10 DEGREES FOR 30.78 PER CENT BINAURAL HEARING LOSS. THIS AWARD IS IN LIEU OF THE AWARD MADE BY THE REFEREE IN HIS ORDER WHICH IN ALL OTHER RESPECTS IS AFFIRMED.

WCB CASE NO. 74-62 JUNE 24, 1976

JACOB E. BALLWEBER, CLAIMANT

RICHARD KROPP, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED DECEMBER 26, 1973 WHEREBY CLAIMANT WAS AWARDED COMPENSATION FOR TEMPORARY TOTAL DISABILITY ONLY.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON OCTOBER 25, 1972 WHILE HELPING LIFT AND MOVE A LARGE CRATED WINCH. THE INJURY WAS DIAGNOSED AS A CERVICAL STRAIN AND THE CLAIM WAS ULTIMATELY CLOSED BY DETERMINATION ORDER WHICH AWARDED NO PERMANENT PARTIAL DISABILITY COMPENSATION.

THE REFEREE FOUND THAT CLAIMANT HAS PERMANENT PHYSICAL IMPAIRMENT OF HIS LEGS RESULTING FROM WAR WOUNDS SUFFERED IN 1969 WHILE IN VIET NAM. HE ALSO HAS PERMANENT DISABILITY FROM A WHIP-LASH INJURY OF THE NECK AND SHOULDERS SUFFERED IN AN AUTOMOBILE ACCIDENT IN JUNE, 1972. CLAIMANT WAS SLOWLY RECOVERING FROM THE LATTER AUTOMOBILE ACCIDENT WHEN HIS CONDITION WAS EXACERBATED BY THE LIFTING INCIDENT IN OCTOBER, 1972.

BEFORE THE AUTOMOBILE ACCIDENT CLAIMANT WAS WORKING AS A MECHANIC FOR A VOLKSWAGEN DEALERSHIP, AFTERWARDS HE STOPPED DOING

MECHANIC WORK BECAUSE OF HIS PHYSICAL DISTRESS AND TOOK A JOB IN THE PARTS DEPARTMENT OF THE TOYOTA DEALERSHIP. AFTER THE OCTOBER 25, 1972 INJURY CLAIMANT DID NOT RETURN TO WORK AT TOYOTA, BUT WHEN HIS CONDITION IMPROVED HE COMMENCED WORKING FOR ALBANY FROZEN FOODS IN MAINTENANCE AND MILLWRIGHT WORK AND LATER WAS EMPLOYED AT LINN-BENTON COMMUNITY COLLEGE AS A MAINTENANCE MAN. CLAIMANT HAS BEEN SO EMPLOYED SINCE OCTOBER, 1973.

THE REFEREE FOUND THAT CLAIMANT'S PRESENT EARNINGS ARE GREATER THAN WHEN HE WAS EMPLOYED AS A PARTS MANAGER FOR TOYOTA, HIS WORKING HOURS ARE APPROXIMATELY THE SAME AND HE WORKS FULL TIME. IT IS NO LONGER NECESSARY FOR CLAIMANT TO USE A CERVICAL COLLAR, HE NO LONGER REQUIRES HOME NECK TRACTION, NOR DOES HE NEED TO TAKE PAIN MEDICATION.

THE REFEREE FOUND NO EVIDENCE THAT CLAIMANT HAD SUSTAINED ANY GREATER PERMANENT PHYSICAL IMPAIRMENT AS A RESULT OF THE OCTOBER 25, 1972 INJURY, SUPERIMPOSED ON THE PRE-EXISTING CONDITION, THAN WHAT HIS CONDITION WAS DESCRIBED TO BE JUST PRIOR TO THAT INCIDENT. FURTHERMORE, CLAIMANT HAD FAILED TO DEMONSTRATE THAT HE HAD SUFFERED ANY PERMANENT IMPAIRMENT OF HIS EARNING CAPACITY. THERE WAS NO EVIDENCE THAT CLAIMANT WOULD BE UNABLE TO CONTINUE WORKING AS A PARTS MANAGER AND PERFORM THE SAME DUTIES HE WAS PERFORMING AT THE TIME HE WAS INJURED, NOR IS HIS PRESENT OUTLOOK FOR FUTURE EMPLOYMENT ANY WORSE NOW THAN IT WAS PRIOR TO THE OCTOBER, 1972 INJURY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED JANUARY 6, 1976, IS AFFIRMED.

WCB CASE NO. 75-1460-E JUNE 24, 1976

ALDEN ABELSEN, CLAIMANT

DAN O'LEARY, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH SET ASIDE THE DETERMINATION ORDER OF JANUARY 6, 1975 AWARDING CLAIMANT PERMANENT TOTAL DISABILITY AND AWARDED CLAIMANT, IN LIEU THEREOF, EFFECTIVE THE DATE OF THE AFORESAID DETERMINATION ORDER, AN AWARD OF 192 DEGREES FOR UNSCHEDULED LOW BACK DISABILITY.

CLAIMANT, AT THE TIME OF THE HEARING WAS 57 YEARS OLD. WHILE EMPLOYED AS A TRUCK DRIVER HE SUSTAINED A COMPENSABLE LOW BACK INJURY ON JULY 25, 1973. THE INJURY WAS DIAGNOSED AS A CHRONIC LOW BACK STRAIN AND HE WAS GIVEN CONSERVATIVE TREATMENT FOR AN EXTENDED PERIOD OF TIME. ON APRIL 11, 1974 HE UNDERWENT A RHIZOTOMY TO RELIEVE HIS LEG PAIN AND, THEREAFTER, HAD A COMPREHENSIVE EVALUATION BY THE DISABILITY PREVENTION DIVISION AS WELL AS A PSYCHOLOGICAL EVALUATION BY DR. HICKMAN, A CLINICAL PSYCHOLOGIST.

CLAIMANT'S WORK BACKGROUND IS PRIMARILY THAT OF A TRUCK DRIVER BUT HE ALSO WORKED FOR A SHORT PERIOD FOR THE PORTLAND POLICE DEPARTMENT, RAN A NIGHTCLUB IN SEASIDE, OPERATED A USED CAR LOT AND A TEXACO SERVICE STATION. CLAIMANT HAS NOT WORKED SINCE MARCH, 1974.

CLAIMANT HAS HAD PROBLEMS WITH HIS BACK SINCE 1941 WHEN HE WAS WORKING IN THE SHIPYARDS AND HAD AN INJURY. CLAIMANT FEELS THAT HE NEVER RECOVERED FROM THIS INJURY AND THAT HE IS PERMANENTLY AND TOTALLY DISABLED. HIS PRESENT ACTIVITIES CONSIST OF MOWING THE GRASS, DOING INCIDENTAL REPAIR WORK IN HIS SHOP, AND DOING LIGHT HOUSEWORK. CLAIMANT HAS, IN ADDITION TO HIS OWN HOME IN BEAVERTON, TWO HOUSES ON FIVE ACRES ON THE COAST WHICH HE RENTS - CLAIMANT DOES SOME INCIDENTAL REPAIRS ON THESE HOUSES BUT NO MAJOR REPAIRS ARE PERFORMED BY HIM.

THE REFEREE FOUND AN ABUNDANCE OF EVIDENCE INDICATING CLAIMANT'S UNEQUIVOCAL INTENT TO RETIRE FOLLOWING HIS INDUSTRIAL INJURY. CLAIMANT HAS RESISTED THE PHYSICAL REHABILITATION EFFORTS TO IMPROVE HIS PHYSICAL CONDITION BY EXERCISES AND SIMILAR MEANS - HE HAS INDICATED NO INTEREST WHATSOEVER FOR ANY VOCATIONAL RETRAINING, NOTWITHSTANDING THE CIRCUMSTANCES THAT THE MEDICAL REPORTS INDICATED THAT HE WAS PHYSICALLY ABLE TO PERFORM LIGHT WORK.

THE REFEREE CONCLUDED THAT CLAIMANT HAD VOLUNTARILY TAKEN HIMSELF OUT OF THE JOB MARKET WITHOUT MAKING THE EFFORT REQUIRED BY THE WORKMEN'S COMPENSATION ACT BOTH TO IMPROVE HIS PHYSICAL ABILITIES AND TO ATTEMPT EMPLOYMENT AT LIGHTER WORK. THE FACT THAT CLAIMANT CANNOT, ACCORDING TO THE MEDICAL EVIDENCE, RETURN TO TRUCK DRIVING, DOES NOT, IN AND OF ITSELF, COMPEL A FINDING OF PERMANENT TOTAL DISABILITY.

THE REFEREE FURTHER CONCLUDED THAT FINDING OF CLAIMANT'S PERMANENT LOSS OF WAGE EARNING CAPACITY IN A SITUATION IN WHICH THE CLAIMANT CONSIDERS HIMSELF RETIRED AND IS UNWILLING TO SEEK LIGHTER EMPLOYMENT OR UNDERGO VOCATIONAL REHABILITATION NECESSARILY COMPELS A CERTAIN AMOUNT OF SPECULATION. CLAIMANT'S AGE AND LACK OF EXPERIENCE IN LIGHTER TYPE OF WORK WOULD, IN ANY EVENT, MILITATE AGAINST HIS SUCCESSFUL RE-EMPLOYMENT, EVEN IF HE HAD GOOD MOTIVATION. CLAIMANT POSSESSES A SUPERIOR INTELLIGENCE BUT PERSONALITY FACTORS HAVE APPARENTLY PREVENTED ITS EFFECTIVE USE IN JOB SITUATIONS.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE ORDER OF THE REFEREE. HOWEVER, THE DETERMINATION ORDER OF JANUARY 6, 1975 CANNOT BE SET ASIDE FOR ALL PURPOSES, E.G., CLAIMANT'S AGGRAVATION RIGHTS WILL COMMENCE AS OF THAT DATE - THE REFEREE MAY ONLY MODIFY A DETERMINATION ORDER. IN THIS CASE, BASED UPON THE EVIDENCE, THE REFEREE CUT AN AWARD OF PERMANENT TOTAL DISABILITY BACK TO AN AWARD OF 192 DEGREES WHICH REPRESENTS 60 PER CENT OF THE MAXIMUM ALLOWABLE FOR UNSCHEDULED DISABILITY.

THE BOARD AGREES WITH THE REFEREE THAT CLAIMANT HAS THE BURDEN OF PROVING PERMANENT TOTAL DISABILITY STATUS AND UNLESS THE MEDICAL EVIDENCE OF THE CLAIMANT'S UNSCHEDULED PHYSICAL IMPAIRMENT COUPLED WITH OTHER RELEVANT FACTORS AFFECTING HIS EMPLOYMENT, ESTABLISHES, PRIMA FACIE, HIS PERMANENT TOTAL DISABILITY HE MUST ALSO ESTABLISH HIS WILLINGNESS TO SEEK GAINFUL AND SUITABLE REGULAR EMPLOYMENT.

IT IS THE BOARD'S OPINION THAT THE EVIDENCE IN THIS CASE INDICATES THAT CLAIMANT IS NOT WILLING TO SEEK GAINFUL AND SUITABLE REGULAR EMPLOYMENT - HE HAS SUBSTANTIAL INDEPENDENT SOURCES OF INCOME AND HE IS NOT HESITANT TO STATE THAT HE CONSIDERS HIMSELF RETIRED AND DOES NOT WISH TO SEEK ANY VOCATIONAL REHABILITATION WHICH MIGHT ENABLE HIM TO ENGAGE IN LIGHTER EMPLOYMENT.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 5, 1975, IS AFFIRMED.

WCB CASE NO. 75-2444B JUNE 24, 1976
WCB CASE NO. 75-2445B

FRANCISCO VILLAVICENCIO, CLAIMANT

DON SWINK, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH REMANDED TO IT CLAIMANT'S CLAIM TO BE ACCEPTED FOR THE PAYMENT OF BENEFITS, AS PROVIDED BY LAW, FROM NOVEMBER 30, 1974 UNTIL THE CLAIM IS CLOSED PURSUANT TO ORS 656.268, AND AWARDED CLAIMANT'S ATTORNEY A FEE OF 1250 DOLLARS, PAYABLE BY THE FUND.

THE ISSUES BEFORE THE REFEREE INVOLVED TWO CLAIMS - (1) A CLAIM FOR AGGRAVATION (WCB CASE NO. 75-2444B) AND (2) A CLAIM FOR A NEW INJURY SUSTAINED ON MARCH 26, 1975 (WCB CASE NO. 75-2445B).

CLAIMANT IS A 56 YEAR OLD MEXICAN WHO HAS LIVED IN THE UNITED STATES SINCE 1942 AND IS ABLE TO SPEAK AND UNDERSTAND THE ENGLISH LANGUAGE FLUENTLY. ON OCTOBER 3, 1973, WHILE IN THE EMPLOY OF THE UNITED MEDICAL LABORATORIES, CLAIMANT SUSTAINED A COMPENSABLE INJURY WHICH INVOLVED HIS SHOULDER BLADES, SHOULDERS AND NECK. THE CLAIM FOR THE INJURY INDICATED THAT IT WAS HIS LEFT SHOULDER, HOWEVER, THE MEDICAL REPORTS INDICATE THAT IT WAS MORE GENERALLY BETWEEN THE SHOULDER BLADES WITH PAIN IN THE RIGHT SHOULDER DIAGNOSED AS TRAUMATIC BURSITIS CAUSED BY THE INDUSTRIAL INJURY. THIS INJURY WAS TREATED CONSERVATIVELY WITHOUT ANY APPARENT RESIDUALS UNTIL THE WINTER OF 1974.

CLAIMANT LEFT THE UNITED MEDICAL LABORATORIES IN JANUARY, 1974 AND STARTED WORKING WITH TRI-MET IN NOVEMBER, 1974, DURING THE INTERIM CLAIMANT HAD WORKED FOR SEVERAL DIFFERENT EMPLOYERS AND TESTIFIED THAT HE HAD NO PARTICULAR PROBLEMS WITH HIS SHOULDERS THROUGHOUT THAT PERIOD EXCEPT FOR OCCASIONAL ACHE AND PAIN.

CLAIMANT HAD WORKED APPROXIMATELY FOUR MONTHS FOR TRI-MET AS A BUS DRIVER WHEN HE ALLEGEDLY SUSTAINED AN INDUSTRIAL INJURY ON MARCH 26, 1975, WHICH INVOLVED HIS RIGHT SHOULDER. CLAIMANT TESTIFIED THAT HE HAD SUFFERED AN INJURY EARLIER IN JANUARY, 1975 AND THAT BOTH INCIDENTS OCCURRED WHILE HE WAS DRIVING BUSES WHICH DID NOT HAVE POWER STEERING.

CLAIMANT FILED HIS CLAIM FOR THE MARCH 26, 1975 INJURY ON MAY 2, 1975. THE FUND DENIED THE CLAIM BY LETTER DATED JUNE 2, 1975 WHICH INFORMED CLAIMANT THAT HE HAD AN OPEN CLAIM WITH THE EMPLOYEE BENEFITS INSURANCE COMPANY FOR HIS 1973 INJURY AND WAS STILL RECEIVING COMPENSATION BENEFITS FROM THEM - ALSO, THAT DR. WELLS HAD INFORMED IT THAT CLAIMANT'S PRESENT SYMPTOMS WERE RELATED BACK TO HIS PRE-EXISTING SHOULDER INJURY.

CLAIMANT REQUESTED A HEARING ON THIS DENIAL AND, THEREAFTER, EMPLOYEE BENEFITS INSURANCE COMPANY, THE WORKMEN'S COMPENSATION CARRIER FOR UNITED MEDICAL LABORATORIES, REQUESTED THE BOARD TO DESIGNATE A PAYING AGENCY PURSUANT TO ORS 656.307. THE BOARD ISSUED ITS ORDER, ON JUNE 16, 1975, DIRECTING THE STATE ACCIDENT INSURANCE FUND TO IMMEDIATELY COMMENCE PAYMENT OF BENEFITS TO CLAIMANT IN ACCORDANCE WITH CHAPTER 656 AND TO CONTINUE PAYMENTS UNTIL SUCH TIME AS THE RESPONSIBLE PARTY HAD BEEN DETERMINED BY A HEARING.

THE FUND CONTENDS THAT CLAIMANT CANNOT PREVAIL ON A NEW CLAIM

FOR THREE REASONS – (1) TIMELY NOTICE OF THE MARCH 26, 1975 CLAIM WAS NOT GIVEN, THE CLAIM WAS NOT FILED UNTIL MAY 2, 1975 – (2) THERE HAD BEEN NO TIMELY REQUEST FOR HEARING FILED WITHIN 60 DAYS FROM THE DATE OF THE FUND'S DENIAL OF JUNE 2, 1975 AND (3) THAT THE ORDER ENTERED BY THE BOARD PURSUANT TO ORS 656.307 WAS INVALID AND CONFERRED NO RIGHT TO A HEARING ON BEHALF OF CLAIMANT.

THE REFEREE FOUND THAT THE FUND DID HAVE NOTICE WITHIN ONE WEEK AFTER THE STATUTORY TIME FOR FILING THE CLAIM HAD EXPIRED AND THAT THE FUND HAD NOT BEEN PREJUDICED BY SUCH FAILURE TO RECEIVE THE NOTICE OF CLAIM UNTIL MAY 2, 1975. THE REFEREE FOUND THAT THE FUND'S CONTENTION WITH RESPECT TO TIMELINESS OF FILING THE REQUEST FOR HEARING UPON THE DENIAL ALSO MUST FAIL BECAUSE THE ORDER ISSUED BY THE BOARD PURSUANT TO ORS 656.307 IS THE SAME AS A REQUEST FOR HEARING BY THE CLAIMANT AND IT WAS ENTERED WITHIN 15 DAYS AFTER THE FORMAL DENIAL BY THE FUND.

WITH RESPECT TO THE VALIDITY OF THE BOARD'S ORDER, ISSUED PURSUANT TO ORS 656.307, THE REFEREE FOUND THAT BY ITS VERY TERMS THE ORDER SPECIFICALLY PROVIDES FOR THE PAYMENT OF BENEFITS UNTIL A DETERMINATION OF THE RESPONSIBLE PAYING PARTY HAS BEEN MADE. SUBSECTION (A) OF ORS 656.307 PROVIDES THAT RESPONSIBILITY BETWEEN EMPLOYER AND–OR CARRIER MAY BE AJUDICATED. NOT ONLY IS CLAIMANT ENTITLED TO FILE A REQUEST FOR HEARING, BUT PURSUANT TO SUBSECTION (3) CLAIMANT MUST BE JOINED AS A NECESSARY PARTY BY ANY OTHER PARTY REQUESTING THE HEARING. CLAIMANT MAY ELECT TO BE TREATED AS A NORMAL PARTY IF IT SO DESIRES – IN THE INSTANT CASE CLAIMANT DID NOT SO ELECT AND HE IS A PROPER PARTY UNDER THE BOARD'S ORDER PURSUANT TO ORS 656.307.

ON THE MERITS AS TO WHETHER CLAIMANT HAS SUFFERED AN AGGRAVATION OR A NEW INJURY, THE REFEREE, RELYING UPON THE MEDICAL REPORTS AND THE TESTIMONY OF THE CLAIMANT, CONCLUDED THAT THERE HAD BEEN BOTH A NEW INJURY AND AN AGGRAVATION OF A PRE-EXISTING INJURY.

DR. WELLS STATED, BASED UPON HIS EXAMINATION, THAT THERE WAS A TOTAL TEAR OF THE SUPRASPINATUS OF APPROXIMATELY 50 PER CENT AND A 30 PER CENT TEAR OF THE SUBSCAPULARIS WITH EXTENSIVE RETRACTION AND THERE WAS AN INDICATION THAT THIS WAS AN OLD INJURY AND THE PROBLEM NOTED ON MARCH 26, 1975 WAS PROBABLY SECONDARY TO AN EXACERBATION OF A PRE-EXISTING INJURY TO THE RIGHT SHOULDER. HOWEVER, DR. GRAY DOUBTED THAT THERE WAS A RELATIONSHIP BETWEEN THE ROTATOR CUFF INJURY AND THE INJURY HAVING OCCURRED TO THE RIGHT SHOULDER EARLIER, ALTHOUGH HE WAS OF THE OPINION THAT CLAIMANT COULD HAVE HAD A PRE–EXISTING TEAR OF THE CUFF EVEN BEFORE HIS FIRST INJURY IN OCTOBER, 1973 WHICH HAD NOT BEEN GIVING HIM ANY TROUBLE.

THE REFEREE CONCLUDED THAT THE WORK ACTIVITIES OF CLAIMANT SINCE NOVEMBER, 1974, I.E., DRIVING BUSES FOR TRI–MET, WAS A (UNDERSCORED) CONTRIBUTING FACTOR LEADING TO CLAIMANT'S MEDICAL CONDITION AS DIAGNOSED BY SURGERY AND, THEREFORE, CLAIMANT HAD SUSTAINED A COMPENSABLE INJURY WHILE IN THE EMPLOY OF TRI–MET AND THE RESPONSIBILITY FOR SUCH INJURY WAS THAT OF THE STATE ACCIDENT INSURANCE FUND. HE DIRECTED THE STATE ACCIDENT INSURANCE FUND TO ACCEPT THE CLAIM AS OF NOVEMBER 30, 1974, THE DATE CLAIMANT'S FIRST COMPLAINT OF DIFFICULTIES ARISING FROM HIS EMPLOYMENT AT TRI–MET WAS MADE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 5, 1975, IS AFFIRMED.

CLAIMANT'S ATTORNEY IS AWARDED AS A REASONABLE ATTORNEY FEE FOR HIS SERVICES IN RELATION WITH THIS BOARD REVIEW THE SUM OF 300 DOLLARS PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-3528 JUNE 24, 1976

JAMES WILSON, CLAIMANT

A. J. MORRIS, CLAIMANT'S ATTY.
J. W. MC CRACKEN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH GRANTED CLAIMANT COMPENSATION FOR PERMANENT TOTAL DISABILITY AS OF THE DATE OF THE ORDER.

CLAIMANT SUSTAINED A COMPENSABLE INJURY ON SEPTEMBER 30, 1973 WHEN HE INJURED HIS LOW BACK SHOVELING SAWDUST. AFTER CONSERVATIVE TREATMENT, CLAIMANT UNDERWENT A LAMINECTOMY AND FUSION. A DETERMINATIVE ORDER, DATED AUGUST 15, 1975, AWARDED HIM 112 DEGREES FOR 35 PER CENT OF THE MAXIMUM ALLOWABLE FOR UNSCHEDULED PERMANENT PARTIAL DISABILITY.

ON MAY 16, 1975 DR. DEGGE REPORTED CLAIMANT HAD MADE A SUCCESSFUL RECOVERY FROM THE FUSION, THAT THERE WERE RESIDUAL SYMPTOMS OF PAIN IN THE SMALL OF THE BACK AND SOME RESTRICTED MOTION DUE TO SPONDYLOSIS IN THE UPPER LUMBAR AND LOWER DORSAL SEGMENTS. DR. DEGGE FOUND CLAIMANT TO BE STATIONARY AND CONSIDERED HIS PERMANENT RESIDUALS TO BE OF MODERATE SEVERITY.

CLAIMANT RETURNED TO HIS EMPLOYER, WEYERHAEUSER, IN AN ATTEMPT TO BE RE-EMPLOYED BUT WAS TOLD THERE WAS NO WORK AVAILABLE WHICH HE WOULD BE ABLE TO DO.

THE BOARD, ON DE NOVO REVIEW, AGREES THAT CLAIMANT'S DISABILITY NOW PREVENTS HIM FROM GAINING EMPLOYMENT IN ANY AREA REQUIRING THE HEAVY USE OF HIS BACK. IT IS ALSO APPARENT THAT ADEQUATE REHABILITATION EFFORTS HAVE NOT BEEN EXTENDED TO CLAIMANT WHEREBY HE MIGHT RECEIVE ASSISTANCE AND TRAINING WHICH WOULD ENABLE HIM TO PERFORM SOME TYPE OF LIGHT WORK WITHIN HIS CAPABILITIES.

BASED ON THE MEDICAL EVIDENCE OF RECORD, THE BOARD DOES NOT FIND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED, NOR DOES IT FIND THE AWARD MADE BY THE EVALUATION DIVISION TO BE ADEQUATE. THE BOARD CONCLUDES THAT CLAIMANT HAS SUSTAINED PERMANENT PARTIAL DISABILITY EQUAL TO 80 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR UNSCHEDULED DISABILITY.

THE BOARD IS HOPEFUL THAT SOME CONCENTRATED REHABILITATIVE EFFORTS CAN BE MADE BY THE EMPLOYER, THE DISABILITY PREVENTION DIVISION OR THE DIVISION OF VOCATIONAL REHABILITATION TO ASSIST THIS CLAIMANT IN SOME TYPE OF RETRAINING, GUIDANCE OR COUNSELING WHICH POSSIBLY COULD ENABLE CLAIMANT TO BECOME EMPLOYED AT AN OCCUPATION WITHIN HIS LIMITED CAPABILITIES.

ORDER

THE ORDER OF THE REFEREE IS MODIFIED.

CLAIMANT IS AWARDED 256 DEGREES OF A MAXIMUM 320 DEGREES FOR

UNSCHEDULED LOW BACK DISABILITY. THIS IS IN LIEU OF THE AWARD OF PERMANENT TOTAL DISABILITY MADE BY THE REFEREE, WHOSE ORDER IS IN ALL OTHER RESPECTS AFFIRMED.

WCB CASE NO. 74-3401 JUNE 24, 1976
WCB CASE NO. 74-3412

VEVLY SNETHEN, CLAIMANT

ROLF OLSON, CLAIMANT'S ATTY.
KEITH SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DENIALS MADE BY TWO CARRIERS WITH RESPECT TO CLAIMANT'S CLAIM FOR COMPENSATION.

CLAIMANT CONTENDS SHE PRESENTLY SUFFERS FROM EMPHYSEMA CAUSED BY HER WORK IN A PROCESSING PLANT, BRINING CHERRIES. SHE HAD WORKED AT WILLAMETTE CHERRY GROWERS FOR APPROXIMATELY TEN YEARS UNTIL SHE QUIT WORK ON DECEMBER 20, 1973.

LIBERTY MUTUAL INSURANCE COMPANY INSURED WILLAMETTE CHERRY GROWERS, INC., TO NOVEMBER, 1973 - FROM NOVEMBER 1, 1973 INSURANCE WAS PROVIDED BY EMPLOYERS INSURANCE OF WAUSAU.

CLAIMANT FILED A REPORT OF INJURY WITH LIBERTY MUTUAL ON JULY 29, 1974 AND WITH EMPLOYERS INSURANCE OF WAUSAU ON AUGUST 16, 1974. BOTH CARRIERS DENIED RESPONSIBILITY ON THE BASIS THAT CLAIMANT DID NOT FILE HER CLAIM WITHIN 180 DAYS FROM THE DATE SHE BECAME DISABLED (DECEMBER 20, 1973), OR WAS INFORMED BY A PHYSICIAN THAT SHE WAS SUFFERING FROM AN OCCUPATIONAL DISEASE, WHICHEVER WAS LATER.

AS FAR BACK AS 1968 CLAIMANT WAS ADVISED BY DR. ATKINSON TO STAY AWAY FROM CHERRY BRINE WHICH, COUPLED WITH HER SMOKING, WAS HER PRIMARY IRRITANT - THAT HER OCCUPATION WAS CONTRIBUTING TO HER PROBLEM. AGAIN, IN FEBRUARY, 1972, HE TOLD HER TO CONSIDER OTHER EMPLOYMENT.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDING OF THE REFEREE THAT CLAIMANT DID NOT FILE A CLAIM FOR COMPENSATION WITHIN THE TIME REQUIRED BY STATUTE. THE BOARD FURTHER FINDS, ON THE MERITS, THAT CLAIMANT'S EXPOSURE TO CHERRY BRINE EXACERBATED HER CONDITION BUT THE PRIMARY CAUSE OF HER LUNG IMPAIRMENT WAS DUE TO CLAIMANT SMOKING FOR A MAJOR PORTION OF HER LIFE.

THE BOARD AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED OCTOBER 27, 1975, IS AFFIRMED.

WCB CASE NO. 75-639 JUNE 24, 1976

RICK REMINGTON, CLAIMANT

DAVID VANDENBERG, CLAIMANT'S ATTY.
ROGER WARREN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW ON THE ISSUE OF THE EXTENT OF PERMANENT DISABILITY SUSTAINED BY CLAIMANT AS A RESULT OF HIS COMPENSABLE INDUSTRIAL INJURY. A DETERMINATION ORDER, DATED JANUARY 31, 1975, HAD AWARDED CLAIMANT 32 DEGREES FOR 10 PER CENT OF THE MAXIMUM FOR UNSCHEDULED RIGHT SHOULDER DISABILITY AS WELL AS CERTAIN TEMPORARY TOTAL DISABILITY. THE REFEREE INCREASED THE AWARD TO 80 DEGREES FOR 25 PER CENT OF THE MAXIMUM.

ON DECEMBER 21, 1973 CLAIMANT SUFFERED A SHOULDER SEPARATION WHILE EMPLOYED IN THE LOGGING INDUSTRY. HE HAD SUFFERED TWO PRIOR DISLOCATIONS WHILE PLAYING FOOTBALL IN HIGH SCHOOL. IN MARCH, 1974, CLAIMANT UNDERWENT RIGHT SHOULDER SURGERY FOR RECURRENT DISLOCATIONS OF THAT SHOULDER. FOLLOWING SURGERY CLAIMANT ENGAGED IN A VIGOROUS PHYSICAL THERAPY PROGRAM TO BUILD UP THE MUSCLE MASS.

AT THE TIME OF HEARING CLAIMANT WAS ENROLLED AT OREGON INSTITUTE OF TECHNOLOGY IN KLAMATH FALLS TAKING A TWO YEAR COURSE TO BECOME A SURVEY ENGINEER.

AT THE REQUEST OF THE CARRIER, CLAIMANT WAS EXAMINED BY DR. BALME IN KLAMATH FALLS. HE REPORTED CLAIMANT WAS DOING WELL AND COULD PURSUE ANY ACTIVITIES DESIRED INCLUDING LIFTING AND VIGOROUS WORK-RELATED ACTIVITIES.

THE BOARD, ON DE NOVO REVIEW, DOES NOT CONCUR WITH THE REFEREE'S FINDING THAT CLAIMANT IS ENTITLED TO ADDITIONAL COMPENSATION EQUAL TO 48 DEGREES. THE BOARD FINDS THAT CLAIMANT'S AWARD OF 32 DEGREES ADEQUATELY COMPENSATES CLAIMANT FOR THE LOSS OF EARNING CAPACITY HE HAS SUSTAINED AS A RESULT OF HIS INDUSTRIAL INJURY.

ORDER

THE ORDER OF THE REFEREE IS REVERSED. THE DETERMINATION ORDER, MAILED JANUARY 31, 1975, IS AFFIRMED.

WCB CASE NO. 75-236 JUNE 24, 1976

FLORENCE JACKSON, CLAIMANT

ROLF OLSON, CLAIMANT'S ATTY.
RAY MIZE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW ON THE REFEREE'S ORDER WHICH GRANTED THE EMPLOYER'S MOTION TO DISMISS THE CLAIM BECAUSE IT WAS NOT TIMELY FILED.

ON DECEMBER 17, 1974 CLAIMANT REPORTED AN INJURY WHICH SHE ALLEGED OCCURRED ON JANUARY 31, 1974 WHEN SHE WAS WORKING AS A BARTENDER AND HER BACK BEGAN TO HURT. INITIALLY, SHE THOUGHT SHE HAD A

COLD IN HER BACK, SHE LEFT WORK ONE HOUR BEFORE THE END OF HER SHIFT AND WENT TO THE HOSPITAL. SHE WAS GIVEN THERAPY TREATMENT AND RETURNED HOME FOR BEDREST FOR ONE WEEK.

BECAUSE HER CONDITION DIDN'T IMPROVE SHE CONTACTED DR. POULSON, WHO EXAMINED HER ON FEBRUARY 2, 1974, RECOMMENDED CONSERVATIVE TREATMENT AND RELEASED HER ON FEBRUARY 13, 1974. CLAIMANT NEVER MENTIONED TO DR. POULSON ANY ACCIDENT OCCURRING ON THE JOB.

ON THE DAY OF THE ALLEGED INJURY CLAIMANT HAD TOLD HER SUPERVISOR SHE HURT HER BACK WRESTLING WITH A FRIEND. AGAIN, WHILE IN THE HOSPITAL, HER EMPLOYER VISITED HER - SHE TOLD HIM SHE WAS HURT AT HOME IN 'A WRESTLING MATCH WITH A FRIEND.'

THE REFEREE FOUND THAT CLAIMANT FIRST TOLD HER EMPLOYER SHE HAD A COLD AND HAD NOT HURT HERSELF ON THE JOB. HOWEVER, AFTER DISCUSSING THE MATTER WITH SOME INSURANCE MEN IN ANOTHER TAVERN WHERE CLAIMANT WENT TO WORK AFTER LEAVING THE EMPLOYER, CLAIMANT FILED HER CLAIM.

THE REFEREE FOUND THE CLAIM WAS UNTIMELY FILED AND GRANTED THE MOTION TO DISMISS. HE DID NOT CONSIDER THE MERITS OF THE CLAIM.

THE BOARD, ON DE NOVO REVIEW, AND AFTER EXAMINATION OF THE EVIDENCE PRESENTED, CONCURS WITH THE REFEREE THAT CLAIMANT'S CLAIM SHOULD BE DENIED FOR UNTIMELY FILING OF THAT CLAIM. THE BOARD ALSO FEELS THAT CLAIMANT'S CLAIM SHOULD BE DENIED ON THE MERITS, BASED UPON DR. POULSON'S REPORT.

ORDER

THE ORDER OF THE REFEREE DATED DECEMBER 3, 1975 IS AFFIRMED.

WCB CASE NO. 75-1057 JUNE 24, 1976

JAMES SPEARS, CLAIMANT

DONALD TODOROVICH, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER DATED JANUARY 9, 1975 AWARDING CLAIMANT 10 PER CENT UNSCHEDULED UPPER BACK AND NECK DISABILITY.

CLAIMANT, A 30 YEAR OLD TIMBER OPERATOR, SUFFERED A BACK AND SHOULDER INJURY ON NOVEMBER 13, 1973 WHEN HE WAS STRUCK BY A FALLING LIMB. DR. TSAI'S DIAGNOSIS WAS CERVICAL CONCUSSION, RECOVERED, RIGHT C7 NERVE ROOT COMPRESSION DUE TO TRAUMATIC DISC HERNIATION, C6-7. CLAIMANT HAS NOT WORKED SINCE THE INJURY AND CONTINUES TO SUFFER NECK AND SHOULDER PAIN.

DR. JAMES H. VAN OLST, WHO SAW CLAIMANT ON JUNE 24, 1975, FELT IF CLAIMANT WOULD SUBMIT TO SURGERY, THE PROBABILITIES OF IMPROVEMENT IN HIS CONDITION WOULD BE IN THE AREA OF 70 TO 75 PER CENT. HOWEVER, CLAIMANT IS FEARFUL OF SURGERY AND DOES NOT WANT TO TAKE THE RISK THAT IT MIGHT NOT BE SUCCESSFUL.

ORS 656.325(2) PROVIDES THAT FOR ANY PERIOD OF TIME DURING WHICH ANY WORKMAN REFUSES TO SUBMIT TO SUCH MEDICAL OR SURGICAL TREATMENT AS IS REASONABLY ESSENTIAL TO PROMOTE HIS RECOVERY, HIS RIGHT TO

COMPENSATION MAY BE SUSPENDED. HOWEVER, THE TEST OF REASONABLENESS IS BASED ON A VARIETY OF FACTORS INCLUDING THE DANGER ATTENDANT TO THE OPERATION, THE PROSPECT OF SUCCESS, AND THE PAIN AND DISCOMFORT WHICH MAY RESULT. HERE CLAIMANT HAS PAIN AND DISCOMFORT IN HIS RIGHT ARM AND SHOULDER WITH ACTIVITY, PHYSIOTHERAPY HAS NOT HELPED HIM. DR. VAN OLST THOUGHT HIS CONDITION COULD BE IMPROVED BY SURGICAL TREATMENT IF SIGNIFICANT EVIDENCE OF NERVE ROOT COMPRESSION WAS EVIDENCED BY MYELOGRAPHY - HOWEVER, UNLESS CLAIMANT IS WILLING TO SUBMIT TO SURGERY, HIS MEDICAL OPINION IS THAT IT WOULD BE USELESS TO SUBJECT HIM TO THIS PROCEDURE.

CLAIMANT WANTS A GUARANTEE OF SUCCESS WHICH IS NOT POSSIBLE. CLAIMANT IS A YOUNG MAN AND ALTHOUGH THERE ALWAYS IS DANGER INVOLVED IN SURGERY, THERE APPEARS TO BE NOTHING UNUSUALLY DANGEROUS IN THE PROCEDURES PROPOSED. THERE IS GOOD PROSPECT OF SUCCESS AND IT IS THE CLAIMANT'S FEAR WHICH PROHIBITS FURTHER MEDICAL AND SURGICAL TREATMENT. THE REFEREE FOUND THAT CLAIMANT'S REFUSAL WAS UNREASONABLE.

THE SERVICES OF THE BOARD'S DISABILITY PREVENTION DIVISION HAVE BEEN MADE AVAILABLE TO CLAIMANT AND, ON THREE DIFFERENT OCCASIONS, HE HAS CANCELLED HIS APPOINTMENT.

IT MAY BE THAT CLAIMANT NOW SUFFERS MORE UNSCHEDULED DISABILITY THAN THAT FOR WHICH HE HAS BEEN AWARDED - HOWEVER, THE EVIDENCE INDICATES THAT IF HIS PHYSICAL DISABILITY HAS BEEN INCREASED IT IS BECAUSE OF HIS REFUSAL TO SUBMIT TO MEDICAL PROCEDURES. THIS IS NOT A PROPER BASIS ON WHICH TO INCREASE THE AWARD. THE REFEREE CONCLUDED THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT CLAIMANT IS ENTITLED TO MORE THAN AN AWARD OF 32 DEGREES.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE REFEREE'S FINDINGS AND CONCLUSIONS AND AFFIRMS AND ADOPTS HIS ORDER.

ORDER

THE ORDER OF THE REFEREE, DATED NOVEMBER 12, 1975, IS AFFIRMED.

WCB CASE NO. 75-3100 JUNE 28, 1976

TERRY YARBROUGH, CLAIMANT

HUGH COLE, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
AMMENDED ORDER ALLOWING ATTORNEY FEE

THE BOARD'S ORDER ON REVIEW ENTERED JUNE 21, 1976 IN THE ABOVE ENTITLED MATTER FAILED TO INCLUDE AN AWARD OF A REASONABLE ATTORNEY FEE.

ORDER

IT IS HEREBY ORDERED THAT CLAIMANT'S COUNSEL RECEIVE A REASONABLE ATTORNEY FEE IN THE AMOUNT OF 350 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 75-2332 JUNE 28, 1976
WCB CASE NO. 75-3480

KIRSTI VIRTANEN, CLAIMANT
DOUGLAS JONES, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AFFIRMED THE DENIAL OF CLAIMANT'S CLAIM FOR AGGRAVATION (WCB CASE NO. 75-3480) AND AWARDED CLAIMANT 22.5 DEGREES FOR 15 PER CENT LEFT LEG DISABILITY (WCB CASE NO. 75-2332). THE TWO MATTERS WERE HEARD ON A CONSOLIDATED BASIS.

CLAIMANT, AT THE TIME A 52 YEAR OLD BEAUTY SHOP OPERATOR, SUFFERED A COMPENSABLE INJURY TO HER RIGHT KNEE ON JANUARY 28, 1970. AN ARTHROTOMY WAS PERFORMED BY DR. BASKIN ON APRIL 21, 1970. ON SEPTEMBER 30, 1970 DR. BASKIN FELT CLAIMANT HAD MADE A COMPLETE RECOVERY AND SHOULD HAVE NO RESIDUAL DISABILITY. THE CLAIM WAS CLOSED BY A DETERMINATION ORDER MAILED OCTOBER 9, 1970 WHICH AWARDED CLAIMANT 8 DEGREES FOR FUNCTIONAL LOSS OF THE RIGHT (UNDERSCORED) LEG.

CLAIMANT CONTENDS THAT SHE INJURED BOTH (UNDERSCORED) KNEES ON JANUARY 28, 1970 - ALSO, AFTER THE 1970 SURGERY THAT THE PAIN WAS INTERMITTANTLY PRESENT AND SHE HAD NEVER FULLY RECOVERED BY SEPTEMBER 30, 1970 AS ASSERTED BY DR. BASKIN.

ON AUGUST 10, 1973 CLAIMANT AGAIN FELL, ALLEGEDLY INJURYING BOTH (UNDERSCORED) KNEES. SHE WAS TREATED BY DR. BUTLER BUT PRIMARILY FOR DEGENERATIVE JOINT DISEASE SUPERIMPOSED UPON THE LEFT (UNDERSCORED) KNEE INJURY. HE RECOMMENDED EXERCISE AND WEIGHT REDUCTION AND BY MAY 13, 1975 FELT THAT CLAIMANT WAS APPROACHING A STATIONARY LEVEL - HER PROBLEM WAS ONE OF OSTEOARTHRITIS INVOLVING PRIMARILY THE LEFT (UNDERSCORED) KNEE.

ON JUNE 26, 1975 DR. SHLIM, AFTER EXAMINING CLAIMANT, WAS OF THE OPINION THAT BOTH KNEES WERE ESSENTIALLY NORMAL. ON JULY 17, 1974 A DETERMINATION ORDER AWARDED CLAIMANT NO COMPENSATION FOR PERMANENT PARTIAL DISABILITY FOR THE AUGUST 10, 1973 INJURY.

THE REFEREE FOUND MEDICAL CONFIRMATION OF CLAIMANT'S COMPLAINTS WITH REGARD TO THE LEFT KNEE. HE ALSO FOUND THAT CLAIMANT HAD FAILED TO PROVE THAT SHE HAD DEVELOPED THIS PERMANENT DISABLING CONDITION IN HER LEFT (UNDERSCORED) KNEE BECAUSE OF THE JANUARY 28, 1970 INJURY AND HAD FAILED TO SHOW THAT HER RIGHT KNEE CONDITION HAS BECOME WORSENED, EXCEPT FOR OCCASIONAL FLAREUPS, SINCE THE ISSUANCE OF THE 1970 DETERMINATION ORDER.

THE REFEREE CONCLUDED THAT THE CLAIMANT'S CLAIM FOR AGGRAVATION OF HER RIGHT KNEE CONDITION WAS PROPERLY DENIED BY THE FUND IN ITS DENIAL LETTER MAILED NOVEMBER 4, 1975.

THE REFEREE CONCLUDED THAT THE RECORD DID SUPPORT AN AWARD OF PERMANENT PARTIAL DISABILITY FOR HER LEFT KNEE RELATED TO THE AUGUST 10, 1973 INJURY WHICH HE EVALUATED AT 22.5 DEGREES FOR 15 PER CENT LOSS OF THE LEFT LEG.

THE BOARD, ON DE NOVO REVIEW, RELYING STRONGLY ON DR. BUTLER'S REPORT, AFFIRMS THE REFEREE'S ORDER.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 11, 1975 IS AFFIRMED.

WCB CASE NO. 74-2027 JUNE 28, 1976

SUSIE STUART, CLAIMANT

LARRY BRUUN, CLAIMANT'S ATTY.
ROGER WARREN, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW ON THE REFEREE'S ORDER WHICH GRANTED CLAIMANT 128 DEGREES FOR 40 PER CENT UNSCHEDULED LOW BACK DISABILITY, CONTENDING SHE IS PERMANENTLY AND TOTALLY DISABLED.

ON SEPTEMBER 14, 1972 CLAIMANT WAS WORKING AS A PLYWOOD WORKER WHEN SHE SLIPPED AND FELL INJURYING HER LOW BACK. THE NEXT DAY SHE WAS SEEN BY DR. HANFORD. SUBSEQUENTLY, SHE RETURNED TO WORK AS A GRADER, A JOB WHICH REQUIRED NO PHYSICAL LABOR. SHE DID WELL UNTIL SHE WAS REQUIRED TO HANDLE VENEER, THIS CAUSED AN ONSET OF PAIN. SHE RETURNED TO DR. HANFORD WHO FOUND MILD SPASMS AND LIMITATION OF MOTION - DR. HANFORD CONSIDERED HER CONDITION AS MILD.

CLAIMANT RETURNED TO WORK AND WORKED UNTIL FEBRUARY 21, 1974 WHEN SHE QUIT WORK BECAUSE OF THE PAIN IN HER BACK. SHE HAS NOT WORKED SINCE.

CLAIMANT WAS SEEN BY DR. YOUNG ON MARCH 25, 1974, HE DIAGNOSED A LUMBOSACRAL STRAIN AND DEGENERATIVE ARTHRITIS AND FOUND CLAIMANT'S CONDITION WAS RELATED TO HER SEPTEMBER, 1972 INJURY. HE RECOMMENDED NO TREATMENT AND FOUND CLAIMANT MEDICALLY STATIONARY.

A DETERMINATION ORDER, MAILED ON OCTOBER 31, 1973, AWARDED CLAIMANT NO COMPENSATION FOR PERMANENT PARTIAL DISABILITY.

CLAIMANT WAS SEEN AT THE PAIN CLINIC ON NOVEMBER 18, 1974. AFTER EXAMINATION, CLAIMANT'S PHYSICAL IMPAIRMENT WAS FOUND TO BE MILD TO MODERATE, IT WAS FELT SHE SHOULD RETURN TO WORK BUT THAT SHE PROBABLY WOULDN'T.

CLAIMANT SAW DR. YOSPE, ON MARCH 14, 1975. AFTER A PSYCHOLOGICAL EXAMINATION, HE FOUND CLAIMANT TO BE SATISFIED WITH NOT WORKING EVER AGAIN.

BOTH DR. RUSSAKOV AND THE DOCTORS AT ORTHOPEDIC CONSULTANTS FOUND CLAIMANT'S DISABILITY TO BE MILD.

CLAIMANT HAS A GOOD WORK RECORD HAVING WORKED FOR THE EMPLOYER FOR 16 YEARS - HOWEVER, SHE IS NOT MOTIVATED TO RETURN TO WORK EVEN THOUGH THE MEDICAL CONCENSUS IS THAT HER DISABILITY IS 'MILD'. SHE IS NOT INTERESTED IN SEEKING HELP FROM THE DIVISION OF VOCATIONAL REHABILITATION AND SHE IS SEEKING SOCIAL SECURITY DISABILITY BENEFITS. CLAIMANT IS 54 YEARS OLD AT THE PRESENT TIME WITH A 7TH GRADE EDUCATION.

THE REFEREE FOUND, BASED UPON HER AGE, WORK EXPERIENCE, AND EDUCATION, THAT CLAIMANT WAS NOT WITHIN THE ODD-LOT CATEGORY, EVEN IF SHE WERE MOTIVATED TO RETURN TO SOME GAINFUL EMPLOYMENT, WHICH APPARENTLY SHE WAS NOT.

THE REFEREE, BASING HIS FINDINGS ON SIMILAR CASES, FOUND CLAIMANT'S DISABILITY TO BE 40 PER CENT UNSCHEDULED PERMANENT PARTIAL DISABILITY.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 2, 1975, IS AFFIRMED.

WCB CASE NO. 75-1220 JUNE 28, 1976

CHARLES PLONSKI, CLAIMANT

J. DAVID KRYGER, CLAIMANT'S ATTY.
BOB JOSEPH, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER GRANTING CLAIMANT 7.5 DEGREES FOR 5 PER CENT LOSS OF THE LEFT LEG. CLAIMANT HAD PREVIOUSLY BEEN AWARDED A TOTAL OF 97.5 DEGREES FOR 65 PER CENT FOR LOSS OF THE LEFT FOREARM.

CLAIMANT SUSTAINED A COMPENSABLE INJURY TO HIS LEFT WRIST ON AUGUST 4, 1971 WHILE CLIMBING DOWN A LADDER. DR. BURR DIAGNOSED A SEVERE FRACTURE COMMINUTED OF THE LEFT DISTAL RADIUS AND WRIST. CLAIMANT WAS HOSPITALIZED AND OPEN REDUCTION SURGERY WAS PERFORMED. CLAIMANT SUBSEQUENTLY RETURNED TO WORK.

ON JULY 8, 1972 A DETERMINATION ORDER WAS ISSUED GRANTING CLAIMANT TEMPORARY TOTAL DISABILITY AND PERMANENT PARTIAL DISABILITY OF 40 PER CENT LOSS OF THE LEFT FOREARM.

ON OCTOBER 19, 1972 DR. BURR EXAMINED CLAIMANT AND NOTED SEVERE ARTHRITIS IN THE LEFT WRIST WITH ANKYLOSIS. HE COMMENTED THAT CLAIMANT'S WRIST WOULD REMAIN PAINFUL AND CLAIMANT COULDN'T PERFORM ANY WORK REQUIRING HEAVY USE OF THE WRIST UNTIL A FUSION COULD BE PERFORMED.

ON MARCH 2, 1973 AN OPINION AND ORDER GRANTED CLAIMANT AN ADDITIONAL 25 PER CENT PERMANENT PARTIAL DISABILITY FOR LOSS OF FUNCTION OF THE LEFT FOREARM.

THE FUSION OF THE LEFT WRIST SURGERY WAS PERFORMED ON FEBRUARY 18, 1974 AND INCLUDED A MASSIVE LEFT ILIAC BONE GRANT. AN EXAMINATION ON FEBRUARY 13, 1975 REVEALED FULL RANGE OF MOTION IN SHOULDERS AND ELBOWS, NO MOTION AT ALL IN THE WRIST FUSION AND EXCELLENT ROTATION OF THE FOREARM. ON FEBRUARY 14, 1975 DR. BURR FOUND CLAIMANT TO BE MEDICALLY STATIONARY.

CLAIMANT SAW DR. BERG, AN ORTHOPEDIC SURGEON, ON SEPTEMBER 8, 1975. CLAIMANT HADN'T RETURNED TO WORK SINCE HIS 1974 SURGERY. DR. BERG FOUND 70 PER CENT LOSS OF FUNCTION OF THE LEFT ARM AND ALSO 5 PER CENT LOSS OF FUNCTION IN THE LEFT LEG DUE TO PROLIFERATED BONE CHANGES FOLLOWING BONE GRAFT AND THE RESULTANT SENSORY NERVE DEFICIT BENEATH THE INCISION.

THE REFEREE CONCLUDED THAT CLAIMANT'S AWARDS, TOTALLING 97.5 DEGREES FOR 65 PER CENT LOSS OF THE LEFT FOREARM, WERE CONSISTENT

WITH THE MEDICAL FINDINGS. LOSS OF FUNCTION IS THE SOLE CRITERION IN DETERMINING SCHEDULED DISABILITY. THE REFEREE ALSO CONCLUDED THAT CLAIMANT BE AWARDED 7.5 DEGREES FOR 5 PER CENT LOSS OF THE LEFT LEG, BASED ON DR. BERG'S REPORT.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 18, 1975, IS AFFIRMED.

WCB CASE NO. 74-4550 JUNE 28, 1976

KALLIE DUGGAN, CLAIMANT

MICHAEL STROOBAND, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH ORDERED THE DETERMINATION ORDER MAILED JULY 5, 1974 TO BE SET ASIDE IN ITS ENTIRETY AND TO BE VOID FOR ALL PURPOSES, THAT TEMPORARY TOTAL DISABILITY COMPENSATION TO CLAIMANT BE RESUMED AS OF JUNE 18, 1974 AND THAT MEDICAL CARE AND TREATMENT BE AFFORDED CLAIMANT UNTIL SUCH TIME AS HER CLAIM IS CLOSED PURSUANT TO ORS 656.268. THE REFEREE FURTHER ORDERED ANY PAYMENTS MADE FOR PERMANENT PARTIAL DISABILITY BE CREDITED AGAINST THE TEMPORARY TOTAL DISABILITY PAYMENTS AWARDED BY HIS ORDER - HE SET ASIDE THE DENIAL LETTER, DATED NOVEMBER 13, 1974, ORDERED THE FUND TO PAY CLAIMANT A PENALTY OF 25 PER CENT OF THE COMPENSATION DUE CLAIMANT BY REASON OF HIS ORDER FROM THE DATE OF THE DENIAL TO THE DATE OF THE HEARING, MARCH 10, 1975 AND TO PAY CLAIMANT'S ATTORNEY A FEE OF 1250 DOLLARS.

THE CLAIMANT FILED A CROSS REQUEST FOR REVIEW BY THE BOARD, CONTENDING THAT THAT PORTION OF THE ORDER DIRECTING ANY PAYMENTS MADE FOR PERMANENT PARTIAL DISABILITY BE CREDITED AGAINST THE TEMPORARY TOTAL DISABILITY PAYMENTS AWARDED BY THE ORDER SHOULD BE REVERSED.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON DECEMBER 26, 1973 WHILE EMPLOYED AS A PUNCH PRESS OPERATOR. SHE WAS ASSISTING A COWORKER TO LIFT A 250 POUND ROLL OF SHEET GLASS AND HER END OF THE ROLL SLIPPED, JARRING HER AND CAUSING PAIN IN HER RIGHT SHOULDER, ARM, RIBS AND CERVICAL AREA. CLAIMANT QUIT WORK SHORTLY THEREAFTER AND WAS TREATED BY HER FAMILY PHYSICIAN, DR. EDMUNDSON, WHO HOSPITALIZED CLAIMANT ON DECEMBER 29, 1973 FOR CONSERVATIVE TREATMENT. SHE WAS RELEASED ON JANUARY 4, 1974, AND, THEREAFTER, WAS SEEN BY DR. EDMUNDSON ON APPROXIMATELY 15 SEPARATE OCCASIONS.

ON APRIL 17, 1974 DR. HALFERTY AT THE DISABILITY PREVENTION DIVISION EXAMINED CLAIMANT AND FOUND MILD CHEST, NECK AND SHOULDER INJURIES AND A LARGE FUNCTIONAL OVERLAY. X-RAYS SHOWED NO DEGENERATIVE CHANGES, CLAIMANT HAD A NORMAL SPINE AND SHOULDER. DR. HALFERTY RECOMMENDED THAT CLAIMANT BE SEEN BY DR. PERKINS AND ALSO BY THE BACK EVALUATION CLINIC.

ON APRIL 22, 1974 DR. JULIA PERKINS, A CLINICAL PSYCHOLOGIST, STATED SHE WAS INCLINED TO BELIEVE THAT PSYCHOLOGICAL FACTORS WERE HINDERING THE RETURN OF CLAIMANT TO GAINFUL EMPLOYMENT. THERE APPEARED TO BE SOME SECONDARY GAIN NOT TO RETURN TO WORK AS CLAIMANT'S

HUSBAND WAS VERY ILL FROM EMPHYSEMA AND SCLEROSIS - ILL TO THE EXTENT THAT SHE INTERPRETS HIM AS BEING ON THE VERGE OF DEATH. DR. PERKINS FELT THIS CONVERSION REACTION PROBABLY STEMMED FROM CLAIMANT'S INJURY BUT IT WAS DIFFICULT TO DETERMINE PRECISELY - IT WAS ALSO DIFFICULT TO DETERMINE PERMANENCY OF THE PSYCHOPATHOLOGY.

CLAIMANT WAS EVALUATED BY THE BACK EVALUATION CLINIC ON APRIL 17. THE DIAGNOSIS WAS A PROBABLE SPRAIN TO THE RIGHT SHOULDER WITH POSSIBLE MILD CERVICAL STRAIN, SEVERE FUNCTIONAL OVERLAY WITH HYSTERICAL CONVERSION SYMPTOMS WITH THE MOTOR AND SENSORY LOSS IN THE RIGHT ARM BEING HER MAIN CONVERSION SYMPTOM. THEY FELT THAT THE TOTAL LOSS OF FUNCTION AS IT EXISTED AT THAT TIME WAS MINIMAL, AND THE LOSS OF FUNCTION DUE TO THE INJURY WAS THAT NO FURTHER NEUROLOGICAL OR ORTHOPEDIC TREATMENT WAS INDICATED - HOWEVER, THEY DID FEEL QUITE STRONGLY THAT CLAIMANT NEEDED PSYCHIATRIC CARE.

ON JUNE 7, 1974 CLAIMANT WAS GIVEN A PSYCHIATRIC EXAMINATION BY DR. QUAN. HIS INITIAL COMMENT WAS THAT THERE APPEARED TO BE CLEAR EVIDENCE OF SECONDARY GAIN AS A RESULT OF CLAIMANT'S IMPAIRMENT AND IT WAS POSSIBLE THAT CLAIMANT WAS MALINGERING ALTHOUGH HE DID NOT HAVE ANY EVIDENCE TO SUPPORT THIS. HE FELT THAT SHE MIGHT HAVE CONVERSION SYMPTOMS AND THAT THE DEGREE TO WHICH SHE WAS DISABLED IN EITHER REGARD COULD BEST BE EVALUATED BY THE ACTUAL FUNCTIONAL CAPACITY AS DETERMINED BY AN ORTHOPEDIST. HER PERSONALITY DIFFICULTY WOULD NOT PRECLUDE HER FROM GAINFUL EMPLOYMENT.

ON JUNE 17, 1974 DR. QUAN CLARIFIED HIS EARLIER REPORT, STATING HE HAD, IN THE INTERIM, REVIEWED THE MEDICALS, INCLUDING THE PSYCHOLOGICAL INFORMATION WRITTEN BY DR. PERKINS, AND HIS OPINION REMAINED UNCHANGED. HE FELT THAT CLAIMANT'S PRIMARY DIFFICULTY WAS OF A PERSONALITY DISTURBANCE, HOWEVER, SHE DID HAVE INEFFECTIVE USE OF HER RIGHT UPPER LIMB. HE FELT THAT SECONDARY GAIN FEATURES AND POSSIBLY PRIMARY GAIN HAD TO DO WITH HER RELATIONSHIPS WITH HER HUSBAND AND 19 YEAR OLD SON, WHO IS NOT WELL, AND THESE FACTORS COULD INFLUENCE THE PRESENCE OF EITHER A CONVERSION NEUROTIC DISORDER OR MALINGERING. HE WAS NOT ABLE TO DISCERN, ON THE BASIS OF ONE EXAMINATION, WHICH IT MIGHT BE AND SUGGESTED POSSIBLY SURVEILLANCE TECHNIQUES WHICH WOULD REVEAL A CLEAR NOTION OF HER ACTUAL RESIDUAL IMPAIRMENT. IN THE SAME WAY, THOUGH THE INJURY SEEMED PRECIPITATED BY AN INDUSTRIAL ACCIDENT, THE UNDERLINING PSYCHOLOGICAL DYNAMIC EXPLANATION HAD TO DO WITH ISSUES NOT RELATED TO WORK. THESE COMBINED WITH HER OWN INADEQUACY SERVED TO EXPLAIN THE PSYCHOLOGICAL BASIS FOR HER RIGHT ARM PROBLEMS.

ON JULY 5, 1974 A DETERMINATION ORDER AWARDED CLAIMANT COMPENSATION FOR TEMPORARY TOTAL DISABILITY AND 16 DEGREES FOR 5 PER CENT UNSCHEDULED RIGHT SHOULDER DISABILITY.

THE REFEREE FOUND THAT THE CLAIM WAS PREMATURELY CLOSED. HE FELT THE STATEMENT FROM THE BACK EVALUATION CLINIC CLEARLY INDICATED THAT THEY FELT STRONGLY THAT CLAIMANT NEEDED PSYCHIATRIC CARE AND COUNSELING - ALSO, AT THE TIME OF THE CLOSURE CLAIMANT WAS UNDER ACTIVE TREATMENT BY DR. BAUERS. HE FELT THAT THE CLOSURE MUST HAVE BEEN BASED UPON A 'CONCLUSION' THAT THERE WAS A PROBLEM OF FUNCTIONAL OVERLAY AND ALL OTHER MATTERS CONTAINED IN THE VARIOUS REPORTS, RECOMMENDATIONS AND FINDINGS WHICH CLEARLY INDICATED THAT CLAIMANT WAS UNABLE TO WORK AND THAT THIS WAS DIRECTLY RELATED TO HER ON-THE-JOB INJURY IN SPITE OF THE REFERENCE TO FUNCTIONAL OVERLAY, WAS COMPLETELY DISREGARDED.

HE CONCLUDED, BASED ON THE EVIDENCE OF THE WITNESSES AT THE HEARING AND THE DOCUMENTARY EVIDENCE, THAT THE CLAIMANT'S CONDITION HAD NOT BEEN MEDICALLY STATIONARY AT THE TIME THE DETERMINATION ORDER WAS ENTERED, THAT, AT THAT TIME, SHE WAS STILL IN NEED OF FURTHER MEDICAL CARE AND TREATMENT. HE THEREFORE SET ASIDE THE DETERMINATION ORDER IN ITS ENTIRETY.

THE REFEREE FOUND THAT DR. BAUERS WHO WAS TREATING CLAIMANT AT THE TIME THE DETERMINATION ORDER WAS ENTERED, HAD WRITTEN A LETTER TO THE FUND ON SEPTEMBER 26, 1974, STATING DIRECTLY AND UNEQUIVOCALLY HIS OPINION THAT CLAIMANT'S DISABILITY WAS RELATED TO HER INDUSTRIAL INJURY AND THAT THERE WERE PSYCHOLOGICAL COMPONENTS ASSOCIATED WITH HER DISABILITY. HE RECOMMENDED FURTHER ORTHOPEDIC AND, POSSIBLY, PSYCHIATRIC EVALUATIONS BE UNDERTAKEN - HE FELT CLAIMANT CERTAINLY WAS IN NEED OF FURTHER THERAPY. AFTER RECEIPT OF THIS LETTER THE FUND HAD CLAIMANT EXAMINED BY DR. GRIPEKOVEN WHO REVIEWED ALL OF THE MEDICAL HISTORY AND CONCLUDED THAT CLAIMANT UNDOUBTEDLY HAD SEVERE EMOTIONAL PROBLEMS WHICH MUST BE RESOLVED BEFORE SHE COULD RETURN TO GAINFUL EMPLOYMENT. ON NOVEMBER 13, 1974 THE FUND DENIED CLAIMANT'S REQUEST TO REOPEN HER CLAIM, STATING IT APPEARED THAT CLAIMANT'S PRESENT PROBLEMS WERE NOT THE RESULT OF THE INDUSTRIAL INJURY.

THE REFEREE FOUND THAT THE DENIAL WAS IMPROPER. THE REPORTS OF DRS. BAUER AND GRIPEKOVEN SHOULD HAVE BEEN REVIEWED WITH THE ENTIRE FILE, AND THE PROBLEM OF PSYCHOLOGICAL DAMAGE CERTAINLY WAS MOST EVIDENT THROUGHOUT THE ENTIRE MEDICAL HISTORY AND THIS ASPECT FOR SOME UNKNOWN REASON HAD BEEN IGNORED.

THE REFEREE ALSO FOUND THE DENIAL WAS NOT JUSTIFIED BECAUSE IT OVERLOOKED AN OBVIOUS SERIOUS CONDITION OF THE CLAIMANT REFERRED TO BY DR. BAUER'S LETTER. HE CONCLUDED THAT THE DENIAL CONSTITUTED UNREASONABLE RESISTANCE TO COMPENSATION ON THE PART OF THE FUND.

THE REFEREE FOUND THAT DR. CHERRY'S REPORT, DATED MARCH 10, 1975, THREE DAYS BEFORE THE HEARING, SUPPORTED THE EARLIER POSITION OF MEDICAL NEED ON THE PART OF CLAIMANT, BUT HAVING FOUND THAT THE CLAIMANT'S CONDITION STILL WAS NOT MEDICALLY STATIONARY, HE MADE NO RULING ON THE EXTENT OF PERMANENT DISABILITY.

THE BOARD, ON DE NOVO REVIEW, DISAGREES WITH THE ORDER OF THE REFEREE. THE BOARD FINDS NO EVIDENCE TO SHOW A MEDICAL RELATIONSHIP BETWEEN CLAIMANT'S PSYCHOLOGICAL CONDITION AND HER INDUSTRIAL INJURY AND HER PHYSICAL DISABILITY IS VERY MINIMAL.

DR. PERKINS, A PSYCHOLOGIST, SAID CLAIMANT SUFFERED A CONVERSION REACTION - HOWEVER, SHE WAS UNABLE TO DETERMINE PRECISELY IF THIS CONDITION STEMMED FROM CLAIMANT'S INDUSTRIAL INJURY. DR. QUAN, A PSYCHIATRIST, DIAGNOSED CLAIMANT'S PSYCHOLOGICAL DISORDER AS 'INADEQUATE PERSONALITY' AND STRESSED SECONDARY GAIN AS A COMPONENT OF THIS DISORDER. HE BELIEVED THAT CLAIMANT'S CONDITION WAS READY FOR CLOSURE AND DISCOUNTED THE NOTION THAT CLAIMANT'S PSYCHIATRIC DIFFICULTIES WERE RELATED TO HER ON-THE-JOB INJURY - HE EXPLICITLY SUGGESTED THAT CLAIMANT'S DISABILITY BE GAUGED BY AN ORTHOPEDIST. DR. QUAN LATER STATED, AFTER REVIEWING ALL OF THE MEDICAL AND PSYCHOLOGICAL EVIDENCE, THAT THE SECONDARY GAIN FEATURE OF CLAIMANT'S DISORDER HAD TO DO WITH FAMILY RELATIONSHIPS RATHER THAN WITH AN INDUSTRIAL INJURY. HIS OPINION WAS THAT CLAIMANT'S PSYCHOLOGICAL PROBLEMS WERE NOT JOB RELATED. HE SAID - 'THOUGH THE INJURY SEEMED PRECIPITATED BY AN INDUSTRIAL ACCIDENT, THE UNDERLYING PSYCHOLOGICAL DYNAMIC EXPLANATION HAS TO DO WITH ISSUES NOT RELATED TO WORK.' (UNDERSCORED - EMPHASIS SUPPLIED)

THE BOARD FINDS THAT CLAIMANT HAS FAILED TO SUSTAIN HER BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT HER PSYCHOLOGICAL PROBLEMS ARE RELATED TO HER INDUSTRIAL INJURY. IT IS NOT SUFFICIENT, AS THE REFEREE APPARENTLY BELIEVED, THAT CLAIMANT SIMPLY ESTABLISH THAT SHE INDEED HAS PSYCHIATRIC DIFFICULTIES, SHE MUST ALSO ESTABLISH A CAUSAL CONNECTION BETWEEN THESE DIFFICULTIES AND HER WORK AND THE BURDEN OF PROOF IN SUCH A CASE CAN ONLY BE SUSTAINED BY EXPERT MEDICAL EVIDENCE. THIS CASE INVOLVES COMPENSABILITY OF A PSYCHIATRIC PROBLEM, THEREFORE, THE TESTIMONY OF THE PSYCHIATRIST SHOULD BE WEIGHED

AS REFLECTING THE GREATEST EXPERTISE IN THIS AREA. THE PSYCHIATRIC TESTIMONY IS THAT OF DR. QUAN WHO UNEQUIVOCALLY OPINES THAT THE EXPLANATION OF THE PSYCHOLOGICAL DYNAMIC OF CLAIMANT'S RIGHT ARM PROBLEMS RESTS IN ISSUES OUTSIDE HER WORK OR WORK INJURIES. THE REPORT OF DR. PERKINS, A PSYCHOLOGIST, AT BEST, IS EQUIVOCAL. SHE ADMITS IT IS DIFFICULT TO PRECISELY DETERMINE IF CLAIMANT'S WORK CONTRIBUTED TO HER EMOTIONAL PROBLEMS AND, IF SO, TO WHAT EXTENT.

THE BOARD HAVING FOUND THAT CLAIMANT HAS NOT SUSTAINED HER BURDEN OF PROVING THE COMPENSABILITY OF HER PSYCHIATRIC PROBLEM CONCLUDES THAT THE REFEREE SHOULD NOT HAVE REOPENED THE CLAIM TO PROVIDE TREATMENT FOR SUCH PROBLEMS.

THE BOARD FINDS THAT THE WEIGHT OF THE MEDICAL EVIDENCE DOES NOT SUPPORT A FINDING OF NEED FOR FURTHER CURATIVE TREATMENT TO BE RENDERED FROM AN ORTHOPEDIC OR NEUROLOGICAL STANDPOINT, THEREFORE, CLAIMANT HAS FAILED TO PROVE BY THE PREPONDERANCE OF THE EVIDENCE THAT HER CLAIM SHOULD BE REOPENED.

THE BOARD HAS REPEATEDLY HELD THAT ONLY UNDER CERTAIN EXTREME CIRCUMSTANCES DOES THE REFEREE HAVE AUTHORITY TO SET ASIDE A DETERMINATION ORDER IN ITS ENTIRETY. IT MUST BE SHOWN THAT THE PREPONDERANCE OF THE MEDICAL EVIDENCE OF RECORD IN EXISTENCE AT THE ISSUANCE OF THE DETERMINATION ORDER SUPPORTS A FINDING THAT CLAIMANT'S CONDITIONS WHICH WERE CONSIDERED AT THAT TIME TO BE COMPENSABLE WERE NOT MEDICALLY STATIONARY. IT IS NOT A QUESTION OF WHETHER CLAIMANT, AT THE PRESENT TIME, NEEDS FURTHER TREATMENT. IN THIS CASE THE PREPONDERANCE OF THE MEDICAL EVIDENCE BEFORE AS WELL AS AFTER THE DETERMINATION ORDER SUPPORTS A FINDING THAT CLAIMANT'S CONDITION RESULTING FROM HER INDUSTRIAL INJURY WAS MEDICALLY STATIONARY AT THE TIME THE DETERMINATION ORDER WAS ISSUED ON JULY 5, 1974.

WITH RESPECT TO THE ASSESSMENT OF PENALTIES AND ATTORNEY FEES, THE BOARD FINDS EVIDENCE THAT THE FUND REFUSED OR RESISTED TO ASSUME RESPONSIBILITY FOR CLAIMANT'S PSYCHOLOGICAL PROBLEMS BUT SUCH REFUSAL CANNOT BE CHARACTERIZED AS UNREASONABLE - IT WAS CLEARLY REASONABLE FOR THE FUND TO TAKE SUCH ACTION BASED UPON THE REPORTS OF DR. QUAN WHICH ESTABLISHED THAT CLAIMANT'S PSYCHOLOGICAL PROBLEMS WERE NOT RELATED TO HER INDUSTRIAL INJURY.

ORDER

THE ORDER OF THE REFEREE, DATED AUGUST 28, 1975, IS REVERSED.

THE DETERMINATION ORDER MAILED JULY 5, 1974 IS AFFIRMED.

WCB CASE NO. 75-3229 JUNE 29, 1976

DAVID LANIER, CLAIMANT

JAN BAISCH, CLAIMANT'S ATTY.
RICHARD DAVID, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DENIAL OF CLAIMANT'S CLAIM FOR BRONCHITIS AND PSYCHOLOGICAL PROBLEMS AND REFUSED TO ASSESS PENALTIES FOR UNREASONABLE CONDUCT BY THE EMPLOYER.

CLAIMANT, IN MARCH, 1974, WAS WORKING ON A SORTER LINE FOR THE EMPLOYER. HIS WORK STATION WAS OPEN TO THE ELEMENTS ON ONE SIDE SUBJECTING CLAIMANT TO EXPOSURE TO WIND AND RAIN. CLAIMANT ALLEGED THAT DUE TO THESE CONDITIONS HE CONTACTED BRONCHITIS.

CLAIMANT SAW DR. J. L. CHITTY ON APRIL 16, 1975 AND DID NOT RETURN TO WORK THEREAFTER. CLAIMANT FILED A CLAIM WITH HIS OFF-THE-JOB CARRIER, STATING ON THE FORM THAT HIS ILLNESS WAS NOT DUE TO, OR CAUSED BY, HIS EMPLOYMENT.

IN JUNE, 1974, SOME 15 MONTHS AFTER THE BRONCHITIS CONDITION WAS REPORTED, THE CLAIMANT FILED A FORM 801 WITH HIS EMPLOYER, ALLEGING HIS EMPLOYMENT CAUSED HIS BRONCHITIS CONDITION. THE CARRIER, 18 DAYS LATER, DENIED THE CLAIM.

THE REFEREE FOUND THAT CLAIMANT HAD BEEN INVOLVED IN TWO AUTOMOBILE ACCIDENTS, HAD MISSED A GREAT DEAL OF TIME FROM WORK AND WAS HAVING FINANCIAL DIFFICULTIES.

THE REFEREE STATED THAT UNDER THE PROPER CIRCUMSTANCES THE BRONCHITIS CONDITION WOULD BE COMPENSABLE. HOWEVER, CLAIMANT FAILED TO SUSTAIN HIS BURDEN OF PROOF OF SHOWING THE BRONCHITIS AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT. HE HAD NOT FILED HIS CLAIM FOR 15 MONTHS AFTER THE INCIDENT. HE HAD FILED FOR OFF-THE-JOB INSURANCE BENEFITS AND HAD FILED A FORM 801 ONLY WHEN THOSE BENEFITS TERMINATED. ALSO HE HAD INFORMED THE OFF-THE-JOB CARRIER ON THEIR ACCIDENT FORM THAT HIS BRONCHITIS WAS NOT A RESULT OF HIS EMPLOYMENT.

THE REFEREE CONCLUDED THAT CLAIMANT'S ISSUE OF PSYCHOLOGICAL PROBLEMS RELATING TO HIS ALLEGED INDUSTRIAL INJURY OR OCCUPATIONAL DISEASE, WERE COMPLETELY WITHOUT MERIT.

THE REFEREE REFUSED TO ASSESS PENALTIES AS THERE WAS NO EVIDENCE OF UNREASONABLE CONDUCT BY THE CARRIER - IT WAS ONLY FOUR DAYS LATE IN DENYING THE CLAIM.

THE BOARD, ON DE NOVO REVIEW, FINDS THE REFEREE'S CONCLUSION THAT THE CLAIMANT'S CLAIM WAS BARRED UNDER THE PROVISIONS OF ORS 656.265 WAS ERRONEOUS. THIS WAS A CLAIM FOR AN OCCUPATIONAL DISEASE NOT AN INDUSTRIAL INJURY AND THE LIMITATION OF TIME FOR FILING SUCH A CLAIM IS FOUND IN ORS 656.807. HOWEVER, BASED UPON THE TOTAL EVIDENCE, THE BOARD AGREES THAT CLAIMANT'S CLAIM SHOULD BE DENIED.

ORDER

THE ORDER OF THE REFEREE, DATED NOVEMBER 25, 1975, IS AFFIRMED.

WCB CASE NO. 75-2505 JUNE 29, 1976

DOROTHY C. BAKER, CLAIMANT

WILLIAM W. MC GEORGE, CLAIMANT'S ATTY.
DEZENDORF, SPEARS, LUBERSKY AND CAMPBELL,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER MAILED JUNE 16, 1975 WHEREBY CLAIMANT RECEIVED 96 DEGREES FOR 30 PER CENT NECK AND RIGHT SHOULDER DISABILITY.

CLAIMANT IS 35 YEARS OLD, HER PRINCIPAL WORK EXPERIENCE HAS BEEN AS A TYPIST AND A TELETYPE OPERATOR. AT THE TIME SHE SUSTAINED A COMPENSABLE INJURY ON OCTOBER 5, 1973, SHE WAS EMPLOYED AS A BILLING CLERK. CLAIMANT WAS INJURED WHEN SHE TRIPPED IN A HOLE IN THE FLOOR AND FELL FORWARD ON HER KNEES, HANDS AND FOREARMS. HER ORIGINAL COMPLAINTS INVOLVED MOSTLY THE LEFT WRIST AND THE CERVICAL NECK AREA - HOWEVER, BY DECEMBER 1973, CLAIMANT WAS HAVING DIFFICULTY WITH HER RIGHT SHOULDER AND RIGHT ARM.

IN MARCH, 1974, DR. DANIELSON PERFORMED A THORACIC OUTLET DECOMPRESSION, RIGHT SIDE. AFTER RECOVERY FROM SURGERY, CLAIMANT ATTEMPTED SEVERAL TIMES TO RETURN TO WORK BUT HER RIGHT SHOULDER COMPLAINTS WERE OF SUCH SEVERITY THAT SHE WAS UNABLE TO DO ANY WORK INVOLVING ACTIVE AND REPETITIVE USE OF HER RIGHT UPPER EXTREMITY. BETWEEN THE TIME OF THE SURGERY ON MARCH 13, 1974, AND THE DATE THE CLAIM WAS CLOSED ON JUNE 6, 1975, CLAIMANT WAS SEEN BY DR. RUSCH, DR. BACHHUBER AND DR. PASQUESI. SHE WAS ALSO GIVEN A PSYCHOLOGICAL EVALUATION BY DR. NORMAN W. HICKMAN, A CLINICAL PSYCHOLOGIST.

CLAIMANT IS PRESENTLY COMPLAINING OF CONSTANT PAIN IN HER RIGHT SHOULDER AND NECK AREA WHICH RADIATES, AT TIMES, DOWN THE RIGHT ARM TO HER HAND. SHE IS UNABLE TO TYPE AND IT IS DIFFICULT FOR HER TO EXTEND, RAISE, FLEX OR PULL TOWARDS HER WITH HER RIGHT ARM. CLAIMANT WAS EARNING APPROXIMATELY 1,000 DOLLARS A MONTH AT THE TIME OF HER INDUSTRIAL INJURY. AS A RESULT OF THE INJURY SHE IS NO LONGER ABLE TO ENGAGE IN THIS TYPE OF WORK.

DR. BACHHUBER'S REPORT OF SEPTEMBER 9, 1975 INDICATED NO ESSENTIAL CHANGE FROM CLAIMANT'S EXAMINATION ON JUNE 21, 1974 (WHICH WAS PRIOR TO THE CLAIM CLOSURE) AND NO SIGNIFICANT INDICATIVE EVIDENCE OF IMPAIRMENT. DR. RUSCH ALSO EXAMINED CLAIMANT IN SEPTEMBER, 1975 AND AGREED WITH THE FINDINGS OF DR. BACHHUBER. CLAIMANT WAS ON A TREATMENT PROGRAM CONSISTING OF STRETCHING EXERCISES AND MUSCLE BUILDING EXERCISES, ALSO CORTISONE INJECTIONS AND THE USE OF ANTI-INFLAMMATORY MEDICATION AND PAIN MEDICATION. DR. RUSCH FOUND MILD PSYCHO-PHYSIOLOGICAL OVERLAY.

DR. HICKMAN'S PSYCHOLOGICAL EVALUATION INDICATES CLAIMANT FUNCTIONS AT A SUPERIOR INTELLECTUAL LEVEL IN THE VERBAL AREA AND AT A BRIGHT NORMAL LEVEL IN THE NON-VERBAL TESTING AREA. HE WAS OF THE OPINION THAT CLAIMANT DID NOT HAVE ANY IDEA WHAT SHE WOULD LIKE TO DO AND HE INDICATED THERE WOULD BE SOME DIFFICULTY IN COUNSELING CLAIMANT INTO AN APPROPRIATE VOCATIONAL OBJECTIVE. SHE DID COMMENCE A RADIO BROADCASTING CLASS UNDER THE AUSPICES OF THE DIVISION OF VOCATIONAL REHABILITATION BUT IT ONLY LASTED A COUPLE OF WEEKS - CLAIMANT QUIT, COMPLAINING SHE WAS UNABLE TO DO THE MATHEMATICS THAT WERE REQUIRED AND ALSO COMPLAINING OF SYMPTOMS OF PAIN RESULTING FROM SITTING IN CLASS.

THE REFEREE FOUND THAT CLAIMANT WAS A PERSON OF KEEN INTELLECT WITH AN EXCELLENT VOCABULARY WHO WAS VERY PERSONABLE IN HER APPEARANCE AND CREATED AN EXCELLENT IMPRESSION. HE FOUND HER TO BE JUSTIFIABLY DISAPPOINTED IN THE KNOWLEDGE THAT SHE NO LONGER WOULD BE ABLE TO DO SECRETARIAL WORK - HE ALSO FOUND THAT SHE HAD NOT AS YET ACCEPTED THE PRESENT SITUATION. THE REFEREE STATED THAT CLAIMANT HAD AVAILABLE TO HER, AND PROBABLY COULD DERIVE MUCH BENEFIT FROM, PSYCHOLOGICAL COUNSELING. HE FELT THAT WITH HER SUPERIOR INTELLECT IT WOULD BE EXTREMELY EASY FOR HER TO UTILIZE IN HER DAILY LIFE THE CONCEPTS PSYCHOLOGICAL COUNSELING COULD PROVIDE - ALSO, CLAIMANT HAS AVAILABLE TO HER THE ADVANCED RESOURCES OF THE DIVISION OF VOCATIONAL REHABILITATION IN SELECTING AN OCCUPATION THAT WOULD NOT ONLY BE INTERESTING BUT FINANCIALLY LUCRATIVE.

THE REFEREE, USING A COMPARISON OF SIMILAR CASES WHERE THE WORKMAN, BECAUSE OF THE INDUSTRIAL INJURY, COULD NOT RETURN TO THE WORK HE HAD DONE PRIOR THERETO BUT WAS ABOVE AVERAGE IN INTELLIGENCE AND RETRAINABLE FOR OTHER OCCUPATIONS, CONCLUDED THAT THE RESIDUALS OF CLAIMANT'S INDUSTRIAL INJURY HAD DIMINISHED HER FUTURE EARNING CAPACITY TO THE EXTENT THAT SHE WAS ENTITLED TO THE AWARD EQUAL TO 30 PER CENT ALLOWED BY THE DETERMINATION ORDER OF JUNE 16, 1975 BUT NO MORE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE REFEREE'S ORDER.

THE BOARD, AS DID THE REFEREE, STRONGLY URGES CLAIMANT TO TAKE ADVANTAGE OF ALL THE FACILITIES AVAILABLE TO HER - WITH PROPER COUNSELING AND RETRAINING CLAIMANT COULD RETURN TO THE LABOR MARKET AS A VERY PRODUCTIVE MEMBER THEREOF.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 30, 1975, IS AFFIRMED.

SAIF CLAIM NO. N 817499 JUNE 29, 1976

LAWRENCE L. KELLOGG, CLAIMANT

JACK MATTISON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION DETERMINATION

CLAIMANT REQUESTED THE BOARD TO EXERCISE ITS CONTINUING JURISDICTION PURSUANT TO ORS 656.278 AND REOPEN CLAIMANT'S CLAIM FOR THE INJURY SUFFERED TO HIS LEFT LEG ON OCTOBER 24, 1942 WHILE WORKING FOR COTTAGE GROVE GAS COMPANY. THE QUESTION WAS WHETHER THERE WAS A MATERIAL CAUSAL CONNECTION BETWEEN CLAIMANT'S 1942 INJURY AND HIS 1971 AND 1974 SURGERIES. THE BOARD REMANDED THE MATTER TO THE HEARINGS DIVISION TO CONDUCT A HEARING AND MAKE A RECOMMENDATION TO THE BOARD BASED UPON HIS FINDINGS.

IT WAS THE REFEREE'S RECOMMENDATION THAT CLAIMANT HAD PROVED A CAUSAL CONNECTION BETWEEN HIS 1942 INJURY AND THE 1974 SURGERY BUT HAD NOT BETWEEN THE 1942 INJURY AND THE 1971 SURGERY. THE BOARD'S OWN MOTION ORDER, ENTERED OCTOBER 23, 1975, DIRECTED THE STATE ACCIDENT INSURANCE FUND TO REOPEN CLAIMANT'S CLAIM FOR SUCH MEDICAL CARE AND TREATMENT AS HE HAS RECEIVED SINCE FEBRUARY 20, 1974.

ON JUNE 4, 1976 THE FUND REQUESTED CLAIM CLOSURE AND A DETERMINATION PURSUANT TO ORS 656.278. THE EVALUATION DIVISION RECOMMENDED THAT CLAIMANT BE AWARDED 20 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR HIS SCHEDULED LEFT LEG DISABILITY. NO CLAIM WAS MADE FOR TEMPORARY TOTAL DISABILITY BENEFITS. THE BOARD ACCEPTS THIS RECOMMENDATION.

ORDER

THE CLAIMANT IS AWARDED 20 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR HIS SCHEDULED LEFT LEG DISABILITY.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY FEE FOR HIS SERVICES IN CONNECTION WITH THIS MATTER, 25 PER CENT OF THE COMPENSATION GRANTED CLAIMANT BY THIS ORDER, PAYABLE OUT OF SAID COMPENSATION, AS PAID, TO A MAXIMUM OF 2,000 DOLLARS.

CLAIM NO. C 223350 JUNE 29, 1976

THEODORE RODRIGUEZ, CLAIMANT

DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION DETERMINATION

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS RIGHT KNEE ON DECEMBER 8, 1969. HIS CLAIM WAS CLOSED ON MARCH 18, 1970 WITH NO AWARD OF PERMANENT PARTIAL DISABILITY. CLAIMANT'S AGGRAVATION RIGHTS HAVE EXPIRED.

CLAIMANT'S CLAIM WAS REOPENED FOR SURGERY WHICH WAS PERFORMED ON JUNE 18, 1970 - THE CLAIM WAS CLOSED ON MARCH 2, 1971 WITH AN AWARD OF 15 PER CENT LOSS OF THE RIGHT LEG.

CLAIMANT'S CLAIM WAS AGAIN REOPENED ON AUGUST 28, 1975, A PATELLECTOMY PERFORMED BY DR. SMITH ON AUGUST 29, 1975. CLAIMANT WAS RELEASED TO RETURN TO WORK ON FEBRUARY 9, 1976 WITH ARTHRITIC CHANGES PRESENT IN THE KNEE.

THE EVALUATION DIVISION RECOMMENDED TO THE BOARD THAT CLAIMANT BE GRANTED TEMPORARY TOTAL DISABILITY FROM AUGUST 28, 1975 THROUGH FEBRUARY 8, 1976 AND AN ADDITIONAL AWARD OF PERMANENT PARTIAL DISABILITY OF 20 PER CENT, LOSS OF THE RIGHT LEG, FOR A TOTAL AWARD OF 35 PER CENT LOSS OF THE RIGHT LEG.

ORDER

THE CLAIMANT IS AWARDED COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM AUGUST 28, 1975 THROUGH FEBRUARY 8, 1976 AND AN AWARD OF 20 PER CENT PERMANENT PARTIAL DISABILITY OF THE MAXIMUM ALLOWABLE BY STATUTE FOR LOSS OF THE RIGHT LEG - THIS IS IN ADDITION TO THE AWARD PREVIOUSLY AWARDED.

WCB CASE NO. 74-3659 JUNE 29, 1976

DENNIS W. LUCAS, CLAIMANT

WILLIAM REISBICK, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH GRANTED CLAIMANT 96 DEGREES FOR 30 PER CENT UNSCHEDULED NECK AND BACK DISABILITY. CLAIMANT CONTENDS HE IS PERMANENTLY AND TOTALLY DISABLED.

CLAIMANT SUSTAINED A COMPENSABLE BACK INJURY ON MARCH 15, 1973 WHEN HE SLIPPED ON SOME ICE AND FELL - HIS CONDITION WAS DIAGNOSED AS AN ACUTE LUMBOSACRAL STRAIN. HE HASN'T WORKED SINCE HIS INJURY.

THE BACK EVALUATION CLINIC'S REPORT OF OCTOBER 24, 1973 INDICATED CLAIMANT'S BACK CONDITION WAS A 'MINIMAL' LOSS OF FUNCTION. CLAIMANT'S LUMBAR AND CERVICAL SPINE WERE NORMAL, BUT THEY DIAGNOSED A HEAVY FUNCTIONAL OVERLAY AND SAID THAT CLAIMANT COULD RETURN TO HIS FORMER OCCUPATION.

THE OTHER DOCTORS WHO HAVE EXAMINED CLAIMANT, DRS. KIMBERLY, JONES AND HUMMEL, INDICATED THAT CLAIMANT COULD RETURN TO HIS FORMER JOB WITH LIMITATIONS AND RATED HIS DISABILITY AS 'MILDLY MODERATE'.

DR. FISHER, WHO EXAMINED CLAIMANT ON MARCH 7, 1973, FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED.

BOTH DR. WATTLEWORTH AND DR. TROMMALD, AT THE DISABILITY PREVENTION DIVISION, NOTED THAT CLAIMANT 'DOES NOT SEEM TO BE IN ANY GREAT DISTRESS'.

THE CLAIM WAS CLOSED BY DETERMINATION ORDER DATED NOVEMBER 28, 1973 WHEREBY CLAIMANT RECEIVED 32 DEGREES FOR HIS UNSCHEDULED DISABILITY.

CLAIMANT HAS AN INDUSTRIAL LUNG DISEASE FOR WHICH HE RECEIVES 80 PER CENT DISABILITY FOR 350 DOLLARS PER MONTH AND A SCHOOL PENSION OF 100 DOLLARS.

THE REFEREE FOUND THAT THE EXTENSIVE MEDICAL REPORTS SUPPORTED CLAIMANT'S INABILITY TO RETURN TO HIS FORMER JOB OR ANY JOB WITH HEAVY PHYSICAL DEMANDS. HIS DISABILITY WAS GREATER THAN THE 10 PER CENT PREVIOUSLY AWARDED.

THE REFEREE CONCLUDED THAT AN AWARD OF 30 PER CENT WOULD COMPENSATE CLAIMANT FOR HIS LOSS OF EARNING CAPACITY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 29, 1975, IS AFFIRMED.

WCB CASE NO. 75-3360 JUNE 29, 1976

RAY L. VAVROSKY, CLAIMANT

LARRY K. BRUUN, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS REVIEW BY THE BOARD OF A REFEREE'S ORDER WHICH GRANTED CLAIMANT AN AWARD OF PERMANENT TOTAL DISABILITY EFFECTIVE JANUARY 19, 1976.

CLAIMANT, A 56 YEAR OLD CONSTRUCTION LABORER SUSTAINED A COMPENSABLE INJURY TO HIS LEFT SHOULDER ON APRIL 9, 1974. DR. ELLISON PERFORMED AN ANTERIOR REPAIR OF A TEAR IN THE ROTATOR CUFF WITH EXCISION OF DEGENERATIVE TISSUE AND REATTACHMENT OF THE CUFF TO THE HUMERUS.

A DETERMINATION ORDER ENTERED APRIL 23, 1975, AWARDED CLAIMANT 64 DEGREES FOR 20 PER CENT PERMANENT PARTIAL DISABILITY FOR UNSCHEDULED LEFT SHOULDER INJURY.

CLAIMANT HAD SUSTAINED A BACK INJURY IN 1959 AND UNDERWENT A LAMINECTOMY AND FUSION. HE WAS GRANTED AN AWARD OF 50 PER CENT LOSS FUNCTION OF AN ARM FOR UNSCHEDULED DISABILITY FOR THIS INJURY. THIS AWARD WAS NOT APPEALED AND CLAIMANT'S AGGRAVATION RIGHTS HAVE EXPIRED.

CLAIMANT, AFTER RECOVERING FROM HIS 1959 INJURY, RESUMED WORK AS A PAINTING CONTRACTOR AND THEN LEASED A BAR WHERE HE WORKED AS A BARTENDER UNTIL 1968. HE TESTIFIED HE COULD NOT PERFORM THE NECESSARY

LIFTING AND THE HIRING OF HELP TO DO THIS WORK HAD RESULTED IN AN UNPROFITABLE ENTERPRISE. THEREAFTER, HE WORKED ON VARIOUS CONSTRUCTION JOBS FOR SHORT PERIODS OF TIME. HE TESTIFIED THAT HE WAS ABLE TO PERFORM THE JOB ON WHICH HE SUSTAINED THE SHOULDER INJURY ONLY BECAUSE IT REQUIRED WORKING TWO OR THREE DAYS A WEEK BECAUSE OF WEATHER CONDITIONS.

THE REFEREE FOUND CLAIMANT FELL WITHIN THE 'ODD-LOT' CATEGORY AND THAT THE FUND FAILED TO PROVE AVAILABILITY OF SUITABLE AND GAINFUL EMPLOYMENT WHICH CLAIMANT COULD DO. HE CONCLUDED CLAIMANT WAS PERMANENTLY TOTALLY DISABLED.

THE BOARD, ON DE NOVO REVIEW, FINDS NO SIGNIFICANT DIFFERENCE IN THE CLAIMANT'S PHYSICAL LIMITATIONS FOLLOWING THE INJURY OF APRIL 9, 1974 AND THOSE WHICH HE HAD PRIOR TO THAT INJURY. THE EVIDENCE DOES NOT INDICATE THAT AS A RESULT OF THIS INJURY CLAIMANT HAS SUFFERED A LOSS OF EARNING CAPACITY GREATER THAN 20 PER CENT. HIS EARNING CAPACITY HAD BEEN SEVERELY DIMINISHED PRIOR TO THE INJURY. ORS 656.222 DOES NOT APPLY TO UNSCHEDULED INJURIES, HOWEVER, CLAIMANT'S PHYSICAL CONDITION WHICH MAY BE THE RESULT OF PRIOR INJURIES CAN BE CONSIDERED.

THE BOARD FINDS THE EVIDENCE DOES NOT SUPPORT THE REFEREE'S CONCLUSION THAT CLAIMANT WAS WITHIN THE 'ODD-LOT' CATEGORY, THEREFORE, THE BURDEN OF PROVING THERE IS NO SUITABLE AND GAINFUL EMPLOYMENT IN WHICH CLAIMANT CAN ENGAGE IS THAT OF CLAIMANT. HE FAILED TO SUSTAIN THIS BURDEN.

DR. SPECHT, CHIEF OF REHABILITATION SERVICES, DIVISION OF ORTHOPEDICS AND REHABILITATION, UNIVERSITY OF OREGON MEDICAL SCHOOL, TESTIFIED THAT CLAIMANT COULD NOT RETURN TO BARTENDING OR CONSTRUCTION WORK, BUT HE DID THINK CLAIMANT COULD WORK AS A SALESMAN OR DO BENCH WORK. THE PROBLEM SEEMS TO BE THAT VOCATIONAL COUNSELORS, ACCORDING TO DR. SPECHT, SIMPLY REFUSE TO MAKE ANY EFFORT IF A CLAIMANT IS OVER 40 OR 50 YEARS OLD.

THE BOARD CONCLUDES THAT CLAIMANT IS NOT PERMANENTLY AND TOTALLY DISABLED - THE DETERMINATION ORDER WHICH AWARDED 20 PER CENT OF THE MAXIMUM FOR UNSCHEDULED DISABILITY ADEQUATELY COMPENSATES CLAIMANT.

THE BOARD URGES CLAIMANT TO SEEK THE BENEFIT OF REHABILITATIVE SERVICES AVAILABLE TO HIM.

ORDER

THE ORDER OF THE REFEREE DATED JANUARY 19, 1976 IS REVERSED. THE DETERMINATION ORDER MAILED APRIL 23, 1975 IS AFFIRMED.

SAIF CLAIM NO. DC 103538 JUNE 29, 1976

MABLE SCHALLBERGER, CLAIMANT

GALTON AND POPICK, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION DETERMINATION

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HER BACK ON NOVEMBER 17, 1967. AFTER CONSERVATIVE TREATMENT A DETERMINATION ORDER WAS ISSUED ON JANUARY 22, 1969 GRANTING CLAIMANT TEMPORARY TOTAL DISABILITY AND 5 PER CENT UNSCHEDULED PERMANENT PARTIAL DISABILITY. AN OPINION AND ORDER OF JUNE 11, 1969 GRANTED CLAIMANT AN ADDITIONAL

AWARD OF 5 PER CENT UNSCHEDULED DISABILITY AND 10 PER CENT LOSS OF THE LEFT LEG. CLAIMANT'S AGGRAVATION RIGHTS HAVE EXPIRED.

DURING 1970 AND 1972 CLAIMANT'S CLAIM WAS REOPENED FOR CONSERVATIVE TREATMENT.

DR. CHURCH, ON MAY 5, 1975, DESCRIBED A MARKED INCREASE IN CLAIMANT'S LUMBOSACRAL DEGENERATIVE ARTHRITIS SINCE 1968 INDICATING PROGRESSIVE DETERIORATION.

ON JULY 23, 1975 THE STATE ACCIDENT INSURANCE FUND DECLINED TO REOPEN CLAIMANT'S CLAIM FOR FURTHER MEDICAL TREATMENT. AN OWN MOTION ORDER DATED NOVEMBER 10, 1975 BASED ON THE RECOMMENDATIONS OF THE REFEREE AFTER A HEARING ON THE MERITS, REMANDED THE CLAIM TO THE STATE ACCIDENT INSURANCE FUND FOR ACCEPTANCE AND PAYMENT OF COMPENSATION.

DR. ORVILLE JONES, ON MARCH 23, 1976, INDICATED CLAIMANT'S CONDITION WAS STATIONARY AND HER SYMPTOMS WERE THOSE OF DEGENERATIVE OSTEOARTHRITIS, DR. CHURCH AGREED. THE EVALUATION DIVISION, AFTER CLOSURE PURSUANT TO ORS 656.278 WAS REQUESTED BY THE FUND, FOUND CLAIMANT'S CONDITION TO BE TOTALLY UNRELATED TO HER INDUSTRIAL INJURY.

THE EVALUATION DIVISION RECOMMENDED THAT CLAIMANT BE GRANTED TEMPORARY TOTAL DISABILITY FROM MAY 5, 1975 THROUGH MAY 21, 1976, INCLUSIVE, AND NO FURTHER COMPENSATION FOR PERMANENT PARTIAL DISABILITY.

ORDER

CLAIMANT IS AWARDED TEMPORARY TOTAL DISABILITY FROM MAY 5, 1975 THROUGH MAY 21, 1976, INCLUSIVE.

CLAIMANT'S COUNSEL IS GRANTED 25 PER CENT OF CLAIMANT'S TEMPORARY TOTAL DISABILITY COMPENSATION AS A REASONABLE ATTORNEY FEE UP TO A MAXIMUM OF 500 DOLLARS.

WCB CASE NO. 75-1883 JUNE 29, 1976

SCANDRA KHAL, CLAIMANT

RASK AND HEFFERIN, CLAIMANT'S ATTYS.
GEARIN, CHENEY, LANDIS, AEBI AND KELLEY,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS THE BOARD REVIEW THE REFEREE'S ORDER WHICH GRANTED AN AWARD OF 96 DEGREES FOR 30 PER CENT UNSCHEDULED LEFT (UNDERSCORED) SHOULDER DISABILITY AND AFFIRMED AWARD OF 96 DEGREES FOR 30 PER CENT UNSCHEDULED RIGHT (UNDERSCORED) SHOULDER DISABILITY MADE BY A DETERMINATION ORDER DATED MAY 7, 1975.

CLAIMANT WHO CAME TO THIS COUNTRY FROM SYRIA 8 YEARS AGO, WAS EMPLOYED AT ATIYEH'S IN THE RUG REPAIR DEPARTMENT. THE LAST DAY SHE WORKED WAS JANUARY 24, 1974. BECAUSE SHE UNDERSTOOD LITTLE ENGLISH, A FORM 801 WAS MADE OUT BY THE EMPLOYER WHICH CLAIMANT SIGNED ON MARCH 1, 1974. THE CLAIM WAS ACCEPTED AS A RIGHT SHOULDER CONDITION.

THE CLAIM WAS CLOSED WITH AN AWARD OF 96 DEGREES AND CLAIMANT

REQUESTED A HEARING. AT THE HEARING CLAIMANT ALLEGED SHE ALSO HAD LEFT SHOULDER PAIN. ACCORDING TO CLAIMANT'S TESTIMONY, THE PAIN IN THE LEFT SHOULDER BEGAN AFTER SHE WAS EMPLOYED AT ATIYEH'S. SHE STATES SHE TOLD DR. WELLS BOTH (UNDERSCORED) SHOULDERS HURT. HIS QUESTIONS CENTERED ON HER RIGHT SHOULDER BECAUSE SHE WAS RIGHT-HANDED. THE RECORD INDICATES THE CARRIER RECEIVED A MEDICAL REPORT FROM DR. WELLS REFERRING PROBLEMS TO THE CLAIMANT'S SHOULDERS (UNDERSCORED) -(PLURAL), AND IN ANOTHER INSTANCE DR. WELLS REFERRED TO LEFT (UNDERSCORED) SHOULDER PAIN. THE CARRIER TOOK NO STEPS TO INQUIRE FURTHER ABOUT THE REFERENCE TO THE LEFT SHOULDER, NOR WAS A DENIAL MADE.

THERE IS NO INDICATION THAT CLAIMANT WAS NOT CREDIBLE, AND COMBINED WITH HER LACK OF UNDERSTANDING THE ENGLISH LANGUAGE AND SOME POOR CLAIMS HANDLING BY THE CARRIER, THE REFEREE FOUND THAT CLAIMANT WAS ENTITLED TO COMPENSATION FOR LEFT SHOULDER DISABILITY, AS WELL AS FOR RIGHT SHOULDER DISABILITY.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE DATED JANUARY 28, 1976, IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH BOARD REVIEW THE SUM OF 250.00 DOLLARS, PAYABLE BY THE EMPLOYER.

WCB CASE NO. 75-711 JUNE 30, 1976

PAUL R. PRITCHARD, CLAIMANT

ROBERT GARDNER, CLAIMANT'S ATTY.
MICHAEL HOFFMAN, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

THE EMPLOYER SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH DENIED CLAIMANT'S CLAIM FOR AN INJURY SUSTAINED ON FEBRUARY 6, 1974 = DIRECTED THE EMPLOYER TO PAY CLAIMANT TEMPORARY TOTAL DISABILITY COMPENSATION BETWEEN FEBRUARY 7 AND FEBRUARY 14, 1974, INCLUSIVE, AND, ADDITIONALLY, A PENALTY IN THE AMOUNT OF 25 PER CENT OF THIS TEMPORARY TOTAL DISABILITY COMPENSATION, AND TO PAY CLAIMANT'S ATTORNEY AN ATTORNEY FEE OF 250 DOLLARS. THE REFEREE DENIED CLAIMANT'S CLAIM ON ALL OTHER ISSUES BEFORE HIM AT THE HEARING.

PRIOR TO JANUARY, 1974 CLAIMANT HAD HAD OCCASIONAL EPISODES OF LOW BACK PAIN DUE TO A PRE-EXISTING CHRONIC LOW BACK SPRAIN. ON JANUARY 26, 1974 CLAIMANT STRAINED HIS LOW BACK WHILE CARRYING A ROLL OF CARPETING, HE DID NOT SEEK MEDICAL TREATMENT NOR MISS ANY TIME FROM WORK.

ON FEBRUARY 2, 1974 CLAIMANT AGAIN STRAINED HIS BACK AND AGAIN HE DID NOT SEEK MEDICAL TREATMENT NOR MISS ANY TIME FROM WORK. THE FOLLOWING WEDNESDAY, FEBRUARY 6, WAS CLAIMANT'S DAY OFF AND HE WAS HOME WHEN HE EXPERIENCED ANOTHER ONSET OF LOW BACK PAIN FOLLOWING A TWISTING MOVEMENT WHILE HE WAS CARRYING A BOX OF KINDLING WOOD WHICH WEIGHED APPROXIMATELY 20 POUNDS. THIS TIME CLAIMANT ADVISED THE ASSISTANT MANAGER THAT HIS BACK WAS HURTING AND HE WAS ADVISED TO SEE THE COMPANY DOCTOR. CLAIMANT DID NOT GO TO WORK AND, ON FEBRUARY 8, WAS SEEN BY DR. BASSINGER WHO ADVISED CLAIMANT NOT TO GO TO WORK BUT TO REST AT HOME AND COME BACK FOR FURTHER CHECKUP. THEREAFTER, CLAIMANT HAD PERIODIC MEDICAL TREATMENT, LOST SOME TIME FROM

WORK, AND RETURNED TO WORK ON FEBRUARY 15, 1974 ALTHOUGH HE WAS STILL EXPERIENCING SOME PAIN.

ON OR ABOUT FEBRUARY 21, 1974 CLAIMANT FILED A WRITTEN WORKMAN'S NOTICE OF INJURY WITH HIS EMPLOYER AND IN APRIL OR MAY, 1974 CLAIMANT WAS ADVISED THAT THE COMPANY WOULD ACCEPT THE INCIDENTS OF JANUARY 26 AND FEBRUARY 2, 1974 AS COMPENSABLE INJURIES BUT WOULD NOT ACCEPT THE INCIDENT OF FEBRUARY 6, 1974.

CLAIMANT CONTINUED TO RECEIVE MEDICAL TREATMENT AND WAS BEING BILLED FOR OVERDUE PAYMENTS - HE ATTEMPTED TO CONTACT THE EMPLOYER BUT RECEIVED NO SATISFACTION. ON FEBRUARY 18, 1975 CLAIMANT REQUESTED A HEARING, AFTER THE REQUEST WAS FILED THE EMPLOYER ISSUED A WRITTEN DENIAL AND ALSO FILED A FORM 802 REPORT. CLAIMANT DID NOTHING AFTER THE ISSUANCE OF THE WRITTEN DENIAL. THE MEDICAL BILLS WERE ULTIMATELY PAID BY THE EMPLOYER, ALTHOUGH THE EVIDENCE DOES NOT INDICATE WHEN.

THE REFEREE FOUND THAT THIS CASE HAD BEEN MADE UNNECESSARILY COMPLICATED BECAUSE THE EMPLOYER HAD ACCEPTED AS COMPENSABLE THE INCIDENTS OF JANUARY 26 AND FEBRUARY 2, 1974. ALTHOUGH THE TWO INCIDENTS AROSE OUT OF AND IN THE COURSE OF CLAIMANT'S EMPLOYMENT AND RESULTED IN SOME BODILY INJURY, NEVERTHELESS, NEITHER MET THE STATUTORY REQUIREMENTS OF THE OREGON WORKMEN'S COMPENSATION LAW BECAUSE, IN EACH SITUATION, THE INJURIES DID NOT REQUIRE MEDICAL TREATMENT NOR CAUSE CLAIMANT ANY DISABILITY - IT WAS NOT UNTIL AFTER THE INCIDENT AT HOME ON FEBRUARY 6, 1974 THAT CLAIMANT SOUGHT MEDICAL ATTENTION AND CEASED WORKING.

THE REFEREE CONCLUDED THAT EVEN CONSIDERING THE TWO INCIDENTS AS 'COMPENSABLE INJURIES' ON THE BASIS THAT THEY HAD BEEN ACCEPTED BY THE EMPLOYER, THE EVIDENCE FAILED TO ESTABLISH ANY CAUSAL RELATIONSHIP BETWEEN THOSE INCIDENTS AND THE MEDICAL TREATMENT SUBSEQUENTLY GIVEN OR CLAIMANT'S SUBSEQUENT ABSENCE FROM WORK. THEREFORE, CLAIMANT'S ENTITLEMENT TO ADDITIONAL COMPENSATION IN THE NATURE OF PENALTIES UNDER ORS 656.262(8) FOR UNREASONABLE DELAY IN ACCEPTING HIS CLAIMS FOR THE COMPENSABLE INJURIES OF JANUARY 26 AND FEBRUARY 2, 1974 - HIS RIGHT TO A PENALTY UNDER THE SAME PROVISION FOR UNREASONABLE DELAY FOR ACCEPTANCE OR DENIAL OF HIS CLAIM FOR A COMPENSABLE INJURY OF FEBRUARY 6, 1974 AND FOR UNREASONABLE DELAY OR REFUSAL TO PAY ANY COMPENSATION PERTAINING TO SUCH A CLAIM - WHETHER THE EMPLOYER SHOULD PAY AN ATTORNEY FEE UNDER ORS 656.382(1) FOR UNREASONABLE RESISTANCE TO PAY COMPENSATION CONCERNING A COMPENSABLE INJURY ARISING OUT OF THE INCIDENTS OF JANUARY 26 AND FEBRUARY 2 OR FEBRUARY 6, 1974, AND HIS RIGHT TO AN ATTORNEY FEE PREVAILING IN A HEARING ON A DENIAL OF A CLAIM FOR COMPENSABLE INJURY OF FEBRUARY 6, 1974 ALL (UNDERSCORED) HINGE UPON A DECISION AS TO WHETHER THE FEBRUARY 6, 1974 INJURY CONSTITUTED A 'COMPENSABLE INJURY'.

THE REFEREE FOUND THAT THE ONLY WAY THE FEBRUARY 6 INJURY COULD BE CONSTRUED AS A COMPENSABLE INJURY WAS THROUGH THE APPLICATION OF THE 'BUT FOR' RULE WHICH WOULD ESTABLISH THE NECESSARY CAUSAL RELATIONSHIP TO HIS WORK EFFORT BY MEDICALLY ESTABLISHING THAT BUT FOR (UNDERSCORED) THE EARLIER STRAINS ON JANUARY 26 AND FEBRUARY 2, CLEARLY RELATED TO HIS EMPLOYMENT, THE INCIDENT AT HOME WHICH REQUIRED MEDICAL ATTENTION AND HIS ABSENCE FROM WORK, WOULD NOT HAVE HAPPENED. THE REFEREE CONCLUDED THAT THE MEDICAL EVIDENCE WAS NOT SUFFICIENT TO ESTABLISH SUCH CONNECTION - THEREFORE, NO COMPENSATION DUE FOR A 'COMPENSABLE INJURY' HAS BEEN ESTABLISHED TO HAVE RESULTED FROM THE FEBRUARY 6 INCIDENT.

THE LAW REQUIRES THE EMPLOYER TO GIVE WRITTEN NOTICE OF ACCEPTANCE OR DENIAL WITHIN 60 DAYS AFTER IT HAS NOTICE OR KNOWLEDGE OF THE CLAIM UNDER THE PROVISIONS OF ORS 656.262(6) AND FURTHER REQUIRES THAT

IF THE CLAIM IS NOT DENIED WITHIN THE 14 DAY PERIOD THE EMPLOYER PAY THE FIRST INSTALLMENT OF COMPENSATION NO LATER THAN THE 14TH DAY AFTER NOTICE OR KNOWLEDGE OF THE CLAIM.

CLAIMANT GAVE THE EMPLOYER WRITTEN NOTICE OF HIS INJURY AND CLAIM ON FEBRUARY 21, 1974 BUT WRITTEN NOTICE OF DENIAL WAS NOT GIVEN UNTIL MARCH, 1975 AND NO INSTALLMENT OF ANY COMPENSATION FOR TEMPORARY TOTAL DISABILITY WAS EVER PAID. THE EMPLOYER CONTENDS THAT CLAIMANT NEVER MADE A CLAIM FOR AN INJURY OF FEBRUARY 6, 1974. THE REFEREE FOUND, AFTER STUDYING THE LENGTHY DESCRIPTION OF EVENTS IN THEIR CHRONOLOGY SET FORTH IN THE ATTACHMENT TO THE FORM 801, THAT SUCH CONTENTION COULD NOT BE UPHELD. IT WAS OBVIOUS THAT CLAIMANT WAS MAKING A CLAIM FOR COMPENSATION DUE TO A COMBINATION OF INJURIES FROM ALL THREE INCIDENTS DESCRIBED IN THE ATTACHMENT, AND, FURTHERMORE, THERE WAS NO RELATIONSHIP TO THE EVENTS OF JANUARY 26 AND FEBRUARY 2, SHOWN FOR THE MEDICAL TREATMENT THAN FOR THE ABSENCE FROM WORK, YET THE EMPLOYER ULTIMATELY PAID FOR THE MEDICAL SERVICES EVEN AFTER IT HAD DENIED RESPONSIBILITY FOR THE FEBRUARY 6 INJURY.

THE REFEREE CONCLUDED THAT CLAIMANT HAD GIVEN NOTICE OF A CLAIM FOR COMPENSATION FROM INJURIES WHICH INCLUDED FEBRUARY 6 INCIDENT AND THAT SINCE THE EMPLOYER HAD NOT DENIED RESPONSIBILITY FOR AN INJURY OCCURRING ON THAT DAY OR ANY OTHER DAY DESCRIBED IN THE ATTACHMENT TO FORM 801 IT WAS REQUIRED BY LAW TO PAY CLAIMANT THE FIRST INSTALLMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION WITHIN 14 DAYS AFTER FEBRUARY 21, 1974 AND CONTINUED TO MAKE INSTALLMENT PAYMENTS UNTIL IT DENIED THE CLAIM IN MARCH, 1975. HOWEVER, THE ONLY EVIDENCE OF TIME LOSS SUSTAINED BY CLAIMANT DURING THAT ENTIRE PERIOD IS BETWEEN FEBRUARY 7 AND FEBRUARY 14 INCLUSIVE, AND THE FIRST THREE DAYS OF TIME LOSS ARE NOT COMPENSABLE UNLESS CLAIMANT IS HOSPITALIZED - THIS DID NOT HAPPEN.

THE REFEREE CONCLUDED THAT CLAIMANT WAS ENTITLED TO FIVE DAYS COMPENSATION AND DIRECTED THE EMPLOYER TO PAY IT.

HE FURTHER CONCLUDED THAT THE MANNER IN WHICH THE EMPLOYER HANDLED THE PROCESSING OF THIS CLAIM CLEARLY CONSTITUTED UNREASONABLE CONDUCT - THE EMPLOYER UNREASONABLY DELAYED THE PAYMENT OF COMPENSATION AND UNREASONABLY DELAYED THE ACCEPTANCE OR DENIAL OF THE CLAIM. THEREFORE, THE REFEREE ASSESSED THE EMPLOYER A PENALTY IN THE AMOUNT OF 25 PER CENT OF THE FIVE DAYS OF TEMPORARY TOTAL DISABILITY COMPENSATION AWARDED CLAIMANT AND ALLOWED AN ATTORNEY FEE OF 250 DOLLARS BASED ON THE EMPLOYER'S UNREASONABLE RESISTANCE TO PAYMENT OF COMPENSATION DUE CLAIMANT.

WITH REGARD TO ASSESSMENT OF A PENALTY FOR THE PERIOD OF TIME (NOT ACTUALLY KNOWN HOW LONG) BEFORE THE MEDICAL BILLS WERE PAID, THE REFEREE, RELYING ON THE COURT'S OPINION IN NEWMAN V. MURPHY PACIFIC CORP. (UNDERSCORED), 750 OR ADV SH 67 - OR APP -, HELD THAT UNDER THE PRESENT SITUATION PENALTIES WOULD NOT LIE BECAUSE NO ULTIMATE PREJUDICE WAS SUFFERED BY CLAIMANT.

THE REFEREE FOUND THAT CLAIMANT HAD FAILED TO PREVAIL ON HIS DENIED CLAIM AND, THEREFORE, WAS NOT ENTITLED TO AN ATTORNEY FEE ON THAT BASIS.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE EXCELLENT ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED OCTOBER 10, 1975, IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED, AS A REASONABLE ATTORNEY FEE, THE SUM OF 350 DOLLARS PAYABLE BY THE EMPLOYER, FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 75-3073 JUNE 30, 1976

JOHN PHILLIPS, CLAIMANT

JERRY G. KLEEN, CLAIMANT'S ATTY.
KEITH SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW ON THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER DATED JULY 14, 1975 AWARDING CLAIMANT 64 DEGREES FOR 20 PER CENT UNSCHEDULED NECK AND LEFT SHOULDER DISABILITY, AND AN AWARD OF 9.6 DEGREES FOR 5 PER CENT LOSS OF THE LEFT ARM.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON SEPTEMBER 8, 1972 WHEN HE SLIPPED WHILE DESCENDING A LADDER, SUSTAINING A BRUISED RIGHT SHOULDER AND FRACTURED RIBS.

ON SEPTEMBER 19, 1972 CLAIMANT SAW DR. PHIL PORTER WHO REFERRED CLAIMANT TO DR. JOHN WHITE, A NEUROSURGEON, ON AUGUST 22, 1973. CLAIMANT WAS COMPLAINING OF FREQUENT HEADACHES, NUMBNESS IN HIS FINGERS OF THE LEFT HAND AND A STIFF NECK. DUE TO THE DURATION OF CLAIMANT'S SYMPTOMS, DR. WHITE PUT CLAIMANT ON CERVICAL TRACTION AT HOME, RATHER THAN OTHER CONSERVATIVE TREATMENT.

LATER A HERNIATED DISC AT C7-8 ON THE LEFT WAS DISCOVERED AND AN ANTERIOR DISECTOMY AND FUSION WAS PERFORMED ON SEPTEMBER 7, 1973. IN DECEMBER, 1973, DR. WHITE RECOMMENDED THAT CLAIMANT RETURN TO WORK WITH HEAVY LIFTING RESTRICTIONS - NO FURTHER SURGERY WAS INDICATED.

ON APRIL 17, 1974, DR. ANDERSON, AN ORTHOPEDIC SURGEON, FOUND NEUROLOGICAL AND CIRCULATORY DEFICIENCIES IN THE LEFT ARM WHICH REQUIRED FURTHER CHECKING. CLAIMANT CONTINUED TO HAVE DISABILITY, ESPECIALLY LOSS OF FUNCTION OF HIS LEFT ARM.

IN MARCH, 1975, BECAUSE OF CLAIMANT'S CONTINUED PAIN SYMPTOMS, CLAIMANT WAS TOLD TO DO NO LIFTING AT WORK. CLAIMANT HAD WORKED CONTINUALLY FROM NOVEMBER, 1974 THROUGH MARCH, 1975.

CLAIMANT, AT THE TIME OF HIS INDUSTRIAL INJURY, WAS A SANITATION SUPERVISOR, A JOB HE COULDN'T HANDLE AFTER HIS INDUSTRIAL INJURY. THE EMPLOYER GAVE CLAIMANT A LIGHTER TYPE JOB, I.E., A LIFT TRUCK OPERATOR - CLAIMANT CAN HANDLE THIS JOB.

THE REFEREE CONCLUDED THAT CLAIMANT HAD BEEN ADEQUATELY COMPENSATED FOR HIS LOSS OF WAGE EARNING CAPACITY BY THE AWARD OF 64 DEGREES. THE REFEREE ALSO CONCLUDED THAT CLAIMANT'S SCHEDULED AWARD ADEQUATELY COMPENSATED HIM FOR THE LOSS OF FUNCTION OF HIS LEFT ARM.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE'S COMPREHENSIVE ORDER.

ORDER

THE ORDER OF THE REFEREE DATED NOVEMBER 25, 1975 IS AFFIRMED.

WCB CASE NO. 74—4372 JUNE 30, 1976

MICHAEL HARTMAN, CLAIMANT

MERWIN LOGAN, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

Reviewed by Board Members Wilson and Moore.

Claimant requests Board review of the referee's order which granted claimant an additional 13.5 degrees for 10 per cent loss of the right foot, making a total of 33.75 degrees for 25 per cent loss of the right foot.

Claimant suffered a compensable injury on April 5, 1973 resulting in a comminuted fracture of his right ankle when a steel beam fell on it. His initial treatment consisted of inserting a metal bone screw to reduce the fracture. However, the screw broke and on October 11, 1973 a bone graft was performed to unite the fracture.

In May, 1974 Dr. Davis, claimant's treating physician, found claimant to be medically stationary but that claimant had residual synovitis present. On June 14, 1974 a determination order granted claimant 20.25 degrees for 15 per cent loss of the right foot.

In March, 1975 Dr. Davis recommended claimant's claim be reopened due to claimant's persistant continuing problems. The claim was again closed in August, 1975 — during this entire period claimant continued to work. Dr. Davis believed that claimant's condition of synovitis and his loss of function in the ankle was a permanent condition and aggravation could be expected any time claimant put undue stress on his ankle.

The referee concluded that claimant had suffered a greater loss of function than indicated by the determination order even though claimant was able to continue in his job. Because of the permanent synovitis condition he awarded claimant an additional 13.5 degrees.

The Board, on de novo review, concurs with the findings and conclusions of the referee.

ORDER

The referee's order of November 13, 1975, as amended on November 26, 1975, is affirmed and adopted.

WCB CASE NO. 75—3653 JUNE 30, 1976

THEODORA BICEK, CLAIMANT

M. MAURICE ORONA, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

Reviewed by Board Members Wilson and Moore.

Claimant requests Board review of the referee's order which granted claimant an additional 20 per cent unscheduled low back disability, making a total award to claimant of 60 per cent unscheduled permanent partial disability or 192 degrees. Claimant contends she is permanently and totally disabled.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON MAY 15, 1973 WHILE WORKING AS A MEAT PACKER. CLAIMANT WAS SEEN ON MAY 18 BY DR. GIROD. HE DIAGNOSED LOW BACK STRAIN WITH SCIATICA AND REFERRED CLAIMANT TO DR. MELGARD, A NEUROSURGEON, WHO DIAGNOSED DEGENERATIVE SPINAL ARTHRITIS, WHICH WAS AGGRAVATED BY THE INDUSTRIAL INJURY.

DR. ROSENBAUM SAW CLAIMANT ON AUGUST 5, 1974 AND AGAIN ON AUGUST 20, 1974 AND FOUND A POSSIBLE L5 NERVE ROOT COMPRESSION.

DR. VAN OSDEL AT THE DISABILITY PREVENTION DIVISON EXAMINED CLAIMANT ON NOVEMBER 4, 1974 AND FOUND NO EVIDENCE OF NERVE ROOT COMPRESSION, BUT DIAGNOSED A LUMBAR STRAIN SUPERIMPOSED ON CLAIMANT'S DEGENERATIVE ARTHRITIS CONDITION. ON NOVEMBER 22, 1974 THE BACK EVALUATION CLINIC EXAMINED CLAIMANT AND CONCURRED WITH THESE FINDINGS. THEY CONSIDERED CLAIMANT'S LOSS OF FUNCTION OF HER BACK AS 'MILD'.

CLAIMANT HAS NOT ATTEMPTED TO RETURN TO ANY TYPE OF WORK, ALLEGING SHE CANNOT DO ANYTHING NOT EVEN HOUSEWORK. THE BACK EVALUATION CLINIC HAD FOUND CLAIMANT CAPABLE OF PERFORMING WORK NOT REQUIRING ANY HEAVY LIFTING, BENDING OR STOOPING.

A DETERMINATION ORDER ISSUED ON MARCH 14, 1975 AWARDED CLAIMANT 128 DEGREES FOR 40 PER CENT LOW BACK DISABILITY.

THE FUND CONTENDS THAT CLAIMANT IS NOT MOTIVATED TO RETURN TO WORK - HOWEVER THE MEDICAL EVIDENCE DOES NOT SUPPORT THIS CONTENTION, IN FACT, ALL OF THE MEDICAL REPORTS INDICATE CLAIMANT'S COMPLAINTS ARE LEGITIMATE AND THAT SHE DOES SUFFER CONSTANT PAIN AND DISCOMFORT DUE TO THE AGGRAVATION OF HER DEGENERATIVE ARTHRITIS CONDITION.

THE REFEREE FOUND THAT CLAIMANT HAD LOST A CONSIDERABLE AMOUNT OF HER WAGE EARNING CAPACITY. THE REFEREE RELIED HEAVILY ON DR. MELGARD'S OPINION THAT CLAIMANT'S DISABILITY WAS IN THE MODERATE RANGE - HE FELT DR. MELGARD WAS IN THE BEST POSITION TO EVALUATE THE DEGREE OF CLAIMANT'S DISABILITY AS HE WAS HER TREATING PHYSICIAN FOR OVER TWO YEARS.

THE REFEREE, BASED UPON CLAIMANT'S LOSS OF WAGE EARNING CAPACITY, GRANTED CLAIMANT AN ADDITIONAL AWARD OF 60 DEGREES FOR 20 PER CENT UNSCHEDULED LOW BACK DISABILITY.

THE BOARD, ON DE NOVO REVIEW, BELIEVES THE GENEROUS AWARD MADE BY THE REFEREE AMPLY COMPENSATES CLAIMANT, WHO CERTAINLY DID NOT PROVE THAT SHE WAS PERMANENTLY AND TOTALLY DISABLED.

ORDER

THE ORDER OF THE REFEREE, DATED JANUARY 27, 1976, IS AFFIRMED.

WCB CASE NO. 75-4166 JUNE 30, 1976
WCB CASE NO. 75-5277

CARL E. WILLIAMS, CLAIMANT

JAMES D. CHURCH, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER

CLAIMANT HAD SUFFERED A COMPENSABLE INJURY ON OCTOBER 19, 1972 WHILE IN THE EMPLOY OF HENSON MASONRY, INC., WHOSE INSURER WAS EMPLOYERS INSURANCE OF WAUSAU. ON JULY 6, 1975, WHILE CLAIMANT WAS EMPLOYED BY J. T. THORPE AND SON, INC., WHOSE INSURER WAS THE STATE ACCIDENT INSURANCE FUND, HE SUFFERED ANOTHER INJURY. CLAIMANT FILED CLAIMS AGAINST BOTH CARRIERS AND BOTH CARRIERS DENIED RESPONSIBILITY.

ON DECEMBER 9, 1975 CLAIMANT REQUESTED THAT THE MATTER BE CONSOLIDATED FOR HEARING - THE PRIMARY ISSUE INVOLVED WAS WHETHER CLAIMANT HAD SUFFERED A NEW INJURY ON JULY 6, 1975 OR HAD AGGRAVATED HIS 1972 INJURY.

CLAIMANT REQUESTED THE BOARD ISSUE AN ORDER, PURSUANT TO ORS 656.307, DESIGNATING A PAYING AGENT TO IMMEDIATELY COMMENCE PAYMENT OF BENEFITS TO CLAIMANT AS PROVIDED BY LAW AND TO CONTINUE PAYING SUCH BENEFITS UNTIL SUCH TIME AS THE RESPONSIBLE PARTY HAD BEEN DETERMINED BY A HEARING ORDER. ON JANUARY 28, 1976 THE BOARD ISSUED ITS ORDER DESIGNATING THE STATE ACCIDENT INSURANCE FUND AS THE PAYING AGENT.

ON APRIL 1, 1976, PURSUANT TO STIPULATION APPROVED BY REFEREE H. DON FINK, EMPLOYERS INSURANCE OF WAUSAU WITHDREW THEIR DENIAL AND ACCEPTED CLAIMANT'S CLAIM AS A COMPENSABLE NEW INJURY CLAIM OF OCTOBER 23, 1972 AND AGREED TO PAY CLAIMANT ALL OF THE BENEFITS PROVIDED BY LAW AND TO PAY AN ATTORNEY FEE OF 750 DOLLARS - CLAIMANT WITHDREW HIS CLAIM AGAINST THE FUND BASED UPON AGGRAVATION OF THE 1972 INJURY AND THE REQUEST FOR HEARING WAS DISMISSED.

ORS 656.307(1) PROVIDES THAT AFTER A DETERMINATION OF THE RESPONSIBLE PAYING PARTY HAS BEEN MADE, THE BOARD SHALL DIRECT ANY NECESSARY MONETARY ADJUSTMENT BETWEEN THE PARTIES INVOLVED. THIS PROVISION SHOULD HAVE BEEN INCORPORATED WITHIN THE STIPULATION BEFORE IT WAS APPROVED. IT WAS NOT.

THEREFORE, THE BOARD, PURSUANT TO ITS OWN MOTION JURISDICTION, HEREBY DIRECTS EMPLOYERS INSURANCE OF WAUSAU TO REIMBURSE THE STATE ACCIDENT INSURANCE FUND FOR ALL SUMS WHICH IT HAS PAID CLAIMANT PURSUANT TO THE ORDER DESIGNATING IT PAYING AGENT PURSUANT TO ORS 656.307. EMPLOYERS INSURANCE OF WAUSAU SHALL BE ALLOWED TO RECOVER ANY OVERPAYMENT TO CLAIMANT DUE TO THE DIFFERENTIAL IN THE RATE OF TEMPORARY TOTAL DISABILITY COMPENSATION PAID, FROM ANY AWARD OF PERMANENT PARTIAL DISABILITY OR ADJUSTMENT FROM THE RETROACTIVE RESERVE, IF APPLICABLE.

SAIF CLAIM NO. FC 178070 JUNE 30, 1976

JOHN A. BARBUR, CLAIMANT

STIPULATED ORDER

THIS MATTER HAVING COME BEFORE THE WORKMEN'S COMPENSATION BOARD BASED UPON THE STIPULATION OF A. E. O'MARA, REPRESENTING THE EMPLOYER AND THE STATE ACCIDENT INSURANCE FUND, AND DAN O'LEARY REPRESENTING THE CLAIMANT, AND IT APPEARING TO THE BOARD THAT THE MATTER IS FULLY COMPROMISED AND SETTLED, NOW, THEREFORE, IT IS

HEREBY ORDERED AND ADJUDGED THAT THERE BE PAID TO THE CLAIMANT 48 DEGREES UNSCHEDULED PERMANENT PARTIAL DISABILITY, THAT BEING AN INCREASE OVER AND ABOVE THE COMPENSATION HERETOFORE AWARDED IN THE AMOUNT OF 48 DEGREES UNSCHEDULED PERMANENT PARTIAL DISABILITY, AND IT IS

FURTHER ORDERED AND ADJUDGED THAT OUT OF THE COMPENSATION MADE PAYABLE BY THIS ORDER THAT THERE BE PAID TO THE LAW FIRM OF POZZI, WILSON AND ATCHISON THE SUM OF 25 PER CENT THEREOF, NOT TO EXCEED THE SUM OF 2,000 DOLLARS, AND IT IS

FURTHER ORDERED AND ADJUDGED THAT CLAIMANT'S REQUEST FOR HEARING AND PETITION FOR THE BOARD'S OWN MOTION JURISDICTION BE AND THE SAME IS HEREBY DISMISSED.

WCB CASE NO. 75-3111 JULY 1, 1976

LUTHER KESTERSON, CLAIMANT

DONALD WILSON, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH GRANTED CLAIMANT 256 DEGREES FOR 80 PER CENT UNSCHEDULED DISABILITY BASED ON HIS CLAIM FOR AGGRAVATION OF A 1968 INJURY. CLAIMANT CONTENDS HE IS PERMANENTLY AND TOTALLY DISABLED.

CLAIMANT WAS COMPENSABLY INJURED ON DECEMBER 4, 1968. THE CLAIM WAS FIRST CLOSED BY DETERMINATION ORDER ON AUGUST 19, 1970 WITH AN AWARD OF 192 DEGREES FOR 60 PER CENT UNSCHEDULED LOW BACK DISABILITY. THIS WAS NOT APPEALED.

ON OCTOBER 5, 1969 CLAIMANT SUFFERED A NON-INDUSTRIAL AUTOMOBILE ACCIDENT IN WHICH HE INJURED HIS UPPER BACK, SHOULDER AND RIBS.

CLAIMANT CONTINUED TO CONSULT A NUMBER OF DOCTORS THROUGHOUT THE 1960'S. HE HAD BEEN INVOLVED IN INDUSTRIAL INJURIES IN NOVEMBER, 1958 (RECEIVED 25 PER CENT UNSCHEDULED DISABILITY), AND IN FEBRUARY, 1964 (RECEIVED 15 PER CENT UNSCHEDULED DISABILITY). DURING THIS TIME CLAIMANT'S SYMPTOMS WERE DIAGNOSED AS LOW BACK PAIN RADIATING INTO THE RIGHT LEG, AND SUBACUTE LUMBOSACRAL STRAIN. ON DECEMBER 12, 1968 DR. SMITH INDICATED LOW BACK PAIN INTERMITTENT SINCE 1964 - PAIN IN THE DORSAL AREA. HIS IMPRESSION WAS CHRONIC LUMBOSACRAL STRAIN.

TAKING INTO CONSIDERATION THE AWARDS RECEIVED FOR THE 1958 AND 1964 INJURIES AND THE 60 PER CENT AWARDED IN AUGUST, 1970, CLAIMANT

HAS RECEIVED A TOTAL OF 100 PER CENT OF THE STATUTORY COMPENSATION.

CLAIMANT SAW DR. SMITH AGAIN IN 1969 - HE RECOMMENDED NO FURTHER TREATMENT. HE DID FEEL, HOWEVER, THAT WITHOUT THE AUTOMOBILE ACCIDENT INVOLVEMENT CLAIMANT COULD HAVE CONTINUED WORKING IN LIGHTER EMPLOYMENT.

ON JULY 29, 1975 CLAIMANT FILED A CLAIM FOR AGGRAVATION - HIS AGGRAVATION RIGHTS WOULD HAVE EXPIRED ON AUGUST 19, 1975. ON SEPTEMBER 11, 1975 THE STATE ACCIDENT INSURANCE FUND DENIED THE CLAIM.

DR. SMITH SAW CLAIMANT ON JUNE 13, 1975 AND FOUND HIM STILL COMPLAINING OF SEVERE PAIN IN THE DORSAL AND LUMBAR AREAS - HOWEVER, HE FOUND 'NO PARTICULAR MEDICAL CONDITION WHICH IS RESPONSIBLE FOR HIS INABILITY TO WORK'.

DR. SMITH REVIEWED HIS REPORTS OF JUNE 13, 1975 WITH THAT OF JULY 7, 1970 AND FOUND CLAIMANT'S PHYSICAL FINDINGS NOT AS SEVERE IN 1975 AS IN 1970. HE FOUND NO BASIS FOR REOPENING THE CLAIM. HOWEVER, IN OCTOBER, 1975 DR SMITH, AFTER EXAMINING CLAIMANT, STATED HE COULD NOT FUNCTION IN ANY GAINFUL OCCUPATION.

THE REFEREE FOUND THE MEDICAL EVIDENCE OF DR. SMITH 'BAFFLING' AT BEST. IN JUNE OF 1975 HE HAD SAID CLAIMANT'S CONDITION WAS NOT AS SEVERE AS IN 1970 BUT WITHIN FOUR MONTHS HE FOUND CLAIMANT'S CONDITION DETERIORATED AND WAS WORSE THAN IT WAS IN 1970. HE FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED. THE REFEREE FOUND THIS SUSPICIOUS, HE ALSO FOUND THAT CLAIMANT WAS MOTIVATED TO RETIRE.

THE REFEREE CONCLUDED THAT CLAIMANT'S DISABILITY HAD WORSENED, BUT HE WAS NOW MEDICALLY STATIONARY. BASED UPON A PREPONDERANCE OF THE UNEQUIVOCAL MEDICAL REPORTS, HE GRANTED CLAIMANT AN ADDITIONAL 64 DEGREES. HE DID NOT BELIEVE THAT THE AUTOMOBILE ACCIDENT WAS AN INDEPENDENT INTERVENING INCIDENT WHICH BROKE THE CHAIN OF CAUSAL RELATIONSHIPS BETWEEN CLAIMANT'S PRESENT CONDITION AND THE INJURY OF DECEMBER 4, 1968.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS OF THE REFEREE. THE FACT THAT CLAIMANT HAS ALREADY RECEIVED 100 PER CENT OF THE MAXIMUM IS IMMATERIAL IN EVALUATING UNSCHEDULED DISABILITY.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 19, 1975, IS AFFIRMED.

WCB CASE NO. 75-842 JULY 2, 1976

DAVID L. MARSHALL, CLAIMANT

GRANT AND FERGUSON, CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTED BOARD REVIEW OF THE REFEREE'S OPINION AND ORDER WHICH FOUND CLAIMANT TO BE PERMANENTLY AND TOTALLY DISABLED.

CLAIMANT, AGE 48, WAS EMPLOYED AS A PARTS MAN FOR JACKSON COUNTY ROAD DEPARTMENT WHEN HE SUSTAINED A COMPENSABLE INJURY AUGUST 22, 1973. ON JANUARY 2, 1974, DR. CAMPAGNA PERFORMED A DECOMPRESSIVE

LAMINOTOMY OF L5-S1 WITH EXCISION OF A LUMBOSACRAL DISC AND SCAR TISSUE. A FORAMINOTOMY OF THE S-1 NERVE ROOT WAS ALSO CARRIED OUT. CLAIMANT WAS NOT RELIEVED OF HIS SYMPTOMS AND ON MARCH 25, 1974, DR. CAMPAGNA PERFORMED A LEFT LUMBAR SYMPATHECTOMY.

A DETERMINATION ORDER ISSUED JANUARY 31, 1975 AWARDED CLAIMANT 128 DEGREES FOR 40 PER CENT OF THE MAXIMUM FOR UNSCHEDULED BACK DISABILITY AND 45 DEGREES FOR 30 PER CENT LOSS OF THE LEFT LEG.

AFTER CLAIMANT MOVED TO CALIFORNIA, HE WAS SEEN BY DR. KRAFT, AN ORTHOPEDIST, WHO FELT CLAIMANT WAS DISABLED FROM WORK AS A LABORER AND WOULD REMAIN SO PERMANENTLY, HAVING ESSENTIALLY LOST HIS CAPACITY FOR BENDING AND LIFTING.

CLAIMANT ALSO WAS SEEN AT THE DISABILITY PREVENTION DIVISON IN JULY, 1975.

DR. HAL J. MAY, PH.D., STATED -

> 'THE PROGNOSIS FOR RETURN OF THIS PATIENT TO GAINFUL EMPLOYMENT MUST BE GUARDED. TO LOOK AT THE PATIENT AND WATCH HIM FUNCTION, ONE CANNOT SEE HOW HE COULD WORK AT ALL.'

AT THE HEARING CLAIMANT'S WIFE TESTIFIED AS TO THE DRASTIC CHANGE IN HER HUSBAND'S PHYSICAL CONDITION SINCE THE LAST SURGERY. SHE TESTIFIED THAT ALTHOUGH THE SYMPATHECTOMY WAS PERFORMED TO RELIEVE THE PAIN IN HIS LEG, A VERY SHORT TIME AFTER SURGERY HIS FOOT STARTED TO SWELL AND HAS CONTINUED TO SWELL LIKE A THREE-SIZE DIFFERENCE IN HIS SHOE. THE FOOT IS HOT AND THE LEG IS ICE COLD ALL THE TIME. WITHOUT A CANE, CLAIMANT FALLS AND HE DESCRIBES IT JUST LIKE ALL OF A SUDDEN THE LEG ISN'T THERE. ANOTHER WITNESS TESTIFIED THAT CLAIMANT, WHO IS 6 FEET AND, AT THE TIME OF THE HEARING, WEIGHED 132 POUNDS, WAS LITERALLY 'WASTING AWAY.'

THE REFEREE FOUND CLAIMANT'S COMPLAINTS, LIMITATIONS AND SYMPTOMS WERE CORROBORATED BY CREDIBLE TESTIMONY OF HIS WIFE AND AN ACQUAINTANCE. THAT CLAIMANT HAD PROVEN PRIMA FACIE THAT HE WAS WITHIN THE 'ODD-LOT' CATEGORY AND THE FUND HAD FAILED TO SHOW GAINFUL AND SUITABLE WORK, REGULARLY AVAILABLE TO CLAIMANT. THEREFORE, CLAIMANT WAS ENTITLED TO AN AWARD OF PERMANENT TOTAL DISABILITY.

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 DECEMBER 2, 1975 IS AFFIRMED.

CLAIMANT'S COUNSEL IS AWARDED AS A REASONABLE ATTORNEY'S FEE FOR HIS SERVICES IN CONNECTION WITH THIS BOARD REVIEW, THE SUM OF 400.00 DOLLARS, PAYABLE BY THE STATE ACCIDENT INSURANCE FUND.

WCB CASE NO. 75-1859 JULY 2, 1976

TOM PORTER, CLAIMANT

DAVID BLUNT, CLAIMANT'S ATTY.
MERLIN MILLER, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE SECOND DETERMINATION ORDER BUT GRANTED CLAIMANT ADDITIONAL TEMPORARY TOTAL DISABILITY COMPENSATION.

CLAIMANT SUFFERED A COMPENSABLE INDUSTRIAL INJURY TO HIS LEFT WRIST ON AUGUST 1, 1974. HE UNDERWENT THREE SEPARATE SURGICAL PROCEDURES. THE FIRST, PERFORMED PRIOR TO OCTOBER 11, 1974 APPARENTLY WAS FOR RELEASE OF THE TENDON SHEATH IN THE LEFT WRIST - THE SECOND, PERFORMED JANUARY 21, 1975 WAS FOR NEUROLYSIS OF THE SUPERFICIAL NERVE OF THE ULNA AND REMOVAL OF SCAR TISSUE.

ON APRIL 24, 1975 A DETERMINATION ORDER GRANTED CLAIMANT 37.5 DEGREES FOR 25 PER CENT SCHEDULED LOSS OF THE LEFT FOREARM. THE CLAIM WAS SUBSEQUENTLY REOPENED. A THIRD SURGERY PERFORMED ON SEPTEMBER 4, 1975 WAS FOR REMOVAL OF A NEUROMA ON A BRANCH OF THE RADIAL NERVE IN THE LEFT WRIST.

DR. PAULUSKA'S FINAL REPORT OF OCTOBER 15, 1975 FOUND CLAIMANT MEDICALLY STATIONARY EVEN THOUGH CLAIMANT COMPLAINED OF CONTINUING PAIN. A SECOND DETERMINATION ORDER, DATED NOVEMBER 3, 1975, GRANTED CLAIMANT AN ADDITIONAL 7.5 DEGREES FOR 5 PER CENT LOSS OF THE LEFT FOREARM, GIVING CLAIMANT A TOTAL OF 45 DEGREES FOR 30 PER CENT LOSS OF LEFT FOREARM.

CLAIMANT CONTENDS HE CAN'T WORK AND HIS LEFT ARM IS 'USELESS'. THE REFEREE FOUND THAT THE MEDICAL REPORTS DID NOT SUBSTANTIATE THIS. HOWEVER, DURING THE PERIOD OF APRIL 8, 1975 THROUGH JULY 24, 1975 CLAIMANT WAS UNABLE TO WORK BECAUSE OF HIS ARM AND THIS IS CONFIRMED BY DR. PALUSKA'S REPORT OF OCTOBER 28, 1975.

THE REFEREE CONCLUDED THAT CLAIMANT'S LOSS OF FUNCTION OF HIS LEFT FOREARM WAS NOT GREATER THAN 30 PER CENT - CLAIMANT STILL MAINTAINS 60 PER CENT PRONATION, FULL SUPINATION AND NORMAL DORSI-EXTENSION AND PALMAR FLEXION, ALL OF WHICH CONTRADICTS CLAIMANT'S CONTENTION OF A USELESS WRIST. THE REFEREE AFFIRMED THE SECOND DETERMINATION ORDER.

THE REFEREE FOUND CLAIMANT WAS ENTITLED TO ADDITIONAL COMPENSATION FOR TEMPORARY TOTAL DISABILITY, BASED ON DR. PALUSKA'S REPORT, FOR THE PERIOD BETWEEN APRIL 4, 1975 THROUGH JULY 24, 1975.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED JANUARY 26, 1976, IS AFFIRMED.

WCB CASE NO. 75-2456 JULY 2, 1976

IN THE MATTER OF THE COMPENSATION OF
THE BENEFICIARIES OF
HARRY, LILLIE, DECEASED
GARRY KAHN, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY BENEFICIARIES
CROSS REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE BENEFICIARIES OF HARRY LILLIE, DECEASED, HEREINAFTER CALLED CLAIMANT, SEEK BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER, DATED MAY 12, 1975, WHEREBY THE DECEASED WORKMAN HAD BEEN AWARDED COMPENSATION FOR TEMPORARY TOTAL DISABILITY ONLY.

THE STATE ACCIDENT INSURANCE FUND CROSS-REQUESTS BOARD REVIEW OF THAT PORTION OF THE ORDER WHICH DIRECTED IT TO PAY COMPENSATION FOR TEMPORARY TOTAL DISABILITY ON A 'FIVE DAY WEEK' BASIS RATHER THAN A 'THREE DAY WEEK', WITH CREDIT TO BE GIVEN FOR ANY AMOUNTS ALREADY PAID, PURSUANT TO THE DETERMINATION ORDER.

THE DECEASED WORKMAN HAD SUFFERED A COMPENSABLE INJURY ON FEBRUARY 11, 1975. HE HAD BEEN FIRST SEEN BY DR. CHATBURN, A CHIROPRACTIC PHYSICIAN, AND TREATED FOR STRAIN OF THE CERVICAL AND LUMBAR SPINE AND THE SPRAIN OF HIS LEFT WRIST. LATER, HE HAD BEEN SEEN BY DR. FRENCH WHO HAD TREATED HIS LEFT WRIST PROBLEM UNTIL FEBRUARY 17, 1975 WHEN HE HAD RELEASED HIM TO RETURN TO HIS REGULAR WORK.

THE WORKMAN HAD BEEN SEEN BY DR. HOLBERT ON JUNE 13, 1975 - AT THAT TIME, DR. HOLBERT FOUND FULL RANGE OF MOTION OF THE LEFT WRIST WITH DISCOMFORT IN PALMAR FLEXION AND TENDERNESS INTO THE LEFT ELBOW. APPROXIMATELY TWO WEEKS LATER, DR. HOLBERT HAD AGAIN SEEN THE WORKMAN AND FOUND THAT HE WAS HAVING PAIN IN HIS NECK, AGGRAVATED BY ACTIVITY. HE ALSO HAD, AT THAT TIME, LUMPS IN THE NECK, ASSOCIATED WITH HEADACHES. DR. HOLBERT FELT THAT THE CURRENT NECK PROBLEM WAS MUCH THE SAME, ONLY WORSE, THAN THE WORKMAN HAD HAD SINCE AN OCTOBER, 1974 TRUCK ACCIDENT IN WHICH THE WORKMAN HAD BEEN THROWN AROUND IN THE CAB OF HIS TRUCK. THE LOW BACK PROBLEM WAS ABOUT THE SAME AS IT HAD BEEN OVER A PERIOD OF THE LAST TWO YEARS. IT HAD COME ON WITH NO SPECIFIC INJURY BUT HAD BEEN AGGRAVATED BY THE FEBRUARY 12, 1975 INJURY. DR. HOLBERT FELT THAT THE CURRENT PAIN WAS PROBABLY NO DIFFERENT THAN IT WAS PRIOR TO THE FEBRUARY 12, 1975 INJURY AND THE PRIMARY AGGRAVATING PROBLEM OF THE DECEASED WORKMAN'S LOW BACK HAD BEEN THE INCIDENT OF OCTOBER, 1974.

THE CLAIM WAS CLOSED BY A DETERMINATION ORDER MAILED MAY 12, 1975 WHEREBY THE WORKMAN HAD BEEN AWARDED COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM FEBRUARY 17 THROUGH APRIL 17, 1975. ON JUNE 19, 1975 HE HAD FILED A REQUEST FOR HEARING FOR THE REASONS - (1) THE FUND HAD FAILED TO PAY HIM THE PROPER RATE FOR TEMPORARY TOTAL DISABILITY BENEFITS - (2) THAT HE WAS IN NEED OF FURTHER MEDICAL CARE AND TREATMENT AND WAS ENTITLED TO ADDITIONAL TEMPORARY TOTAL DISABILITY BENEFITS BEYOND THAT PROVIDED BY THE DETERMINATION ORDER MAILED MAY 12, 1975, AND (3) HE WAS ENTITLED TO AN AWARD OF COMPENSATION FOR PERMANENT DISABILITY FOR HIS INJURIES OF FEBRUARY 12, 1975.

THE WORKMAN HAD NOT BEEN ABLE TO RETURN TO WORK AFTER JUNE 25, 1975. AT THAT TIME THE WORKMAN'S WIFE ASKED DR. HOLBERT TO PLACE THE WORKMAN BACK ON DISABILITY STATUS, HOWEVER, HE DECLINED TO DO SO.

ON AUGUST 6, 1975 HARRY LILLIE DIED FROM BRONCHOGENIC CARCINOMA. HE HAD BEEN PAID TIME LOSS FROM FEBRUARY 17 TO APRIL 17, 1975.

CLAIMANT APPEALED FROM THE DETERMINATION ORDER, PURSUANT TO ORS 656.218(3).

DR. HOLBERT'S REPORTS DO NOT SHOW ANY LOSS IN RANGE OF MOTION OF THE LEFT WRIST - THERE WAS SOME TENDERNESS BUT HE FELT THAT THERE WOULD BE COMPLETE HEALING WITH TIME. SOME RESIDUAL SYMPTOMS OF SPRAIN TO THE LEFT WRIST WERE NOTED BUT DR. HOLBERT FELT THAT NO SPECIFIC MANAGEMENT WAS INDICATED EXCEPT TIME.

THE LAST REPORT OF DR. HOLBERT INDICATED THAT THE NECK PROBLEM WAS DUE TO THE OCTOBER, 1974 TRUCK ACCIDENT AND HAD REMAINED MUCH THE SAME ONLY WORSE, SINCE THAT DATE AND THE LOW BACK PROBLEMS WERE BROUGHT ON WITH NO SPECIFIC INJURY (ALTHOUGH IT MIGHT HAVE BEEN AGGRAVATED BY THE INJURY OF FEBRUARY 12, 1975 THE CURRENT PROBLEM IN JUNE, 1975 WAS NOT DIFFERENT THAN IT HAD BEEN PRIOR TO THE INDUSTRIAL INJURY OF FEBRUARY, 1975). THE TOTALITY OF THE EVIDENCE INDICATED THAT THE WORKMAN'S CONDITION HAD RETURNED TO WHAT IT WAS BEFORE THE INDUSTRIAL INJURY OF FEBRUARY 12, 1975 AND THAT ANY RESULTANT COMPLAINTS THAT HE HAD HAD WERE DUE TO THE OCTOBER, 1974 INJURY, THEREFORE, THE REFEREE CONCLUDED THERE WAS NOT SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF PERMANENT PARTIAL DISABILITY.

THE REFEREE FOUND THAT THE DECEASED WORKMAN HAD WORKED A VARIED WORK WEEK FROM WEEK TO WEEK AS A TRUCK DRIVER. DURING 1974 HIS EARNINGS WERE LESS THAN OTHER TRUCK DRIVERS WITH SIMILAR SENIORITY BECAUSE HE HAD BEEN PHYSICALLY INCAPABLE OF WORKING SOME OF THE TIME. DURING JANUARY, 1975 THE TRUCKING BUSINESS WAS SLOW. ALL ACTIVITY CEASED FROM DECEMBER 20, 1974 UNTIL JANUARY 6, 1975 WHEN THE TRUCK DRIVERS WENT ON A THREE DAY WORK SCHEDULE. THE REFEREE FOUND ALTHOUGH IT WAS NORMAL PROCEDURE IN THE WINTER TIME TO GO INTO A THREE DAY WORK WEEK, THE NORMAL WORK WEEK WAS FIVE DAYS. AT THE TIME THE DECEASED WORKMAN HAD BEEN INJURED THE TRUCKING OPERATION WAS ON A THREE DAY WORK WEEK WHICH WAS CONTINUED, WITH SOME EXCEPTIONS, DURING MARCH AND APRIL, 1975, THE COMPANY WORKED VARYING TIMES DEPENDING ON THE SENIORITY OR STATUS OF THE INDIVIDUAL DRIVER.

THE REFEREE FOUND THAT DR. FRENCH HAD RELEASED THE DECEASED WORKMAN TO RETURN TO REGULAR WORK ON APRIL 17, 1975 - HE HAD CONTINUED TO SEE DR. CHATBURN FOR HIS NECK AND BACK PROBLEMS AND HAD LATER SEEN DR. HOLBERT FOR THESE PROBLEMS, BUT DR. HOLBERT, ON JANUARY 25, 1975 REFUSED THE WIFE'S REQUEST TO PUT HER HUSBAND BACK ON A DISABILITY STATUS. HE CONCLUDED THAT COMPENSATION FOR TEMPORARY TOTAL DISABILITY WAS PROPERLY TERMINATED ON APRIL 17, 1975.

WITH RESPECT TO THE PROPER COMPUTATION FOR THE TEMPORARY TOTAL DISABILITY COMPENSATION, CLAIMANT'S CONTENTION WAS THAT IF A WORKMAN WAS EMPLOYED FIVE DAYS A WEEK AND WAS WILLING AND AVAILABLE TO WORK HE SHOULD BE ENTITLED TO HAVE HIS TEMPORARY TOTAL DISABILITY COMPENSATION BE COMPUTED ON A FIVE DAY BASIS. HOWEVER, THE FUND CONTENDED THAT THE WORKMAN WOULD BE ENTITLED TO COMPENSATION BASED ON THE NUMBER OF DAYS PER WEEK HE WAS WORKING AT THE TIME THE INJURY OCCURRED AND IF HE NORMALLY WORKED FIVE DAYS A WEEK BUT WAS ONLY WORKING THREE DAYS A WEEK WHEN THE INJURY OCCURRED, AND OTHER WORKERS IN THE SAME CATEGORY WERE LIKEWISE WORKING THREE DAYS A WEEK, THAT THIS COMPENSATION SHOULD BE COMPUTED AT THE LOWER SCALE.

THE REFEREE FOUND THAT A WORKMAN WHO USUALLY WORKS THREE DAYS A WEEK IF INJURED DURING THAT PERIOD OF TIME WHEN HE WAS EMPLOYED FIVE DAYS A WEEK WOULD BE ENTITLED TO COMPENSATION COMPUTED ON THE BASIS OF FIVE DAYS A WEEK, BUT THAT A WORKMAN WHO NORMALLY WORKS

THREE DAYS A WEEK WOULD ONLY BE ENTITLED TO COMPENSATION COMPUTED ON THE THREE DAY WEEK EVEN THOUGH HE MAY HAVE BEEN WILLING, OR EVEN ANXIOUS, TO WORK FIVE OR SIX DAYS A WEEK. IN THE PRESENT CASE THE REFEREE FOUND THAT THE DECEASED WORKMAN HAD BEEN EMPLOYED TO WORK A FIVE DAY WEEK, ALTHOUGH AT THE TIME THAT HE HAD SUFFERED HIS COMPENSABLE INJURY, BECAUSE OF CONDITIONS IN THE INDUSTRY, HE, AS WELL AS OTHERS IN THIS CATEGORY, HAD BEEN WORKING A THREE DAY WORK SCHEDULE.

HE CONCLUDED THAT AS THE DECEASED WORKMAN WOULD HAVE NORMALLY BEEN EMPLOYED FIVE DAYS A WEEK BUT WAS REDUCED TO THREE DAYS A WEEK BECAUSE OF TEMPORARY PROBLEMS HE SHOULD HAVE RECEIVED COMPENSATION AS THOUGH HE HAD BEEN WORKING A FIVE DAY WEEK AT THE TIME HE HAD BEEN INJURED - HE, THEREFORE, DIRECTED THE FUND TO ADJUST THE RATE OF COMPENSATION FOR TEMPORARY TOTAL DISABILITY ON THE BASIS OF A FIVE DAY WEEK RATHER THAN A THREE DAY WEEK.

THE BOARD, ON DE NOVO REVIEW, AGREES WITH THE REFEREE'S FINDINGS AND CONCLUSIONS THAT THE DECEDANT WORKMAN HAD SUFFERED NO PERMANENT PARTIAL DISABILITY.

HOWEVER, THE BOARD DISAGREES WITH THE REFEREE'S CONCLUSION THAT BECAUSE THE DECEASED WORKMAN WOULD HAVE NORMALLY BEEN EMPLOYED FIVE DAYS A WEEK BUT HAD BEEN REDUCED TO A THREE DAY A WEEK SCHEDULE BECAUSE OF TEMPORARY PROBLEMS HE WAS ENTITLED TO RECEIVE COMPENSATION AS THOUGH HE HAD BEEN WORKING FIVE DAYS A WEEK AT THE TIME OF HIS INJURY. THE EVIDENCE INDICATES THAT THE ENTIRE CREW HAD BEEN LAID OFF ON DECEMBER 20, 1974 AND DID NOT RETURN TO WORK UNTIL JANUARY 6, 1975 WHEN THEY WERE REHIRED ON A THREE DAY WORK SCHEDULE. AT THE TIME OF THE HEARING ON OCTOBER 14, 1975 THE EMPLOYER WAS STILL WORKING THE THREE DAY A WEEK SCHEDULE. THE REFEREE STATED THAT IT WAS NORMAL PROCEDURE DURING THE WINTER MONTHS TO REDUCE THE WORKING SCHEDULE.

THE BOARD CONCLUDES THAT THE NORMAL WORKING WEEK CONSISTED OF THREE DAYS AT THE TIME THE DECEASED WORKMAN HAD SUFFERED HIS INDUSTRIAL INJURY AND, THEREFORE, THE COMPENSATION FOR TEMPORARY TOTAL DISABILITY WAS PROPERLY COMPUTED ON A THREE DAY WEEK. THE REDUCTION FROM A FIVE DAY WEEK TO A THREE DAY WEEK WAS NOT DUE TO ANY 'TEMPORARY PROBLEM' BUT WAS A REGULAR, SEASONAL CHANGE OF SCHEDULE AND AFFECTED ALL OF THE DRIVERS, INCLUDING THE DECEASED WORKMAN.

ORDER

THE ORDER OF THE REFEREE, DATED JANUARY 13, 1976 IS MODIFIED.

CLAIMANT SHALL BE PAID TEMPORARY TOTAL DISABILITY COMPENSATION FROM FEBRUARY 17 THROUGH APRIL 17, 1975 ON THE RATE OF A THREE DAY WEEK.

THE DETERMINATION ORDER MAILED MAY 12, 1975 IS AFFIRMED.

WCB CASE NO. 75-2151 JULY 2, 1976

LEWIS MORRIS, CLAIMANT

D. KEITH SWANSON, CLAIMANT'S ATTY.
DARYLL KLEIN, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AFFIRMED THE DETERMINATION ORDER GRANTING CLAIMANT TIME LOSS AND

96 DEGREES FOR 30 PER CENT UNSCHEDULED NECK DISABILITY.

CLAIMANT, A TRUCK DRIVER, SUFFERED A COMPENSABLE INJURY ON MARCH 25, 1974 WHEN AS HE WAS UNLOADING A TRUCK, HE THREW A STRAP OVER THE LOAD AND EXPERIENCED PAIN BETWEEN THE SHOULDER BLADES WHICH LATER RADIATED DOWN HIS RIGHT ARM.

CLAIMANT RECEIVED CHIROPRACTIC TREATMENTS FROM DR. WARNER - IN MAY CLAIMANT WAS EXAMINED BY DR. JOHN WHITE WHO DIAGNOSED ACUTE DISC HERNIATION AT C6-7 ON THE RIGHT AND RECOMMENDED HOSPITALIZATION.

IN JUNE, 1974, CLAIMANT WAS HOSPITALIZED AND A DECOMPRESSION FORAMINOTOMY AT C6-7 AND C7-T1 WAS PERFORMED BY DR. HILL. IN OCTOBER, 1974, DR. HILL STATED CLAIMANT STILL HAD PAIN SYMPTOMS - HE HAD TRIED TO RETURN TO TRUCK DRIVING BUT HAD TO TERMINATE HIS EMPLOYMENT. DR. HILL FOUND CLAIMANT TO BE MEDICALLY STATIONARY AND REFERRED HIM TO THE DISABILITY PREVENTION DIVISION TO BE RETRAINED.

DR. VAN OSDEL, WHO EXAMINED CLAIMANT AT THE DISABILITY PREVENTION DIVISION ON JANUARY 6, 1975, FOUND RESIDUALS OF NECK STRAIN, MILD - SIGNIFICANT PSYCHOPATHOLOGY. HE RECOMMENDED A JOB CHANGE WITH NO OVERHEAD WORK OR BENDING, TWISTING OR STOOPING MOTION.

ON MAY 23, 1975, CLAIMANT'S CLAIM WAS CLOSED WITH AN AWARD OF 96 DEGREES.

DR. POULSON EXAMINED CLAIMANT ON AUGUST 12, AND AUGUST 26, 1975 AND FOUND CLAIMANT'S CONDITION IMPROVED BUT HE DID HAVE RESIDUALS - DUE TO THE FUNCTIONAL OVERLAY, DR. POULSON FOUND IT DIFFICULT TO EVALUATE THE EXTENT OF CLAIMANT'S DISABILITY.

THE DIVISION OF VOCATIONAL REHABILITATION FOUND CLAIMANT WAS NOT ELIGIBLE FOR VOCATIONAL REHABILITATION ON THE BASIS OF 'MEDICALLY' NOT FEASIBLE.

THE CLAIMANT TESTIFIED THAT HE HAD GREAT DIFFICULTY GETTING IN AND OUT OF CARS AND CHAIRS AND COULD NOT STAND OR SIT FOR EXTENDED PERIODS OF TIME - AT THE HEARING CLAIMANT LIMPED BADLY. HOWEVER, FILM SHOWN AT THE HEARING REFUTED THE EXTENT OF CLAIMANT'S PROBLEM. THEY SHOWED CLAIMANT DOING ALL THE AFOREMENTIONED ACTIVITIES WITHOUT APPARENT DIFFICULTY AND WALKING WITH NO LIMP.

THE REFEREE CONCLUDED THAT CLAIMANT OBVIOUSLY EXAGGERATED HIS PHYSICAL IMPAIRMENT AND, BASED UPON THE MEDICAL EVIDENCE AND THE FILMS, FELT CLAIMANT HAD BEEN ADEQUATELY COMPENSATED FOR HIS LOSS OF WAGE EARNING CAPACITY BY THE AWARD OF 96 DEGREES FOR 30 PER CENT UNSCHEDULED NECK DISABILITY.

THE BOARD, ON DE NOVO REVIEW, ADOPTS THE CONCLUSIONS AND FINDINGS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED JANUARY 16, 1976 IS AFFIRMED.

WCB CASE NO. 75-2020 JULY 2, 1976

THOMAS G. DALTON, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT SEEKS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH AWARDED HIM AN ADDITIONAL 96 DEGREES, MAKING A TOTAL AWARD OF 224 DEGREES FOR 70 PER CENT UNSCHEDULED LOW BACK DISABILITY. HE CONTENDS THAT HE IS PERMANENTLY AND TOTALLY DISABLED.

CLAIMANT SUFFERED A COMPENSABLE LOW BACK INJURY IN AUGUST, 1973. HE FIRST RECEIVED CHIROPRACTIC ADJUSTMENTS AND WAS FITTED FOR A LUMBO-SACRAL SUPPORT - HE WAS RELEASED FOR WORK ON SEPTEMBER 5, BUT WAS ONLY ABLE TO WORK FOR ABOUT A WEEK. HE WAS AGAIN RELEASED TO RETURN TO WORK ON SEPTEMBER 27, BUT WAS ONLY ABLE TO WORK FOUR HOURS THIS TIME DUE TO THE BOUNCING INVOLVED IN DRIVING A LUMBER STACKER, WHICH WAS HIS REGULAR JOB.

CLAIMANT'S TREATING CHIROPRACTOR WAS OF THE OPINION THAT CLAIMANT WAS UNABLE TO RETURN TO HIS FORMER WORK AND, IN NOVEMBER 1973, CLAIMANT WAS REFERRED TO DR. MELSON, A NEUROLOGIST, WHO PERFORMED A MYELOGRAM AND SUBSEQUENTLY, A LUMBAR LAMINECTOMY. CLAIMANT HAD A SLOW RECOVERY WITH GRADUALLY INCREASING MOTION AND DECREASING PAIN - DURING THIS PERIOD OF TIME HE WAS TREATED BY BOTH AN ORTHOPEDIST AND A CHIROPRACTOR.

IN FEBRUARY, 1975 CLAIMANT HAD REACHED A STATIONARY POINT WITH LIMITED USE OF HIS BACK. ANY STRAIN OR STRESS MOTION USED CAUSED BACK DISCOMFORT WHICH COULD BE RELIEVED BY CHIROPRACTIC TREATMENT. DR. HOLBERT, AN ORTHOPEDIST, FELT THAT A FUSION WOULD BE A PROBABLE BENEFIT TO CLAIMANT AND IN MARCH, 1975, CLAIMANT WAS EVALUATED AT THE BACK EVALUATION CLINIC. IT WAS FELT THAT CLAIMANT'S MECHANICAL BACK PAIN WOULD PROBABLY, BUT NOT ABSOLUTELY, BE LESSENED BY A FUSION - HOWEVER, CLAIMANT REFUSED SUCH PROCEDURE.

AT THE PRESENT TIME CLAIMANT HAS LOW BACK AND BI-LATERAL ACHE AND PAIN AGGRAVATED BY BENDING, LIFTING, STOOPING, CLIMBING AND TWISTING AND REMAINING IN ONE POSITION FOR A PROLONGED PERIOD OF TIME. CLAIMANT'S PRIOR WORK EXPERIENCE CONSISTED ALMOST ENTIRELY OF LOGGING AND HEAVY EQUIPMENT OPERATION. CLAIMANT IS NOT WORKING NOW BUT DURING A TYPICAL DAY HE WILL TRAIN HIS BIRD DOG FOR ONE TO TWO HOURS, THIS INVOLVES WALKING THE DOG BUT ALSO ALLOWS CLAIMANT TO, ALTERNATIVELY, SIT, STAND AND SQUAT. HE IS ABLE TO DRIVE SHORT DISTANCES FOR VISITING PURPOSES AND CLAIMANT HUNTS IN THE SAND DUNES FOR A FEW HOURS A DAY. OCCASIONALLY HE GOES BAY FISHING IN A 15 FOOT BOAT FOR APPROXIMATELY A THREE HOUR TRIP.

THE REFEREE FOUND THE CONCENSUS OF MEDICAL OPINION WAS THAT CLAIMANT COULD NOT RETURN TO HIS JOB HE WAS DOING AT THE TIME HE SUFFERED HIS INJURY NOR TO ANY OTHER JOB WHICH REQUIRED STRENUOUS LABOR INVOLVING REPETITIVE LIFTING, BENDING, TWISTING OR STOOPING. HE CONCLUDED, THEREFORE, THAT CLAIMANT WAS PRECLUDED FROM ALL WORK IN WHICH HE HAD HAD EXPERIENCE.

THE FUND URGES THAT THE DETERMINATION ORDER BE AFFIRMED BY THE REFEREE ON THE BASIS OF CLAIMANT'S REFUSAL TO SUBMIT TO THE RECOMMENDED FUSION SURGERY. THE REFEREE FOUND THAT THERE WAS AN 80 PER CENT

CHANCE OF A SUCCESSFUL FUSION WHICH, IF IT WERE ACCOMPLISHED, WOULD ENHANCE CLAIMANT'S PRESENT WORK CAPABILITIES. IT WOULD NOT PERMANENTLY ENABLE HIM TO RETURN TO HEAVY WORK BUT IT WOULD ALLOW CLAIMANT TO ATTEMPT TO PERFORM LIGHT WORK.

THE REFEREE FOUND THAT CLAIMANT'S PRESENT DISABILITY AS IT PERTAINED TO IMPAIRMENT WAS GREATER THAN IT WOULD BE IF A FUSION WAS PERFORMED AND HE FOUND NO JUSTIFICATION FOR CLAIMANT'S REFUSAL FOR THE FUSION. HOWEVER, EVEN WITH A FUSION, CLAIMANT COULD NOT ENGAGE IN HEAVY WORK AND HE HAS HAD NO TRAINING OR EXPERIENCE IN LIGHT TYPE WORK. CLAIMANT HAS ONLY A 9TH GRADE EDUCATION AND THERE IS NO EVIDENCE IN THE RECORD THAT HE IS NOT TRAINABLE. CLAIMANT'S ONLY ATTEMPT AT LIGHTER WORK WAS PRIOR TO HIS LAMINECTOMY.

THE REFEREE CONCLUDED THAT THE MEDICAL EVIDENCE, COMBINED WITH OTHER FACTORS RELEVANT TO THE DETERMINATION OF UNSCHEDULED DISABILITY, FAILED TO ESTABLISH THAT CLAIMANT WAS INCAPABLE OF ANY TYPE OF WORK - HOWEVER, HE HAS LOST HIS MAIN ASSET IN THE LABOR MARKET, NAMELY HIS BACK AND HE PRESENTLY HAS FEW OTHER ATTRIBUTES OR ABILITIES TO OFFSET THAT LOSS. HE CONCLUDED THAT THE SEVERE LIMITATION OF CLAIMANT'S ABILITY TO GAIN AND HOLD WORK IN THE BROAD FIELD OF INDUSTRIAL OCCUPATIONS ENTITLED HIM TO AN AWARD OF 70 PER CENT OF THE MAXIMUM ALLOWABLE BY STATUTE FOR HIS UNSCHEDULED LOW BACK DISABILITY.

THE BOARD, ON DE NOVO REVIEW, DOES NOT AGREE WITH THE REFEREE'S FINAL CONCLUSION. THE BOARD DOES NOT BELIEVE THAT CLAIMANT HAS MADE A BONA FIDE ATTEMPT TO ASSIST HIMSELF. HE HAS MADE ONLY ONE ATTEMPT TO DO LIGHT WORK. THE MEDICAL EVIDENCE INDICATES THAT THERE ARE MANY DIFFERENT TYPES OF WORK WHICH HAVE BEEN OFFERED TO CLAIMANT BUT HE HAS REFUSED REPEATEDLY TO ATTEMPT ANY OF THEM. CLAIMANT HAS APPLIED FOR SOCIAL SECURITY BUT WAS REFUSED. HE HAS NOT GONE TO THE DEPARTMENT OF EMPLOYMENT, REEMPLOYMENT SECTION, TO SEE IF THEY COULD GIVE HIM ANY HELP, NOR HAS HE GONE TO THE COMMUNITY COLLEGE TO LOOK FOR ANY POSSIBLE TRAINING COURSES.

CLAIMANT HAS NOT APPLIED AT ANY PLACE OTHER THAN COOS HEAD TIMBER CO., HIS FORMER EMPLOYER, FOR ANY TYPE OF WORK. HE DID RETURN TO WORK FOR THIS EMPLOYER PRIOR TO HIS LAMINECTOMY BUT AFTER DR. HOLBERT SAID HE COULD NOT DO HEAVY WORK HE DID NOT RETURN TO SEE IF THERE WAS ANY LIGHTER WORK AVAILABLE FOR HIM. THE EVIDENCE INDICATES CLAIMANT HAS BEEN ABLE TO GO DEER HUNTING, TRAIN HIS BIRD DOG, DRIVE HIS CAR AND GO FISHING WITHOUT EXPERIENCING ANY GREAT DISTRESS OR DISCOMFORT.

THE BOARD FEELS THAT CLAIMANT WAS NOT UNREASONABLE IN REFUSING THE SURGERY, HOWEVER WITHOUT IT, IT IS IMPOSSIBLE TO ACCURATELY ASSESS THE CLAIMANT'S PRESENT LOSS OF EARNING CAPACITY. THERE IS ABUNDANT EVIDENCE OF CLAIMANT'S FAILURE TO ATTEMPT TO TRY ANY LIGHTER TYPE OF WORK WHICH HE MIGHT BE ABLE TO DO EVEN WITHOUT THE FUSION. CLAIMANT SIMPLY IS NOT MOTIVATED TO RETURN TO ANY TYPE OF WORK.

THE BOARD CONCLUDES THAT THIS LACK OF MOTIVATION TO RETURN TO THE LABOR MARKET IS THE PRIMARY REASON CLAIMANT IS PRESENTLY EXPERIENCING A SUBSTANTIAL LOSS OF EARNING CAPACITY, NOT THE INDUSTRIAL INJURY. CLAIMANT HAS MADE NO ATTEMPT TO DISCOVER WHAT HIS EARNING CAPACITY MIGHT BE.

THE BOARD CONCLUDES THAT UNTIL CLAIMANT CAN SHOW GREATER MOTIVATION TO RETURN TO WORK BY ATTEMPTING TO LOOK FOR LIGHTER TYPE WORK WITHIN HIS CAPABILITIES - BY SEEKING ASSISTANCE FROM THE VARIOUS FACILITIES WHICH PROVIDE RETRAINING PROGRAMS AND POSSIBLY BY GIVING FURTHER CONSIDERATION TO THE SURGERY WHICH COULD NOT RESTORE CLAIMANT TO HIS PRE-INJURY CONDITION BUT MIGHT, IF SUCCESSFUL, OPEN A GREATER PORTION

OF THE LABOR MARKET TO HIM, THAT CLAIMANT HAS BEEN ADEQUATELY COMPENSATED FOR HIS LOSS OF EARNING CAPACITY BY THE AWARD OF 128 DEGREES.

ORDER

THE ORDER OF THE REFEREE, DATED NOVEMBER 28, 1975 IS REVERSED.

THE DETERMINATION ORDER MAILED APRIL 30, 1975 IS AFFIRMED.

WCB CASE NO. 75-3335 JULY 7, 1976

CHARLES MC MURRIAN, CLAIMANT

GARY JENSEN, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY SAIF
CROSS REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH AWARDED CLAIMANT 48 DEGREES FOR 15 PER CENT UNSCHEDULED LOW BACK DISABILITY. THE CLAIMANT CROSS REQUESTS BOARD REVIEW, CONTENDING HE IS ENTITLED TO A LARGER AWARD.

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS LOW BACK ON DECEMBER 28, 1971 WHEN HE SLIPPED ON SOME ICE. HE WAS TREATED AS AN OUTPATIENT ONLY AND CONTINUED TO WORK UNTIL THE SUMMER OF 1974 WHEN HIS CONDITION BECAME SO BAD THAT HE QUIT WORK AND HAS NOT WORKED SINCE. APPARENTLY, THE CLAIM HAD BEEN INITIALLY CLOSED AS A 'MEDICAL ONLY'. IT WAS REOPENED BY THE FUND AND SUBSEQUENTLY CLOSED BY A DETERMINATION ORDER, DATED AUGUST 5, 1975, WHICH AWARDED CLAIMANT ONLY COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM OCTOBER 24, 1974 THROUGH JUNE 20, 1975.

CLAIMANT ORIGINALLY RECEIVED CHIROPRACTIC MANIPULATIONS AND WAS LATER REFERRED TO DR. DEGGE WHO HOSPITALIZED CLAIMANT FOR APPROXIMATELY A WEEK. THEREAFTER, CLAIMANT DISCONTINUED TREATMENT WITH DR. DEGGE AND, IN NOVEMBER, 1974, WAS SEEN BY BOTH DR. SCHROEDER AND DR. HOCKEY.

DR. HOCKEY FELT THAT THERE WAS A FUNCTIONAL LOW BACK PROBLEM WHICH RESULTED FROM CLAIMANT'S WORK BUT HE FOUND NO EVIDENCE OF A LUMBAR HERNIATED DISC. HE DID FEEL THAT THERE WAS A GREAT DEAL OF FUNCTIONAL OVERLAY REGARDING CLAIMANT AND HIS ABILITY TO WORK. HE RECOMMENDED THAT CLAIMANT BE SENT TO THE DISABILITY PREVENTION DIVISION IN PORTLAND, NO SURGERY OR THERAPY WAS NECESSARY.

THE PHYSICIANS AT THE DISABILITY PREVENTION DIVISION FOUND EVIDENCE OF MODERATE SEVERE PSYCHOPHYSIOLOGICAL REACTION WITH MILDLY SEVERE ANXIETY IN A PASSIVE-DEPENDENT PERSONALITY. PSYCHIATRIC EVALUATION WAS RECOMMENDED AS IT WAS THOUGHT THAT CLAIMANT'S PSYCHOPATHOLOGY WAS, AT LEAST, MODERATELY RELATED TO HIS INJURY.

DR. KAJAR, A PSYCHIATRIST, ATTEMPTED TO EVALUATE CLAIMANT BUT FOUND HIM TOTALLY UNCOOPERATIVE. DR. KAJAR STATED HE WAS UNABLE TO ENGAGE THE CLAIMANT IN PSYCHIATRIC CARE AND HIS FINAL DIAGNOSIS WAS PASSIVE AGRESSIVE PERSONALITY WITH ANTI-AUTHORITY TRAITS.

CLAIMANT WAS SEEN AT THE PAIN CLINIC WHERE HIS COMPLAINTS WERE DIAGNOSED AS CHRONIC BACK SPRAIN AND IT WAS NOTED HE HAD POOR MOTIVATION.

CLAIMANT WAS ALSO EXAMINED BY THE ORTHOPEDIC CONSULTANTS WHO FELT THAT CLAIMANT'S CONDITION WAS THEN MEDICALLY STATIONARY AND THAT HIS DISABILITY WAS IN THE AREA OF 'MILD'.

DR. HOCKEY INDICATED THAT CLAIMANT HAD CHRONIC LUMBOSACRAL STRAIN, OR, AT LEAST, LOW BACK PAIN AND THAT THE PRIMARY TROUBLE WAS PSYCHOLOGICAL IN NATURE. BASED UPON THE MEDICAL REPORTS RECEIVED FROM DR. HOCKEY, DR. KAJAR, AND ALSO THE REPORTS RECEIVED FROM DR. SHROEDER, DR. YOSPE AND DR. NEWMAN, THE DETERMINATION ORDER WAS ISSUED ON AUGUST 5, 1975.

DR. WOODWARD SUBMITTED A REPORT, DATED DECEMBER 18, 1975, WHICH INDICATED THAT CLAIMANT HAD PERMANENT DISABILITY AND HE HAD CONTINUED SUSPICION OF FIBROTIC TISSUE DEVELOPMENT, HE SUGGESTED A CHANGE OF EMPLOYMENT EVEN IF IT BECAME NECESSARY TO RETRAIN CLAIMANT.

IF CLAIMANT'S PHYSICAL DISABILITY PLUS HIS PSYCHOLOGICAL OVERLAY WERE TO BE CONSIDERED THE CLAIMANT WOULD PROBABLY BE ENTITLED TO AN AWARD OF 50 OR 60 PER CENT, BUT THE REFEREE FOUND THAT BECAUSE OF CLAIMANT'S ATTITUDE IT WAS IMPOSSIBLE TO MAKE ANY DETERMINATION WITH RESPECT TO HIS PSYCHOLOGICAL PROBLEMS. HE REFUSED TO TAKE INTO CONSIDERATION THESE PROBLEMS BECAUSE OF CLAIMANT'S LACK OF COOPERATION WITH THE PSYCHIATRIST AND ALSO HIS LACK OF COOPERATION WITH THE OTHER DOCTORS WHO TREATED AND-OR EXAMINED HIM.

ALL OF THE DOCTORS HAVE FOUND THAT CLAIMANT HAD CHRONIC LUMBOSACRAL STRAIN AND WILL PROBABLY HAVE TO LIVE WITH IT, THEY ALSO HAVE EXPRESSED THEIR INDIVIDUAL BELIEFS THAT CLAIMANT, WHILE HAVING SOME PAIN AND DIFFICULTIES, WAS STRETCHING HIS DISABILITY ALL OUT OF PROPORTION. THE REFEREE TENDED TO AGREE WITH THIS ASSESSMENT.

BASED UPON THE MEDICAL REPORTS AND TAKING INTO CONSIDERATION CLAIMANT'S LACK OF MOTIVATION AND HIS REFUSAL TO DO ANYTHING INCLUDING TAKING THE PROPER TREATMENT FOR HIS DIFFICULTIES, THE REFEREE FELT THAT CLAIMANT WOULD BE ADEQUATELY COMPENSATED FOR HIS LOSS OF EARNING CAPACITY BY AN AWARD EQUAL TO 48 DEGREES FOR 15 PER CENT LOW BACK DISABILITY.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS AND CONCLUSIONS REACHED BY THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED JANUARY 23, 1976, IS AFFIRMED.

WCB CASE NO. 75-4053 JULY 7, 1976

JOSEPH DATZ, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
LINDSAY, NAHSTOLL, HART, DAFOE AND KRAUSE,
DEFENSE ATTYS.
ORDER OF REMAND

THE CLAIMANT SEEKS BOARD REVIEW OF THAT PORTION OF THE REFEREE'S ORDER WHICH DENIED HIS CLAIM FOR CERTAIN MEDICAL EXPENSES, CONTENDING THAT THE EMPLOYER HAD UNREASONABLY DELAYED AND RESISTED PAYMENT OF THESE MEDICAL BILLS TO THE EXTENT THAT THE EMPLOYER WAS SUBJECT TO PENALTIES AND PAYMENT OF AN ATTORNEY'S FEE.

THE ISSUES BEFORE THE REFEREE WERE = (1) PROPRIETY OF THE DENIAL OF CLAIMANT'S CLAIM FOR AGGRAVATION = (2) CLAIMANT'S ENTITLEMENT TO COMPENSATION FOR TEMPORARY TOTAL DISABILITY FOR A PERIOD OF 24 DAYS IN AUGUST, 1975 = (3) CLAIM FOR CERTAIN MEDICAL EXPENSES AND (4) A REQUEST FOR PENALTIES AND AN ATTORNEY'S FEE FOR THE EMPLOYER'S UNREASONABLE RESISTANCE AND DELAY IN THE PAYMENT OF SAID MEDICAL EXPENSES.

THE BOARD, AFTER DE NOVO REVIEW, FINDS NOTHING IN THE FINDINGS OR OPINION OF THE REFEREE'S ORDER WHICH EXPLAINS HIS DENIAL OF ISSUE 3 OR DISPOSES OF ISSUE 4. THE ORDER MERELY STATES = 'THAT THE REQUEST OF CLAIMANT FOR AGGRAVATION BENEFITS, COMPENSATION FOR TEMPORARY TOTAL DISABILITY, AND MEDICAL EXPENSES IN 1975 BE, AND THE SAME HEREBY IS, DENIED AND THIS MATTER IS DISMISSED.'

THE CLAIMANT CONTENDS THAT EMPLOYER IS SUBJECT TO A PENALTY BECAUSE IT WAITED UNTIL THE MORNING OF THE HEARING BEFORE IT TENDERED PAYMENT OF CLAIMANT'S MEDICAL BILLS WHICH IT HAD EARLIER DECLINED TO PAY.

THE BOARD CONCLUDES THAT THE CASE HAS BEEN INCOMPLETELY DEVELOPED BY THE REFEREE AND, PURSUANT TO ORS 656.295(5), REMANDS IT TO REFEREE H. DON FINK FOR THE SOLE PURPOSE OF ENTERING A SUPPLEMENTAL OPINION AND ORDER STATING HIS FINDINGS, CONCLUSIONS AND ORDER ON THE ISSUES OF UNREASONABLE DELAY AND RESISTANCE IN PAYMENT OF MEDICAL BILLS AND THE ASSESSMENT OF PENALTIES AND AWARD OF ATTORNEY'S FEE. THE BOARD FURTHER CONCLUDES THAT IT IS NOT NECESSARY TO CONVENE A HEARING FOR THIS PURPOSE.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 31, 1975, IS REMANDED TO REFEREE H. DON FINK WITH DIRECTIONS TO ENTER AN AMENDED OPINION AND ORDER WITH HIS FINDINGS, CONCLUSIONS AND ORDER ON THE ISSUES OF UNREASONABLE DELAY AND RESISTANCE OF PAYMENT OF MEDICAL BILLS AND ASSIGNMENT OF PENALTIES AND AWARD OF AN ATTORNEY'S FEE.

WCB CASE NO. 75-3676 JULY 7, 1976

JAMES W. SCOTT, CLAIMANT

POZZI, WILSON AND ATCHISON,
CLAIMANT'S ATTYS.
JONES, LANG, KLEIN, WOLF AND SMITH,
DEFENSE ATTYS.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE DECEDENT WORKMAN'S WIDOW SEEKS BOARD REVIEW OF THE REFEREE'S ORDER WHICH DENIED THE CLAIM FOR A FATAL HEART ATTACK.

THE WORKMAN, WHO DIED ON FEBRUARY 21, 1975, HAD BEEN EMPLOYED AS A TRAILER SALESMAN. ON THE WEDNESDAY, PRECEDING HIS DEATH, THE MOBILE HOME SHOW STARTED AT THE MEMORIAL COLISEUM. WEDNESDAY AFTERNOON THE DECEDENT HAS SPENT ONE HOUR AT THE TRAILER LOT AND THE REST OF THE AFTERNOON AT THE COLISEUM. HE LEFT AT APPROXIMATELY 7 P.M. ON THURSDAY, THE DECEDENT HAD GONE DIRECTLY TO THE COLISEUM, ARRIVING AT 5 P.M. AND STAYING UNTIL, APPROXIMATELY, 10 P.M. = HE DID NOT GO TO THE CAR LOT THAT DAY. ON FRIDAY, HE DID NOT GO TO THE CAR LOT BUT AGAIN WENT DIRECTLY TO THE COLISEUM ARRIVING AT 4.30 P.M.

THE SALES MANAGER TESTIFIED THAT THE DECEDENT HAD LOOKED TIRED, THAT HE WENT IN AND SAT DOWN ON ONE OF THE BAR STOOLS IN THE TRAILER HOME. THE SALES MANAGER WAS OUTSIDE THE HOME FOR A FEW MOMENTS AND SHORTLY THEREAFTER ONE OF THE OTHER PEOPLE IN THE MOBILE HOME CAME OUT AND SAID THAT THE SALESMAN WAS HAVING A HEART ATTACK. THE DECEDENT HAD NOT DONE ANY WORK AT ALL ON FRIDAY PRIOR TO HIS HEART ATTACK.

DR. REAUME, A CARDIOLOGIST WHO TOOK CARE OF THE DECEDENT WORKMAN AFTER HIS ATTACK, AND DR. REYNOLDS, THE FAMILY PHYSICIAN, WERE ASKED TO ASSUME THAT THE DECEDENT, WHO HAD HAD A PRIOR HEART ATTACK IN AUGUST, 1973, WORKED 10 TO 12 HOURS A DAY AND, FURTHERMORE, THAT IN THE TEN TO FOURTEEN DAY PERIOD IMMEDIATELY PRIOR TO THE ATTACK ON FEBRUARY 21, 1975, HE WAS COMING HOME WITH ADDITIONAL DUTIES IN THE FORM OF HAVING TO PREPARE AND PARTICIPATE IN THE MOBILE HOME SHOW. BASED UPON THESE AND OTHER FACTS, BOTH FELT IT WAS POSSIBLE THAT THE HEART ATTACK RELATED TO THE DECEDENT'S WORK ACTIVITY - NEITHER STATED THAT THE WORK ACTIVITY WAS THE MATERIAL CONTRIBUTING FACTOR IN PRODUCING THE HEART ATTACK.

THE REFEREE FOUND THAT THE PREPONDERANCE OF THE EVIDENCE WAS NOT IN ACCORD WITH THE FACTS WHICH THE TWO DOCTORS WERE ASKED TO ASSUME AND UPON WHICH THEY BASED THEIR OPINION. THE EMPLOYEES WORKED SLIGHTLY LESS THAN FIVE DAYS A WEEK AND WORKED TWO SHIFTS - EITHER FROM 9 A. M. UNTIL 3 OR 4 P. M. OR FROM 2 P. M. UNTIL 9 P. M. THERE WERE AS MANY AS FIVE SALESMEN WORKING IN THE LOT AT ANY GIVEN TIME, THE WORK WAS LOW KEY AND THERE WAS NO REQUIRED 'SCRAMBLING' FOR CUSTOMERS. THE ROTATION SYSTEM WAS USED, I. E., THE SALESMEN HAVE THEIR NAMES ON A BOARD AND THEY TAKE EVENTUAL CUSTOMERS IN ORDER. THE SALESMEN ARE ONLY RESPONSIBLE FOR CONTACTING THE CUSTOMER AND MAKING THE SALE, ALL CREDIT APPLICATION AND CLOSING PROCEDURES ARE HANDLED BY THE SALES MANAGERS.

THE REFEREE FOUND THAT ON THE DAY BEFORE DECEDENT WOULD TAKE HIS REGULAR DAY OFF HE WOULD WORK THE MORNING SHIFT AND ON THE DAY AFTER HIS DAY OFF HE WOULD WORK THE LATE SHIFT, RESULTING IN A 'LONG' DAY OFF. ALSO THE DECEDENT WORKED LESS THAN A 40 HOUR WEEK. THERE IS NO EVIDENCE THAT WHEN THE HOME SHOW COMMENCED, OR EVEN PRIOR THERETO, THE DECEDENT HAD ANY ADDITIONAL RESPONSIBILITIES.

DR. GRISWOLD, A CARDIOLOGIST, AFTER LISTENING TO ALL OF THE TESTIMONY, TESTIFIED THAT, IN HIS OPINION, THERE WAS NO CAUSAL RELATIONSHIP BETWEEN THE DECEDENT'S WORK ACTIVITY AND HIS HEART ATTACK OF FEBRUARY 21, 1975. HE FOUND NOTHING THAT INVOLVED ACUTE EMOTIONAL OR PHYSICAL STRESS OR ANY PERIOD OF PROLONGED SLEEP DEPRIVATION BECAUSE OF THE WORK ACTIVITY WHICH MATERIALLY CONTRIBUTED TO THE INFARCTION. HE FOUND NO SPECIFIC INCIDENT OF STRESS.

THE REFEREE CONCLUDED THAT THE BURDEN OF PROVING BY PREPONDERANCE OF THE EVIDENCE THAT THE WORK OR STRESS INVOLVED WAS A MATERIAL CONTRIBUTING FACTOR TO THE ATTACK HAD NOT BEEN MET AND, THEREFORE, THE MYOCARDIAL INFARCTION OF FEBRUARY 21, 1975 WAS NOT COMPENSABLE.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE ORDER OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 19, 1975 IS AFFIRMED.

WCB CASE NO. 75-395 JULY 7, 1976

WESLEY LEACH, CLAIMANT

KEITH TICHENOR, CLAIMANT'S ATTY.
JACK MATTISON, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE EMPLOYER REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH REMANDED CLAIMANT'S CLAIM TO THE EMPLOYER FOR PAYMENT OF WORKMEN'S COMPENSATION BENEFITS FROM AND AFTER CLAIMANT'S ABSENCE FROM WORK FOR DIAGNOSTIC STUDY AND FOR SAPHENOUS BYPASS SURGERY AND UNTIL THE CLAIM IS CLOSED PURSUANT TO ORS 656.268. THE EMPLOYER ALSO REQUESTS REVIEW OF WHETHER CLAIMANT'S CLAIM IS BARRED FOR FAILURE TO GIVE ADEQUATE NOTICE WITHIN 30 DAYS.

ON AUGUST 7, 1974 CLAIMANT, A 28 YEAR OLD GREENCHAIN OFF-BEARER, LEFT WORK FOR DIAGNOSTIC STUDY BECAUSE OF REOCCURRING CHEST PAINS WHICH HAD BEGUN IN JANUARY OR FEBRUARY, 1974.

FOLLOWING THE ANGIOGRAPHY CLAIMANT UNDERWENT SURGERY BY DR. LAWRENCE BONCHEK FOR DOUBLE CORONARY ARTERY BYPASS.

PRIOR TO ASSUMING HIS JOB IN 1973 WITH THIS EMPLOYER, CLAIMANT HAD NEVER SUFFERED FROM CHEST PAINS OR HAD ANY INDICATION OF HEART TROUBLE. HIS WORK ON THE GREENCHAIN WAS CONSIDERED MODERATELY HEAVY WORK WITH QUICK MOVEMENTS NECESSARY AT TIMES.

IN JANUARY, 1974 CLAIMANT HAD COME UNDER THE SUPERVISION OF IVAN ROBISON AND THE RELATIONSHIP BETWEEN THE TWO WAS ONE OF CONSTANT TENSION AND MUTUAL DISLIKE - AND WITNESSES TESTIFIED THAT THE TWO ARGUED A LOT. CLAIMANT FELT HE WAS BEING PICKED ON AND ROBISON DIDN'T THINK CLAIMANT'S WORK WAS UP TO CAPACITY. THE REFEREE CALLED THEIR RELATIONSHIP A 'PERSONALITY CONFLICT'. IT WAS ABOUT THIS TIME THAT THE CHEST PAINS BEGAN.

DR. OELKE FOUND THAT THE CHEST PAINS STARTED AFTER THE WORK GOT REAL HEAVY AND WHENEVER THE TWO MEN QUARRELED.

WHETHER OR NOT CLAIMANT WAS ACTUALLY 'PICKED UPON' BY ROBISON IS IMMATERIAL - THE REFEREE FOUND, HOWEVER, THAT THE QUARRELING, AT LEAST IN CLAIMANT'S CASE, CAUSED A GREAT DEAL OF TENSION IN CLAIMANT AND BROUGHT ABOUT CHEST PAINS. THIS CONCURRED WITH THE MEDICAL FINDINGS - DR. DEMOTS, A PROFESSOR IN THE DIVISION OF CARDIOLOGY OF THE UNIVERSITY OF OREGON MEDICAL SCHOOL, STATED THE NEED FOR SURGERY IN AUGUST, 1974 WAS RELATED TO THE STRESS OF CLAIMANT'S WORK BECAUSE THE PHYSICAL AND (UNDERSCORED) EMOTIONAL STRESS OF HIS WORK CONTRIBUTED TO THE SEVERITY OF CLAIMANT'S SYMPTOMS. THE REFEREE FOUND CLAIMANT'S DISABILITY WAS COMPENSABLE.

ON THE ISSUE OF TIMELINESS, THE REFEREE FOUND THAT CLAIMANT HAD INDICATED HIS CHEST PAINS TO HIS SUPERINTENDENT AND THAT THE LATTER WAS ALSO AWARE OF THE ANGIOGRAPHY BEING ADMINISTERED.

CLAIMANT HAD FILED FOR OFF-THE-JOB INSURANCE AND ON THE FORM ANSWERED THE QUESTION, 'WAS THIS SICKNESS OR INJURY CAUSED BY EMPLOYMENT?' CLAIMANT ANSWERED 'UNKNOWN'. CLAIMANT STATES HE DIDN'T UNDERSTAND THE WORKMEN'S COMPENSATION LAW BUT ON THE ADVICE OF HIS FAMILY HE CONSULTED COUNSEL IN JANUARY, 1975.

THE REFEREE CONCLUDED THAT CLAIMANT HAD ESTABLISHED GOOD CAUSE

FOR FAILURE TO GIVE NOTICE WITHIN 30 DAYS AND HAD ONE YEAR WITHIN WHICH TO GIVE NOTICE PURSUANT TO ORS 656.265(4)(C).

THE BOARD, ON DE NOVO REVIEW, CONCLUDES WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED OCTOBER 9, 1975 IS AFFIRMED.

CLAIMANT'S ATTORNEY IS AWARDED AS A REASONABLE ATTORNEY FEE THE SUM OF 400 DOLLARS, PAYABLE BY THE EMPLOYER FOR SERVICES IN CONNECTION WITH BOARD REVIEW.

WCB CASE NO. 75-4026 JULY 7, 1976

ELLIS GLAHN, CLAIMANT

ROBERT BENNETT, CLAIMANT'S ATTY.
KEITH SKELTON, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH HELD THAT THE SUSPENSION OF CLAIMANT'S COMPENSATION BY THE EMPLOYER, WITH CONSENT OF THE COMPLIANCE DIVISION, PURSUANT TO ORS 656.325, WAS PROPER AND JUSTIFIED.

CLAIMANT SUFFERED A COMPENSABLE INJURY ON MARCH 15, 1974 AND HIS CLAIM WAS ACCEPTED AS NON-DISABLING. CLAIMANT RECEIVED TEMPORARY TOTAL DISABILITY BENEFITS FROM JANUARY, 1975 UNTIL THE APPROVED TERMINATION OF HIS COMPENSATION IN AUGUST, 1975.

CLAIMANT WAS REFERRED BY HIS FAMILY PHYSICIAN TO DR. LISAC WHO FIRST FELT CLAIMANT'S OPTIONS WERE (1) A WRIST FUSION OR (2) WEARING A WRIST GAUNTLET OR A PROSTHETIC WRIST JOINT REPLACEMENT. HE LATER DISCARDED THE LATTER.

IN DECEMBER, 1975 CLAIMANT WAS SEEN AT THE PORTLAND HAND SURGERY CENTER BY DR. NATHAN WHO BELIEVED THAT AS CLAIMANT'S WRIST BECAME MORE IMMOBILE THERE WOULD BE LESS DISCOMFORT AND SURGERY COULD BE AVOIDED. CLAIMANT DID NOT WANT SURGERY. CLAIMANT HAS NOT WORKED SINCE JANUARY 15, 1975.

DR. LISAC FELT SURGERY WAS NECESSARY - DR. NATHAN THOUGHT OTHERWISE. MEANWHILE, CLAIMANT WAS RECEIVING TEMPORARY TOTAL DISABILITY COMPENSATION WITH NO ACTIVITY TOWARDS RECOVERY. AT THIS POINT THE CARRIER, WITH THE PERMISSION OF THE COMPLIANCE DIVISION, TERMINATED CLAIMANT'S TEMPORARY TOTAL DISABILITY PAYMENTS.

THE REFEREE FELT THAT THOUGH CLAIMANT TESTIFIED HE COULDN'T GO BACK TO WORK, A MORE REASONABLE CONCLUSION WAS THAT CLAIMANT JUST DIDN'T WANT TO RETURN TO WORK.

THE REFEREE CONCLUDED THAT THE ONLY EVIDENCE THAT CLAIMANT IS NOT MEDICALLY STATIONARY IS THE RECOMMENDED WRIST FUSION SURGERY. HOWEVER, SINCE CLAIMANT REFUSES TO UNDERGO THIS SURGERY AND THERE ARE NO OTHER MEDICAL RECOMMENDATIONS, CLAIMANT IS CONSIDERED TO BE MEDICALLY STATIONARY.

THE BOARD, ON DE NOVO REVIEW, ADOPTS THE CONCLUSIONS OF THE REFEREE THAT THE SUSPENSION OF BENEFITS WAS JUSTIFIED.

ORDER

THE ORDER OF THE REFEREE, DATED JANUARY 29, 1976, IS AFFIRMED.

WCB CASE NO. 75-4108 JULY 9, 1976
WCB CASE NO. 75-5501

DENNIS KRALL, CLAIMANT

SID BROCKLEY, CLAIMANT'S ATTY.
RICHARD DAVIS, DEFENSE ATTY.
ORDER

THE OPINION AND ORDER ENTERED IN THE ABOVE ENTITLED MATTER ON MARCH 10, 1976, AS AMENDED ON APRIL 26, 1976, AWARDED CLAIMANT 25 PER CENT INCREASE FOR HIS UNSCHEDULED DISABILITY BUT INADVERTANTLY NEGLECTED TO ALLOW CLAIMANT'S ATTORNEY A REASONABLE ATTORNEY FEE PAYABLE OUT OF THE INCREASED COMPENSATION, AS PAID, TO A MAXIMUM OF 2,000 DOLLARS.

BEFORE THE REFEREE COULD RECTIFY THIS OMISSION BY AN AMENDED ORDER, THE EMPLOYER REQUESTED BOARD REVIEW OF THE REFEREE'S ORDER, THEREBY DIVESTING THE REFEREE OF JURISDICTION OVER THE MATTER.

THE BOARD, AT THE PRESENT TIME, HAS NOT REVIEWED THE ABOVE ENTITLED MATTER, HOWEVER, IT CONCLUDES THAT IT WOULD BE APPROPRIATE TO AWARD CLAIMANT'S ATTORNEY AN ATTORNEY FEE FOR HIS SERVICES AT THE HEARING, IN CONFORMITY WITH THE ATTORNEY FEE AGREEMENT BETWEEN CLAIMANT AND HIS ATTORNEY, A PART OF THE RECORD.

THEREFORE, THE EMPLOYER, MILWAUKIE PLYWOOD CORPORATION, AND ITS CARRIER, ARGONAUT INSURANCE COMPANY, HEREBY ARE DIRECTED TO PAY CLAIMANT'S ATTORNEY, AS A REASONABLE ATTORNEY FEE, THE SUM OF 25 PER CENT OF THE COMPENSATION INCREASED BY THE REFEREE'S OPINION AND ORDER, AS AMENDED, PAYABLE OUT OF SAID COMPENSATION, AS PAID, NOT TO EXCEED 2,000 DOLLARS.

WCB CASE NO. 75-3057 JULY 9, 1976

SHILDS KELLUM, CLAIMANT

ROBERT BABCOCK, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH UPHELD THE DENIAL BY THE STATE ACCIDENT INSURANCE FUND OF HIS CLAIM FOR COMPENSATION.

CLAIMANT WAS 16 YEARS OLD WHEN HE WAS INJURED ON DECEMBER 2, 1972. HE WAS THE SON OF AN EMPLOYEE WHO WORKED FULL TIME FOR THE EMPLOYER AS A SAWYER. SHORTLY AFTER HIS EMPLOYMENT THE FATHER, WILLIAM KELLUM, HAD REQUESTED TO DO CLEANUP AROUND THE MILL ON WEEK-ENDS FOR WHICH HE WOULD BE PAID AN HOURLY WAGE.

AFTER DOING THIS CLEANUP WORK ON WEEKENDS FOR A SHORT PERIOD OF TIME, THE FATHER ASKED THE PLANT SUPERINTENDENT IF HIS TWO SONS COULD ASSIST HIM IN THIS WORK. THE SUPERINTENDENT WAS HESITANT BUT FINALLY AGREED TO ALLOW THE REQUEST IF THE FATHER WOULD KEEP THE BOYS AWAY FROM THE POWER-DRIVEN MACHINERY. THE ARRANGEMENT FOR COMPENSATION WAS STRICTLY BETWEEN THE FATHER AND HIS SONS - NO MONEY CAME TO THE SONS FROM THE EMPLOYER. ONE SON QUIT, THE CLAIMANT REMAINED.

THE ONLY SUPERVISION OVER THE CLEANUP JOB WAS DONE BY THE SUPERINTENDENT ON MONDAY MORNINGS - THIS CONSISTED OF INSPECTING FOR APPROVAL OR DISAPPROVAL.

THE REFEREE FOUND THAT THE WORK WHICH CLAIMANT DID WAS DONE IN BEHALF OF THE FATHER NOT THE EMPLOYER. THE FATHER WAS TO PAY CLAIMANT HALF OF THE FATHER'S EARNINGS. THE FATHER'S REQUEST WAS MERELY FOR PERMISSION TO BRING CLAIMANT ON THE PREMISES WITH NO CONTRACT TO HIRE.

THE REFEREE CONCLUDED THAT ALTHOUGH CLAIMANT WAS SUBJECT TO THE CONTROL OF THE EMPLOYER, CLAIMANT DID NOT ENGAGE TO FURNISH HIS SERVICES TO THE EMPLOYER FOR REMUNERATION, THUS CLAIMANT WAS NOT A SUBJECT WORKMAN AS DEFINED BY ORS 656.002(22) AND HIS CLAIM WAS NOT COMPENSABLE UNDER THE WORKMEN'S COMPENSATION LAW.

THE BOARD, ON DE NOVO REVIEW, AGREES THERE WAS NO CONTRACT OF EMPLOYMENT BETWEEN CLAIMANT AND EMPLOYER. THE BOARD ALSO FINDS THAT CLAIMANT WAS NOT SUBJECT TO CONTROL OF THE EMPLOYER.

ORDER

THE ORDER OF THE REFEREE, DATED JANUARY 30, 1976, IS AFFIRMED.

WCB CASE NO. 75-3162 JULY 9, 1976

ARTHUR JONES, CLAIMANT

CHARLES SEAGRAVES, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT
CROSS REQUEST FOR REVIEW BY SAIF

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH GRANTED CLAIMANT AN ADDITIONAL 10 PER CENT FOR A TOTAL OF 48 DEGREES FOR 15 PER CENT UNSCHEDULED DISABILITY. CLAIMANT CONTENDS THIS IS AN INADEQUATE AWARD.

THE STATE ACCIDENT INSURANCE FUND CROSS APPEALS THE REFEREE'S ORDER, CONTENDING THE DETERMINATION ORDER WAS CORRECT.

CLAIMANT SUFFERED A COMPENSABLE INJURY TO HIS LOW BACK ON SEPTEMBER 26, 1974. IT WAS DIAGNOSED AS AN ACUTE LUMBAR STRAIN. CLAIMANT WAS TREATED CONSERVATIVELY BY DR. JOHNSON WHO, IN MARCH, 1975, REFERRED CLAIMANT TO THE DISABILITY PREVENTION DIVISION TO DETERMINE IF SURGERY WAS WARRANTED.

CLAIMANT WAS SEEN BY THE ORTHOPEDIC CONSULTANTS ON APRIL 24, 1975. THEY FOUND SOME LOSS OF MOTION, BUT NOT SIGNIFICANT BACK PROBLEMS. CLAIMANT'S TOTAL LOSS OF FUNCTION TO HIS BACK WAS MINIMAL AND NO SURGERY WAS INDICATED - CLAIMANT COULD RETURN TO HIS JOB.

IN JUNE, 1975 DR. JOHNSON REPORTED CLAIMANT HAD ACHIEVED MAXIMUM RECOVERY AND DIAGNOSED CHRONIC LOW BACK STRAIN.

A DETERMINATION ORDER, ISSUED JULY 21, 1975, GRANTED CLAIMANT 16 DEGREES FOR 5 PER CENT UNSCHEDULED DISABILITY.

CLAIMANT, ON HIS OWN, CONTACTED DR. POTTER WHO, ON SEPTEMBER 30, 1975, REFERRED CLAIMANT TO A PSYCHIATRIST BECAUSE HE COULD FIND NO OBJECTIVE FINDINGS FOR CLAIMANT'S COMPLAINTS. THE PSYCHIATRIST, DR. GOLDBLOOM, CONCLUDED THAT CLAIMANT WAS POSSIBLY MALINGERING.

CLAIMANT HAS MADE NO ATTEMPT TO RETURN TO WORK EVEN THOUGH HIS EMPLOYER, AT THE HEARING, SAID HE HAD A LIGHTER JOB AVAILABLE FOR CLAIMANT.

THE REFEREE CONCLUDED THAT CLAIMANT WAS CAPABLE OF RETURNING TO WORK AND HIS ABILITIES AND APTITUDES QUALIFIED CLAIMANT FOR CERTAIN TYPES OF WORK, WHETHER RETRAINED OR NOT. HOWEVER, CLAIMANT CANNOT DO ANY WORK THAT INVOLVES HEAVY LIFTING OR CARRYING, THEREFORE, CLAIMANT HAS LOST A GREATER AMOUNT OF EARNING CAPACITY THAN THE AWARD OF 5 PER CENT INDICATES. HE INCREASED THE AWARD TO 15 PER CENT OF THE MAXIMUM.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE CONCLUSIONS OF THE REFEREE. THE REFEREE WAS ABLE TO OBSERVE CLAIMANT AT THE HEARING AND WAS IN THE BEST POSITION TO JUDGE HIS CAPABILITIES AS WELL AS HIS IMPAIRMENT.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 24, 1975, IS AFFIRMED.

WCB CASE NO. 75-83 JULY 9, 1976

ERNEST BRENNER, CLAIMANT

JAMES POMAJEVICH, CLAIMANT'S ATTY.
SCOTT KELLEY, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT
CROSS REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

CLAIMANT REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH GRANTED HIM AN ADDITIONAL 192 DEGREES FOR A TOTAL AWARD OF 256 DEGREES FOR 80 PER CENT UNSCHEDULED LOW BACK DISABILITY. CLAIMANT CONTENDS HE IS PERMANENTLY AND TOTALLY DISABLED.

THE EMPLOYER REQUESTS CROSS REVIEW CONTENDING THAT THE REFEREE'S ORDER WAS TOO GENEROUS AND CLAIMANT WAS ENTITLED ONLY TO THE AWARD MADE BY THE DETERMINATION ORDER OF DECEMBER 20, 1974.

CLAIMANT, A CEMENT FINISHER, SUFFERED AN INDUSTRIAL INJURY ON FEBRUARY 22, 1972 WHEN HE SLIPPED AND FELL INJURING HIS LOW BACK. THE INITIAL DIAGNOSIS WAS LUMBAR BACK STRAIN. CLAIMANT, INITIALLY, WAS TREATED CONSERVATIVELY BUT THIS PROVED NEGATIVE IN RELIEVING CLAIMANT'S DISTRESS AND A TWO-LEVEL LAMINECTOMY AND NERVE ROOT DECOMPRESSION SURGERY WAS PERFORMED. NO HERNIATED DISC WAS FOUND.

BECAUSE OF CONTINUAL DISTRESS, CLAIMANT'S TREATING PHYSICIAN, DR. MELGARD, REFERRED CLAIMANT FOR RETRAINING. IT WAS HIS CONCLUSION

THAT CLAIMANT COULD NOT WORK IN JOBS INVOLVING HEAVY LIFTING OR REPETITIVE BENDING. THIS OPINION WAS AFFIRMED BY THE MAJORITY OF THE OTHER MEDICAL OPINIONS.

ON DECEMBER 20, 1974 A DETERMINATION ORDER GRANTED CLAIMANT 64 DEGREES FOR 20 PER CENT UNSCHEDULED LOW BACK DISABILITY.

IN 1963 CLAIMANT HAD SUFFERED AN INJURY INVOLVING HIS LOW BACK. DR. ANDERSON TREATED CLAIMANT FOR THAT INJURY. DR. ANDERSON ALSO SAW CLAIMANT ON MARCH 7, 1972 FOR HIS 1972 INJURY. DR. ANDERSON CONCLUDED THAT THERE WAS 'NO APPRECIABLE DIFFERENCE' BETWEEN HIS FINDINGS RELATING TO CLAIMANT'S CONDITION, BASED ON HIS REPORTS OF MARCH 10, 1964 AND HIS FINDINGS MADE IN 1972. CLAIMANT HAD NOT WORSENED. DR. ANDERSON AND DR. MELGARD FELT CLAIMANT WAS CAPABLE OF LIGHT EMPLOYMENT - DR. ANDERSON ALSO FELT CLAIMANT LACKED MOTIVATION.

IN FEBRUARY, 1974 CLAIMANT WAS EXAMINED BY DR. SCHULER WHO, IN CONCURRANCE WITH THE OTHER DOCTORS' OPINION, FELT THAT CLAIMANT COULD NOT RETURN TO HIS JOB AS A CEMENT FINISHER.

CLAIMANT CONTENDS THAT HE CAN DO VERY LITTLE, THAT HE CANNOT BEND DOWN OR SIT FOR OVER 30 MINUTES. HIS BACK ACHES CONSTANTLY. CLAIMANT ATTRIBUTES ALL OF HIS COMPLAINTS TO THE 1972 INJURY - HE STATES HE HAS FULLY RECOVERED FROM THE 1964 INJURY.

A FILM, SHOWN AT THE HEARING, PICTURES CLAIMANT, WITHOUT HESITATION OR ANY SIGN OF LIMITATION, BENDING, TWISTING AND EVEN LIFTING A BALE OF HAY.

THE REFEREE FINDS THAT THE FILM DOESN'T ESTABLISH THAT CLAIMANT IS WITHOUT DISABILITY, IT ONLY CONTRADICTS CLAIMANT'S ASSERTIONS OF HIS ABILITY TO DO SPECIFIC TASKS. HE WAS SHOWN DOING THESE ONLY ON A LIMITED TIME BASIS. THE VOCATIONAL COUNSELOR FELT CLAIMANT WAS TOTALLY UNEMPLOYABLE BASED ON HIS PHYSICAL AND MENTAL CAPABILITIES, HOWEVER, THE REFEREE FELT THE FILMS CONTRADICTED SUCH A FINDING.

THE REFEREE CONCLUDED THAT CLAIMANT HAD LOST CONSIDERABLE WAGE EARNING CAPACITY AND HE GRANTED CLAIMANT AN ADDITIONAL 192 DEGREES.

THE BOARD, ON DE NOVO REVIEW, DISAGREES WITH THE REFEREE'S AWARD WHICH RESULTS IN GIVING CLAIMANT A TOTAL OF 256 DEGREES FOR 80 PER CENT DISABILITY. THE BOARD FEELS THAT CLAIMANT DOES HAVE DISABILITY AND HAS LOST SOME WAGE EARNING CAPACITY, HOWEVER, THE CONCENSUS OF THE MEDICAL OPINIONS IS THAT CLAIMANT COULD DO LIGHT EMPLOYMENT. DR. SCHULER FELT CLAIMANT COULD DO MODERATE WORK AND DR. MELGARD OPINED IT MIGHT BE POSSIBLE.

DR. ANDERSON STATES CLAIMANT ISN'T ANY WORSE NOW THAN HE WAS WHEN HE EXAMINED HIM IN 1964, FOLLOWING THE JULY, 1963 INJURY.

ALL OF CLAIMANT'S COMPLAINTS SEEM TO BE GROSSLY EXAGGERATED. THIS IS CONFIRMED BY THE FILMS - DR. SCHULER FELT THAT CLAIMANT VOLUNTARILY RESTRICTED HIS MOVEMENTS WHEN HE EXAMINED HIM.

BASED ON THE MEDICAL EVIDENCE AND THE FILM, THE BOARD CONCLUDES THAT CLAIMANT SHOULD BE AWARDED 160 DEGREES FOR A TOTAL OF 50 PER CENT UNSCHEDULED LOW BACK DISABILITY.

ORDER

THE ORDER OF THE REFEREE, DATED NOVEMBER 10, 1975, IS MODIFIED.

CLAIMANT IS AWARDED 96 DEGREES OF A MAXIMUM 320 DEGREES FOR

UNSCHEDULED LOW BACK DISABILITY. THIS IS IN ADDITION TO, NOT IN LIEU OF, THE AWARD OF 64 DEGREES GRANTED BY THE DETERMINATION ORDER OF DECEMBER 20, 1974.

WCB CASE NO. 75-2303 JULY 9, 1976

RICHARD HESS, CLAIMANT

BURL GREEN, CLAIMANT'S ATTY.
RICHARD LANG, 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 WORKMEN'S COMPENSATION BOARD, 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. 75-711 JULY 9, 1976

PAUL R. PRITCHARD, CLAIMANT

ROBERT GARDNER, CLAIMANT'S ATTY.
MICHAEL HOFFMAN, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

AN ORDER ON REVIEW, ENTERED BY THE BOARD IN THE ABOVE ENTITLED MATTER ON JUNE 30, 1976, ERRONEOUSLY STATED THAT THE REQUEST FOR REVIEW WAS BY THE EMPLOYER AND AWARDED CLAIMANT'S COUNSEL AN ATTORNEY'S FEE OF 350 DOLLARS PAYABLE BY THE EMPLOYER.

THE REQUEST FOR REVIEW, IN FACT, WAS MADE BY THE CLAIMANT, THE REFEREE'S ORDER WAS AFFIRMED BY THE BOARD, THEREFORE, CLAIMANT'S COUNCIL IS NOT ENTITLED TO ANY ATTORNEY'S FEE.

THE ORDER ON REVIEW IS AMENDED AS FOLLOWS -

THE WORD "EMPLOYER" IS DELETED FROM THE PARENTHETICAL PORTION OF THE CAPTION AND THE WORD "CLAIMANT" IS INSERTED IN LIEU THEREOF.

THE WORD "EMPLOYER" IS DELETED FROM THE FIRST LINE OF THE FIRST PARAGRAPH ON PAGE 1 OF THE ORDER AND THE WORD "CLAIMANT" IS INSERTED IN LIEU THEREOF.

ON PAGE 4 OF THE ORDER, THE SECOND PARAGRAPH OF THE "ORDER" PORTION IS DELETED.

IN ALL OTHER RESPECTS THE ORDER ON REVIEW, ENTERED JUNE 30, 1976, IS REAFFIRMED AND RATIFIED.

WALTER, HIGGINBOTHAM, CLAIMANT

EVOHL MALAGON, CLAIMANT'S ATTY.
ELDON CALEY, DEFENSE ATTY.
REQUEST FOR REVIEW BY CLAIMANT

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE CLAIMANT REQUESTS REVIEW BY THE BOARD OF THE REFEREE'S ORDER WHICH DENIED CLAIMANT'S CLAIM FOR AGGRAVATION OF HIS RESPIRATORY CONDITION FROM AND AFTER APRIL 14, 1972.

CLAIMANT, WHO WAS 46 YEARS OLD AT THE TIME OF THE HEARING, HAS BEEN EMPLOYED IN THE LUMBER INDUSTRY, PRIMARILY MILL WORK, SINCE HE WAS 16. DURING 1969, CLAIMANT DEVELOPED A RESPIRATORY PROBLEM IN THE CHEST WHICH HE DESCRIBED AS COLD SYMPTOMS - ADDITIONALLY HE DEVELOPED DERMATITIS OF THE HAND. BOTH THESE PROBLEMS WERE OF AN INTERMITTANT NATURE, THEY WOULD CLEAR UP WHEN CLAIMANT WAS OFF WORK FOR ANY PERIOD OF TIME BUT WOULD REOCCUR WHEN HE RETURNED.

CLAIMANT TERMINATED HIS EMPLOYMENT IN JANUARY, 1971 AND, ON FEBRUARY 10, 1971, HE FILED A CLAIM FOR OCCUPATIONAL DISEASE BECAUSE OF HIS RESPIRATORY AND SKIN PROBLEM, INDICATING HE HAD DEVELOPED AN ALLERGY BECAUSE OF HIS EXPOSURE TO DOUGLAS FIR DUST OVER THE ENTIRE PERIOD OF HIS EMPLOYMENT. THE CLAIM WAS DENIED BY THE EMPLOYER.

ON MAY 20, 1971, DR. FLETCHER, AN OSTEOPATHIC PHYSICIAN STATED THAT HE DID NOT FEEL THAT CLAIMANT'S ILLNESS WAS ENTIRELY INDUSTRIALLY ORIENTED.

ON OCTOBER 1, 1971, PURSUANT TO STIPULATION, THE CARRIER ACCEPTED CLAIMANT'S CLAIM OF OCCUPATIONAL DISEASE ON THE BASIS OF A RESPIRATORY IRRITATION CAUSED BY INHALATION OF DOUGLAS FIR WOOD DUST AND IT WAS PROVIDED THAT CLAIMANT BE PAID COMPENSATION FOR TEMPORARY TOTAL DISABILITY FROM JANUARY 11, 1971 TO APRIL 28, 1971, INCLUSIVE. ON OCTOBER 29, 1971 A DETERMINATION ORDER CLOSED THE CLAIM AWARDING THE TEMPORARY TOTAL DISABILITY COMPENSATION PURSUANT TO THE STIPULATION AND MAKING NO AWARD FOR PERMANENT PARTIAL DISABILITY.

ON APRIL 14, 1972 ANOTHER STIPULATION WAS APPROVED BY THE HEARINGS DIVISION WHEREBY CLAIMANT WAS AWARDED 18 DEGREES FOR HIS PERMANENT DISABILITY. THIS IS THE LAST AWARD OR ARRANGEMENT OF COMPENSATION.

CLAIMANT TESTIFIED THAT HIS RESPIRATORY CONDITION WORSENED DURING OCTOBER, 1974 - HE COULD NOT BREATH (SIC) AND HIS SLEEPING WAS AFFECTED AND BECAUSE OF HIS BREATHING DIFFICULTY HE WAS NOT ABLE TO ENGAGE IN ANY PHYSICAL ACTIVITY. ON OCTOBER 2, 1974 CLAIMANT WAS SEEN BY DR. LARNER, A SPECIALIST IN SKIN DISEASE. CLAIMANT COMPLAINED OF THE SAME SYMPTOMS HE HAD HAD DURING 1971. AS A RESULT OF THE PHYSICAL EXAMINATION, DR. LARNER FOUND NO ABNORMALITIES OF THE EYES, EARS, NOSE OR THROAT RESPIRATORY OR CARDIAC SYSTEM. THE BLOOD EXAMINATION WAS WITHIN NORMAL LIMITS AND ALLERGY TESTS INDICATED THAT CLAIMANT WAS EXTREMELY SENSITIVE TO DUST AND RESPIRATORY BACTERIA AND BACTERIAL EXTRACTS. DR. LARNER RECOMMENDED A PROGRAM OF DESENSITIZATION AND PREPARED AN APPROPRIATE VACCINE FOR THIS PURPOSE.

ON OCTOBER 4, 1975 DR. LARNER REPORTED THAT HE HAD EXAMINED AND TREATED CLAIMANT, PERIODICALLY, SINCE NOVEMBER 2, 1974 FOR A RESPIRATORY DISEASE BUT SINCE HE HAD NOT EXAMINED CLAIMANT IN 1970 IT WAS IMPOSSIBLE TO EVALUATE THE PRESENT STATUS WITH THE INITIATING SYMPTOMS. HE THOUGHT THAT A REVIEW OF THE PREVIOUS REPORTS 'SUGGESTED'

CLAIMANT'S PHYSICAL HANDICAP HAD INCREASED. HE EXPRESSED HIS MEDICAL JUDGMENT THAT CLAIMANT'S RESPIRATORY DISTRESS HAD INCREASED IN SEVERITY OVER THE PAST YEAR, SINCE HIS FIRST VISIT.

UPON DR. FLETCHER'S ADVICE CLAIMANT HAD MOVED TO CALIFORNIA AND RESIDED THERE BETWEEN DECEMBER, 1970 AND JUNE, 1971, ALTHOUGH HIS CONDITION IMPROVED SOMEWHAT HE DID NOT BECOME ENTIRELY ASYMPTOMATIC. HE TESTIFIED HE WAS NO BETTER IN CALIFORNIA THAN IN OREGON. AFTER CLAIMANT RECEIVED THE AWARD OF 18 DEGREES HE MOVED TO MISSOURI FOR A MONTH WHERE HE WAS EXPOSED TO COLD WEATHER AND CAUGHT A BAD COLD.

THE REFEREE FOUND NO EVIDENCE THAT CLAIMANT WAS EXPOSED TO DOUGLAS FIR DURING HIS STAY IN CALIFORNIA OR IN MISSOURI. CLAIMANT HAS NOT WORKED IN LUMBER PRODUCTS OR IN THE LUMBER INDUSTRY SINCE HIS TERMINATION WITH THE EMPLOYER IN JANUARY, 1971. AT THE PRESENT TIME CLAIMANT DOES SOME JUNKING AND YARD WORK AND RECEIVES A TOTAL INCOME OF APPROXIMATELY 2,000 DOLLARS FROM THESE ACTIVITIES - THE FAMILY INCOME CONSISTS OF CLAIMANT'S WIFE'S SUPPORT PAYMENTS IN THE AMOUNT OF 600 DOLLARS PER MONTH RECEIVED FROM HER PRIOR DIVORCE DECREE. CLAIMANT HAS NOT BEEN SUCCESSFUL IN SEEKING WORK, HE DOES NOT FEEL THAT HE CAN WORK AT ANYTHING HE KNOWS, I.E., LUMBER INDUSTRIES, BECAUSE OF HIS RESPIRATORY CONDITION.

THE REFEREE, BASED UPON THE EVIDENCE, CONCLUDED THAT CLAIMANT HAD FAILED TO PROVE BY A PREPONDERANCE THEREOF THAT HIS PRESENT RESPIRATORY PROBLEMS WERE RELATED TO THE ORIGINAL RESPIRATORY PROBLEM ACCEPTED BY THE CARRIER OR TO HIS JOB ACTIVITIES. THE REFEREE FOUND NO MEDICAL EVIDENCE TO ESTABLISH A CONNECTION WITH CLAIMANT'S ORIGINAL CONDITION OR HIS ACTIVITIES AT THE EMPLOYERS WITH HIS PRESENT RESPIRATORY PROBLEMS. THE ONLY MEDICAL EVIDENCE IN THE RECORD ARE DR. LARNER'S REPORTS OF NOVEMBER 10, 1974 AND AUGUST 4, 1975. THESE REPORTS ESTABLISH THAT CLAIMANT'S RESPIRATORY HAD WORSENED FROM OCTOBER 2, 1974 TO THE PRESENT AND THAT CLAIMANT WAS SENSITIVE NOT ONLY TO DOUGLAS FIR DUST BUT OTHER MATERIALS SUCH AS DUST, RESPIRATORY BACTERIA AND BACTERIAL EXTRACTS, ANIMAL DANDERS, FEATHERS AND SOME POLLENS BUT DR. LARNER WAS UNABLE TO EXPRESS ANY OPINION REGARDING THE RELATIONSHIP BETWEEN CLAIMANT'S PRESENT CONDITION AND HIS ORIGINAL CONDITION OR WORK ACTIVITIES.

THE REFEREE HAVING FOUND THAT CLAIMANT'S PRESENT CONDITION DID NOT REPRESENT A WORSENING SINCE THE DATE OF THE LAST AWARD OR ARRANGEMENT OF COMPENSATION, CONCLUDED THE OTHER ISSUES PRESENTED BY CLAIMANT WERE MOOT EXCEPT THE ISSUE OF PENALTIES AND ATTORNEY FEES PURSUANT TO ORS 656.262(8) AND 656.382 BECAUSE OF THE EMPLOYER'S ALLEGED FAILURE TO TIMELY PROCESS CLAIMANT'S CLAIM FOR AGGRAVATION.

THE REFEREE FOUND THAT CLAIMANT HAD AGAIN FAILED TO PROVE BY THE PREPONDERANCE OF THE EVIDENCE THAT PENALTIES SHOULD BE IMPOSED OR ATTORNEY FEES AWARDED. HE FOUND THAT CLAIMANT DID NOT FILE A CLAIM FOR AGGRAVATION IN ACCORDANCE WITH ORS 656.273(2) NOR DID HE PRESENT MEDICAL EVIDENCE WHICH HAD PUT THE EMPLOYER ON NOTICE OR KNOWLEDGE OF A MEDICALLY VERIFIED INABILITY TO WORK RESULTING FROM CLAIMANT'S WORSENED CONDITION. HE CONCLUDED THAT CLAIMANT'S COURSE OF CONDUCT CONTRIBUTED TO THE EMPLOYER'S FAILURE TO MORE QUICKLY PROCESS THIS CLAIM, ADDITIONALLY, THE REFEREE CONCLUDED THAT CLAIMANT'S AGREEMENT TO POSTPONE THE PRIOR SCHEDULED HEARING AND ALLOW THE EMPLOYER 60 DAYS TO ACCEPT OR DENY CLAIMANT'S CLAIM CONSTITUTED A WAIVER OF A PRIOR DEFECTS IN THAT REGARD. HE DENIED CLAIMANT'S CLAIM FOR PENALTIES AND ATTORNEYS FEES AND ALSO CLAIMANT'S CLAIM FOR AGGRAVATION.

THE BOARD, ON DE NOVO REVIEW, AFFIRMS AND ADOPTS THE REFEREE'S ORDER.

ORDER

THE ORDER OF THE REFEREE, DATED DECEMBER 24, 1975, IS AFFIRMED.

WCB CASE NO. 75-3206 JULY 9, 1976

RUSSELL ANDERSON, CLAIMANT

BENTON FLAXEL, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
REQUEST FOR REVIEW BY EMPLOYER

REVIEWED BY BOARD MEMBERS WILSON AND MOORE.

THE STATE ACCIDENT INSURANCE FUND REQUESTS BOARD REVIEW OF THE REFEREE'S ORDER WHICH FOUND CLAIMANT'S CLAIM TO BE COMPENSABLE AND REMANDED IT TO SAIF TO BE ACCEPTED FOR PAYMENT OF COMPENSATION PURSUANT TO LAW.

CLAIMANT, A MAINTENANCE MAN, SUFFERED AN ACUTE MYOCARDIAL INFARCTION ON MAY 12, 1975 WHILE INSTALLING SMOKE DETECTORS IN THE JAIL CELL CEILINGS. THE INSTALLATION REQUIRED CLAIMANT TO HOLD A 10 POUND ELECTRIC DRILL OVER HIS HEAD WHILE PERCHED ON A LADDER IN A VERTICAL POSITION AND TO DRILL TWO HOLES IN REINFORCED CONCRETE CEILINGS. CLAIMANT TESTIFIED THE EXERTION REQUIRED TO DO THIS CAUSED HIM TO BECOME BREATHLESS AND HE HAD TO REST FREQUENTLY. HE BECAME DIZZY AND PERSPIRED A LOT, AND RESTED MORE FREQUENTLY. AFTER FINISHING THE SECOND INSTALLATION CLAIMANT BECAME NAUSEOUS, HAD CRAMPING AND A DIARRHETIC BOWEL MOVEMENT. HE WENT TO THE POLICE DEPARTMENT AREA FROM WHERE HE IMMEDIATELY WAS TAKEN TO THE HOSPITAL IN AN AMBULANCE.

THE STATE ACCIDENT INSURANCE FUND CONTENDS THAT CLAIMANT SUFFERED THE MYOCARDIAL INFARCTION PRIOR TO GOING TO WORK. HOWEVER, CLAIMANT AND HIS WIFE TESTIFIED THAT HE FELT FINE THAT MORNING. ALSO, A WITNESS, WHO SAW CLAIMANT, NOTICED NOTHING WRONG. CLAIMANT HAD HAD A COMPLETE PHYSICAL IN 1974 - HE HAD NO HISTORY OF ARTERIOSCLEROSIS HEART DISEASE.

CLAIMANT'S TREATING PHYSICIAN, DR. DAVID WHITE, FELT THAT CLAIMANT'S WORK ACTIVITIES THAT DAY WERE A MATERIAL CONTRIBUTING FACTOR TO HIS MYOCARDIAL INFARCTION.

THE REFEREE FOUND NO EVIDENCE TO DISPUTE CLAIMANT'S TESTIMONY CONCERNING THE UNUSUAL PHYSICAL STRESS ON THIS PARTICULAR JOB, NOR ANY MEDICAL EVIDENCE WHICH CONTRADICTED THE OPINION OF DR. WHITE.

THE REFEREE CONCLUDED CLAIMANT HAD SUSTAINED HIS BURDEN OF PROOF BOTH LEGAL AND MEDICAL CAUSATION AND ORDERED SAIF TO ACCEPT THE CLAIM.

THE BOARD, ON DE NOVO REVIEW, CONCURS WITH THE FINDINGS AND CONCLUSIONS OF THE REFEREE.

ORDER

THE ORDER OF THE REFEREE, DATED FEBRUARY 3, 1976, IS AFFIRMED.

THE STATE ACCIDENT INSURANCE FUND IS ORDERED TO PAY CLAIMANT'S ATTORNEY AN ATTORNEY'S FEE IN THE SUM OF 350 DOLLARS.

WCB CASE NO. 73-913 JULY 9, 1976

JACK C. RUTHERFORD, CLAIMANT

FRANK SUSAK, CLAIMANT'S ATTY.
DEPT. OF JUSTICE, DEFENSE ATTY.
OWN MOTION ORDER

ON FEBRUARY 3, 1976 CLAIMANT, BY AND THROUGH HIS ATTORNEY, REQUESTED THE BOARD TO EXERCISE ITS OWN MOTION JURISDICTION PURSUANT TO ORS 656.278(1) AND REOPEN CLAIMANT'S CLAIM FOR HIS AUGUST 10, 1968 INDUSTRIAL INJURY, ALLEGING HIS CONDITION HAS WORSENED AND HE IS DEFINITELY IN NEED OF FURTHER MEDICAL CARE AND TREATMENT. IN SUPPORT OF THE REQUEST, CLAIMANT FURNISHED THE BOARD AND THE STATE ACCIDENT INSURANCE FUND MEDICAL REPORTS FROM DR. EDWARD LACKNER, LOS GATOS, CALIFORNIA, DR. MICHAEL G. NESPOLE, RADIOLOGIST, VALLEY WEST GENERAL HOSPITAL, LOS GATOS, CALIFORNIA, DR. CHARLES B. WILSON, NEUROSURGEON, SAN FRANCISCO, CALIFORNIA, AND DR. CESAR M. MAYO, A NEUROLOGIST, SAN JOSE, CALIFORNIA. THESE REPORTS COVER A PERIOD FROM SEPTEMBER, 1975 AND JUNE, 1976.

ON JUNE 29, 1976 THE FUND, AFTER REVIEWING ALL OF THE MEDICAL REPORTS HERETOFOR REFERRED TO, RESPONDED THAT IT WOULD NOT REOPEN THE CLAIM ON BOARD'S OWN MOTION BUT WOULD ASSUME RESPONSIBILITY FOR TREATMENT OTHER THAN CLAIMANT'S CERVICAL AREA AND PYLORIC ULCER WHICH IT FELT WERE NOT CAUSED BY, NOR THE RESULT OF, THE INDUSTRIAL INJURY OF AUGUST 10, 1968.

CLAIMANT'S CLAIM WAS INITIALLY CLOSED BY A DETERMINATION ORDER OF OCTOBER 6, 1969, WHEREBY HE RECEIVED COMPENSATION FOR TEMPORARY TOTAL DISABILITY AND TEMPORARY PARTIAL DISABILITY ONLY, HIS AGGRAVATION RIGHTS EXPIRED ON OCTOBER 5, 1974.

ON FEBRUARY 19, 1970 A STIPULATION AWARDED CLAIMANT 16 DEGREES FOR 5 PER CENT UNSCHEDULED DISABILITY AND, ON FEBRUARY 26, 1973, A SECOND DETERMINATION ORDER AWARDED CLAIMANT AN ADDITIONAL 32 DEGREES FOR 10 PER CENT UNSCHEDULED LOW BACK DISABILITY, A TOTAL OF 48 DEGREES. FEBRUARY 26, 1973 WAS THE LAST DATE OF AN AWARD OR ARRANGEMENT OF COMPENSATION.

THE BOARD, AFTER CAREFULLY REVIEWING ALL OF THE MEDICAL REPORTS SUBMITTED IN SUPPORT OF CLAIMANT'S REQUEST, CONCLUDES THAT CLAIMANT'S PRESENT CONDITION HAS BEEN CAUSED BY AND IS THE RESULT OF HIS INDUSTRIAL INJURY OF OCTOBER 10, 1968 AND THAT CLAIMANT'S PRESENT CONDITION WAS WORSENED SINCE FEBRUARY 26, 1973.

THEREFORE, THE CLAIMANT'S CLAIM IS HEREBY REMANDED TO THE STATE ACCIDENT INSURANCE FUND FOR ACCEPTANCE AND FOR THE PAYMENT OF COMPENSATION AS PROVIDED BY LAW COMMENCING SEPTEMBER 17, 1975, THE DATE THAT CLAIMANT WAS FIRST HOSPITALIZED, AND UNTIL CLOSURE IS AUTHORIZED PURSUANT TO ORS 656.278.

CLAIMANT'S ATTORNEY IS AWARDED AS A REASONABLE ATTORNEY FEE FOR HIS SERVICES IN CONNECTION WITH THIS MATTER, THE SUM OF 25 PER CENT OF THE COMPENSATION PAID CLAIMANT, PAYABLE OUT OF SAID COMPENSATION AS PAID, NOT TO EXCEED THE SUM OF 250 DOLLARS.

APPEAL NOTICE

THE CLAIMANT HAS NO RIGHT TO A HEARING, REVIEW OR APPEAL ON THIS AWARD MADE BY THE BOARD ON ITS OWN MOTION.

THE STATE ACCIDENT INSURANCE FUND MAY REQUEST A HEARING ON THIS ORDER.

THIS ORDER IS FINAL UNLESS WITHIN 30 DAYS FROM THE DATE HEREOF THE STATE ACCIDENT INSURANCE FUND APPEALS THIS ORDER BY REQUESTING A HEARING.

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4 Morrison, Phillip No. 95247 -- Affirmed.
8 Beazizo, Lola M. WCB Case No. 75-1910-NC -- Affirmed.
0 Reyes, Paul WCB Case No. 75-2979 -- Order of Referee reinstated.
2 Moore, Gayle R. WCB Case No. 74-3739 -- Affirmed.
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192 Johnson, Jack WCB Case No. 74-4290 -- Affirmed.
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202 Davidson, Dale No. 32704 -- Affirmed.
205 Olsen, Craig WCB Case No. 75-2318 -- Claim Compensable.
209 Blaha, Joseph S. WCB Case No. 75-3415 -- Affirmed.
215 Marumoto, Tana WCB Case No. 75-2477 -- Award increased.
215 Joy, Amelia M. WCB Case No. 74-491 -- Affirmed.
220 Brockman, Garwood Case No. 76-3420 -- Affirmed.
227 Miller, William H. WCB Case No. 75-3823 -- The Court Finds: (1) That medical services were required to be paid pending the carrier's appeal, as compensation includes all benefits including medical services. (2) That a request for Board review by the carrier as provided by ORS 656.313(1) does not stay the obligation of the carrier to pay compensation, including medical services. (3) That the carrier refused to pay the claimant's medical services incurred in the care and treatment of his compensable injury of October 4, 1974, pending its request for Board review on the issue of the compensability of claimant's claim. (4) That the amount of the medical bill which the carrier refused to pay is $115.51, the services performed to the claimant by the Oregon Orthopedic Clinic in the care and treatment of his compensable injuries. (5) That the carrier by its refusal to pay the medical services incurred by the claimant pending its appeal, refused to pay compensation due under the Order of the Referee and claimant's attorneys are entitled to a reasonable attorneys fee to be assessed against the carrier. (6) That the refusal of the carrier to pay claimant's medical services pending its appeal on the issue of compensability was allegedly based upon its reliance upon a decision of the Workmen's Compensation Board (In the Matter of the Compensation of Betty Rivera, WCB Case No. 74-2377), which Circuit Court Judge Jena V. Schlegel reversed by memorandum opinion dated November 3, 1975, approximately two months prior to the hearing conducted by Referee Raymond Danner. The carrier's failure to pay the claimant's medical services following the reversal in the Rivera claim as the carrier knew or should have known of the action by the Court, constitutes unreasonable delay or unreasonable refusal to pay for the claimant's medical services pending appeal and penalty of 25% of the $115.51 is assessed against the carrier.
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235 Hills, Rollan C. WCB Case No. 74-1450 & 75-1975 -- Affirmed.
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ERRATTA

On page 120, WCB Case No. 75-4688 incorrectly lists Roger A. Luedtke as Claimant's Attorney. Roger A. Luedtke is the carrier's attorney.